

2011 IL App (1st) 092267-U
No. 1-09-2267

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SIXTH DIVISION
July 29, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 08 CR 23652
)	
ANDRE HILL,)	The Honorable
)	Thomas M. Davy,
Defendant-Appellant.)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Garcia and Justice Cahill concurred in the judgment.

O R D E R

HELD: Conviction for unlawful use of a weapon by a felon affirmed over claim of ineffective assistance of trial counsel; Class X sentence vacated where State failed to provide notice to defendant that his offense classification would be increased; cause remanded for resentencing.

¶ 1 Following a bench trial, defendant Andre Hill was found

guilty of unlawful use of a weapon by a felon and sentenced as a Class X offender to eight years' imprisonment with three years of mandatory supervised release (MSR). On appeal, defendant contends that trial counsel was ineffective for failing to withdraw after raising his own ineffectiveness; that he was improperly sentenced as a Class X offender because he had only been charged with a Class 3 offense; and that he is not subject to a three-year term of MSR.

¶ 2 Defendant was charged, by information, with unlawful use of a weapon by a felon (720 ILCS 5/24-1.1 (West 2008)). The predicate felony for that offense was his 2002 conviction for possession of a stolen motor vehicle. The record, including defendant's criminal history and presentence investigation report, reveals that defendant also has a 2000 conviction for possession of a stolen vehicle and a 2004 conviction for aggravated unlawful use of a weapon.

¶ 3 At trial, Chicago police officer Matthew Schaller testified that, on November 17, 2008, he and his partner were directed to a two-flat apartment building where gambling had been observed. The officers approached the building, which has a glass exterior door, through which Officer Schaller saw four men shooting dice in the entryway. Two of the men ran through an open white interior door there and down a flight of stairs into the basement. The officers pursued them, and in the basement,

Officer Schaller saw defendant kneeling on the ground with a shotgun in his lap, and dice and a "pile of money" in front of him.

¶ 4 On cross-examination, Officer Schaller stated that there were four men in the basement. These included the two men who had fled from the entryway, defendant, and another man who was already there. He admitted that he did not remember whether he or his partner entered the basement first; but recalled that they opened the glass exterior door, entered the building and proceeded through the open white interior door on the right-hand side of the entryway. Two backup officers detained two men who fled from the entryway, and Officer Schaller and his partner followed the other men into the basement.

¶ 5 Defense counsel showed Officer Schaller a series of photographs portraying the apartment building, including photographs of the closed glass exterior door through which the officers entered the building. One photograph depicted the entryway as seen through the closed glass exterior door. The white interior door was on the right side of the entryway and provided entry to the basement area. Defense counsel moved, without objection, to enter the photographs into evidence.

¶ 6 The State then offered into evidence, without objection, a certified copy of defendant's 2002 conviction for possession of a stolen motor vehicle and defendant rested without

presenting any testimony.

¶ 7 On this evidence, the trial court found defendant guilty of unlawful use of a weapon by a felon. In doing so, the court found Officer Schaller's testimony credible, and noted that the photographs admitted into evidence show that the offenders in the entryway could have run through the door to the basement as the officers entered the building.

¶ 8 Defense counsel filed a motion to reconsider, arguing, *inter alia*, that he "was ineffective for failing to get photographs that would have established that the events could not have happened as testified to by the police officer." At a hearing on the motion, the circuit court asked counsel why he was alleging his own ineffectiveness, and the following colloquy occurred:

"DEFENSE COUNSEL: Judge, I felt there was an argument to be made that I should have gone out to the scene and more accurately perfected my allegation that the physical impossibility of both doors being simultaneously open."

THE COURT: And by raising that, [counsel], then does that mean I should appoint another attorney for [defendant] to effectively argue that?

DEFENSE COUNSEL: No, I don't believe so,

I think it's just preserving the issue."

¶ 9 Counsel then argued that the photographs, particularly those involving the white interior door leading to the basement, undermined Officer Schaller's credibility. The court denied defendant's motion, noting that it had reviewed the officer's testimony, looked at the photographic evidence, and determined that Officer Schaller was a credible witness.

¶ 10 At sentencing, the court stated:

"I have considered the testimony at trial. I have considered the matters contained in the presentence investigation as well as the statutory factors in mitigation and aggravation.

The defendant, because of his prior background, has to be sentenced as a Class X offender. He has a previous conviction for the offense of aggravated unlawful use of weapons and was sentenced September 15th of 2004."

The court sentenced defendant as a Class X offender to eight years' imprisonment with three years' MSR.

¶ 11 In this appeal from that judgment, defendant first

contends that his right to effective assistance of trial counsel was violated when counsel failed to withdraw after raising his own ineffectiveness, and the trial court did not appoint new counsel to investigate counsel's claims. He maintains that, as a result, counsel was laboring under a conflict of interest, and because this situation represented a *per se* conflict of interest, he need not demonstrate prejudice in order to obtain relief.

¶ 12 A criminal defendant's constitutional right to effective assistance of counsel includes the right to conflict-free representation. *People v. Hernandez*, 231 Ill. 2d 134, 142 (2008). Such representation means assistance by an attorney whose loyalty to his or her client is not diluted by conflicting interests or inconsistent obligations. *People v. Spreitzer*, 123 Ill. 2d 1, 13-14 (1988).

¶ 13 In determining whether defendant received conflict-free representation, we first resolve whether his counsel labored under a *per se* conflict of interest. *People v. Taylor*, 237 Ill. 2d 356, 374 (2010). Our review of that issue is *de novo*. *Hernandez*, 231 Ill. 2d at 144.

¶ 14 A *per se* conflict of interest exists where certain facts about a defense attorney's status engender, by themselves, a "disabling conflict." *Taylor*, 237 Ill. 2d at 374. In *Taylor*, the supreme court identified three situations where a *per se* conflict exists; however, defendant has not alleged that trial

counsel labored under any of the situations described in *Taylor*. Rather, defendant asserts that, under *People v. Spreitzer*, 123 Ill. 2d 1 (1988), *People v. Willis*, 134 Ill. App. 3d 123 (1985), and *People v. Norris*, 46 Ill. App. 3d 536 (1977), a *per se* conflict arises when an attorney is called upon to argue his own incompetence.

¶ 15 We find defendant's reliance on these cases misplaced. In *Spreitzer*, the supreme court clarified that *per se* conflicts arise when "defense counsel *** had a tie to a person or an entity *** which would benefit from an unfavorable verdict for the defendant." *Spreitzer*, 123 Ill. 2d at 16. None was shown here. In *Willis*, defendant's trial counsel was placed in a position, at a post-trial hearing, of interviewing defendant about his *pro se* claims of ineffectiveness. The record here does not support any such claim. Finally, in *Norris*, this court held that a public defender would have an inherent conflict in arguing the ineffectiveness of another public defender, a finding which relied on *People v. Terry*, 46 Ill. 2d 75 (1970), that was overruled by *People v. Banks*, 121 Ill. 2d 36, 44 (1987). Accordingly, we find that these cases do not support defendant's contention that defense counsel was laboring under a *per se* conflict of interest when he continued to represent defendant after claiming he was ineffective for failing to acquire better photographic evidence.

¶ 16 Absent a *per se* conflict, defendant may establish that an actual conflict of interest adversely affected counsel's performance. *Taylor*, 237 Ill. 2d at 375. In order to show an actual conflict of interest, defendant must point to some specific defect in counsel's strategy tactics, or decision making attributable to the conflict. *Taylor*, 237 Ill. 2d at 376.

¶ 17 Defendant asserts that counsel should have taken better photographs to "accurately depict the impossibility" of Officer Schaller's testimony, which would have "clearly persuaded the court" and impeached the officer. Defense counsel admitted as much when he argued, posttrial, in the interest of preserving the appellate record, that he was ineffective for failing to "perfect" one of his attacks on the testifying officer's credibility.

¶ 18 The record shows, however, that despite his own claim of ineffectiveness, defense counsel introduced into evidence at least one picture of the entryway and the two doors in question, which he used in cross-examining Officer Schaller. In addition, he employed the photograph to attack the credibility of the same officer during closing arguments, and argued the practical impossibility of the solid white interior door being simultaneously opened with the glass front door, and the ability of the men in the entryway to see the officers approaching, as the officer had testified. Defense counsel also argued that

Officer Schaller forgot which officer was first through the door and omitted testimony about backup officers.

¶ 19 That counsel did not provide additional photographs, or photographs taken at a different angle, of the entry doors, does not support defendant's claim of ineffectiveness, based on an actual conflict of interest. Rather, it appears that defendant is merely attempting to create an actual conflict of interest through conjecture and hindsight as to what strategy might have been pursued in this case. *Taylor*, 237 Ill. 2d at 377. A defendant is entitled to competent, not perfect, representation, and counsel's decision to proceed as he did, although it ultimately proved unsuccessful, does not, in itself, render the representation ineffective or inadequate. *People v. McCullom*, 386 Ill. App. 3d 495, 514 (2008).

¶ 20 Defendant also asserts that, due to the conflict, counsel "lost enthusiasm" for advocating the claim of ineffective assistance. We find no suggestion in the record to support this assertion. To the contrary, the record shows that counsel made the allegation to preserve it for appellate review, included it in the written post-trial motion, and argued it to the court. We, thus, find no *per se* or actual conflict resulting from this situation, or inattention by defense counsel to defendant's interests at that point in the proceedings.

¶ 21 Notwithstanding, defendant finds *People v. Friend*, 341

Ill. App. 3d 139 (2008), analogous where defense counsel claimed his own ineffectiveness, and invited the court to question defendant on the allegations, which the court declined. On appeal, the reviewing court determined that the court did not adequately investigate defendant's allegations and remanded for further proceedings. *Friend*, 341 Ill. App. 3d at 142-43. *Friend*, however, is readily distinguishable from the case at bar. In *Friend*, defense counsel filed a motion to withdraw defendant's guilty plea based on defendant's statements in the presentence report that he was "blackmailed" into pleading guilty and questioned the quality of counsel's representation. Here, defendant was tried before the bench, never questioned the representation he received, and the court inquired into counsel's own claim of ineffective representation. Thus, *Friend* is factually distinguishable and provides no support for defendant's present contention.

¶ 22 In sum, we find that defendant has failed to establish his ineffectiveness claim and that the trial court did not err in failing to appoint other counsel based on defense counsel's representation.

¶ 23 Defendant next contends, for the first time on appeal, that he was ineligible for sentencing as a Class X offender because the State charged him with, and presented evidence at trial of, a Class 3 offense, and, thus, his conviction of that

offense did not provide the requisite Class 2 conviction to trigger Class X sentencing under section 5-5-3(c)(8) of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5-5-3(c)(8) (West 2008)). Defendant concedes that he forfeited this argument by failing to object and raise it in a postsentencing or posttrial motion (*People v. Williams*, 181 Ill. 2d 297, 322 (1998)), but, nonetheless, seeks plain error review.

¶ 24 The record clearly shows that defendant did not properly preserve this issue for review; however, this court may consider plain errors or defects affecting substantial rights even though they were not properly preserved. Ill. S. Ct. R. 615(a) (eff. Aug. 27, 1999). Sentencing issues, such as here, have been regarded as matters affecting defendant's substantial rights which have been excepted from forfeiture (*People v. Owens*, 377 Ill. App. 3d 302, 304 (2008)), and may be reviewed under the second prong of the plain error doctrine.

¶ 25 As noted, defendant was charged with unlawful use of a weapon by a felon, and the predicate felony for that offense was his 2002 conviction for possession of a stolen motor vehicle. As charged and found at trial, this offense was a Class 3 felony. (720 ILCS 5/24-1.1(e) (West 2008)). However, at sentencing, his previous conviction for aggravated unlawful use of a weapon (720 ILCS 5/24-1.6 (West 2008)) was noted, and used to elevate this to a Class 2 offense, which then triggered Class X sentencing (730

ILCS 5/5-5-3(c)(8) (West 2008)). The propriety of that Class X sentence involves a question of statutory interpretation, an issue of law which is subject to *de novo* review. *People v. Zimmerman*, 239 Ill. 2d 491, 497 (2010).

¶ 26 The sentencing section of the unlawful use of a weapon by a felon statute provides that:

"Violation of this Section by a person not confined in a penal institution shall be a Class 3 felony for which the person, if sentenced to a term of imprisonment, shall be sentenced to no less than 2 years and no more than 10 years ***. Violation of this Section by a person not confined in a penal institution who has been convicted of *** a felony violation of Article 24 of this Code [720 ILCS 5/24-1 et seq.] *** is a Class 2 felony for which the person shall be sentenced to not less than 3 years and not more than 14 years." 720 ILCS 5/24-1.1(e) (West 2008).

¶ 27 Under this statute, defendant was eligible for enhanced sentencing based on his prior aggravated unlawful use of a weapon conviction. However, if the State intended to enhance the charge to a Class 2 felony, it was required under section 111-3(c) of

the Code of Criminal Procedure (725 ILCS 5/111-3(c) (West 2008)), to state its intention to increase the offense classification based on a prior conviction and also specify that prior conviction in order to give notice to defendant. *People v. Griham*, 399 Ill. App. 3d 1169, 1172-73 (2010).

¶ 28 Here, the information charging defendant with a violation of section 24-1.1 of the Code, unlawful use of a weapon by a felon, referenced defendant's 2002 conviction for possession of a stolen motor vehicle as the predicate felony. *Griham*, 399 Ill. App. 3d at 1172. The parties stipulated to this prior conviction at trial, which resulted in defendant's conviction of a Class 3 felony offense.

¶ 29 Nonetheless, at sentencing, the court elevated the offense from a Class 3 to a Class 2 after noting defendant's prior conviction for aggravated unlawful use of a weapon. Although such an elevation is provided for within section 24-1.1(e), it is a "sentencing enhancement" as defined in section 111-3(c) of the Code of Criminal Procedure (*Zimmerman*, 239 Ill. 2d at 500-01), which requires prior notice to defendant (*Griham*, 399 Ill. App. 3d at 1172-73). Thus, since the State did not provide defendant with this notice, defendant must be treated as having committed a Class 3 offense, and not a Class 2. *People v. Beasley*, 307 Ill. App. 3d 200, 212 (1999). As a result, defendant was ineligible for sentencing as a Class X offender,

which requires that he be convicted of a Class 2 or greater offense in addition to having two prior qualifying offenses. 730 ILCS 5/5-5-3(c)(8) (West 2008); *People v. Holmes*, 405 Ill. App. 3d 179, 187 (2010).

¶ 30 In light of these findings, we vacate the sentence imposed and remand the cause for resentencing. *Griham*, 399 Ill. App. 3d at 1173. In doing so, we acknowledge that defendant's eight-year sentence falls within the permissible range for a Class 3 felony under section 24-1.1(e); however, even where a sentence imposed under an incorrect sentencing range falls within the correct sentencing range, the sentence must be vacated because of the court's reliance on the wrong sentencing range in imposing the sentence. *Owens*, 377 Ill. App. 3d at 305-06.

¶ 31 Based on this finding, we need not address defendant's third contention regarding the proper term of MSR.

¶ 32 For the reasons stated, we vacate defendant's sentence and remand for resentencing, and affirm the judgment in all other respects.

¶ 33 Affirmed in part and vacated in part; cause remanded.