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No. 3--08--0803

Order filed March 3, 2011

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of the 13th Judicial Circuit,
	)	La Salle County, Illinois,
Plaintiff-Appellee,	)	
	)	
v.	)	No. 02--CF--272
	)	
MICHAEL MUNSON,	)	Honorable
	)	Cynthia M. Raccuglia,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE LYTTON delivered the judgment of the court.  
Justices Holdridge and O'Brien concurred in the judgment.

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ORDER

*Held:* Where, following a third stage hearing, defendant failed to establish that appellate counsel was ineffective for failing to raise several issues on appeal, the trial court did not err in denying defendant's postconviction petition.

Defendant was found guilty of unlawful possession with the intent to deliver 900 grams or more of a substance containing cocaine (720 ILCS 570/401(a)(2)(D) (West 2002)), and sentenced to 40 years in prison. His conviction and sentence were affirmed on

appeal. *People v. Munson (Munson I)*, No. 3--04--0703 (January 10, 2007) (unpublished order under Supreme Court Rule 23). In his postconviction petition, defendant alleged that direct appeal counsel was ineffective for failing to argue that (1) he was denied his right to a speedy trial, (2) the trial court erred in admitting other crimes evidence, and (3) the trial court relied on improper factors in aggravation at sentencing. Following a third stage evidentiary hearing, the trial court denied defendant's petition. We affirm.

Defendant was arraigned on charges of unlawful possession with intent to deliver cocaine on June 26, 2002. At that time, the State informed the trial court that defendant was being held in Grundy County on separate charges. Defense counsel suggested that the parties refrain from any further proceedings until the Grundy County charges were resolved, and the State agreed. Defendant was held in the custody of Grundy County until June 12, 2003.

On June 20, 2003, defendant appeared for a status hearing on the La Salle County charges. The trial court was informed that the Grundy County charge had been nol-prossed due to the unavailability of a witness and that defendant was not in the custody of La Salle County. A trial date was set for September 23, 2003.

At the next hearing on August 15, 2003, defendant's attorney moved to withdraw from the case; defendant had no objection. Defendant was then appointed a public defender and the matter was

continued. The public defender appeared with defendant on August 21, and a new trial date was set for October 27, 2003, with no objection from defendant.

At the final pretrial hearing on October 23, 2003, the public defender moved to withdraw due to a conflict of interest. The trial court granted the motion and appointed a new public defender in his place. The newly assigned public defender was in court at that time and asked for 30 days to prepare for trial. The trial court agreed and set a status hearing for three weeks. At that point, the following exchange occurred:

DEFENDANT: Your honor, if I could get a trial shorter than that I'll appreciate it.

THE COURT: We'll do it as soon as possible. But you need to talk to Mr. Reilly [newly appointed counsel] about what he needs to do.

DEFENDANT: Because I really don't want to waive my 120-day speedy trial.

THE COURT: Well, you already have. You have no choice.

DEFENDANT: When did I do that?

THE COURT: You did that several times because of the continuances that have occurred so it's already been done. But you discuss it with Mr. Reilly and, like I said, I will give you a date that's reasonable but you

don't want to go to trial without waiving or without making sure your lawyer is prepared.

DEFENDANT: Right.

THE COURT: Okay. That's a key.

DEFENDANT: Yeah."

After a short recess, the hearing resumed. The trial judge informed defendant that if he wished to reinstate his speedy trial demand, she would set the cause for a quick trial date. Defendant stated, "Yes, please, if you could." The judge then reset the trial date for November 17. Defendant made no further objections.

On October 31, 2003, attorney Fred Cohn moved to substitute as counsel for public defender Reilly, indicating, through a written motion, that he would be ready to proceed to trial on November 17. On November 17, defendant's pretrial motions were heard. Defense counsel made an oral motion *in limine* to preclude evidence of defendant's commission of the Grundy County crime two days before the charge in this case. The trial court denied the motion and the matter proceeded to jury selection.

At trial, drug task officer Kenneth Kessinger testified that in June 2002 he was assigned to investigate defendant, which led to a residence in Ottawa owned by defendant's mother. Kessinger found nothing in her house, but then asked for and obtained her consent to search the garage. In the garage, he found a white Bergner's bag containing several one-gallon "Zip-lock" baggies of cocaine.

Defendant's fingerprints were found on the Bergner's bag and on one of the baggies.

Investigators also executed a warrant at defendant's business and found four bottles of Inositol powder, a substance which is commonly mixed with powder cocaine as a "filler." Officers also recovered four boxes of 150 count baggies and two electronic scales.

Chicago police officer Thomas Cunningham also testified regarding his involvement with defendant. However, before he took the stand, the trial court instructed the jurors that his testimony was to be considered only for the limited issue of defendant's knowledge and intent. Cunningham then testified that he arrested defendant during a drug transaction two days before Officer Kessinger found the cocaine in defendant's mother's garage. On June 1, 2002, Cunningham followed a Chrysler from Chicago to the Morris exit on Interstate 80. The car pulled up next to a Dodge truck that was waiting in a parking lot. Defendant was in the driver's seat of the truck; he did not have any passengers in the vehicle. Cunningham observed defendant talk to the people in the Chrysler. He then saw someone get out of the car, walk to defendant's truck and drop a kilogram of cocaine into defendant's vehicle. At that point, Cunningham approached defendant's truck. He saw a kilogram of cocaine and a large amount of U.S. currency inside and arrested defendant.

Defendant testified that in June 2002 he was storing a car for his friend, Robert Harris, while Harris was in federal prison. When he was working on the car, he discovered a brown paper grocery bag in the trunk. He opened the bag and lifted out a white Bergner's bag containing several baggies. He did not know exactly what was inside the baggies. He put them back inside the grocery bag. He testified that later that day, his wife left with the grocery bag and went to pick up their son at defendant's mother's house. When she returned, defendant asked her what she did with the bags; she did not answer.

Defendant also denied that the items found at his business were used to package cocaine. He stated that he used the Inositol powder as a dietary supplement and the baggies for a Christmas promotional event.

At the sentencing hearing, federal agent Tim Eley testified that during an interview with defendant, defendant admitted his relationship with an individual named "Pudgy" Robert Harris, who was the subject of Eley's investigation. Defendant told Eley that he and Harris were long time business associates. In 1995, defendant became heavily involved in Harris's cocaine business. Harris taught defendant how to dilute the cocaine with Inositol powder. When Harris was out of town, defendant oversaw distribution. When Harris returned from a trip, defendant would give Harris the cash from any drug sales he conducted. He was then

compensated for his management. Defendant eventually bought the cocaine business from Harris. Defendant then continued to sell cocaine, diluted with Inositol, in the local area.

Defendant presented no mitigating witnesses. The presentencing investigation report indicated that current charges were pending against defendant for federal tax evasion. He had no prior convictions, occasionally drank alcohol, and never used illegal drugs. The trial judge sentenced defendant to 40 years in prison, noting that the crime was motivated by greed and that defendant's actions had seriously harmed the youth in the community.

On direct appeal, appellate counsel argued that (1) the trial court erred in denying his motion to suppress the items found in his home and business, (2) the State failed to prove his guilt beyond a reasonable doubt, and (3) the trial court abused its discretion in sentencing him by failing to consider several mitigating factors. We affirmed defendant's conviction and sentence. *Munson I*, No. 3--04--0703.

Eighteen months later, defendant filed a *pro se* postconviction petition, claiming that appellate counsel was ineffective for failing to argue that (1) he was denied his right to a speedy trial, (2) the consideration of other crimes evidence was improper, and (3) the trial judge relied on improper sentencing factors. The trial court appointed postconviction counsel, and a third stage

hearing was conducted.

At the evidentiary hearing, defendant's appellate counsel testified that in her brief on direct appeal, she mentioned the trial court's improper comments at sentencing but did not raise the other two issues because she believed they lacked merit. The trial court found that counsel's failure to raise the additional issues on appeal did not constitute ineffective assistance of appellate counsel and denied defendant postconviction petition.

#### ANALYSIS

Defendant argues that he is entitled to a reversal of his conviction based on the ineffective assistance of appellate counsel.

At the third stage of a postconviction petition, defendant bears the burden of establishing a substantial showing that his conviction resulted from a violation of a constitutional right. *People v. Pendleton*, 223 Ill. 2d 458 (2006). A defendant has the right to effective assistance of counsel on direct appeal. *People v. Simms*, 192 Ill. 2d 348 (2000). A claim of ineffective assistance of appellate counsel is also cognizable in postconviction proceedings. *Simms*, 192 Ill. 2d at 361.

Claims of ineffective assistance of appellate counsel are evaluated under the familiar standards outlined in *Strickland v. Washington*, 466 U.S. 668 (1984). The defendant must show both deficient performance by counsel and prejudice as a result of that

performance. *Strickland*, 466 U.S. 668; *People v. Coleman*, 168 Ill. 2d 509 (1995). A defendant who contends that appellate counsel rendered ineffective assistance by failing to argue a certain issue must show that appellate counsel's failure was objectively unreasonable and prejudicial. *Simms*, 192 Ill. 2d at 362. "Appellate counsel is not obligated to brief every conceivable issue on appeal, and it is not incompetence of counsel to refrain from raising issues which, in his or her judgment, are without merit, unless counsel's appraisal of the merits is patently wrong." *Id.* at 362. In ineffective assistance of appellate counsel cases, the prejudice inquiry requires us to examine the merits of the underlying issues. *Id.* at 362. If we determine that the issue has no merit, defendant suffers no prejudice due to counsel's failure to raise it on appeal. *Id.* at 362.

We will therefore address the merits of the three underlying issues.

#### I. Speedy Trial Violation

Defendant first contends that he was denied his right to a speedy trial because, although he demanded a speedy trial, he was not tried within 120 days.

The speedy trial statute requires that an incarcerated defendant be brought to trial within 120 days. 725 ILCS 5/103--5(a) (West 2002). The 120-day period begins to run automatically, without a formal demand for trial, from the day a defendant is

taken into custody. *People v. Hampton*, 394 Ill. App. 3d 683 (2009). Where a defendant is "in custody" in one county and a charge is pending against him in another county, he cannot be deemed to be in custody for the latter offense until such time as the proceedings against him in the first county are terminated and he is returned to or held in custody by the second county. *People v. Davis*, 97 Ill. 2d 1 (1983).

Any delay occasioned by the defendant tolls the speedy trial period. 725 ILCS 5/103--5(a) (West 2002). The speedy trial statute provides that a "[d]elay shall be considered to be agreed to by the defendant unless he or she objects to the delay by making a written demand for trial or an oral demand for trial on the record." 725 ILCS 5/103--5(a) (West 2002). A delay is attributable to defendant when his act causes or contributes to the postponement. *People v. Myers*, 352 Ill. App. 3d 684 (2004). In addition, a trial date proposed by the trial court, which is set outside the 120-day limit, qualifies as a "delay" pursuant to the statute. *People v. Cordell*, 223 Ill. 2d 380 (2006). The defendant is obligated to object to a trial set beyond the 120-day period to prevent the speedy trial clock from tolling. *Id.* at 391.

Defendant's first reported appearance in La Salle County custody was June 20, 2003. At that appearance, defendant agreed to a trial date within the 120-day period of September 23, 2003, and the speedy trial clock began to run. On August 15, 2003, defense

counsel moved to withdraw, and on August 21, newly appointed counsel appeared and agreed to a new trial date. Defendant did not object to counsel withdrawing and a new public defender serving as his attorney. Accordingly, the delay between August 15 and August 21 is chargeable to defendant. See *Myers*, 352 Ill. App. 3d at 687. Thus, from defendant's appearance on June 20, 2003, to August 21, 2003, 56 days had passed under the speedy trial statute.

On August 21, the public defender appeared and agreed to a trial date of October 27, a date outside the 120-day period. Defendant was present in court and did not object when the date was selected. Although he asserts that he made his initial demand for a speedy trial on this date, the record is silent. The speedy trial statute requires that a defendant is considered to agree to the delay unless, at that time, he makes a written demand or "an oral demand for trial on the record." 725 ILCS 5/103--5(a) (West 2002). When the trial court set a date for trial that fell outside the 120-day limit of section 103--5(a), it was delaying trial and defendant was obligated to object. Defendant's failure to object on the record tolled the speedy trial clock.

The parties appeared again at a pretrial conference on October 23, 2003. At this hearing, the public defender moved to withdraw based on a conflict of interest and a new public defender was immediately appointed. During subsequent discussions regarding a new trial date, defendant specifically stated that he wished to

assert his right to a speedy trial. A trial date of November 17, 2003 was eventually set.

The State contends that as the conversation with the trial court continued, defendant changed his mind and, in essence, chose his right to counsel over his right to a speedy trial. Thus, the delay from October 23 to the trial is attributable to defendant. However, in determining whether defendant's right to a speedy trial was violated, we need not decide that issue. Even if we assume that defendant did not waive his speedy trial right at the October 23 hearing and that the dates from October 23 to November 17, 2003, are attributable to the State, defendant's right to a speedy trial was not violated. As of the November 17 trial date, only 88 days of the statutory 120-day period had elapsed.

Defendant has not established that appellate counsel was ineffective for declining to raise a speedy trial issue because defendant failed to show that he would have prevailed had the issue been raised on appeal.

## II. Other Crimes Evidence

Defendant next argues that the trial court erred in denying his motion *in limine*, seeking to bar evidence of his arrest in Grundy County on charges of possession with intent to deliver two days before his arrest in this case.

Prior bad acts evidence is inadmissible to show a defendant's propensity to commit a crime. *People v. Heard*, 187 Ill. 2d 36

(1999). However, such evidence is admissible for other purposes, so long as it is relevant. *People v. Juarbe*, 318 Ill. App. 3d 1040 (2001). Evidence of other crimes is admissible to show, among other things, *modus operandi*, knowledge, intent and absence of mistake. *Id.* at 1055. If it is relevant to the case, other crimes evidence may be properly admitted to establish the presence of criminal knowledge or intent for possession of narcotics with intent to deliver. *People v. LeCour*, 273 Ill. App. 3d 1003 (1995).

As with all questions of admissibility, the trial judge must balance whether the prejudicial effect of the evidence substantially outweighs its probative value. *Heard*, 187 Ill. 2d at 58. The determination of whether other crimes evidence should be admitted is within the sound discretion of the trial judge and will not be disturbed absent an abuse of that discretion. *Id.* at 58.

Here, the trial court did not abuse its discretion in admitting evidence of defendant's prior crime to establish his knowledge and intent to distribute cocaine. At trial, defendant denied any knowledge that the brown bag found in his mother's garage contained illegal drugs. He also claimed that he had baggies at his business for a promotional sale and that he used the recovered Inositol powder as a vitamin supplement. In light of this testimony, evidence that defendant was involved in the delivery of cocaine for purchase two days earlier was relevant to show defendant's knowledge that the baggies contained cocaine and

his intent to deliver the cocaine found in the garage. Thus, the trial court did not err in determining that the probative value of defendant's earlier arrest outweighed its prejudicial effect on the jury.

Moreover, the jury was properly instructed to consider such evidence only as to the issues of knowledge and intent. We must presume, absent a showing to the contrary, that the jury followed the trial court's instructions in reaching a verdict. *Simms*, 192 Ill. 2d at 373. The trial court did not abuse its discretion in allowing the evidence at trial.

Because we have found that the trial court acted properly, appellate counsel was not ineffective for failing to raise the issue of other crimes evidence on appeal.

### III. Improper Sentencing Factors

Last, defendant argues that at sentencing, the trial court considered improper factors in aggravation. Specifically, defendant claims that the court erred in noting that he received compensation for committing the offense and that his actions caused serious harm to the community.

Generally, a trial judge should not consider factors in aggravation that are implicit in the offense because such factors are presumed to have been considered by the legislature in setting the penalty. *People v. Conover*, 84 Ill. 2d 400 (1981). Nevertheless, an implicit factor in the offense may relate to a

proper sentencing factor, such as the extent and nature of a defendant's involvement in a particular case, his underlying motivation for committing the offense, the likelihood that he will commit a similar offense again, and the need to deter others. *People v. M.I.D.*, 324 Ill. App. 3d 156 (2001). In sentencing, a trial judge may consider the nature and extent of each element of the committed offense. *People v. Saldivar*, 113 Ill. 2d 256 (1986). For example, a trial judge may consider a defendant's efforts to maximize profits from a drug enterprise in sentencing for unlawful possession with intent to deliver. *M.I.D.*, 324 Ill. App. 3d at 159-60. A trial judge may also refer to the significant harm inflicted on a community by drug trafficking. *People v. McCain*, 248 Ill. App. 3d 844 (1993). While the harm caused by distributing drugs is factored into the sentencing statute, a judge may find that the minimum sentence set by the legislature fails to adequately address the degree of harm a defendant imposed in a particular case. *Id.* at 852-53.

Here, defendant was convicted of unlawful possession with intent to deliver 900 grams or more of an illegal substance. Evidence at trial demonstrated that defendant possessed more than 900 grams of cocaine two days earlier and that he was engaged in a large scale cocaine distribution business. Defendant admitted to agent Eley that he operated and owned a cocaine trafficking business in La Salle County for several years. The presentencing

investigation report also indicated that defendant sold drugs to people in the community but did not use drugs. At sentencing, the trial judge did not impose the 40-year sentence based on defendant's intent to receive payment for selling the cocaine that was found in his mother's garage. The judge's comments indicated that she considered the profit from defendant's criminal enterprise and the greed he exhibited by selling drugs that had been diluted. The judge also considered the large volume of cocaine sold and defendant's active involvement in cocaine sales in the community for a significant number of years. She considered all these factors as bearing on the nature and extent of defendant's involvement in the criminal enterprise. On these facts, the trial judge did not err in factoring compensation and the additional threat of harm to the community into the sentence imposed. See *M.I.D.*, 324 Ill. App. 3d 156, *McCain*, 248 Ill. App. 3d 844.

#### CONCLUSION

The judgment of the circuit court of La Salle County is affirmed.

Affirmed.

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