

NOTICE  
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2011 IL App (4th) 100672-U

Filed 12/2/11

NO. 4-10-0672

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Livingston County
JOHN E. ROBERTS,	)	No. 10CM270
Defendant-Appellant.	)	
	)	Honorable
	)	Mark A. Fellheimer,
	)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.  
Justices McCullough and Knecht concur in the judgment.

**ORDER**

¶ 1 *Held:* The court affirmed the trial court's judgment, finding (1) the court did not err in denying defendant's motion to withdraw his guilty plea where defense counsel's possible contemporaneous representation of potential State witnesses did not amount to a *per se* conflict of interest because the potential witnesses did not testify, and (2) defendant did not receive ineffective assistance of counsel at a postplea hearing where defense counsel represented defendant rather than withdraw.

¶ 2 In July 2010, defendant, John E. Roberts, pleaded guilty to battery (720 ILCS 5/12-3(a)(1) (West 2010)). The trial court sentenced defendant to 364 days in the Livingston County jail with credit for 21 days served but found him ineligible for good-time credit. In July 2010, defendant filed motions to withdraw his guilty plea and to reduce his sentence. In August 2010, the court denied defendant's motions. Defendant appeals, arguing (1) the court erred in denying his motion to withdraw his guilty plea because defense counsel's simultaneous

representation of defendant and one or more potential State witnesses constituted a *per se* conflict of interest, denying defendant the effective assistance of counsel at his plea hearing; and (2) defendant received ineffective assistance of counsel when defense counsel elected to represent him in postplea proceedings rather than withdraw as counsel. We affirm.

¶ 3

### I. BACKGROUND

¶ 4 In June 2010, the State charged defendant by complaint with one count of battery (720 ILCS 5/12-3(a)(1) (West 2010)). The complaint alleged defendant knowingly caused bodily harm to T.J.A. by striking T.J.A. in the face on June 23, 2010. On July 8, 2010, defendant entered a waiver of trial and guilty plea with the trial court. The court sentenced defendant to 364 days in the Livingston County jail with credit for 21 days served but found him ineligible for good-time credit. On July 13, 2010, defendant filed a motion to withdraw his guilty plea, arguing (1) he only entered the plea in an attempt to obtain "the quickest disposition possible," and (2) "[a]fter the taking of the plea, counsel for [d]efendant \*\*\* discovered that he is currently representing several victims in this cause." Defendant also filed a motion to reconsider his sentence on the same day, arguing the court (1) failed to consider factors in mitigation and (2) imposed an excessive sentence. The court set the motions for hearing in August 2010. The August 2010 hearing consisted solely of argument, which showed the following.

¶ 5

Defendant first claimed he entered his guilty plea after speaking with defense counsel for only a few minutes and did not have adequate time to consider his options. Defendant also claimed defense counsel thereafter discovered he contemporaneously represented a witness to the altercation leading to defendant's arrest, and defendant believed this constituted a conflict of interest. Counsel later qualified this claim by stating he was not sure whether he

represented the witness at the same time he represented defendant but was sure he had represented the witness at some point. Finally, defense counsel stated he might have represented another witness to the incident, as the name sounded familiar. Based on the brief time defendant had to enter his plea and defense counsel's alleged conflict of interest, defendant asked the court to vacate his guilty plea.

¶ 6 The State argued defendant was fully admonished regarding the nature of the plea and knowingly waived his right to trial and pleaded guilty. In addition, the State argued defense counsel's purported conflicts were insufficient to invalidate defendant's plea.

¶ 7 The trial court first dealt with defendant's contention he was not afforded adequate time to consider his options. The court noted it specifically admonished defendant pursuant to Illinois Supreme Court Rule 402 (Ill. S. Ct. R. 402 (effective July 7, 1997)) regarding his right to a jury or bench trial, and defendant knowingly and voluntarily waived his rights. The court went on to state:

"[I]t is my standard practice that when defendants are in custody on a charge and are desirous of pleading guilty while they are in custody, I always ask whether or not they are simply pleading guilty to a charge to be released from jail."

The court found defendant knowingly and voluntarily entered his guilty plea.

¶ 8 The trial court next addressed defense counsel's purported conflict of interest. In finding no conflict of interest, the court stated:

"[T]his wasn't a case that went to trial and ultimately [it] was figured out that [defense counsel] represented these victims that he

was cross-examining. This was done at an arraignment where the defendant elected to plead guilty. \*\*\* [E]ven if there was any sort of potential conflict here, I don't know how that impacts the defendant's decision to plead guilty to this charge."

The court denied defendant's motion to withdraw his guilty plea.

¶ 9 The hearing proceeded to defendant's motion to reconsider his sentence. Defendant argued the trial court failed to consider as mitigating factors (1) the role alcohol played in the offense and (2) the fact defendant was provoked. The State argued defendant's extensive criminal history and the fact his actions caused or threatened serious harm warranted the sentence. The court stated it considered all the relevant factors at the initial sentencing hearing and denied defendant's motion to reconsider his sentence.

¶ 10 This appeal followed.

## ¶ 11 II. ANALYSIS

¶ 12 On appeal, defendant argues (1) the trial court erred in denying his motion to withdraw his guilty plea because defense counsel's simultaneous representation of defendant and one or more potential State witnesses constituted a *per se* conflict of interest, denying defendant the effective assistance of counsel at his plea hearing; and (2) defendant received ineffective assistance of counsel when defense counsel elected to represent him in postplea proceedings rather than withdraw as counsel. We disagree.

### ¶ 13 A. Defendant's Motion To Withdraw His Guilty Plea

¶ 14 "The decision to grant or deny a motion to withdraw a guilty plea rests in the sound discretion of the circuit court and, as such, is reviewed for abuse of discretion." *People v.*



N.E.2d at 513. However, when counsel contemporaneously represents a potential State witness who does not end up testifying, no *per se* conflict of interest exists. *Id.* Whether the facts of a particular case present a *per se* conflict is reviewed *de novo*. *Morales*, 209 Ill. 2d at 345, 808 N.E.2d at 512-13.

¶ 18 Here, it is unclear from the record whether defense counsel contemporaneously represented defendant and any potential witnesses for the State. However, it is clear none of the State's potential witnesses actually testified against defendant as he pleaded guilty without proceeding to trial. Representation of a potential State witness does not constitute a *per se* conflict of interest if the witness does not testify. Applying the court's reasoning in *Morales*, we conclude defendant demonstrated no *per se* conflict of interest in this case. Accordingly, we find the trial court did not abuse its discretion in denying defendant's motion to withdraw his guilty plea on the grounds a *per se* conflict of interest existed.

¶ 19 *2. Actual Conflicts of Interest*

¶ 20 Where no *per se* conflict of interest exists, a defendant can show an actual conflict by "showing that the conflict actually affected the attorney's performance." *Spreitzer*, 123 Ill. 2d at 17, 525 N.E.2d at 36. If counsel informs the court of the potential conflict at an early stage the court has the responsibility to either appoint new counsel or adequately determine whether a conflict exists. *Spreitzer*, 123 Ill. 2d at 18, 525 N.E.2d at 36. "However, if the trial court is not apprised of the potential conflict, then reversal of the conviction will only be had upon a showing that an actual conflict of interest adversely affected counsel's performance." (Internal quotation marks omitted.) *Id.*

¶ 21 Here, defendant only alleged a *per se* conflict of interest. Defendant did not allege

