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2012 IL App (4th) 100539-U

Filed 3/15/12

NO. 4-10-0539

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Macon County
TYRONE E. JOHNSON,)	No. 09CF1715
Defendant-Appellant.)	
)	Honorable
)	Lisa Holder White,
)	Judge Presiding.

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

ORDER

¶ 1 *Held:* (1) Trial court did not err in denying defendant's *pro se* posttrial motion alleging ineffective assistance of counsel where (a) no *per se* conflict of interest was shown and (b) defendant did not show an actual conflict of interest.

(2) Trial court did not err in sentencing defendant to a three-year MSR term where he was subject to mandatory Class X sentencing.

¶ 2 In May 2010, a jury convicted defendant, Tyrone E. Johnson, of possession of a controlled substance with intent to deliver (heroin) (720 ILCS 570/401(d) (West 2008)). In June 2010, the trial court sentenced him to nine years' imprisonment, with three years' mandatory supervised release (MSR).

¶ 3 Defendant appeals, arguing the trial court erred in (1) failing to appoint new trial counsel to represent him where he alleged counsel had previously prosecuted him, and (2) sentencing him to a three-year term of MSR. We affirm.

¶ 4

I. BACKGROUND

¶ 5 On October 30, 2009, the State charged defendant by information with (1) unlawful possession of a controlled substance with intent to deliver (more than 5 grams but less than 15 grams of a substance containing heroin) with a prior unlawful possession of controlled substance conviction (count I) (720 ILCS 570/401(c)(1) (West 2008)); (2) unlawful possession of a controlled substance with intent to deliver (less than one gram of a substance containing heroin) with a prior unlawful possession of controlled substance conviction (count II) (720 ILCS 570/401(d) (West 2008)); and (3) unlawful possession of a controlled substance with a prior unlawful possession of controlled substance conviction (count III) (720 ILCS 570/402(c) (West 2008)). That same day, the trial court appointed the public defender to represent defendant. Count I was dismissed by the State prior to trial.

¶ 6 Prior to trial, defendant *pro se* filed several motions, including (1) a motion to dismiss counsel, (2) a "motion to suppress [evidence] and complaint of warrant," and (3) a "motion for dismissal." Defendant's motions alleged, *inter alia*, the evidence was insufficient and must be suppressed, his trial counsel failed to adequately consult with him about the case, and his appointed counsel "still holds some kind of grudge" against him because he had prosecuted defendant in a "93 case" in which he received 31 years' imprisonment, which following appeal, resulted in a reduced sentence (see *People v. Johnson*, No. 4-94-1062 (July 12, 1995) (unpublished order under Supreme Court Rule 23)).

¶ 7 During a March 16, 2010, hearing, the trial court acknowledged defendant's motions and told him it would give him more time to put into writing any allegations he had regarding his attorney. The court then set the matter for an April 12, 2010, hearing pursuant to

People v. Moore, 207 Ill. 2d 68, 78, 797 N.E.2d 631, 637 (2003).

¶ 8 On April 12, 2010, the trial court held a hearing on defendant's allegations of ineffective assistance of counsel. Defendant tendered a one-page writing comprised of three paragraphs. The court addressed each paragraph in turn. Paragraph one stated, "[Defense counsel] refused to help me in filing motions in [this] case on my behalf telling me in his twenty-some years in law, motion or motions would not do any good." The court asked defendant if there was anything else he wanted to add. Defendant replied no, "that quite sums that." The court asked defendant's trial counsel whether he had any comment. Counsel replied he believed defendant's dissatisfaction with him related to counsel's decision not to file a motion to suppress the search warrant. Counsel stated he attempted to explain to defendant he did not believe a sufficient basis existed to file a motion to suppress the warrant.

¶ 9 Paragraph two stated, "When [defense counsel] comes to see me, he only comes leading to one option[:] for me to cop-out." The trial court again asked defendant's trial counsel whether he had any comment. Counsel replied he never told defendant or any other client the only option was to plead guilty. Counsel stated he told defendant the best option, under the circumstances, was not to proceed to trial. Counsel told defendant he could go to trial if he wanted but it would be a bad idea under the circumstances of the case. The court told defendant counsel's job was to give legal advice based on his experience and review of the case and give the defendant options so he could make an intelligent decision.

¶ 10 Paragraph three alleged, "[Defense counsel] clearly hasn't looked over my case, or he clearly just don't care. Because when I looked over my police report and preliminary transcripts[,] I see a lot of things helpful in my case." The trial court asked defense counsel for

any comments on the allegation. Counsel declined to go into specifics because some issues involved matters of trial strategy. The court stated it understood but asked counsel if he had reviewed the discovery. Counsel responded:

"I have reviewed it several times. In fact, I have been to see [defendant on] I think three occasions, including reviewing his—sending his police reports back to him on at least one other occasion. We always send the police reports to people in custody on one occasion initially when they are arrested. At his request[,] I sent them back to him along with the complaint for search warrant and the search warrant itself from which he could take notes. I have prepared on his case [to] the same degree that I would with any other case. I have actually [had] some more conversations with [defendant] at this stage than I do with many other clients."

The court then asked defendant if he had any comment. Defendant responded:

"Your Honor, I talked to [defense counsel] on several occasions where when he came up to see me the first time. It was based on trying to obtain a search warrant, you know, so I could see, you know, what—with the search warrant. I was in custody four months. I never had a search warrant inside of my police report for me to review or nothing, you know what I am saying, until four months after I was in here.

So, that key was my 120 days because I can't—if I can't look

and see my police report in time, you know, what I am saying, I mean it is no good for my 120 days if it takes him 120 days to show me my police report. [Defense counsel] was supposed to get the police report. I had got him 60 days after in custody. He didn't show me the police report until 120 days in custody, you know. He was supposed to c[o]me down here and file—to see the police report. When he came back to see me in 30 days he told me, well, the State had not got the police report, I will be back in a couple days. I didn't see him [until] 33 days later. And here it is, the police report, you know."

¶ 11 The trial court explained while there was no right for an individual to receive the police reports, the public defenders usually give their clients the opportunity to look at the police report and search warrant. However, the State does not always provide all the information at once. Defense counsel stated defendant was given the basic reports early on. However, defense counsel did not have the copy of complaint for search warrant and the search warrant itself for some time. Defense counsel explained he did not want to file a motion to compel the State to produce because the State, while slow in this case, was usually very good in providing such items.

¶ 12 The trial court then asked defendant if he had anything else he wanted to state. Defendant replied:

"I was also told by [defense counsel] that the warrant that was issued for—to my arrest, he told me that I can't use the warrant in my case, you know. He said I cannot use the warrant. I said, well,

they used it to come in my house, but he was telling me, no, you can't use it. He was trying to get me off the subject of using the warrant, you know, and just worry about what was in the house. I was like, you know, but you used the warrant to come in my house[,] how come we can't start by using the warrant. [']Oh, we aren't going to worry about it, you can't use it.['] That is what he is telling me."

Defense counsel responded while defendant wanted to contest the search warrant, counsel did not believe there was a sufficient basis to contest it with a motion to suppress. Defendant never raised the issue of defense counsel's purported conflict of interest at the pretrial hearing.

¶ 13 At the conclusion of the hearing, the trial court found the following:

"[A]s far as your motion today and your complaints about your attorney, the law is clear. There are no supporting facts or specific claims of ineffectiveness here. The allegations are conclusory and ambiguous. There simply is not a basis to find that you should be given a different attorney. *** [Y]ou have a Public Defender who has a lot of experience, and I am sure he will represent you to the fullest extent of his ability."

¶ 14 During defendant's May 2010 trial, City of Decatur police officer Shannon Seal testified she was working with the street crimes unit on October 28, 2009, when it executed a search warrant at defendant's home. Seal testified inside the residence on the floor she observed "eight small tins containing a tan powdery substance" as well as "a crumpled dollar bill and a crumpled cigarette." Eight folded pieces of tin foil containing a brown powder were introduced

as people's exhibit No. 1. Seal identified those tins as the ones she recovered from defendant's apartment.

¶ 15 Seal testified she searched defendant and recovered \$169 from his left pants pocket, which was rubber banded by denomination. Seal also recovered "a cell phone with a cell phone receipt in the same pocket." Seal also testified she recovered "two heroin kits" from a shelf underneath the coffee table in the living room. According to Seal's testimony, a "heroin kit" is where users of heroin put their "syringes, straws, razors and other paraphernalia" used to consume heroin. She also recovered a digital scale, a roll of aluminum foil, and a "large amount of white powder inside of [] some cellophane."

¶ 16 Police also recovered a "piece of foil with some powder inside of it" and a bottle of sleeping pills in the kitchen. The powder was tan colored and introduced as people's exhibit No. 2. Seal testified sleeping pills are commonly used as cutting agents for heroin.

¶ 17 Following defendant's arrest, Seal testified she interviewed defendant. According to Seal's testimony, defendant told Seal he was the sole resident of the house. Defendant admitted to Seal he used 15 tins of heroin per day and he sold three or four tins of heroin a day to support his habit. Defendant also told Seal he was making a profit of between \$20 and \$25 a day selling heroin. Thereafter, the jury convicted defendant of possession of a controlled substance with intent to deliver (count II).

¶ 18 On June 1, 2010, prior to sentencing, defendant *pro se* filed motions for arrest of judgment, a new trial, and to dismiss counsel. In his motion to dismiss counsel, defendant alleged the following:

"In a 1993 case in which I was found guilty, [my trial

counsel] was the head prosecutor of the case. The charges were very serious to where if I was ever convicted of any serious charges, I [would be] eligible for [an] extended term. [My trial counsel] labeled me to be a menace to society and I was sentence[d] to 31-thirty-one [sic] years. I later appealed, and a high court over[]turned the label menace to society, and I received a shorter sentence. I truly feel [my trial counsel] is not a counsel on my side because of our previous run in, I truly can say [my trial counsel] still feels the same as before about me."

¶ 19 During a June 18, 2010, hearing on defendant's posttrial motions, defendant stated he did not think counsel represented him to the best of his ability. Defendant stated when he noticed defense counsel was his attorney he tried to get him removed because of a conflict of interest. The trial court asked defendant's trial counsel if he had any comment with regards to defendant's motion. Counsel responded defendant had a disagreement with him over how to proceed in the case and the issue of his purported conflict of interest was not raised in court at the pretrial hearing. The State commented defendant's counsel had provided adequate representation throughout the proceeding. The court stated it had observed counsel's performance and characterized it as exemplary. The court also noted defense counsel's performance caused the jurors to have questions and take their time in deliberation despite the fact the evidence presented by the State was overwhelming.

¶ 20 The trial court also observed this same issue was presented before a different judge, prior to trial. The court concluded it appeared the previous judge considered the same allegations

and found them meritless. The court explained defense counsel's prior job involved proving a person's guilt. The court stated counsel's job now was to defend people. The court noted counsel had done a good job in this case. The court found it was unlikely defendant's counsel had any personal feelings regarding defendant and stated the court's prior ruling on defense counsel's performance would stand.

¶ 21 During defendant's June 18, 2010, sentencing hearing, the trial court found defendant was subject to a Class X sentencing range due to his prior criminal record. The court then sentenced defendant on count II to nine years' imprisonment, followed by a three-year term of MSR.

¶ 22 This appeal followed.

¶ 23 II. ANALYSIS

¶ 24 On appeal, defendant argues the trial court erred (1) in failing to appoint new counsel to represent him during the hearing on his *pro se* posttrial motion where his trial counsel's prior prosecution of him created a *per se* conflict of interest and (2) in sentencing him to a three-year term of MSR where he was convicted of a Class 2 felony but sentenced as a Class X offender.

¶ 25 A. Conflict-of-Interest Claim

¶ 26 Defendant argues the trial court erred in failing to appoint new counsel to represent him during the hearing on his *pro se* posttrial motion where his trial counsel's prior prosecution of him created a *per se* conflict of interest

¶ 27 The State argues the trial court did not err in declining to appoint new counsel where (1) there was no *per se* or actual conflict of interest and (2) the court conducted an

adequate inquiry into defendant's allegations of ineffective assistance of counsel.

¶ 28 A trial court is required to inquire into a defendant's *pro se* posttrial claims of ineffective assistance of counsel. *People v. Krankel*, 102 Ill. 2d 181, 189, 464 N.E.2d 1045, 1049 (1984). However, the appointment of new counsel to represent the defendant during a hearing on his claim of ineffectiveness is "not automatically required." *Moore*, 207 Ill. 2d at 77, 797 N.E.2d at 637. Instead,

"when a defendant presents a *pro se* posttrial claim of ineffective assistance of counsel, the trial court should first examine the factual basis of the defendant's claim. If the trial court determines that the claim lacks merit or pertains only to matters of trial strategy, then the court need not appoint new counsel and may deny the *pro se* motion. However, if the allegations show possible neglect of the case, new counsel should be appointed." *Moore*, 207 Ill. 2d at 77-78, 797 N.E.2d at 637.

¶ 29 Here, the record shows defendant's appointed trial counsel previously prosecuted him in Macon County case No. 94-CF-376. Defendant argues the trial court erred because trial counsel's prior prosecution of him created a *per se* conflict of interest, requiring the appointment of new counsel. We disagree.

¶ 30 "A criminal defendant's sixth amendment right to effective assistance of counsel includes the right to conflict-free representation." *People v. Morales*, 209 Ill. 2d 340, 345, 808 N.E.2d 510, 513 (2004). In determining whether a defendant received ineffective assistance based on an alleged conflict of interest, the first inquiry is whether there was a *per se* conflict of

interest. *People v. Hernandez*, 231 Ill. 2d 134, 142, 896 N.E.2d 297, 303 (2008). When a *per se* conflict of interest exists, reversal is required without proof the conflict influenced the defense counsel's conduct. *People v. Spreitzer*, 123 Ill. 2d 1, 17, 525 N.E.2d 30, 36 (1988). "In other words, a defendant is not required to show actual prejudice when a *per se* conflict exists." *Hernandez*, 231 Ill. 2d at 143, 896 N.E.2d at 303.

¶ 31 Our supreme court has identified the following three situations where a *per se* conflict exists: (1) where the defendant's trial counsel has a prior or contemporaneous association with the victim, the prosecution, or an entity assisting the prosecution in the same criminal proceeding (see *People v. Lawson*, 163 Ill. 2d 187, 214, 644 N.E.2d 1172, 1185 (1994)); (2) where defendant's trial counsel contemporaneously represents a prosecution witness (see *People v. Moore*, 189 Ill. 2d 521, 538; 727 N.E.2d 348, 357 (2000)); and (3) where defendant's trial counsel was a former prosecutor who had been personally involved in the prosecution of the defendant in the same criminal proceeding (see *Lawson*, 163 Ill. 2d at 217-18, 644 N.E.2d at 1186-87). We review *de novo* the question of whether the undisputed facts present a *per se* conflict of interest. *Morales*, 209 Ill. 2d at 345, 808 N.E.2d at 512-13.

¶ 32 Citing the Third District Appellate Court's decision in *People v. Hoskins*, 73 Ill. App. 3d 739, 387 N.E.2d 405 (1979), defendant contends his two convictions are closely related because the conviction in the prior case caused him to be extended-term eligible in the present case. As a result, defendant maintains his counsel's involvement in both cases triggers a *per se* conflict of interest. We disagree.

¶ 33 In *Hoskins*, the defendant was convicted of burglary and sentenced to probation. *Hoskins*, 73 Ill. App. 3d at 739, 387 N.E.2d at 406. Approximately one year later, defendant was

charged with and pleaded guilty to forgery. *Hoskins*, 73 Ill. App. 3d at 740, 387 N.E.2d at 406. As a result of the forgery conviction, the State sought to revoke the defendant's probation on the burglary conviction. *Hoskins*, 73 Ill. App. 3d at 740, 387 N.E.2d at 406. The prosecutor appearing in the defendant's burglary case was later appointed to represent the defendant in a Rule 604(d) hearing related to the appeal of the forgery conviction. *Hoskins*, 73 Ill. App. 3d at 740, 387 N.E.2d at 406. The Third District found a conflict of interest existed in that while the proceedings were different, the two cases were related because the forgery conviction resulted in the revocation of the defendant's probation on the burglary charge. *Hoskins*, 73 Ill. App. 3d at 741-42, 387 N.E.2d at 407-08.

¶ 34 In *People v. Kester*, 66 Ill. 2d 162, 361 N.E.2d 569 (1977), the supreme court found a conflict of interest existed because defense counsel earlier served as an assistant state's attorney in the *same* criminal proceeding. *Kester*, 66 Ill. 2d at 167-68, 361 N.E.2d at 571-72. In *People v. Franklin*, 75 Ill. 2d 173, 387 N.E.2d 685 (1979), the defendant argued his counsel was under a conflict of interest because counsel prosecuted the defendant for an unrelated burglary offense 4½ years earlier. *Franklin*, 75 Ill. 2d at 178-79, 387 N.E.2d at 687. However, the supreme court in *Franklin* specifically refused to extend the holding in *Kester* to its facts and concluded the "crucial difference" was the defense counsel in *Kester* had previously served as a prosecutor "in the same criminal proceeding." *Franklin*, 75 Ill. 2d at 178, 387 N.E.2d at 687.

¶ 35 Moreover, the supreme court in *Lawson* noted *Franklin* "turned on the fact that the appointed defense counsel had not been personally involved as the prosecutor in the particular case." *Lawson*, 163 Ill. 2d at 216, 644 N.E.2d at 1186. Further, in *Spreitzer*, the supreme court listed several cases regarding conflicts involving defense counsel. *Spreitzer*, 123 Ill. 2d at 14,

525 N.E.2d at 34. *Kester* was cited for an example where a conflict would exist, *i.e.*, where defense counsel served as a prosecutor in the *same* case. See *Spreitzer*, 123 Ill. 2d at 15, 525 N.E.2d at 34-35; see also *Kester*, 66 Ill. 2d at 163, 361 N.E.2d at 569-70.

¶ 36 Defendant argues the instant case occupies "a grey area" between the supreme court's holdings in *Kester* and *Franklin*. While in *Hoskins* the defendant's convictions could arguably be considered part of a related proceeding because the defendant's forgery conviction bore directly on his probation revocation, defendant's convictions in this case cannot be reasonably viewed as being part of the same criminal proceeding. In this case, defendant's trial counsel had prosecuted defendant on an unrelated charge 16 years earlier. The facts of this case are too remote to warrant finding a *per se* conflict of interest.

¶ 37 "If a *per se* conflict of interest does not exist, a defendant may still establish a violation of his right to effective assistance of counsel by showing an actual conflict of interest that adversely affected his counsel's performance." *Hernandez*, 231 Ill. 2d at 144, 896 N.E.2d at 304 (citing *Morales*, 209 Ill. 2d at 348-49, 808 N.E.2d at 510). However, on appeal, defendant does not argue an actual conflict of interest existed, and our review of the record does not reveal one.

¶ 38 "The operative concern for the reviewing court is whether the trial court conducted an adequate inquiry into the defendant's *pro se* allegation of ineffective assistance of counsel." *Moore*, 207 Ill. 2d at 78, 797 N.E.2d at 638. A discussion between the trial court and counsel regarding the representation is permissible and necessary to determine whether any further action is needed. *Moore*, 207 Ill. 2d at 78, 797 N.E.2d at 638. A brief discussion between the trial court and counsel where counsel answers the court's questions and explains the circumstances

surrounding the allegations may be sufficient. *Moore*, 207 Ill. 2d at 78, 797 N.E.2d at 638.

"Also, the trial court can base its evaluation of the defendant's *pro se* allegations of ineffective assistance on its knowledge of defense counsel's performance at trial." *Moore*, 207 Ill. 2d at 79, 797 N.E.2d at 638.

¶ 39 In this case, the trial court adequately investigated defendant's claims. The trial court observed the question of counsel's ineffectiveness was presented to a different judge prior to trial. The trial court stated it appeared the motions judge considered the same allegations and found them meritless. We note while the specific question of whether counsel's prior prosecution of defendant caused counsel to render ineffective assistance was not raised by defendant during the pretrial hearing, the motions judge thoroughly investigated counsel's underlying conduct. Further, defendant was given ample and repeated opportunities to raise that specific issue during that hearing and failed to do so.

¶ 40 During the hearing on defendant's posttrial motion, the trial court directly questioned defense counsel regarding defendant's allegations of ineffectiveness. Counsel answered the court's questions and explained the circumstances surrounding defendant's allegations. The court stated it had observed counsel's performance during trial and, considering the overwhelming nature of the evidence presented by the State, found it to be exemplary. Although the court did not comment directly on the purported conflict of interest, it adequately examined the basis of defendant's posttrial ineffective-assistance claim and found the claim was meritless. The court did not err in its finding. Accordingly, the appointment of new counsel was unnecessary. See *Moore*, 207 Ill. 2d at 78, 797 N.E.2d at 637.

¶ 41

B. Defendant's MSR Term

¶ 42 Defendant argues the trial court erred in sentencing him to a three-year term of MSR. Specifically, defendant contends he should be subject to a two-year term of MSR because he was convicted of a Class II felony (see 730 ILCS 5/5-8-1(d)(2) (West 2008)) instead of the three-year MSR term reserved for Class X convictions (see 730 ILCS 5/5-5-3(c)(8) (West 2008)). Defendant maintains a plain reading of section 5/5-8-1 of the Unified Code of Corrections (Unified Code) requires his MSR period be based on the class of felony underlying his conviction. Alternatively, defendant argues such a result is required by the doctrine of lenity.

¶ 43 This court has previously considered and rejected defendant's arguments in *People v. Smart*, 311 Ill. App. 3d 415, 418, 723 N.E.2d 1246, 1248 (2000); *People v. Lee*, 397 Ill. App. 3d 1067, 1069-72, 926 N.E.2d 402, 404-07 (2010); and *People v. Allen*, 409 Ill. App. 3d 1058, 1078, 950 N.E.2d 1164, 1183 (2011). Defendant also asks this court to reconsider our holding in *Smart* in light of the supreme court's decision in *People v. Pullen*, 192 Ill. 2d 36, 46, 733 N.E.2d 1235, 1240 (2000) (finding the defendant's maximum consecutive sentence is determined by the classification of the underlying felonies). However, this court has considered and rejected that same argument in *People v. Lee*, 397 Ill. App. 3d at 1072-73, 926 N.E.2d at 407.

¶ 44 In *Lee*, we distinguished *Pullen* and found it "does not undermine our decision in *Smart*." *Lee*, 397 Ill. App. 3d at 1073, 926 N.E.2d at 407. We reasoned because "the MSR term is part of the sentence under section 5-8-1(d) of the Unified Code and the sentence must be a Class X sentence under section 5-5-3(c)(8) of the Unified Code, a reading of the two provisions together requires a Class X MSR term, *i.e.*, a three-year term under section 5-8-1(d)(1) of the Unified Code." *Lee*, 397 Ill. App. 3d at 1073, 926 N.E.2d at 407; *People v. McKinney*, 399 Ill.

App. 3d 77, 82-83, 927 N.E.2d 116, 121 (2010) ("the statutory mandate that defendant 'shall be sentenced as a Class X offender' [citation] means that defendant shall receive a sentence that one convicted of a Class X felony would receive, *i.e.*, a prison term ranging from 6 to 30 years followed by a 3-year term of MSR. *Pullen* is entirely consistent with this interpretation.").

¶ 45 We see no reason to depart from the decisions in *Lee* and *McKinney* and decline defendant's invitation to revisit this court's holdings in *Smart*. Accordingly, the trial court did not err in imposing the MSR term provided for a Class X offense when it sentenced defendant as a Class X offender.

¶ 46 III. CONCLUSION

¶ 47 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we grant the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 48 Affirmed.