

NOTICE

Decision filed 06/01/12. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2012 IL App (5th) 100097-U
NO. 5-10-0097
IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

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).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Jackson County.
)	
v.)	No. 09-CF-486
)	
LYDELL NEAL,)	Honorable
)	E. Dan Kimmel,
Defendant-Appellant.)	Judge, presiding.

PRESIDING JUSTICE DONOVAN delivered the judgment of the court.
Justices Goldenhersh and Wexstten concurred in the judgment.

ORDER

- ¶ 1 *Held*: Defendant was not entitled to a remand of his cause for a hearing on his *pro se* claims of ineffective assistance of counsel. While his convictions are affirmed, his cause is remanded for the purposes of resentencing only.
- ¶ 2 Lydell Neal, defendant, was convicted after a jury trial in the circuit court of Jackson County of armed robbery and possession with intent to deliver less than 15 grams of a substance containing cocaine. He was sentenced to concurrent terms of 21 and 7 years' imprisonment, respectively. Defendant argues on appeal that his cause should be remanded to the circuit court for a hearing because the trial court failed to address his *pro se* claims of ineffective assistance of counsel. He further argues that counsel's failure to sever the drug charge from the armed robbery charge denied him effective legal representation. Defendant also questions whether the 15-year enhancement for the use of a firearm in an armed robbery could be applied to him. And, if the court imposed the sentence without applying the 15-year enhancement, defendant asserts the 21-year sentence he received for armed robbery is

excessive and represents an abuse of the court's discretion considering his youth and lack of prior criminal history. Finally, defendant contends the evidence was insufficient to prove him guilty beyond a reasonable doubt of possessing cocaine with intent to deliver.

¶ 3 On the evening of August 5, 2009, the victim, David Raymond, was visiting with friends outside of a house in Carbondale. At approximately 9:30 p.m., the victim received a phone call from his girlfriend. Wishing to have some privacy, Raymond walked away from the others and went to a nearby parking area along the street. As he was standing near his car talking on his cell phone, he noticed two males walking towards him. One of the males, who was wearing a black shirt and black pants, was carrying a gun. The other, defendant, was wearing a red T-shirt and dark shorts, with the shirt pulled up over his face. In court, Raymond identified Daquarii Mathis as the male with the gun. He further identified clothing taken from both males as being similar to that worn by his assailants and further identified the handgun recovered by the police as the one carried by Mathis. Upon seeing the two men approach, Raymond ended his phone call and put the phone back in his pocket. One of the males told him to give them his money. Raymond had no money. The male holding the gun kept it pointed at Raymond, while the person wearing the red T-shirt went through his pockets and took the phone. As they backed away, Raymond asked for his phone, but the two refused to give it back. Raymond started following them, again asking for his phone. He also called out to one of his friends to come over and help. The male with the gun fired it over Raymond's head. Believing the gun was fired as a warning, Raymond decided to return to his friend's house to call the police. One of the other people at the house, Andrew Robertson, hearing the gunshot and seeing Raymond head back to the house, started to follow the two individuals. He ran up to the corner, where he spotted two males running along the east side of the street. One of the two males was wearing a black shirt and the other a red one. He did not see anyone else in the area. Robertson continued to follow the

two as they made their way into downtown Carbondale.

¶ 4 The police arrived at the house belonging to Raymond's friend and got a description of the two individuals. In the meantime, Robertson, using his cell phone, called back to the house and gave them information as to where the two males were headed. Soon the police located Robertson, who was then by the civic center, while other officers continued the pursuit. As Robertson walked around the corner of the civic center, he saw that the police had two males on the ground. Robertson informed the officers that the two were the same ones he had been following. At trial, Robertson also identified clothing taken from the suspects as being similar to that worn by the people he followed that evening. Robertson led the police back along the route he had taken in pursuit of the two males. They soon located Raymond's cell phone in a yard. Raymond was given back his phone and was brought to the scene where the two males were being held by the police. He identified them as the ones who had stolen his cell phone at gunpoint. The next day, one of the victim's friends found a .45-caliber shell casing in the grass near the house where they had been the night before. The shell casing was matched as having come from the gun recovered from the two suspects.

¶ 5 While the two suspects were on the ground in police custody, one of the officers noticed defendant moving his left hand along his side. After other officers arrived, defendant was picked up from the ground and handcuffed. Once defendant was standing, the officers discovered a clear plastic bag on the ground where he had been. The bag contained six smaller bags, each containing a small white rock. The officers believed the rocks to be cocaine. Forensic testing confirmed the rocks to be 1.3 grams of a substance containing cocaine. According to the testimony of one of the officers who had previously worked in a drug task force, the packaging of the rocks was consistent with them being for sale. No other drugs, scales, bags, or large amounts of money were found on defendant.

¶ 6 Defendant and Mathis, both 16 years old, were jointly tried for the armed robbery of

Raymond. No motions to sever the charges of the codefendants' trials were filed. Both subsequently were found guilty of the armed robbery. Each of them was also found guilty of an additional charge, defendant for unlawful possession with intent to deliver and Mathis for aggravated discharge of a firearm.

¶ 7 Defendant first argues on appeal that his cause should be remanded to the circuit court for a hearing because the trial court failed to address his *pro se* claims of ineffective assistance of counsel. Defendant claims that after his trial was over, he informed the court by letter that he no longer wanted trial counsel to represent him, believing him to be incompetent. He further attempted to file a *pro se* posttrial motion. Defendant therefore believes the trial court was obligated to conduct an inquiry into his claim. The court conducted no such inquiry. Given that a trial court must adequately inquire into the factual basis of each *pro se* allegation of ineffective assistance of counsel before rejecting the allegations, defendant concludes the court's failure to do so in his case was error. See *People v. Krankel*, 102 Ill. 2d 181, 189, 464 N.E.2d 1045, 1049 (1984). Defendant argues on appeal that we should remand his cause to the trial court so that the required investigation into his allegations of ineffective assistance can be completed. See *People v. Moore*, 207 Ill. 2d 68, 81-82, 797 N.E.2d 631, 639-40 (2003). As the State points out, however, defendant's letter to the court did not mention trial counsel's incompetence. Rather, the letter stated that defendant understood his appeal rights but that he was "concerned, and sincere; about [his] freedom, [his] life and [his] rights of a fair trial." There was no mention of defense counsel in the letter, much less any claim of dissatisfaction about counsel's performance. His letter to defense counsel terminating his services, on the other hand, does state that defendant considered his counsel to be incompetent and unconcerned in handling his case. Yet, his subsequent letter to the court, informing the court that he no longer wanted his attorney to do anything further regarding his case, again failed to mention any claim of incompetence.

Accordingly, the letters were not sufficient to trigger a duty of the court to inquire further into defendant's claims. We also note that defendant failed to make any oral claim of ineffective assistance of counsel at his sentencing hearing. In fact, defendant refused to put on any evidence or call any witnesses. Although he had the opportunity to make an oral allegation of ineffective assistance of counsel at that time, he did not do so.

¶ 8 Under the ruling in *Krankel*, a trial court has a duty to inquire when a defendant presents a *pro se* posttrial claim of ineffective assistance of counsel. The court first should examine the factual basis of the claim. If the court determines that the claim lacks merit or pertains only to matters of trial strategy, the court need not appoint new counsel and may deny the *pro se* motion. If the allegations show possible neglect of the case, then new counsel is to be appointed. *Moore*, 207 Ill. 2d at 77-79, 797 N.E.2d at 637-38. A bare and conclusory claim of ineffective assistance of counsel, however, is not sufficient to trigger a preliminary inquiry. See *People v. Taylor*, 237 Ill. 2d 68, 73-77, 927 N.E.2d 1172, 1174-77 (2010). A defendant must bring to the court's attention sufficient factual allegations complaining about counsel's performance in order to trigger any further inquiry. Bald assertions that counsel was inadequate without providing any supporting facts or specific claims fail to sufficiently raise any issue of ineffective assistance of counsel for the trial court to consider. *People v. Rucker*, 346 Ill. App. 3d 873, 883, 803 N.E.2d 31, 38 (2003). Under the circumstances presented here, defendant was not entitled to a remand for consideration of his claim of ineffective assistance of counsel.

¶ 9 Defendant next argues that counsel was ineffective for failing to sever the drug charge from his armed robbery charge and for failing to be aware of the possible sentencing enhancement which applied to the armed robbery charge. To establish a claim of ineffective assistance of counsel, a defendant must show that his attorney committed such serious errors as to fall below an objective standard of reasonableness, and that, absent those objectively

unreasonable errors, there was a reasonable probability that his trial would have had a different result. *People v. Albanese*, 104 Ill.2d 504, 526, 473 N.E.2d 1246, 1255 (1984). Mistakes in strategy or tactics alone do not amount to ineffective assistance of counsel. *People v. Palmer*, 162 Ill. 2d 465, 476, 643 N.E.2d 797, 801-02 (1994).

¶ 10 Defendant believes the two charges against him should have been severed because the two crimes were not part of the same comprehensive transaction. The drugs were not involved in taking the cell phone from the victim, but were found only when defendant was arrested. He believes he suffered prejudice as a result because the evidence of unlawful possession with intent to deliver was weak, and had the crimes been tried separately, he would not have been convicted of both charges. A defendant is not prejudiced by the improper joinder of charges, however, if defendant still would have been convicted of both even if separate trials had been held. *People v. Gonzalez*, 339 Ill. App. 3d 914, 922, 791 N.E.2d 578, 584 (2003). The most important factors to consider in deciding whether offenses are part of the same comprehensive transaction are their proximity in time and location and the identity of evidence between the two offenses. *People v. Reynolds*, 116 Ill. App. 3d 328, 335, 451 N.E.2d 1003, 1008 (1983). Here, the facts included that two males were being pursued by the police and that the two were armed and had just shot at another individual. Such facts would have been admitted to explain not only why the two males were arrested but also to explain why they were arrested at gunpoint and ordered to lie prone on the ground. It was the very circumstance of defendant's arrest that led to the discovery of the cocaine. All of the actions took place within a 10-minute space of time within the space of a few blocks. All of these intertwined facts were part of the same comprehensive transaction and would have been admitted at defendant's trial for possession of cocaine with intent to deliver if the charges had been severed. Additionally, defense counsel's decision not to seek a severance, even though unwise in hindsight, is a matter of trial strategy. *People v. Gapski*,

283 Ill. App. 3d 937, 942, 670 N.E.2d 1116, 1119 (1996). And, even if defense counsel's failure to file a motion to sever was not a matter of trial strategy, the failure to file the motion to sever did not result in any prejudice to defendant. Given the circumstances, there was no reasonable probability that defendant would have been acquitted of the charge of possession of cocaine with intent to deliver had the charge been tried separately.

¶ 11 Defendant next argues that counsel was ineffective because he was unaware that armed robbery while possessing a firearm carried a mandatory 15-year enhancement of sentence. Defendant argues that counsel's "mistaken view of the law likely impacted counsel's trial preparation and response to any negotiations offered by the State." Defendant offers no evidence, however, that the parties even engaged in any plea negotiations. Moreover, defendant's sentence fell within the permissible sentencing range. The court, in fashioning defendant's sentence, made no mention of the mandatory 15-year enhancement, found unconstitutional in *People v. Hauschild*, 226 Ill. 2d 63, 871 N.E.2d 1 (2007), some 2½ years earlier. Presumably the court knew the law and applied it correctly. *People v. Henderson*, 136 Ill. App. 3d 1041, 1045, 483 N.E.2d 1068, 1071 (1985). Accordingly, defendant has failed to show he suffered any prejudice from counsel's performance. His claims of ineffective assistance therefore fail.

¶ 12 Defendant also argues on appeal that he was not guilty of possession of a controlled substance with intent to deliver because the amount of cocaine he possessed was consistent with personal use. He believes his conviction should be reduced to simple possession. In reviewing a claim of insufficiency of the evidence, we, as a reviewing court, are to view the evidence in the light most favorable to the prosecution. Determinations of the credibility of the witnesses, the weight to be given to their testimony, and the reasonable inferences to be drawn from the evidence are responsibilities of the trier of fact. *People v. Graham*, 392 Ill. App. 3d 1001, 1009, 910 N.E.2d 1263, 1271 (2009). Consequently, a criminal conviction

will not be set aside on appeal unless the evidence is so unreasonable, improbable, or unsatisfactory that it creates a reasonable doubt as to the defendant's guilt. *People v. Hall*, 194 Ill. 2d 305, 330, 743 N.E.2d 521, 536 (2000). The question here then is whether any rational trier of fact could have concluded beyond a reasonable doubt that defendant intended to deliver the packets of cocaine in his possession. See *People v. Robinson*, 167 Ill. 2d 397, 407, 657 N.E.2d 1020, 1026 (1995). We conclude that there was sufficient evidence presented for the jury to conclude that defendant committed the crime. Given that direct evidence of intent to deliver is rare, such intent usually must be proven by circumstantial evidence. *Robinson*, 167 Ill. 2d at 408, 657 N.E.2d at 1026. Here the cocaine was found under defendant's body after he made furtive movements along his side upon being ordered to the ground by police. All of the rocks of cocaine were packaged individually in separate little plastic baggie corners. One of the officers who had previously worked on drug task forces testified that the manner in which the rocks were packaged was consistent with the way drugs are packaged for sale. He further testified that crack cocaine is generally ingested by smoking and that a person would need a pipe to do so. Defendant had no pipe in his possession when he was arrested. Another officer corroborated the first officer's testimony and further testified that the amount of cocaine was not consistent with personal use. Rather, the number of rocks individually packaged and carried in another bag was consistent with the manner in which a dealer would carry cocaine for sale. Under the circumstances presented, we agree that there was sufficient evidence in the record for a reasonable trier of fact to find that defendant possessed the cocaine found under his body at the time of his arrest and that he knew he possessed it because he was trying to remove it from his person and dispose of it upon being apprehended. The evidence that the cocaine was individually packaged for sale, that the amount was in excess of an amount consistent with personal use, and that defendant had no pipe for smoking it, along with the presence of a gun, was

sufficient for a reasonable trier of fact to find that defendant possessed the cocaine with intent to deliver.

¶ 13 For his final point on appeal, defendant contends that he was sentenced improperly because he received a 21-year sentence for armed robbery. As previously stated, the court made no mention of the mandatory 15-year enhancement found unconstitutional in *Hauschild* (recently affirmed in *People v. Clemons*, 2012 IL 107821). The only suggestion that the court should apply the 15-year add-on came from the State upon arguing that armed robbery was a Class X felony for which 15 years should be added to the term of imprisonment. The State recommended a sentence of 25 years, while defense counsel urged that the minimum of 6 years should be imposed. Again, all reasonable presumptions are in favor of the actions of the trial court that the law was applied correctly. *Henderson*, 136 Ill. App. 3d at 1045, 483 N.E.2d at 1071. Moreover, defendant's sentence of 21 years fell within the sentencing range of 6 to 30 years. While the court correctly emphasized the serious nature of defendant's crime when imposing sentence, we agree with defendant that his sentence, given his youth and lack of prior criminal history, is substantial. We, as a reviewing court, are not to serve as a sentencing court, and we are not to substitute our judgment for that of the trial court merely because we may have imposed a different sentence had that function been delegated to us. See *People v. Perruquet*, 68 Ill. 2d 149, 156, 368 N.E.2d 882, 885 (1977). But, in this instance, given that there may have been some confusion as to the enhancement urged by the State at the sentencing hearing, we are compelled to remand this cause for a new sentencing hearing to ensure that the law was followed correctly. Again, we recognize the seriousness of the crimes committed by defendant, his lack of cooperation with efforts to prepare a presentence investigation report, and the fact that, by good luck only, the victim or some other individual in the area was not injured when the gun was fired. We also note the young age of defendant, the fact that he was still in school at the time of the offense, his lack of a

prior criminal history, and the possibility that defendant's unwillingness to cooperate may have stemmed from misguided family members. In light of such mitigating factors and the possibility of a sentencing error, we choose to remand this cause for resentencing in order to ensure that justice was properly rendered.

¶ 14 For the foregoing reasons, we affirm the judgment of the circuit court of Jackson County with respect to defendant's convictions for armed robbery and possession with intent to deliver. We remand this cause, however, for resentencing on his conviction for armed robbery.

¶ 15 Affirmed in part; sentence vacated; cause remanded for resentencing.