

No. 1-11-1156

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
	)	the Circuit Court
Plaintiff-Appellee,	)	of Cook County.
	)	
v.	)	No. 08 CR 17830
	)	
ELROY HENDERSON,	)	Honorable
	)	Jorge Luis Alonso,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE CONNORS delivered the judgment of the court.  
Presiding Justice Harris and Justice Simon concur in the judgment.

**ORDER**

¶ 1 *Held:* The trial court conducted an adequate inquiry into defendant's *pro se* claim of ineffective assistance of counsel. Defendant's sentence was appropriate where it was within the range permitted by statute and included mandatory additional time pursuant to the jury's findings.

¶ 2 Following a jury trial, defendant was convicted of first-degree murder and sentenced to 30 years' imprisonment and received an additional 25-year sentence for personally discharging a firearm. He now appeals his conviction and sentence, arguing that: (1) the court failed to

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conduct an inquiry into his *pro se* claim of ineffective assistance of counsel, and (2) his sentence was excessive. For the following reasons, we affirm.

¶ 3

### BACKGROUND

¶ 4 Defendant was convicted by a jury of fatally shooting Jamale Houston based on the testimony of several eyewitnesses. Houston and his friends gathered outside of an apartment building after attending a party. Defendant and his friends approached the group. The two groups began to argue and the argument turned into a fist fight. Defendant was punched in the mouth and his tooth was knocked out; however, he and his friends eventually walked away. Defendant returned a short time later with a gun and shot Houston in the back five times as Houston shielded his girlfriend and his son from the gunfire. At trial, defendant testified that he went to the hospital after getting punched and never returned to the scene to shoot Houston. Nevertheless, the jury found him guilty and he does not challenge his conviction on appeal.

¶ 5 At defendant's sentencing hearing, the following colloquy occurred between defendant and the court after defense counsel argued for the minimum sentence.

“THE DEFENDANT: I just [*sic*] to make a record that I talked to my attorney about several issues pertaining to a lesser charge due to the circumstances and evidence of the case. And yesterday, he came to see me and we talked about a motion that I was trying to put in for a lesser charge. But he said that it was no support from [*sic*] me getting a lesser charge.

We talked about several defenses, different defenses that I wanted to seek out but he told me that if I were to go any other way that I would lose the case. I

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believe by taking my counsel's advise [*sic*], I went with what he said and I end up losing the case.

So I believe the outcome could have been different if we would have went with the appropriate defense that I wanted to go with.

THE COURT: What defense was that, sir?

THE DEFENDANT: I have a motion that I wanted to put in that I wanted to submit but he said it was irrelevant at the time. And, um, with all due respect, I ask that you show mercy on me with the sentencing and give my condolences to the family and my family[,] too."

¶ 6 In response to defendant's statement, the State pointed out that at trial, defendant testified that he was not present at the time of Houston's shooting and that he was not the shooter. The court then commented, "Hard to imagine a lesser included offense when you weren't there."

¶ 7 The court proceeded to sentencing and discussed aggravating and mitigating factors. The court specifically noted that it considered the financial impact of incarceration and "defendant's statement in allocution, which is mostly setting up post-trial motions but he also did express some remorse to the family [of the victim]."

¶ 8 The court also noted that defendant was on probation at the time of his arrest. It also stated that although defendant had been punched in the face, he was not continually beaten or prevented from leaving and, thus, was not "strongly provoked" to the point that the shooting was justified. The court recounted that the incident started very "innocently" as defendant's friend was trying to "pick up a young lady" at the party, but ended in Houston's murder. The court

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noted that defendant was “allowed” to walk away from the fight but “made the choice” to return with a gun and shoot Houston in the back five times. The court declared that the minimum sentence was not appropriate in this case and instead imposed a 30-year sentence for first-degree murder and a 25-year sentence for personally discharging a firearm, pursuant to the jury’s finding. Defendant filed a motion to reconsider his sentence, arguing that the sentence was excessive and that the court improperly considered in aggravation matters that were implicit in the offense. The court denied defendant’s motion and this timely appeal followed.

¶ 9

#### ANALYSIS

¶ 10 Defendant first argues that the trial court erred in not sufficiently probing his *pro se* claims of ineffective assistance of counsel, contained in his statements to the court at the sentencing hearing, to determine whether appointment of new counsel was warranted to further investigate his claims.

¶ 11 When a defendant makes a *pro se* claim of ineffective assistance of counsel, the trial court must conduct an adequate inquiry of the factual basis of the claim to determine whether new counsel should be appointed to independently evaluate the defendant’s claim. *People v. Taylor*, 237 Ill. 2d 68, 75 (2010); *People v. Krankel*, 102 Ill. 2d 181 (1984). The inquiry may include some interchange between the court and trial counsel “regarding the facts and circumstances surrounding the allegedly ineffective representation.” *People v. Moore*, 207 Ill. 2d 68, 78 (2003). However, a “brief discussion between the trial court and the defendant may be sufficient.” *Moore*, 207 Ill. 2d at 78. The trial court may also rely on “its knowledge of defense counsel’s performance at trial and the insufficiency of the defendant’s allegations on their face”

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to determine whether the defendant's *pro se* claim requires the appointment of new counsel.

*Moore*, 207 Ill. 2d at 79.

¶ 12 The trial court is only required to appoint new counsel if the defendant's allegations show possible neglect of the case. *Taylor*, 237 Ill. 2d at 75. If the court determines that the defendant's claim lacks merit or pertains only to matters of trial strategy, the trial court may reject it without the appointment of new counsel. *Taylor*, 237 Ill. 2d at 75. The trial court's decision to decline the appointment of new counsel shall not be overturned unless it is manifestly erroneous. *People v. McCarter*, 385 Ill. App. 3d 919, 940-41 (2008).

¶ 13 Here, the trial court adequately inquired into defendant's complaints about trial counsel's performance and correctly declined to appoint independent counsel. In his statement to the court, defendant identified two complaints he had about trial counsel, namely that: (1) counsel would not submit a motion defendant prepared pertaining to a "lesser charge," and (2) counsel tendered a defense different from the one proposed by defendant. The court asked defendant to expound on the nature of the defense rejected by counsel, but defendant merely replied that counsel told him the motion he wanted to submit was "irrelevant" and provided no further details to suggest that trial counsel neglected his case or that his performance fell below an objective standard of competence. Where the defendant has an opportunity to articulate his theory but fails to do so, the trial court is not expected to "divine his intent." See *Taylor*, 237 Ill. 2d at 77 (quoting *People v. Grant*, 71 Ill. 2d 551, 557-58 (1978)).

¶ 14 Moreover, defendant's allegations were facially insufficient as claims of ineffective assistance and there was no basis for appointing substitute counsel to further investigate his

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complaints. See *Moore*, 207 Ill. 2d at 79; *McCarter*, 385 Ill. App. 3d at 942. Absent a claim that counsel neglected the case, the appointment of substitute counsel was not required. *Taylor*, 237 Ill. 2d at 75. Defendant's complaints suggested that his counsel was anything but neglectful in explaining why defendant's preferred defense strategy would be unsuccessful. Counsel told defendant that there was no "support" for seeking a lesser-included offense instruction, based on the fact that defendant testified that he was not present at the time of the shooting. Defendant's second complaint about the theory of the defense involved a matter of trial strategy that is exclusively reserved to the discretion of trial counsel and does not form the basis of a claim of ineffective assistance. See *People v. Chapman*, 194 Ill. 2d 186, 231 (2000). Defendant's complaints reflect his dissatisfaction with the outcome of the case, but that is not enough to suggest that his counsel's performance fell below an objective standard of competence. Specifically, the fact that defendant stated his belief that the outcome would have been different if counsel had pursued his unspecified theory of defense "does not affect the fact that the matters about which defendant complain[ed] lack merit and involve a question of trial strategy." *Chapman*, 194 Ill. 2d at 231. The court was permitted to rely on its inquiry of defendant and the sufficiency of the claims presented in deciding whether to appoint substitute counsel. *Moore*, 207 Ill. 2d at 78. Accordingly, we cannot say that the court's determination was manifestly erroneous.

¶ 15 As to defendant's contention that remand is necessary because, as in *Moore* and *McCarter*, the trial court failed to rule on his claim, we disagree. In *Moore*, the supreme court remanded the matter for an inquiry into the defendant's ineffective assistance claims because the

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trial court originally “conducted no inquiry of any sort” and it was not clear that the court had even read the defendant’s *pro se* posttrial motion. Rather, the trial court erroneously ruled that the defendant’s claims “could be resolved by appointment of different counsel *on appeal*.” (Emphasis in original.) *Moore*, 207 Ill. 2d at 79. In *McCarter*, this court remanded the matter for an inquiry because the trial court “made no effort to ask defendant to provide further details or question trial counsel” to evaluate the credibility of the defendant’s claims. Additionally, the court did not provide any rationale for denying the claim, stating only that the “error was harmless.” *McCarter*, 385 Ill. App. 3d at 943.

¶ 16 Here, although the court could have made its ruling more explicit, the response was sufficient under these circumstances. Unlike the trial courts in *Moore* and *McCarter*, the trial court in this case asked defendant to expound on the merits of his claims. It then explained that the lesser included offense instruction would be unwarranted where the defendant testified that he was not present at the time of the shooting and that it regarded defendant’s statements as “setting up posttrial motions,” as opposed to credible claims of ineffective assistance; ultimately, it did not appoint substitute counsel. Thus, unlike *Moore* and *McCarter*, remand is not warranted under these circumstances.

¶ 17 Defendant also challenges his sentence on appeal. He contends that the trial court erred in not giving adequate consideration to his limited criminal history, his youth, and his rehabilitative potential when delivering its sentence.

¶ 18 It is well established that the trial court has broad discretion in sentencing a defendant because it is in a superior position to assess the credibility of witnesses and to weigh the evidence

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presented at the sentencing hearing. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010).

Accordingly, we will not reverse a defendant's sentence absent an abuse of discretion. Where the defendant's sentence falls within the sentencing range, we will only find an abuse of discretion if the sentence is at variance with the spirit of the law or disproportionate to the offense.

*Alexander*, 239 Ill. 2d at 212.

¶ 19 In determining an appropriate sentence, the trial court must consider all factors in aggravation and mitigation, including defendant's age, mental ability, credibility, demeanor, moral character, social environment, and habits. *Alexander*, 239 Ill. 2d at 212. However, the most important factor in sentencing is the seriousness of the crime. *People v. Flores*, 404 Ill.

App. 3d 155, 159 (2010). Where mitigating evidence is before the trial court, it must be presumed that the trial court considered the evidence absent some indication otherwise.

*Alexander*, 239 Ill. 2d at 212. Nevertheless, a defendant's rehabilitative potential cannot outweigh the seriousness of the crime committed. *Alexander*, 239 Ill. 2d at 214. Even if we may have balanced the sentencing factors differently, we may not substitute our judgment for that of the trial court. *Alexander*, 239 Ill. 2d at 212.

¶ 20 Here, defendant was convicted of first-degree murder, an offense that is punishable by a sentence of 20 to 60 years' imprisonment (730 ILCS 5/5-8-1(a)(1)(a) (West 2008)). Defendant's 30-year sentence is on the lower end of that range. Based on the information in the record, including the facts of the offense, his current probation status, and the arguments and evidence in mitigation and aggravation, we cannot say that the trial court abused its discretion in sentencing defendant to 30 years' imprisonment. We are particularly unpersuaded by defendant's argument

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that being punched in the face was provocation sufficient to mitigate the severity of the sentence imposed after he repeatedly shot an unarmed man in the back.

¶ 21 Furthermore, we reject defendant’s argument that the court improperly relied on the fact that a gun was used in the offense as an aggravating factor in sentencing, thereby committing a double enhancement error. Specifically, he argues that the court cited to his use of the gun as a factor in imposing a 30-year sentence for murder even though the use of the gun was inherent in the crime charged by adding the personal discharge of a firearm sentence enhancement.

¶ 22 Generally, a sentencing court may not consider a factor that is necessarily implicit in an offense as an aggravating factor in sentencing. *People v. Walker*, 392 Ill. App. 3d 277, 300 (2009). However, this general rule has been refined to allow a court to consider the degree or gravity of the defendant’s conduct, including the amount of force used, the physical manner in which the victim’s death was brought about, or the nature and circumstances of the offense. *People v. Saldivar*, 113 Ill. 2d 256, 271-72 (1986). It is a recognition of the fact that “ ‘although the consequences are identical, a defendant who tortures his victim to death should expect to receive a more severe punishment than a defendant who \*\*\* is guilty of murder on a theory of accountability.’ ” *People v. Saldivar*, 113 Ill. 2d at 270 (quoting *People v. Andrews*, 105 Ill. App. 3d 1109, 1113 (1982)).

¶ 23 Here, the court did not cite the mere fact that a gun was used as an aggravating factor to increase the sentence imposed for murder. Rather, the court referenced the gun to illustrate the grossly disproportionate reaction defendant had to being punched in the face following a relatively “innocent” argument about defendant’s friend trying to “pick up a young lady.” It

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stated that although defendant was hurt in the fight, he had the opportunity to walk away, and he did so. However, he returned shortly thereafter after having retrieving a gun from his car and, without further provocation, shot an unarmed man five times in the back while he laid in the back seat of a car. That illustrates the gravity of defendant's conduct, the manner in which Houston's death was brought about, and the amount of force used to commit the crime, which are permissible considerations in increasing the sentence beyond the minimum. See *Saldivar*, 113 Ill. 2d at 270-71 (citing *People v. Hughes*, 109 Ill. App. 3d 352, 363 (1982)).

¶ 24 For the foregoing reasons, we affirm defendant's conviction and sentence.

¶ 25 Affirmed.