

No. 1-11-1585

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 09 CR 14825
)	
DWAYNE EPPS,)	Honorable
)	Carol A. Kipperman,
Defendant-Appellant.)	Judge Presiding.

JUSTICE QUINN delivered the judgment of the court.
Presiding Justice Harris and Justice Connors concurred in the judgment.

ORDER

- ¶ 1 **Held:** Judgment of circuit court of Cook County affirmed over defendant's contention that he received ineffective assistance of trial counsel under *Cronic* and *Strickland*; 10-year sentence not an abuse of discretion.
- ¶ 2 Following a bench trial, defendant Dwayne Epps was found guilty of delivery of a controlled substance and sentenced as a Class X offender to 10 years' imprisonment. On appeal, he contends that he was denied effective assistance of trial counsel under *Cronic* and *Strickland*. He also maintains that his sentence was excessive.
- ¶ 3 Defendant was charged with two counts of delivery of a controlled substance. The charges arose out of an incident that occurred in the afternoon on March 5, 2009, involving an

undercover narcotics mission conducted by Chicago police officer David Pearson with the assistance of officers from Maywood and Broadview, as well as the Illinois state police.

¶ 4 At trial, defense counsel presented the following opening statement:

"Your Honor, you will see at the close of this evidence that [defendant] is not a drug dealer. He's, in fact, an innocent man. The State will not be able to meet their burden of proof, your Honor. In no way shape or form will this evidence indicate that he's out there delivering narcotics, your Honor. He is -- he's an innocent man, and that will be shown by the evidence."

¶ 5 Chicago police officer David Pearson then testified that at 3 p.m. on March 5, 2009, he was working undercover in a vehicle equipped with audio and video recording equipment when he observed defendant standing outside Hannah's Liquors at 17th Avenue and Lexington Street in Broadview. Officer Pearson inquired about purchasing cocaine, and defendant entered the passenger side of his vehicle. Defendant directed the officer where to drive, and after driving around for 15 minutes, they were stopped by Officers Ladd and Ackerman, who asked them to exit the vehicle. Officer Pearson remained undercover during the traffic stop, and heard defendant tell the police his name. After the traffic stop was complete, defendant and Officer Pearson went their separate ways.

¶ 6 At 4:40 p.m. on the same day, Officer Pearson, who was still working undercover, observed defendant in the 1900 block of 15th Avenue. Defendant called out to him, and Officer Pearson allowed defendant to enter his undercover vehicle. Defendant asked him if he was still looking for narcotics, and he answered in the affirmative. Defendant told him where to drive, and he followed defendant's directions. Defendant then called out to a man, later identified as Savann Wilson. Officer Pearson stopped his car, and Wilson approached defendant. Defendant

asked the officer how many he wanted, the officer said two, and defendant then told Wilson that he wanted two "dubs," which is rock cocaine. Wilson then went to retrieve the narcotics, and defendant told Officer Pearson where to drive. Defendant had him drive to the alley between 15th and 16th Avenues in the 1800 block of Lexington Street. Once there, he stopped his car, and Wilson first approached the driver's side but then walked over to the passenger side where defendant was seated. Wilson handed defendant two bags of cocaine, and defendant then gave it to the officer, who, in turn, handed defendant \$20, which was prerecorded. Defendant handed the money to Wilson, who gave defendant a cigarette. Officer Pearson then dropped defendant off and met with his undercover team. Officer Pearson later identified defendant from a photo array as the person who directed him to the narcotics.

¶ 7 During counsel's cross-examination of Officer Pearson, the officer testified that the person in the car with him did not have any narcotics on him. Officer Pearson also testified that the individual in the car with him did not keep any of the money he tendered for the narcotics.

¶ 8 The video from the undercover vehicle was produced in court, and Officer Pearson testified that it was a true and accurate recording of the events. The video was played in court, and Officer Pearson identified the portions of it that showed the narcotics transaction.

¶ 9 This video was filed with the record on appeal. The video and its audio show that defendant asked the officer, "how many do you want," and when the officer told him, "two," he said to Wilson, "I've got a customer. Give me two." They then drove for a little while, and when they stopped, defendant tells Wilson, who met them, to "come on this side" of the car. It then clearly shows defendant receiving the narcotics from Wilson, handing them to the officer, and then handing Wilson the money.

¶ 10 Illinois State Police Officer Wayne Ladd testified that he stopped Officer Pearson and defendant for the officer's safety because they had been in the car for a while. Officer Ladd

identified defendant in court as the man who was sitting in the passenger side of the undercover vehicle. Defendant also told the officer his name, and was later arrested pursuant to a warrant on July 29, 2009. On cross-examination by counsel, Officer Ladd testified that defendant did not have any identification on him when he was stopped.

¶ 11 The parties stipulated that the recovered narcotics tested positive for cocaine. Counsel then moved for a directed finding, which was denied.

¶ 12 Counsel presented the following closing argument:

"You seen the videotape. We in no way shape or form are saying that the person on the video isn't our -- isn't my client, your Honor. It's that the officer testified, Officer Ladd, that at no point is there any photo identification even presented to him. Obviously my client is not a drug dealer, your Honor. It's -- obviously Savann Wilson is this drug dealer. My client is at the most merely present, your Honor, and we would ask for a finding of not guilty."

¶ 13 The court subsequently found defendant guilty of delivery of a controlled substance. In doing so, the court found that it was clear from the video and the testimony that defendant facilitated the narcotics sale, noting that defendant was the "middleman." Counsel filed a motion for a new trial, which was denied.

¶ 14 At sentencing, the State presented in aggravation that defendant has an extensive criminal history dating back to 1992 when he was convicted of a Class III weapons offense and placed on intensive supervision probation, which he violated and was then imprisoned. The State further noted that this offense is his tenth felony conviction, and he has prior theft convictions. The

State also noted that defendant has been given opportunities to address any type of drug or addiction issues that he suffers from.

¶ 15 In mitigation, counsel argued that defendant was never arrested for unlawful use of a weapon by a felon, and has a non-violent background. Counsel stated that every prior offense was drug related, and that defendant was not a drug dealer but a drug addict who has a long-term problem. Counsel also noted that defendant is currently in a drug treatment program, and that the purpose of his participation in this crime was to get a "hit off a rock of cocaine." Counsel also informed the court that codefendant Wilson, who was the drug dealer, only received probation.

¶ 16 The court sentenced defendant as a Class X offender to 10 years' imprisonment. In doing so, the court noted that it reviewed the presentence investigation (PSI) report, which showed that many of his prior offenses were drug related. The court noted that defendant was "enthusiastic" about the drug program he was currently in. The court, however, further observed that defendant has been given plenty of opportunities to "clean up," but has not done so. The court stated that in imposing a 10-year sentence it considered the nature of the offense, defendant's background, and that this was a Class X felony with a sentencing range of 6 to 30 years' imprisonment.

¶ 17 Counsel filed a motion to reconsider sentence in which he alleged, in relevant part, that the sentence was excessive in view of defendant's criminal history which did not include any violent crimes, the nature of his participation of the offense, and that he was a substance abuser. Counsel also argued to the court that defendant was merely attempting to fuel his drug habit, whereas codefendant Wilson was the drug dealer. The court denied the motion.

¶ 18 On appeal, defendant maintains that he was denied effective assistance of counsel where counsel conceded his guilt by admitting that he was the person in the video, and misapprehended the law of delivery of a controlled substance where he argued that defendant was not the actual drug dealer and "did not profit" from the drug transaction. Defendant maintains, relying on

United States v. Cronin, 466 U.S. 648 (1984), that counsel failed to subject the State's case to meaningful adversarial testing, and, therefore, he need not show any prejudice.

¶ 19 In *Cronin*, the supreme court identified circumstances in which the right to counsel was implicated and prejudice may be assumed, including, in relevant part, where counsel entirely fails to subject the State's case to meaningful adversarial testing. *Cronin*, 466 U.S. at 658-59. In *Bell v. Cone*, 535 U.S. 685, 696-97 (2002), the supreme court emphasized that counsel's failure to test the State's case must be complete to warrant the presumption of prejudice. Because the defendant in *Bell* argued that counsel failed to oppose the State at specific points, and not throughout the proceeding as a whole, the court held that *Strickland* governed the analysis of counsel's conduct. 535 U.S. at 697-98. In doing so, the court noted that the aspects of counsel's performance about which defendant complained were similar to other errors it had held subject to the *Strickland* standard. *Bell*, 535 U.S. at 697-98. Accordingly, because *Strickland*, and not *Cronin*, was the applicable standard to evaluate counsel's performance, prejudice was not presumed in *Bell*. *Bell*, 535 U.S. at 698. Here, as in *Bell*, we find, for the reasons that follow, that defendant has failed to show that counsel completely failed to advocate for him, and thus, the applicable standard to evaluate counsel's performance is *Strickland*.

¶ 20 Defendant contends that counsel failed to subject his case to meaningful adversarial testing where he admitted that the person in the video was defendant, and misapprehended the law regarding delivery of a controlled substance where he argued that defendant was not guilty where he merely handed the cocaine to the officer, and did not profit from the transaction. He maintains that counsel, in effect, conceded his guilt, thereby providing the court no choice but to convict him. We disagree.

¶ 21 Counsel presented opening and closing arguments during which he maintained that defendant was "innocent" and "merely present" for the transaction. Counsel did not concede his

guilt, but cross-examined the State's witnesses, and presented motions for a directed verdict, a new trial, and to reconsider the sentence. Based on the record before us, counsel did not fail to subject the State's case to meaningful adversarial testing. *Bell*, 535 U.S. at 697.

¶ 22 Moreover, counsel advanced a valid argument when he contended that the State failed to prove anything more than defendant was merely present, because it is well recognized that a defendant may not be convicted under the theory of accountability if the State merely shows that defendant was present at the scene of the crime. *People v. Darnell*, 214 Ill. App. 3d 345, 364-67 (1990). Further, counsel did not, contrary to defendant's contention, argue that defendant was not guilty because he merely handed the cocaine to the officer and did not profit from the transaction, but merely obtained testimony on cross-examination of Officer Pearson that the individual in the officer's car did not keep the money. He also elicited from Officer Ladd that the person in Officer Pearson's car did not have identification on him. In light of the overwhelming evidence at trial showing that defendant was present during the drug transaction, counsel argued during closing that defendant was merely present. Counsel used a degree of creativity to fashion a defense where no other was available, and adequately cross-examined the officers. *People v. Milton*, 354 Ill. App. 3d 283, 289-90 (2004). If counsel had argued that the person in the video was not defendant, it would have been a less credible theory as the video shows that it was defendant, who was clearly found guilty based on the video and not counsel's performance. *People v. Shatner*, 174 Ill. 2d 133, 148 (1996). Counsel had no duty to manufacture a defense where none existed. *People v. Elam*, 294 Ill. App. 3d 313, 323 (1998).

¶ 23 Defendant, nonetheless, urges this court to apply the standard of *per se* ineffectiveness of counsel announced in *Cronic*, maintaining that this case is similar to *People v. Hattery*, 109 Ill. 2d 449 (1985). In *Hattery*, defendant's counsel conceded his guilt during the opening statement, failed to present any evidence, failed to advance any theory of defense, and failed to deliver a

closing argument. *Hattery*, 109 Ill. 2d at 458-59. Here, counsel did not concede that defendant was guilty, but, rather, maintained that he was "innocent" and was, "at the most merely present." This was a case where defendant literally had no defense where there was a video that clearly showed him handing the narcotics to the undercover officer. A weak or insufficient defense does not indicate ineffectiveness of counsel in a case where defendant has no defense. *People v. Ganus*, 148 Ill. 2d 466, 474 (1992). Where, as here, there was not much more counsel could do, his performance will not be deemed constitutionally defective under *Cronic*. *People v. Stone*, 274 Ill. App. 3d 94, 99 (1995). Accordingly, we conclude that defendant has not shown that his trial counsel was presumptively ineffective under *Hattery* and *Cronic*.

¶ 24 Defendant, however, further contends that he has satisfied the *Strickland* test. He maintains that counsel misapprehended the law of delivery of a controlled substance where he "argued that [defendant] was not guilty of the delivery because he did not profit from the transaction," and that this misapprehension amounted to deficient performance under *Strickland*.

¶ 25 Under the two-prong test for examining a claim of ineffective assistance of counsel, defendant must establish that his counsel's performance fell below an objective standard of reasonableness, and that but for counsel's deficient performance, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984). The scrutiny of defense counsel's performance is highly deferential due to the inherent difficulties of making the evaluation, and the reviewing court must indulge in a strong presumption that counsel's conduct fell within the range of reasonable professional assistance. *People v. Robinson*, 299 Ill. App. 3d 426, 433 (1998). To prevail, defendant must satisfy both prongs of the *Strickland* test, and if this court concludes that defendant did not suffer prejudice, we need not decide whether counsel's performance was deficient. *People v. Harris*, 206 Ill. 2d 293, 304 (2002).

¶ 26 We observe, contrary to defendant's contention, that his counsel did not admit that defendant delivered the drugs and was not guilty because he did not profit from the transaction. Rather, he maintained that defendant was "innocent," and was, "at the most merely present." Counsel did not misapprehend the law of delivery of a controlled substance where he elicited testimony on cross-examination of Officer Pearson that defendant did not keep the money tendered by the officer. Counsel was grasping at straws in an attempt to present a defense for defendant, who had none, and thus, cannot be deemed ineffective based on the weakness of defendant's case. *Ganus*, 148 Ill. 2d at 474.

¶ 27 Furthermore, defendant cannot show prejudice where the evidence against him was overwhelming. *People v. Davis*, 353 Ill. App. 3d 790, 795 (2004). Officer Pearson testified that he picked up defendant, who directed him to Wilson, who handed defendant the narcotics. Defendant then handed the narcotics to Officer Pearson. Moreover, there was a video presented in court which clearly showed defendant handing the narcotics from Wilson to the officer. Accordingly, this evidence was clearly overwhelming proof that defendant was guilty of delivery of a controlled substance. *People v. Rendon*, 238 Ill. App. 3d 135, 139-40 (1992).

¶ 28 Defendant, however, relying on *People v. Chandler*, 129 Ill. 2d 233, 247-49 (1989), *People v. Baines*, 399 Ill. App. 3d 881, 896-99 (2010), and *People v. Lemke*, 349 Ill. App. 3d 391 (2004), maintains that where counsel's performance left the trial court with no choice but to convict him, he was so severely prejudiced that the error necessitates a finding of ineffective assistance of counsel under *Strickland*.

¶ 29 In *Chandler*, counsel told the jury that defendant would testify and tell them what he did and did not do, but then counsel did not call defendant, counsel further failed to cross-examine several of the State's key witnesses, failed to develop a theory of innocence and argued that defendant did not inflict the fatal wounds to the victim but did burglarize his home, thereby

miscomprehending the law of accountability and felony murder. *Chandler*, 129 Ill. 2d at 247-49. The supreme court found that counsel failed to subject the State's case to meaningful adversarial testing, and "forced" the jury to convict defendant, and that there was a reasonable probability that but for counsel's deficient performance, the result of the trial would have been different. *Chandler*, 129 Ill. 2d at 249-50. Here, counsel, as explained, did not miscomprehend the law of delivery of a controlled substance where he argued that defendant was innocent and merely present during the transaction. Further, counsel cross-examined the State's witnesses, maintained defendant's innocence during argument, and presented motions for a directed verdict, a new trial and to reconsider the sentence. Counsel clearly subjected the State's case to meaningful adversarial testing unlike counsel in *Chandler*. Counsel used his resourcefulness in this case to present a defense where none existed. *Ganus*, 148 Ill. 2d at 473-74. Moreover, we cannot find, as in *Chandler*, that a reasonable probability exists that if counsel did not pursue the theory he did, that he would have been acquitted given the overwhelming evidence against him which included a video that clearly depicted him facilitating the narcotics transaction. *People v. Nieves*, 192 Ill. 2d 487, 499 (2000).

¶ 30 In *Baines*, counsel allowed for defendant to lead his examination, elicited an inculpatory statement from defendant, and then continued to examine defendant in a manner that helped the State's case, and his examination of the witnesses showed his "shocking" lack of familiarity with the basic facts of the case. *Baines*, 399 Ill. App. 3d at 888-91. This court concluded that both prongs of the *Strickland* test were satisfied where counsel's representation was so deficient in that he made numerous mistakes during trial, and the identification testimony by the State's key witness was weak and counsel failed to challenge that testimony. *Baines*, 399 Ill. App. 3d at 898. Here, unlike *Baines*, counsel was familiar with the facts of the case and properly cross-examined the State's witnesses. Furthermore, in this case, unlike *Baines*, there was no prejudice where the

evidence against defendant, which included a video clearly depicting him handing the narcotics from Wilson to the officer, was overwhelming. *Nieves*, 192 Ill. 2d at 499.

¶ 31 In *Lemke*, counsel chose a trial strategy based on his misapprehension of the law, and the reviewing court found there was a viable defense, which, if counsel had pursued, had a reasonable probability of acquittal. *Lemke*, 349 Ill. App. 3d at 399-402. Here, as explained in detail above, counsel did not misapprehend the law. Counsel asserted that defendant was merely present, which is a viable defense, but unfortunately was unsuccessful where a video clearly showed defendant facilitating the narcotics transaction. Counsel attempted to present a defense in light of the overwhelming evidence against defendant. The fact that he was unsuccessful does not lead to the conclusion that counsel was ineffective. *People v. Skillom*, 361 Ill. App. 3d 901, 913-14 (2005). Defendant has failed to show that there was a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different, and accordingly, has not established ineffective assistance of counsel. *Davis*, 353 Ill. App. 3d at 795.

¶ 32 Finally, defendant maintains that his 10-year sentence is excessive. He claims that it was excessive given his treatment for drug addiction, potential for rehabilitation, and non-violent background, that the sentence was manifestly disproportionate to the nature of the offense, and that the court failed to consider his drug addiction and treatment for it as a mitigating factor.

¶ 33 There is no dispute that the 10-year sentence imposed by the trial court falls within the sentencing range of 6 and 30 years' imprisonment (720 ILCS 570/401(d)(1); 730 ILCS 5/5-4.5-25 (West 2010)), and that we may not disturb that sentence absent an abuse of discretion (*People v. Bennett*, 329 Ill. App. 3d 502, 517 (2002)). We find none here.

¶ 34 It is not our prerogative to reweigh the factors which were properly considered by the trial court (*People v. Martin*, 2012 IL App (1st) 093506, ¶¶52-53), and independently conclude that the sentence is excessive (*People v. Burke*, 164 Ill. App. 3d 889, 902 (1987)). Furthermore, drug

addiction is not necessarily a mitigating factor (*People v. Newbill*, 374 Ill. App. 3d 847, 854 (2007)), and the amount of drugs involved in the case is not determinative of the sentence imposed (*People v. Averett*, 381 Ill. App. 3d 1001, 1021 (2008)). Here, it is evident that the court carefully considered the aggravating and mitigating factors, the PSI report and defendant's drug addiction. The court also weighed defendant's potential for rehabilitation against his nine prior felonies, and failure to take advantage of the opportunities provided to him, and concluded that a 10-year term was appropriate. We cannot say that the trial court abused its discretion in imposing that term. *People v. Shumate*, 94 Ill. App. 3d 478, 485 (1981).

¶ 35 In light of the foregoing, we affirm the judgment of the circuit court of Cook County.

¶ 36 Affirmed.