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2014 IL App (3d) 120139-U

Order filed May 23, 2014

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-12-0139
	)	Circuit No. 07-CF-160
CLARICE N. HAWKINS,	)	
Defendant-Appellant.	)	Honorable Stephen A. Kouri, Judge, Presiding.

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JUSTICE O'BRIEN delivered the judgment of the court.  
Justice Schmidt concurred in the judgment.  
Justice McDade dissented.

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**ORDER**

- ¶ 1 *Held:* Defendant's claim of ineffective assistance of counsel fails because counsel's errors at sentencing did not affect defendant's sentence.
- ¶ 2 Defendant, Clarice N. Hawkins, was convicted of first degree murder (720 ILCS 5/9-1(a)(1) (West 2006)) and unlawful sale of a firearm (720 ILCS 5/24-3(A)(a) (West 2006)). She was sentenced to 65 years in prison for murder and a consecutive 7-year term for unlawful sale

of a firearm. Defendant appealed, and this court affirmed her convictions and her 65-year sentence for murder; however, we vacated her 7-year sentence for unlawful sale of a firearm and remanded for a new sentencing hearing. *People v. Hawkins*, No. 3-08-0008 (2009) (unpublished order under Supreme Court Rule 23). On remand, the trial court resentenced defendant to an identical consecutive seven-year prison term. Defendant appeals, arguing that she was denied the effective assistance of counsel at the sentencing stage where counsel: (1) admitted he was unfamiliar with the case; (2) conceded to the State's theory of defendant's motive despite her claim to the contrary; (3) failed to offer vital mitigating evidence; and (4) neglected to file a motion to reconsider sentence. We find that counsel provided deficient performance, but defendant was not prejudiced by counsel's errors.

¶ 3

#### FACTS

¶ 4

Defendant was charged with first degree murder (720 ILCS 5/9-1(a)(1) (West 2006)) and unlawful sale of a firearm (720 ILCS 5/24-3(A)(a) (West 2006)). The cause proceeded to a jury trial. Evidence established that after defendant and Semeeka Cotton were seen smoking crack cocaine together, defendant shot Cotton, causing her death. There were no eyewitnesses to the shooting. Evidence also established that defendant sold the gun used to kill Cotton to a 17-year-old drug dealer. The jury found defendant guilty, and the trial court sentenced her to 65 years in prison for first degree murder and a consecutive term of 7 years for unlawful sale of a firearm. Defendant appealed her convictions and sentences. On appeal, this court vacated defendant's sentence for unlawful sale of a firearm due to the trial court's misstatement of law during sentencing. *Hawkins*, No. 3-08-0008. Defendant's convictions and her sentence for first degree murder were affirmed. *Id.*

¶ 5 On remand, the trial court held a new sentencing hearing for unlawful sale of a firearm. At the hearing, defendant's new attorney informed the court that he had not been present for the trial and then stated that he was "not familiar specifically with the facts and circumstances of the underlying case." However, after hearing the State's argument, he agreed that the crime was aggravated by a possible motive to sell the gun in order to conceal the murder. Counsel made this concession despite defendant's continued claim, restated in allocution, that she was not attempting to conceal the murder but rather sold the gun simply to purchase drugs. Counsel further failed to offer any mitigating evidence on defendant's behalf, thus ignoring facts from the record detailing defendant's history of mental issues. That history included her suffering from bipolar disorder and depression, taking prescription medication, and being treated by psychiatrists and psychologists.

¶ 6 At the conclusion of the hearing, defendant was sentenced to an identical term of seven years in prison which was set to run consecutively with her sentence for first degree murder. Following the sentence, defense counsel failed to file a motion to reconsider sentence. Defendant appeals.

¶ 7 ANALYSIS

¶ 8 Defendant argues that she was denied the effective assistance of counsel where counsel: (1) admitted he was unfamiliar with the case; (2) conceded to the State's theory of defendant's motive despite her claim to the contrary; (3) failed to offer vital mitigating evidence; and (4) failed to file a motion to reconsider sentence.

¶ 9 Initially, the State argues that the above issues have been waived because defendant did not file a motion to reconsider sentence. While it is true that a defendant's failure to file a motion to reconsider sentence generally results in the forfeiture of all sentencing issues (see *People v.*

*Rathbone*, 345 Ill. App. 3d 305 (2003)), our supreme court has held that the doctrine of waiver should not bar consideration of an issue where the alleged waiver stems from incompetency of counsel (*People v. Williams*, 181 Ill. 2d 297 (1998)). Thus, where defendant alleges on appeal that counsel was ineffective, we need not conduct a plain error analysis even if the issue was not raised below. See *id.*

¶ 10 Here, defendant argues that counsel was incompetent for a number of reasons, including the failure to file a motion to reconsider sentence. If the rule of waiver were applied strictly, the failure to file a motion to reconsider could result in the waiver of defendant's other claims of ineffective assistance. It would obviously be unfair to find waiver in such circumstances. Because of this, we conclude that the issues raised by defendant have not been waived. See *id.* Therefore, we will address all of defendant's allegations of ineffective assistance.

¶ 11 To establish ineffective assistance of counsel, a defendant must show that: (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different. *People v. Albanese*, 104 Ill. 2d 504 (1984). In order to establish the first prong of ineffective assistance, the defendant must show that counsel's performance was so inadequate that counsel was not functioning as the counsel guaranteed by the sixth amendment. *People v. Manning*, 241 Ill. 2d 319 (2011). For all of the reasons asserted by defendant, counsel's performance failed to meet that standard here.

¶ 12 First, counsel was inadequate for failing to familiarize himself with defendant's case prior to the hearing. It is obvious that an attorney must be prepared to represent a defendant and that a lack of any preparation results in deficient performance. Second, counsel's concession to the State's theory of defendant's motive, despite defendant's continued claim to the contrary,

amounted to deficient performance in that it showed counsel's unfamiliarity with the case and his lack of zealous advocacy for defendant. Third, counsel's failure to offer vital mitigating evidence, coupled with his lack of knowledge of the case, also resulted in deficient performance. See *People v. Jackson*, 200 Ill. App. 3d 92 (1990) (counsel's failure to offer mitigating evidence may demonstrate ineffective assistance when it was the result of counsel's lack of diligence, rather than a result of tactics or strategy). Finally, counsel's performance was deficient when he failed to file a motion to reconsider sentence. It has long been established that a written motion to reconsider sentence is required in order to preserve sentencing issues for appeal. *People v. Reed*, 177 Ill. 2d 389 (1997). Counsel's failure to file a motion to reconsider sentence here deprived the trial court of an opportunity to review its sentence. See Ill. S. Ct. R. 615(a).

¶ 13            However, defendant's ineffective assistance of counsel claim fails because defendant was not prejudiced by counsel's errors. Defendant argues she was prejudiced because resentencing counsel conceded to the State's theory of defendant's motive. Defendant claims that, had counsel argued that defendant sold the gun to buy drugs rather than to conceal a murder weapon, there was a reasonable probability that the court would have imposed a lesser sentence. We find nothing in the record to support that claim.

¶ 14            During defendant's statement in allocution at resentencing, she stated, "I sold the gun because of drugs. I didn't sell the gun to conceal the weapon." The court responded that it believed her. Therefore, despite counsel's failure to argue that defendant was motivated by drugs, the court took that fact into account. Nevertheless, it imposed the maximum sentence. There was no prejudice as a result of counsel's error.

¶ 15            Nor did counsel's other errors result in prejudice. First, the claim that counsel was unprepared is too open-ended. Counsel had admitted to being unfamiliar with the trial record,

but defendant does not explain how that unfamiliarity affected her sentence. We find nothing in the record to suggest that counsel's performance affected the court's decision to again impose a seven-year sentence.

¶ 16 Second, defendant claims that counsel failed to present "vital" mitigating evidence, specifically, that defendant suffered from mental illness. However, the original presentence investigation detailed defendant's mental health history. The court was therefore aware of that potentially mitigating evidence, and we presume that the court had considered it. *People v. Donath*, 357 Ill. App. 3d 57 (2005).

¶ 17 Third, defendant was not prejudiced by counsel's failure to file a motion to reconsider sentence. Had such a motion been filed, counsel presumably would have raised the same arguments that she now raises on appeal. For the foregoing reasons, we do not believe those arguments would have affected defendant's sentence.

¶ 18 Counsel's performance did not prejudice defendant. Therefore defendant's claim of ineffective assistance of counsel fails.

¶ 19 CONCLUSION

¶ 20 The judgment of the circuit court of Peoria County is affirmed.

¶ 21 Affirmed.

¶ 22 JUSTICE McDADE, dissenting.

¶ 23 Defendant, Clarice Hawkins, has appealed, for the second time, her 7-year sentence for unlawful sale of a firearm. In the portion of her initial appeal relevant to the sale of a firearm, we vacated the sentence because of the trial court's misstatement of the law during sentencing and remanded for a new sentencing hearing on that charge. *Hawkins*, 03-08-0008.

¶ 24 At this new hearing, defendant was represented by counsel whose performance the majority agrees was ineffective. The majority finds counsel was "inadequate" for failing to familiarize himself with defendant's case prior to the hearing. It also finds that his performance was: "deficient" and indicative of a "lack of zealous advocacy" when he, without knowledge of the case, conceded the State's theory of defendant's motive; "deficient" in failing to offer "vital mitigating evidence" because of his lack of knowledge of the case; and "deficient" because his failure to file a motion to reconsider the sentence "deprived the trial court of an opportunity to review its sentence" and failed to preserve the sentencing issue for appeal.<sup>1</sup>

¶ 25 And yet, according to the majority, there is no prejudice.

¶ 26 I strongly disagree. Our justice system is adversarial in nature, designed to elicit truth through the zealous advocacy, before an impartial judge, of competing theories, buttressed by witness testimony, the presentation of other evidence, and the arguments of counsel. To that end, in criminal cases we recognize the right to be represented by counsel at all of the critical stages of the trial. See *People v. Green*, 34 Ill. App. 3d 153, 155 (1975) (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963) on fundamental right to counsel); *Escobedo v. Illinois*, 378 U.S. 478 (1964) on the right to counsel at all critical stages of the proceedings)). We employ carefully crafted safeguards and admonitions before a defendant can effectively waive the right

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<sup>1</sup> In order to preserve a claimed error for review, a defendant must make a contemporaneous objection at trial and assert, in a post-trial motion, the existence of the alleged error. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). This rule also applies to sentencing hearings. *People v. Williams*, 181 Ill. 2d 297, 322 (1998). As the majority has noted, we are considering the issue only because of an exception, triggered when the defendant alleged the ineffectiveness of her counsel. *Id.*

to counsel. We have an elaborate code of professional conduct to ensure all parties can be zealously represented at all stages of trial by competent, conflict-free counsel.

¶ 27 None of that structure and those protections can be found at this sentencing hearing.

¶ 28 This defendant did not have ineffective counsel. To say that she did would suggest that her appointed attorney attempted to do something on her behalf and fell short. She had *no* counsel. Both of the attorneys in that courtroom were advocating for the State. The defendant was systemically prejudiced.

¶ 29 Sentencing is a critical stage of trial. See *Mempa v. Rhay*, 389 U.S. 128, 136-37 (1967) (noting that sentencing proceedings are a critical stage to which the right to counsel attaches); see also *People v. Baker*, 92 Ill.2d 85, 90 (1982) (recognized that a defendant has a constitutional right to be represented by counsel at the sentencing stage of a proceeding). There is nothing in the record to indicate defendant waived counsel. There is also nothing in the record to indicate her counsel advocated for her in any way either prior to, during or after the sentencing hearing. Nor did he take any steps to preserve her ability to appeal from his failure to advocate.

¶ 30 The majority speculates that, as a practical matter, there was no prejudice because the trial court said it "believed" defendant's statement that she sold the gun because of drugs; because defendant does not explain how she was prejudiced by counsel's unfamiliarity with her case; and because we "presume" the trial court appropriately considered the potentially mitigating evidence.

¶ 31 There are, in my opinion, two flaws in their conclusion. First, as a *general proposition*, it demeans the value of advocacy and the importance of representation of criminal defendants by trained, competent advocates. The second, and more specific, flaw I point out by way of analogy. Frequently when judges on courts of review are asked by attorneys about the wisdom

of waiving oral argument, we recount occasions when we approached oral argument with a conviction of how the case should be resolved based on our review of the briefs and the record only to have an able and persuasive advocate change our focus, our perception, and our decision.

¶ 32           Being deprived of that *possibility* in this case, as well as lacking zealous and meaningful representation, was clearly prejudicial to the defendant. It is for all of the foregoing reasons that I respectfully dissent from the majority decision.