2013 IL App (1st)11-3776-U

FIRST DIVISION
FILED: January 21, 2014

No. 1-11-3776

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	
v.	)	No. 08CR4056 (02)
DEMETRIUS WARREN,	)	Honorable Dennis J. Porter,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE Hoffman delivered the judgment of the court.
Justice Cunningham and Justice Delort concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant's conviction and sentence was affirmed where there was no finding that his counsel labored under a *per se* conflict of interest, and his constitutional challenge to the statutory scheme under which he was prosecuted and sentenced was rejected.

¶ 2 The defendant, Demetrius Warren, was charged by indictment with, *inter alia*, murder with a firearm (720 ILCS 5/9-1(a)(1)(West 2006), multiple counts of armed robbery (720 ILCS 5/18-2(a)(2)(West 2006), and aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2)(West 2006)). He was transferred to be tried as an adult under the mandatory transfer provision of the

Juvenile Court Act (JCA)(705 ILCS 405/5-120 (West 2010)), and following a jury trial, was found guilty of these offenses, and sentenced to 120 years' imprisonment.

¶ 3 On appeal, he contends 1) his conviction should be reversed because defense counsel labored under a *per se* conflict of interest when she contemporaneously represented both him and a State witness during preliminary proceedings; and 2) the statutory scheme under which he was prosecuted and sentenced violated his rights under the State and federal constitutions by mandating that he be sentenced as an adult and giving no regard to his youthfulness and its attendant circumstances.

¶ 4 This case arises from a series of armed robberies and attempted armed robberies perpetrated by the defendant, then age 17, along with Eric Walker, Benjamin Williams, and Jamal Bracey, resulting in the death of Amadou Cisse. The evidence at trial may be briefly summarized as follows. Co-defendant Walker testified that on the evening of November 18, 2007, he was out driving when he encountered the defendant, whom he knew from the neighborhood, accompanied by Williams, Bracey, and an individual named "E." He agreed to give the four a ride. Walker testified that as they drove, the defendant displayed a gun, later found to be the murder weapon. The defendant told Walker that they were planning to "hit some licks," which Walker defined as "robberies." As Walker drove into Hyde Park, they passed within 10 or 15 feet of James Rourke, who was on foot. The defendant ordered Walker to stop the car, at which point he passed the gun to "E", who exited the vehicle. "E" then fired a shot at Rourke, as Rourke fled.

¶ 5 The group then continued driving until they saw another victim, Rodney Jones, standing on a corner. The defendant got out of the vehicle and pursued Jones with the gun. Walker

testified that the defendant subsequently returned to the car and pronounced that Jones had nothing, only "a couple of dollars."

¶ 6 Walker proceeded to drive, and around 1 a.m. on November 19, they saw two women walking near the University of Chicago, carrying book bags. This time, Bracey exited the car along with the defendant, and the two pursued the women, grabbed their bags, and returned to the car. Finally, as the group continued to drive, they saw Amadou Cisse, also on foot and carrying a backpack. According to Walker, the defendant and Williams approached Cisse, and the defendant pointed the gun at him while Williams attempted to grab his backpack. A struggle ensued, and Walker saw the defendant shoot the man, who fell to the ground. Walker then drove away from the scene. The defendant was later apprehended.

¶ 7 We now summarize in greater detail the facts relevant to the defendant's claim of conflict of interest. The defendant made his first appearance in this case on January 11, 2008, accompanied by an unidentified public defender. At the beginning of the proceedings, the court inquired whether he had retained counsel, to which he responded that he had not. The public defender informed the court that someone from his office had appeared in this case and should have been present to represent the defendant, but that "nobody knows who represented him." The court then appointed an assistant public defender, Brett Balmer, who was present in the court room on another matter, to represent the defendant. Balmer agreed to do so, but stated that she did not "want to interfere with the process." The court then proceeded to inform the defendant of the allegations against him for armed robbery, attempted armed robbery, and aggravated discharge of a firearm (first arraignment). Balmer accepted the appointment, entered pleas of not guilty, and

requested leave to file motions and discovery. The court continued the case to January 31, 2008.

¶ 8 On January 31, 2008, the judge again inquired whether the defendant had retained counsel, to which he replied that he had not, prompting the court to again appoint Balmer. The court again informed the defendant of the allegations against him for armed robbery and aggravated discharge of a firearm, and of the additional charge of first degree murder. Balmer accepted her appointment on behalf of the defendant, entered a plea of not guilty, waived formal reading of the indictment, and requested leave to file her appearance and engage in discovery. The court then continued the case until February 26, 2008.

¶ 9 On February 21, 2008, an indictment was returned against the defendant charging him with first degree murder with a firearm, armed robbery, attempted armed robbery, and aggravated discharge of a firearm. That same day, an appearance was filed in the defendant's case by privately-retained counsel, Richard Kling. On February 26, 2008, the defendant and his co-defendants were arraigned on these charges (second arraignment). At the commencement of the proceedings, Susanna Ortiz appeared for the defendant "on behalf of" her law partner Kling, and requested leave to continue Kling's appearance "from the Branch 66 court". Balmer was also present, but was representing co-defendant Bracey. She addressed the court as follows:

> "If I may for the record, Brett Balmer. I was previously appointed on [behalf of the defendant]. That was on his *** first arraignment *** on the original charge. For him it was the armed robbery. He was not at that time charged with the murder. Since that time Chief Judge appointed Mr. Kling to represent him.
>
> I do want to state for the record that I had been representing [the defendant]. I did

visit him and talked to him in the jail, but I don't believe there is a conflict in [co-defendant] Bracey's case."

¶ 10 Ortiz then proceeded to represent the defendant through the arraignment. On the next court date, March 25, 2008, Balmer was replaced as Bracey's counsel by another assistant public defender, and Balmer withdrew from the case entirely.

¶ 11 At trial, the State offered the testimony of Corey Jackson, who was in temporary custody with the defendant on January 11, 2008, and overheard the defendant make incriminating statements. Jackson testified that on that date, he was in a group of courthouse cells awaiting a hearing on two offenses unrelated to the defendant's case. At the time, Jackson was being represented by public defender Balmer. According to Jackson, he and the defendant were in one cell, and Walker was in an adjacent cell. The defendant called out "Ja-Mo" to the man in the adjacent cell, and when the man answered, the defendant asked "don't you want to go home?" The other man stated that he did, to which the defendant replied "man, the State ain't got shit *** only thing you got to say is Benjamin Williams did it and, *** they ain't got nothing." Jackson then heard the defendant say that he "whacked this bitch ass off the map."

¶ 12 Jackson testified that at some point after his January 11 hearing, he spoke to the police about what he had overheard. Jackson was in a jail cell when two police officers entered and began "grabbing snatching" people. The officers transported Jackson to the police station, where he informed them of what he had overheard in the cell. According to Jackson's testimony, at the time of this discussion, there was no one else in the room with him apart from the two officers. Following this conversation with the police, he was returned to the jail. At some point thereafter,

the defendant was taken before the grand jury, although he was unable to recall when this occurred, or any details about it. Jackson was also unable to recall ever speaking with a State's attorney about what he had heard in the lockup, other than when he testified before the grand jury. The record indicates that on May 6, 2008, Jackson entered into a plea agreement with the State's attorney to testify to his statements regarding the defendant in exchange for a reduced sentence on the offenses with which Jackson was charged. Jackson testified that throughout this time period, Balmer remained his counsel.

¶ 13 The State next offered the testimony of Joshua Luciano, who was also in the lockup on January 11, 2008, awaiting a hearing on a matter unrelated to that of the defendant. Luciano described a conversation between Walker and the defendant in which they discussed in detail how they were going to "turn this around" by blaming co-defendant Benjamin for the murder. Luciano subsequently contacted a federal agent about the conversation he had overheard. Then, on January 17, 2008, after Luciano's own case was dismissed, the federal agent brought him to the police officers and an assistant State's attorney, where Luciano discussed what he had overheard in the lockup.

¶ 14 Following arguments, the jury found the defendant guilty of one count of first-degree murder, three counts of aggravated armed robbery with a firearm, and one count of aggravated discharge of a firearm. The court sentenced him to 80 years' imprisonment for murder (730 ILCS 5/5-4.5-20(a)(West 2010)), which included a mandatory 15-year enhancement for possession of a firearm (730 ILCS 5/3-6-3(a)(2)(i) (West 2010)). This sentence was to run consecutively to a 40 year sentence for one count of armed robbery (730 ILCS 5/5-8-4(a), 730 ILCS 4/4-8-1(a)(3(West

2010)), plus eight years for each of the remaining armed robberies, to be served concurrently, and 15 years for the aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2)(West 2010)), also to be served concurrently, for a total of 120 years' imprisonment.

¶ 15 On appeal, the defendant first claims ineffective assistance of counsel on the basis that Balmer, his attorney in the preliminary proceedings, labored under a *per se* conflict of interest, because she was simultaneously representing both him and State witness Jackson. Accordingly, he argues that he is entitled to a new trial. We disagree.

¶ 16 It is well established that the right to effective assistance of counsel encompasses a defendant's right to conflict-free representation, meaning assistance by an attorney whose loyalty is undiluted by conflicting interests or inconsistent obligations. *People v. Hernandez*, 231 Ill. 2d 134, 142, 896 N.E.2d 297 (2008); *People v. Morales*, 209 Ill.2d 340, 345, 808 N.E.2d 510 (2004). *People v. Moore*, 189 Ill. 2d 521, 538, 727 N.E.2d 348 (2000). In order to prove ineffective assistance based upon a conflict of interest, the defendant bears the burden of showing either that his attorney labored under an *actual* conflict of interest, or that a *per se* conflict existed. *Hernandez,* 231 Ill. 2d at 142; *Moore,* 189 Ill. 2d at 538; *People v. Flores,* 128 Ill. 2d 66, 83-84, 538 N.E.2d 481 (1989). Where a *per se* conflict is present, the defendant need not show that he was prejudiced by the conflict or that his attorney's performance was in any manner affected by its existence; automatic reversal is warranted, unless the defendant waived his right to conflict-free representation. *Morales*, 128 Ill. 2d at 345, citing *People v. Spreitzer,* 123 Ill. 2d 1, 15-17, 525 N.E.2d 30 (1988). The supreme court has found a *per se* conflict where certain facts about a defense counsel's status, by themselves, are found to engender a disabling conflict. *People v.*

Taylor, 237 Ill.2d 356, 374, 930 N.E.2d 959 (2010). In particular, such a conflict can exist where defense counsel has a contemporaneous relationship with the victim, the prosecution, or an entity assisting the prosection (*Id.; Morales*, 209 Ill. 2d at 345-46), or where defense counsel has contemporaneously represented a witness for the prosecution. *Taylor*, 237 Ill. 2d at 374; *Morales*, 209 Ill. 2d at 345-46. When deciding whether a *per se* conflict of interest exists, the reviewing court should make a "realistic appraisal of defense counsel's professional relationship to someone other than the defendant under the circumstances of each case." (Internal quotation marks omitted.) *People v. Daly*, 341 Ill.App.3d 372, 376, 792 N.E.2d 446 (2003) (quoting *People v. Hernandez*, 246 Ill.App.3d 243, 249, 615 N.E.2d 843 (1993)). Because the facts of this case are not in dispute, our review is *de novo. People v. Fields,* 2012 IL 112438 ¶ 19, 980 N.E.2d 35.

¶ 17 It is undisputed that Balmer represented the defendant in his first arraignment on January 11, 2008, and again during his second appearance on January 31, 2008. It is further undisputed that Balmer was also representing Jackson at this time, although in a matter completely unrelated to the defendant's case. By the time of the defendant's second arraignment on February 21, 2007, adding the murder charge, Balmer had been replaced as the defendant's counsel by Kling and Ortiz, and Balmer ceased to represent him. Although Jackson later became a witness against the defendant based upon the defendant's incriminating statements in the lockup, this was long after Balmer had withdrawn as the defendant's attorney. There was no evidence that, at the time she represented the defendant, Balmer was even aware Jackson could potentially become a State witness. In fact, Jackson did not become a State witness until he entered into his plea agreement with the State on May 6, 2008. Under these circumstances, we are unable to find a

"contemporaneous representation" of both the defendant and Jackson so as to give rise to any *per se* conflict of interest. See *Flores*, 128 Ill. 2d at 83.

¶ 18 The defendant acknowledges that, although Balmer was ultimately replaced by Kling, she nonetheless was engaging in the dual representation of Jackson and the defendant as of the date of the defendant's original indictment for the robbery charges. He asserts that, at this time, adversarial proceedings against him had commenced and the right to conflict-free representation had attached. While we do not disagree with this statement of law, the fact remains that Jackson was not yet a State witness at the time of Balmer's representation of the defendant, and there was no connection between their cases. Thus, there was no contemporaneous, dual representation of a prosecution witness and the defendant, and the cases cited by the defendant are inapposite. See *People v. Murphy*, 2013 IL App (4th) 111128, 990 N.E.2d 815 (contemporaneous representation of defendant and a declared State witness during pretrial proceedings).

¶ 19 Next, the defendant argues that his sentence must be reversed because the Illinois statutory scheme under which it was imposed violates the due process clause (U.S. Const. amend. XIV) and the prohibition against "cruel and unusual punishment" (U.S. Const. amend. VIII) of the federal constitution, by mandating that he be tried and sentenced as an adult and disallowing any consideration of his youthfulness and its attendant circumstances. Specifically, he contends that, for 17-year-old offenders charged with murder and robbery with a firearm, our statutes converge to require, first, that juveniles be automatically removed from the jurisdiction of the juvenile court under the JCA (705 ILCS 405/5-120, 5-130(1)(a) (West 2010)), and second, that, if a finding of guilty results, the court then impose the mandatory minimum sentences set for adults under the

Criminal Code of 1961 (720 ILCS 5/1-1 *et seq.* (West 2010)), which can result in sentences in excess of 60 years' imprisonment.

¶ 20 The constitutionality of a statute is a question of law and is therefore subject to *de novo* review on appeal. *People v. Sharpe*, 216 Ill.2d 481, 486-87, 839 N.E.2d 492 (2005); *People v. Jackson*, 2012 IL App (1st) 100398 ¶ 8, 965 N.E.2d 623, appeal denied, 968 N.E.2d 1069 (Ill. 2012). Statutes are presumed constitutional, and this court has a duty to construe a statute in a manner that upholds its validity if reasonably possible. *Sharpe*, 216 Ill. 2d at 487; *Jackson*, 2012 IL App 100398 ¶ 7, quoting *People v. Graves*, 207 Ill.2d 478, 482, 800 N.E.2d 790 (2003). The party challenging the statute has the burden of clearly establishing that it violates the constitution. *Sharpe*, 216 Ill.2d at 487.

¶ 21 As a threshold matter, we note that the defendant does not attack the sentences imposed upon him *per se*. Rather, his challenge to the juvenile "sentencing scheme" turns upon, once again, an evaluation of the constitutionality of the "automatic transfer" provision of the JCA (see 705 ILCS 405/5-130(1)(a) (West 2010)). This provision excludes juveniles over 15 years of age who are charged with murder or armed robbery with a firearm from juvenile court jurisdiction. We note that the automatic transfer provision has been upheld as constitutional by our supreme court (see, *e.g., People v. J.S.*, 103 Ill. 2d 395, 405, 469 N.E.2d 1090 (1984); *People v. M.A.*, 124 Ill.2d 135, 147, 529 N.E.2d 492 (1988)), and that each of the constitutional issues raised by the defendant here have consistently been rejected by our courts. See *People v. Pacheco*, 2013 IL App (4th) 110409; *People v. Jackson*, 2012 IL App (1st) 100398, 965 N.E.2d 623; *People v. Salas*, 2011 IL App (1st) 091880, 961 N.E.2d 831. We are bound by this precedent and will not depart

from it here.

¶ 22 The defendant urges that we reconsider the issue in light of three recent Supreme Court cases, *Miller v. Alabama*, 132 S.Ct. 2455 (2012), *Graham v. Florida*, 130 S.Ct. 2011 (2010), and *Roper v. Simmons*, 543 U.S. 551 (2005), which he argues reflect a growing understanding that juvenile offenders are less culpable than their adult counterparts regardless of the offense, and thus should not automatically be treated as adults in sentencing. While we do not take a position regarding the logic underlying these cases, we note that these cases have been distinguished by this court on the basis that they, unlike the case at bar, involved direct challenges to the sentencing statutes themselves, rather than the procedure that exposed the defendant to an adult sentencing scheme. *Jackson,* 2012 IL App (1st) 100398*,* ¶¶ 19, 24 *; Salas,* 2011 IL App (1st) 091880 ¶¶ 66, 67. In *Jackson* and *Salas*, this court determined that the proportionate penalties clause of the Illinois Constitution and the eighth amendment of the U.S. Constitution apply to penalties and punishments, not to procedure, and therefore do not apply to a defendant's challenge to the automatic transfer provision. See *Jackson*, 2012 IL App (1st) 100398, ¶¶19, 24; *Salas*, 2011 IL App (1st) 091880, ¶¶ 68, 70. We agree with the reasoning in *Jackson* and *Salas* and similarly find that the automatic transfer provision does not violate the eighth amendment or due process clauses of the U.S. constitution.

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

¶ 24 Affirmed.