2018 IL App (2d) 160210-U
No. 2-16-0210
Order filed June 11, 2018

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. MARIO JAMES SCOTT, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 15-CF-612 Honorable Brian F. Telander, Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices McLaren and Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: Defense counsel was not ineffective under *Cronic*: lacking any *bona fide* defense, counsel held the State to its burden of proof without conceding defendant's guilt.

¶ 2 Defendant, Mario James Scott, appeals from the judgment of the circuit court of Du Page County finding him guilty of possessing with the intent to deliver more than 1 gram but not more than 15 grams of cocaine (720 ILCS 570/401(c)(2) (West 2014)). He contends that his trial counsel was *per se* ineffective for failing to subject the State's case to meaningful adversarial testing. Because counsel did not fail to subject the State's case to meaningful adversarial testing,

we affirm defendant's conviction. However, on the State's concession, we vacate an improper fine.

¶ 3 I. BACKGROUND

¶ 4 Defendant was indicted on one count of unlawful possession with intent to deliver more than 1 gram but not more than 15 grams of cocaine (*id.* § 401(c)(2)) and charged by complaint with unlawful possession of not more than 2½ grams of cannabis (*id.* § 4(a)), illegal use of an electronic communication device (625 ILCS 5/12-610.2(b) (West 2014)), and making an improper turn (*id.* § 11-801). The State nol-prossed the latter three charges.

¶ 5 Defendant was initially represented by a public defender, who answered the State's discovery request and filed a motion for discovery. About a week later, a private attorney appeared on behalf of defendant.

¶ 6 On June 10, 2015, defense counsel advised the trial court that defendant and the State had been discussing the case and he asked for a continuance. The trial court set the matter for June 25, 2015. On June 25, 2015, defense counsel told the court that the State had made an offer and he requested a continuance so that he could discuss the offer with defendant. On July 1, 2015, defendant opted for a bench trial.

¶ 7 The following occurred at the trial. The State gave its opening statement. When the trial court asked defense counsel if he wanted to give an opening statement, he answered that he "[did not] think [he] need[ed] to tell [the] Court that what [it] just heard was not evidence, but only the State's version of what [it] intend[ed] to present[,]" and that was the "extent of [his] opening."

¶ 8 Officer Douglas Dunteman of the Carol Stream Police Department was the State's only witness. According to Officer Dunteman, on March 23, 2015, he and another officer were conducting narcotics surveillance on a Carol Stream residence. At about 5:38 p.m., he observed

a vehicle parking in the residence's driveway. A few minutes later, the vehicle exited the driveway and drove away.

¶ 9 Officer Dunteman and his partner followed the vehicle. After they observed the vehicle making an illegal turn and the driver using his cell phone, the officers stopped the vehicle. When Officer Dunteman approached the driver's window, he saw a folding knife in the center console and smelled fresh cannabis coming from the vehicle's interior. According to Officer Dunteman, as a police officer, he had smelled fresh cannabis more than 100 times.

¶ 10 After they had the driver, who was defendant, exit the vehicle, they questioned him about the cannabis smell. Defendant admitted that he had smoked cannabis about an hour earlier and had a small amount of cannabis in the vehicle. A search of the vehicle revealed three cannabis cigarettes and a package of baggies used for packaging illegal drugs. In a subsequent search of defendant, the officers discovered near the zipper of his pants seven clear baggies containing crack cocaine.

¶ 11 The officers transported defendant to the Carol Stream police station, where he was advised of, and waived, his *Miranda* rights. Defendant admitted that he had purchased the cocaine from someone known as "G" and had arranged to sell it to someone named "Pat." A subsequent search of defendant's cell phone showed several messages between defendant and someone named "Pat." According to Officer Dunteman, defendant confirmed that a person who lived at the suspected drug house that defendant had been at before his arrest was the person known as "G." The State introduced a recording of defendant's interview. Defense counsel neither objected to the recording nor cross-examined Officer Dunteman.

¶ 12 Defense counsel stipulated to the admission of a forensic expert's report related to the laboratory analysis of the cocaine, the chain of custody, and all other foundational requirements.

According to the stipulation, the forensic expert received a sealed envelope that contained "a baggy." The baggie contained an off-white, chunky substance that weighed 1.243 grams.

¶ 13 Following the State's case-in-chief, defense counsel offered no evidence and rested. When asked if he wanted to give a closing argument, he responded, "Nothing, [Y]our [H]onor."

¶ 14 The trial court found defendant guilty. In doing so, the court noted that the evidence was "clear and convincing." Defense counsel did not file any posttrial motions.

¶ 15 At sentencing, defense counsel objected to an inaccurate attempt-murder conviction in the presentence investigation report (PSR). The trial court agreed and stated that it would not consider that conviction in sentencing defendant. Defense counsel offered no mitigating evidence beyond that contained in the PSR. The PSR showed that defendant had a longstanding drug-abuse problem and that he had four children. The PSR further provided that defendant had been convicted of armed robbery, aggravated discharge of a firearm, and possession of a controlled substance, for which he received prison sentences of nine years, seven years, and one year, respectively. The most recent of those convictions was in 2006.

¶ 16 Defendant was subject to a prison sentence of 6 to 30 years. 730 ILCS 5/5-4.5-25(a) (West 2014). Relying primarily on defendant's criminal history, the State asked the trial court to impose a 15-year prison sentence. Defense counsel noted that no one had been hurt or threatened by defendant's conduct. He pointed to defendant's persistent drug use as a "major part of his problem." He added that, while in jail, defendant had taken advantage of opportunities to improve himself and that defendant had four children. Defense counsel asked for the minimum sentence of six years' imprisonment. In allocution, defendant said that he was "[s]orry for everything *** as far as wasting everybody's time on this case" and that he had "made mistakes."

¶ 17 The trial court imposed a six-year term of imprisonment. In doing so, the court noted that defendant had a drug problem, that the present crime involved intent to deliver as opposed to an actual delivery, and that defendant had not committed a serious offense in several years. The court also imposed a $750 fine pursuant to section 411.4(b) of the Illinois Controlled Substances Act (720 ILCS 570/411.4(b) (West 2014)). Defense counsel did not file a postsentencing motion. Defendant then filed a notice of appeal.[1]

¶ 18 II. ANALYSIS

¶ 19 On appeal, defendant contends (1) that his trial counsel was *per se* ineffective for entirely failing to subject the State's case to meaningful adversarial testing, and (2) that the trial court improperly imposed a $750 fine.

¶ 20 The State responds that counsel was not *per se* ineffective, because he did not concede guilt and obtained a minimum sentence. The State concedes that the fine was improper.

¶ 21 Ordinarily, in determining whether a defendant was denied the effective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficiency prejudiced the defendant. *People v. Cherry*, 2016 IL 118728, ¶ 24 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). However, prejudice will be presumed where, among other things, counsel entirely failed to subject the State's case to meaningful adversarial testing. *Id.* ¶ 25 (citing *United States v. Cronic*, 466 U.S. 648, 659-61 (1984)).

¶ 22 The United States Supreme Court has characterized the exception under *Cronic* as narrow and infrequently applied. See *id.* ¶ 26 (citing *Florida v. Nixon*, 543 U.S. 175, 190 (2004)). For the exception to apply, it is not enough that counsel failed to oppose the prosecution at specific points in the proceeding. *Id.* ¶ 26 (citing *Bell v. Cone*, 535 U.S. 685, 697 (2002)). Rather,

[1] We allowed defendant to file a late notice of appeal.

counsel's failure must be complete, such that he failed to oppose the prosecution throughout the proceeding as a whole. *Id.* ¶ 26. Accordingly, courts have rarely applied *Cronic*, explaining that only nonrepresentation, not poor representation, triggers the presumption of prejudice under *Cronic*. *Id.* ¶ 26 (citing *Miller v. Martin*, 481 F.3d 468, 473 (7th Cir. 2007)). Thus, the *Cronic* exception applies only if counsel fails to contest any portion of the State's case. *Id.* ¶ 26. If counsel mounts a partial defense, *Strickland* is the appropriate test. *Id.* ¶ 26. We must examine the entire record to determine if, under all of the circumstances, counsel's performance was ineffective. *People v. Cloyd*, 152 Ill. App. 3d 50, 57 (1987).

¶ 23 The Illinois Supreme Court has identified *per se* ineffectiveness under *Cronic* only two times. *Cherry*, 2016 IL 118728, ¶¶ 27-28 (citing *People v. Hattery*, 109 Ill. 2d 449 (1985), and *People v. Morris*, 209 Ill. 2d 137 (2004), *overruled in part on other grounds by People v. Pittman*, 211 Ill. 2d 502 (2004)).

¶ 24 In *Hattery*, defense counsel admitted the defendant's guilt during the opening statement, advanced no theory of defense at trial, presented no evidence, and did not make a closing argument. *Hattery*, 109 Ill. 2d at 458-59. In holding that counsel was *per se* ineffective, our supreme court emphasized that counsel's concession of guilt was unequivocal. *Id.* at 464.

¶ 25 In *Morris*, during the opening statement, defense counsel readily admitted the defendant's guilt. *Morris*, 209 Ill. 2d at 182. Counsel further introduced evidence of the defendant's involvement in a grisly and unrelated murder, despite the trial court's previous ruling, at defense counsel's request, that such evidence was inadmissible. *Id.* at 184-85. The supreme court held that the "unusual convergence of errors" resulted in a breakdown of the adversarial process such that the defendant was denied *per se* the effective assistance of counsel. *Id.* at 187-88.

¶ 26 Our supreme court has subsequently characterized defense counsels' conduct in *Hattery* and *Morris* as "effectively conced[ing] the State's entire case against the [respective] defendant[s]." *Cherry*, 2016 IL 118728, ¶ 29. In doing so, the supreme court emphasized that the *Cronic* exception applies only when counsel entirely fails to subject the State's case to meaningful adversarial testing. *Id.* ¶ 29.

¶ 27 In this case, defense counsel did not fail entirely to subject the State's case to "meaningful" adversarial testing. Significantly, he never unequivocally or readily conceded defendant's guilt. Instead, lacking any *bona fide* defense, he required the State to put on its case and prove defendant guilty beyond a reasonable doubt. The *Cronic* standard is not satisfied where, as here, counsel holds the State to its burden of proof. In light of the State's overwhelming evidence of guilt, *Cronic* did not require counsel to make meaningless attacks on the State's case. See *Cronic*, 466 U.S. at 656 n. 19.

¶ 28 Defendant asserts that his counsel should have thrown a "Hail Mary" by forgoing the stipulation and requiring the State to establish the chain of custody of the cocaine and have the forensic expert testify regarding the analysis of the cocaine. However, defendant does not point to any specific aspects of the forensic evidence upon which counsel could have based an attack.[2]

[2] For the first time at oral argument, counsel pointed to the difference between Officer Dunteman's testimony, that he found seven baggies of suspected cocaine on defendant, and the stipulation, which indicated that there was only one baggie in the evidence envelope. That argument is forfeited. See Ill. S. Ct. R. 341(h)(7) (eff. Nov. 1, 2017); *People v. Polk*, 2014 IL App (1st) 122017, ¶ 49 (cannot raise argument for the first time at oral argument). Even were we to consider it, it would fail, as the difference was not material. Defendant was charged with possessing more than one gram of cocaine, and the amount in the baggie, 1.243 grams,

¶ 29 We observe that, after holding the State to its burden at trial, counsel rigorously advocated for defendant at sentencing. He successfully challenged a conviction in the PSR, pointed out defendant's drug problem, noted the lack of harm caused by his crime, commented on his positive behavior while in jail, and stated that he had four children. As a result, the trial court imposed the minimum sentence, despite defendant's significant criminal history. Counsel's conduct at sentencing indicates that his conduct at trial was part of a larger strategy and not an abdication of defendant's interests. *Cf. Florida v. Nixon*, 543 U.S. 175, 190-91 (2004) (approves such strategy in death-penalty case).

¶ 30 Defendant, relying on *People v. Dodson*, 331 Ill. App. 3d 187 (2002), and *People v. Jones*, 311 Ill. App. 3d 433 (2000), insists that a *Cronic* violation occurred. We disagree, however, as neither case supports defendant.

¶ 31 In *Dodson*, the defendant's counsel stipulated to all of the State's evidence. *Dodson*, 331 Ill. App. 3d at 190. The stipulation compelled the inescapable conclusion that the defendant had committed the crime, making the outcome a virtual certainty. *Dodson*, 331 Ill. App. 3d at 191. In our case, however, there was no stipulation to all of the State's evidence. Rather, the State remained obligated to present its case and convince the trial court of defendant's guilt. Thus, *Dodson* is readily distinguishable.

¶ 32 In *Jones*, the defendant was convicted following a bench trial in which both sides presented evidence. *Jones*, 311 Ill. App. 3d at 434. Following the grant of a new trial on appeal, the defendant opted for another bench trial before the same judge who had previously found her guilty. *Id.* at 434. Notwithstanding that the judge had indicated that he was predisposed to find the defendant guilty again on the same evidence, counsel relied solely on that evidence. *Id.* at

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established the charged amount.

434. Unsurprisingly, the court found the defendant guilty the second time. *Id.* at 434. The appellate court held that such an approach constituted *per se* ineffectiveness. *Id.* at 836-37. *Jones* is distinguishable from this case, as here counsel's approach comes nowhere close to the "capitulation" of guilt that occurred in *Jones*. See *Id.* at 437.

¶ 33 Nor does *People v. Bonslater*, 261 Ill. App. 3d 432 (1994), support defendant. In *Bonslater*, the defendant's counsel failed to move to suppress evidence, failed to make an opening statement, failed to cross-examine the State's only witness, failed to move for a directed finding, and failed to present any witnesses. *Id.* at 438. Further, during closing argument, counsel focused on a proposition that was legally incorrect. *Id.* at 438. Recognizing that many of the individual instances of counsel's conduct would ordinarily constitute matters of trial strategy, the appellate court held that the totality of counsel's conduct in the context of the record did not reflect any conceivably valid trial strategy. *Id.* at 439. In so holding, the court emphasized that the testimony of the State's sole witness, a police officer, was not so clear and convincing that it would have been fruitless to challenge it. *Id.* at 440. Additionally, during closing argument, counsel erroneously argued that the State was required to prove an actual delivery of drugs. *Id.* at 442. By failing to challenge the officer's testimony and making a legally incorrect assertion during closing argument, counsel presented no real defense. *Bonslater*, 261 Ill. App. 3d at 443.

¶ 34 Although this case is somewhat similar to *Bonslater*, in that defense counsel failed to make an opening statement, did not cross-examine the State's only witness, and did not present any evidence, it differs in several material respects. First, unlike in *Bonslater*, the officer's testimony here was clear and convincing. He unequivocally identified defendant as having been at the suspected drug house, having committed traffic violations, having the smell of cannabis

coming from his vehicle, having admitted to recently smoking cannabis, having cannabis in his vehicle, having several bags of cocaine on his person, having admitted to purchasing the cocaine from someone living at the drug house, and having admitted to intending to resell it to a particular person. Additionally, Officer Dunteman testified that a search of defendant's cell phone bolstered defendant's story about from whom he had purchased the cocaine and to whom he was going to sell it. Indeed, the trial court found that the evidence was clear and convincing. Thus, unlike in *Bonslater*, it would have been fruitless to challenge Officer Dunteman's testimony. Second, counsel here did not make any erroneous legal assertions that amounted to a futile defense. Counsel's conduct did not rise to the level of the *per se* ineffectiveness present in *Bonslater*.

¶ 35 We next address defendant's contention that the trial court erred in imposing a $750 fine under section 411.4(b) of the Illinois Controlled Substances Act (720 ILCS 570/411.4(b) (West 2014)). The State concedes that the fine was incorrectly imposed. We agree, as there was no showing that defendant's conduct proximately caused any incident resulting in an appropriate emergency response. See *id.* § 411.4(b). Thus, we vacate the fine.

¶ 36 III. CONCLUSION

¶ 37 For the reasons stated, we affirm in part and vacate in part the judgment of the circuit court of Du Page County. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 38 Affirmed in part and vacated in part.