2018 IL App (5th) 150187-U

NO. 5-15-0187

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Wabash County.
	)	
v.	)	No. 13-CF-29
	)	
DAVID D. SHARP,	)	Honorable
	)	David K. Frankland,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Justices Welch and Chapman concurred in the judgment.

ORDER

¶ 1 *Held*: The sentence imposed by the circuit court was proper. Any issue raised on appeal would be wholly frivolous. Therefore, the Office of the State Appellate Defender's motion to withdraw is granted, and the judgment of the circuit court of Wabash County is affirmed.

¶ 2 The defendant, David D. Sharp, appeals his sentence of five years' imprisonment for aggravated domestic battery. The Office of the State Appellate Defender (OSAD) was appointed to represent the defendant. OSAD filed a motion to withdraw as counsel, alleging that there is no merit to the appeal. See *Anders v. California*, 386 U.S. 738 (1967). The defendant was given proper notice and granted an extension of time to file briefs, objections, or any other document supporting his appeal. The defendant filed a

response. We considered OSAD's motion to withdraw as counsel on appeal as well as the defendant's response. We examined the entire record on appeal and found no error or potential grounds for appeal. For the following reasons, we grant OSAD's motion to withdraw as counsel on appeal and affirm the judgment of the circuit court of Wabash County.

¶ 3 BACKGROUND

¶ 4 On November 18, 2013, the defendant pleaded guilty to aggravated domestic battery. The circuit court did not advise the defendant of the minimum and maximum sentence he faced. The same day, the circuit court sentenced the defendant to a two-year term of probation. One of the conditions of his probation was that he was forbidden to consume alcohol.

¶ 5 On December 14, 2013, a number of police officers were present at the defendant's residence. Each of them observed that the defendant appeared and smelled intoxicated. Additionally, the defendant took a breathalyzer test. The results of that test indicated that the defendant had consumed alcohol.

¶ 6 On February 7, 2014, the State filed a petition to revoke the defendant's probation. On February 14, 2014, the defendant's counsel filed a petition to determine if the defendant was fit to stand trial. On February 18, 2014, the circuit court granted the motion and placed him in the Chester Mental Health Center (Center) for treatment. Several months later, the Center submitted a report indicating that the defendant had been restored to fitness.

¶ 7 The circuit court conducted a new hearing to determine if the defendant was fit to stand trial. The defendant subpoenaed numerous employees of the Center. On the day of the hearing, a number of those employees failed to appear. The defendant's counsel made no effort to enforce the subpoenas or seek a continuance to obtain their presence. Wayne Womac, the forensic coordinator at the Center, testified. At one point Womac was the defendant's therapist. Womac testified that based on his review of the defendant's record and discussions with the defendant's treatment team, and his own experiences with the defendant, the defendant was fit to stand trial. The defendant presented no affirmative evidence that the defendant was unfit to stand trial. The circuit court found the defendant fit to stand trial.

¶ 8 The circuit court subsequently held a hearing on the State's petition to revoke the defendant's probation. The officers present on the date of the violation testified that they observed that the defendant acted as if he was inebriated, smelled of alcohol, and one officer testified to the results of the blood alcohol test. Additionally, the defendant's counsel agreed to the State's entering into evidence blood test results from a blood draw conducted on the day of the probation violation. The circuit court found, by a preponderance of the evidence, that the defendant had violated the terms of his probation.

¶ 9 At the sentencing hearing, the State, over objection, presented evidence concerning the defendant's actions on the night of the probation violation. Those actions were the basis for a then-pending case separate from the one at issue in this appeal. The circuit court sentenced the defendant to five years' imprisonment, of which the defendant was required to serve 85%. The term of imprisonment was to be followed by a four-year

term of mandatory supervised release. The defendant filed a motion to reconsider his sentence. On April 13, 2015, the circuit court denied that motion.

¶ 10 On April 16, 2015, the defendant filed a notice of appeal.

¶ 11 ANALYSIS

¶ 12 OSAD's motion to withdraw discusses four potential issues that it concludes are without merit.

¶ 13 The first issue raised by OSAD concerns the defendant's guilty plea. Before accepting a defendant's guilty plea, the circuit court is required to inform the defendant of the maximum and minimum sentences he faces for the crimes with which he is charged. Ill. S. Ct. R. 402(a)(2) (eff. July 1, 2012). The defendant was not informed of either the maximum or minimum sentence he faced. A failure to admonish the defendant pursuant to Illinois Supreme Court Rule 402 requires that a defendant's guilty plea be vacated. *People v. Vasquez*, 332 Ill. App. 3d 269 (2002). For a number of reasons, however, the defendant's guilty plea is not, and in fact cannot be, before this court.

¶ 14 First, in a revocation proceeding, the circuit court cannot consider the underlying conviction unless that conviction is void (*People v. Dieterman*, 243 Ill. App. 3d 838, 841 (1993)); generally, the circuit court loses jurisdiction 30 days after it enters judgment. *People ex rel. Alvarez v. Skryd*, 241 Ill. 2d 34, 40 (2011).

¶ 15 Second, this court has no jurisdiction to hear an appeal from a final judgment unless a notice of appeal is filed within 30 days of the judgment. Ill. S. Ct. R. 606(b) (eff. Feb. 6, 2013). Here, the defendant did not file an appeal regarding his conviction or

original sentence of probation within 30 days. In fact, the defendant has never filed a notice of appeal regarding his conviction or original sentence.

¶ 16 Third, even if the defendant had filed a notice of appeal, his appeal would have to be dismissed because he did not first file a motion to withdraw his guilty plea. *Id.*; Ill. S. Ct. R. 604(d) (eff. Feb. 6, 2013).

¶ 17 Next, OSAD discusses whether the defendant's counsel provided ineffective assistance at the hearing to determine his fitness to stand trial and at the probation revocation hearing.

¶ 18 An allegation of a violation of the constitutional right to effective assistance of counsel is evaluated under the standard set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), and adopted in Illinois by *People v. Albanese*, 104 Ill. 2d 504, 526-27 (1984). The standard has two prongs, both of which must be satisfied for a defendant to prevail on an ineffective-assistance-of-counsel claim. First, defendant must show that his "counsel's representation fell below an objective standard of reasonableness and that counsel's shortcomings were so serious as to deprive the defendant of a fair trial." (Internal quotation marks omitted.) *Albanese*, 104 Ill. 2d at 525. Second, defendant must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (Internal quotation marks omitted.) *Id.* The reviewing court can address these requirements in either order. *Id.* at 527. A failure to satisfy either prong of the *Strickland* standard causes the allegation of ineffective assistance of counsel to fail; the court need not address both prongs. See *Strickland*, 466 U.S. at 670. There is a strong presumption

that counsel's action or inaction is a matter of trial strategy (*People v. Evans*, 186 Ill. 2d 83, 93 (1999)), and matters of trial strategy will not support a claim of ineffective assistance of counsel unless counsel's strategy is so unsound that he or she entirely fails to conduct any meaningful adversarial testing of the State's case. *People v. Patterson*, 217 Ill. 2d 407, 441 (2005).

¶ 19 We agree with OSAD that no meritorious argument can be made that counsel's decision not to enforce the subpoenas on the witnesses who failed to appear at the fitness hearing was objectively unreasonable or prejudicial. There is no evidence in the record suggesting what testimony these witnesses would have given. There is, however, evidence that their testimony would have been detrimental to the defendant. Dr. Womac testified that the entire team of personnel who treated the defendant agreed that the defendant was fit to stand trial.

¶ 20 Counsel could have made a strategic decision to not enforce the subpoenas. Whether to call a particular witness is a matter of trial strategy. *Id.* at 442. Given Dr. Womac's testimony and the lack of any indication that the witnesses in question would have provided any testimony beneficial to the defendant, no meritorious argument can be made that counsel provided ineffective assistance. Moreover, allegations of ineffective assistance of counsel are often better raised in postconviction petitions where evidence outside the record is available. *People v. Richardson*, 401 Ill. App. 3d 45, 48 (2010) (citing *People v. Durgan*, 346 Ill. App. 3d 1121, 1141-42 (2004); *People v. Burns*, 304 Ill. App. 3d 1, 11-12 (1999)).

¶ 21 We now consider whether the defendant could successfully argue that his counsel was ineffective for failing to object to the admission of the report of a blood test taken from the defendant on December 14, 2013. There is no question that the State did not authenticate the report and had no witness available to authenticate it. And yet, not only did defendant's counsel not object to admission of the report, it seems he previously agreed with the State to allow its admission, which is likely the reason the State did not procure a witness to authenticate the report.

¶ 22 This evidence could not support an allegation of ineffective assistance of counsel. First, the record suggests that counsel allowed the report to come in as a courtesy to opposing counsel because there is no reason to doubt that the State could have obtained a witness to authenticate the report, and requiring the State to do so served no purpose. Second, even without the report, the defendant cannot show that but for the admission of that report the court would not have found a probation violation. With the testimony of the officers that he appeared to have been drinking and smelled of alcohol and the results of the breathalyzer, the State met its burden of showing a probation violation by a preponderance of the evidence. 730 ILCS 5/5-6-4(c) (West 2014); *People v. Taube*, 299 Ill. App. 3d 715, 721 (1998). The admission of the blood test report does not establish ineffective assistance of counsel.

¶ 23 Finally, we consider whether the circuit court improperly considered evidence of the defendant's violation of probation in sentencing the defendant. At the sentencing hearing the defendant's counsel objected to testimony of the defendant's probation violation that was the basis of charges in a separate case.

¶ 24 We review the defendant's sentence for an abuse of discretion. *People v. Varghese*, 391 Ill. App. 3d 866, 876 (2009). It is proper for a sentencing court to "consider a defendant's conduct while on probation as evidence of rehabilitative potential." *Id.*; *People v. Young*, 138 Ill. App. 3d 130, 142 (1985). The circuit court may increase the original sentence based on that information. *Varghese*, 391 Ill. App. 3d at 876. But it is impermissible for the circuit court to punish the defendant for his actions while on probation. *Id.*

¶ 25 We will not overturn a sentence within the statutory range without strong evidence that the sentence was imposed as a penalty for the conduct that occurred while the defendant was on probation. There is no such evidence in this case. We also presume the trial court knew the law and followed it. *In re Jonathon C.B.*, 2011 IL 107750, ¶ 72. There is no evidence here that the judge sought to punish the defendant for his actions on probation with this sentence. There is no error in the defendant's sentence.

¶ 26 CONCLUSION

¶ 27 Because there is no evidence of ineffective assistance of counsel or error in the defendant's sentence and any irregularities in the defendant's guilty plea are not, and in fact cannot be, before this court, OSAD's motion for leave to withdraw is granted, and the circuit court of Wabash County's order is affirmed.

¶ 28 Motion granted; judgment affirmed.