2019 IL App (1st) 151314-U

No. 1-15-1314

Order filed February 15, 2019

Sixth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 14 CR 3467
	)	
TONY KUITA,	)	Honorable
	)	Anna Helen Demacopoulos,
Defendant-Appellee.	)	Judge, presiding.

PRESIDING JUSTICE DELORT delivered the judgment of the court.
Justices Cunningham and Harris concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the circuit court's finding that new counsel need not be appointed, over defendant's contention that the court relied upon the wrong standard when denying his motion. Pursuant to the one-act, one-crime rule, we vacate defendant's sentence for the unlawful use or possession of a weapon by a felon because it is based upon the same conduct as his conviction for armed habitual criminal. The court did not abuse its discretion in sentencing defendant to 15 years in prison for armed habitual criminal.

¶ 2 Following a bench trial, defendant Tony Kuita was found guilty of armed habitual criminal (720 ILCS 5/24-1.7(a) (West 2012)), and the unlawful use or possession of a weapon by

a felon (720 ILCS 5/24-1.1(a) (West 2012)). He was sentenced to 15 years in prison on the armed habitual criminal conviction and to a concurrent 7-year sentence on the unlawful use or possession of a weapon by a felon conviction. On appeal, he contends that the case should be remanded for a hearing pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984), and new counsel appointed because the circuit court relied upon the wrong standard in conducting its preliminary inquiry, and his allegations demonstrated "at least possible" neglect of his case by trial counsel. He further contends that his conviction for the unlawful use or possession of a weapon should be vacated pursuant to the one-act, one-crime rule. Defendant finally contends that his sentence for armed habitual criminal is excessive, considering that he was the only person harmed in the course of the offense and the "bulk" of his criminal background occurred when he was a juvenile. We affirm in part, and vacate in part.

¶ 3 Defendant was charged with armed habitual criminal (count I), unlawful use or possession of a weapon by a felon (count II), and disorderly conduct (count III), following a January 8, 2014 incident during which he suffered a gunshot wound. The State nol-prossed count III before to trial.

¶ 4 In its opening argument, the State argued that defendant was found sitting in a pool of blood on his front porch, that a gun and live rounds were recovered from inside the home, and that defendant indicated during a phone call with a police officer that he shot himself. The defense argued that this was a circumstantial case and that "the question" before the court was whether the evidence and testimony "rises to the level of that quantum of evidence by which The Court can make a finding."

¶ 5 At trial, Chicago Heights police officer Mohammad Matariyed testified that around 7:20 a.m. on January 8, 2014, he responded to a dispatch of an ambulance call. He arrived at the location, and saw defendant sitting on a porch wearing bloody clothes surrounded by blood. Matariyed asked defendant what happened. Defendant lifted his shorts, showed off his thigh, and indicated that he had been shot. Matariyed then asked how he was injured, to which defendant replied that he did not know, he just " 'woke up here.' " When Matariyed asked additional questions, defendant indicated that he was walking toward a gas station, heard someone call his name, turned around, observed two men, heard gunshots, and lost consciousness. During the conversation, paramedics arrived and began treating defendant. Matariyed also observed a trail of blood leading from the porch and followed it to a door on the "back side" of the house.

¶ 6 After observing the blood, Matariyed asked defendant if officers could enter the house to do a safety check. At first, defendant indicated that his "people" were inside sleeping, but then gave permission. Matariyed and two other officers then went inside. When he entered the house, Matariyed observed a "live round" of ammunition at the bottom of a stairwell. He further observed a small hole in the wall consistent with a bullet hole above the live round. In one of the bedrooms, Matariyed observed a mattress with a "significant" amount of blood on it and a live round of ammunition on the ground next to the bed.

¶ 7 During cross-examination, Matariyed testified that defendant was "nervous or shaken" and that his responses to questions changed. However, defendant was able to answer every question. He did not know when the bullet hole in the wall was made.

¶ 8 Chicago Heights Detective Stuart Murtagh spoke with defendant at a hospital and stated that he needed to "process" the residence. Defendant then signed a consent form. At the

residence, Murtagh recovered one unfired bullet from the hallway near the kitchen and another unfired bullet from one of the bedrooms. He also recovered a firearm from the "furnace area." During cross-examination, Murtagh testified that the firearm was unloaded and he did not find any bodily fluids on it. He believed, based upon the "large amount of blood" on the mattress, that a person sat there after being shot in that location or very close to that location. He acknowledged that it was "fair" to say that the location of bleeding was not necessarily consistent with the "location of the shooting." The court then asked Murtagh how far the bedroom was from the furnace, and Murtagh answered 10 feet.

¶ 9 Chicago Heights Detective Steve Bakowski, who had spoken to defendant four to five times previously, had a telephone conversation that evening with defendant during which he asked defendant what happened, and stated that two of defendant's brothers were in custody because of this incident. Defendant then "related that it was an accident when he had shot himself." During cross-examination, Bakowski testified that at the time of the phone call, he was operating under the presumption that the firearm recovered from the house may have been used in the shooting. Bakowski explained that this conclusion was based upon a statement from witness Carlos Lopez stating that he had moved the firearm from the kitchen table after defendant's brothers escorted defendant outside to wait for paramedics.

¶ 10 The parties stipulated that a dispatcher working on January 8, 2014, at approximately 7:20 a.m., would say that a certain CD contained a true and accurate recording of the 9-1-1 call regarding this incident. The CD was then played for the court. On the CD, a woman's voice is heard asking "where'd he shoot himself, in the leg." The woman then tells the 9-1-1 operator that this person needs an ambulance, gives an address and states that "somebody" is hurt and is on a

front porch. When the 9-1-1 operator asks for details, the woman answers that she does not know what happened as she was driving by. The woman further states that "he" was walking home, had no shoes on, and needed help.

¶ 11 The State then admitted certified copies of defendant's convictions for armed robbery and aggravated battery in case number 06 C6 60779, and aggravated battery causing great bodily harm in case number 07 C6 61068.

¶ 12 The defense made a motion for a directed finding, which the circuit court denied. After defense counsel indicated that the defense was going to rest, the court asked defendant whether he had spoken to counsel regarding his right to testify. Defendant indicated that he had and that he did not wish to testify. The court then asked defendant whether he wished to have any witnesses presented on his behalf and defendant replied no.

¶ 13 In its closing argument, the defense argued that this was a circumstantial case and that the State had not proven its case. Specifically, the defense argued that "the elusive Carlos," who had "firsthand" knowledge of the handgun did not testify at trial, that there was no investigation regarding the 9-1-1 call, and that defendant's statement was not "really perfected." The defense noted that there were no specifics in defendant's statement such as what defendant did with the gun, whether he wiped it down, and where the discharge took place. The defense acknowledged that defendant suffered a gunshot wound and that a gun was "apparently used" but that nothing tied the weapon found in the house to defendant. The defense concluded that "there are the makings here of a case," but that the unanswered questions created doubt. The State responded that the evidence showed that defendant was in possession of a gun when it went off and that he suffered a self-inflicted gunshot wound. The State further argued that "even the circumstantial

evidence [was] clear that the gun was moved after it was fired" because there was no blood in the room where the gun was found. The State noted that it did not matter who moved the gun; rather, it mattered whether defendant possessed the gun, and defendant admitted during the phone call that he accidently shot himself. The State concluded that not only was defendant in possession of the weapon at the time that it was fired, but that he was in constructive possession because it was located in his home as evidenced by the fact that he gave both Officer Matariyed and Detective Murtagh permission to enter. Following closing arguments, the court found defendant guilty of armed habitual criminal and the unlawful use or possession of a weapon by a felon. Trial counsel then filed a motion for reconsideration and/or for a new trial.

¶ 14 At the next hearing, defendant told the court that he wished to file a motion for a *Krankel* hearing. The court then passed the case so that defendant and counsel could speak. After speaking to defendant, counsel told the court that defendant's position was that counsel failed to subpoena certain witnesses at trial. Counsel stated that he "became aware of these witnesses at the very moment" that he spoke to defendant. The court permitted defendant to file the motion.

¶ 15 Defendant's *pro se* "Motion for *Krankel* Hearing" alleged, *inter alia*, that counsel failed to subpoena defendant's brother and defendant's brother's girlfriend, who were "important witnesses central to the case at hand," and failed to interview witnesses. The motion also alleged that defendant's brother was the "sole lease-holder" of the property where the firearm was found and was prepared to testify as to its ownership.

¶ 16 When the circuit court asked counsel to respond to defendant's motion, counsel stated that:

> "it would be imprudent for [him] as [defendant's] attorney to call any witness in a case where there's an allegation of constructive possession of a weapon within a house. It would be imprudent for [him] to call a witness who could tie the weapon to the house by a claim of ownership because even though that would prove that [defendant] may not have been the owner of the weapon to which possession has been imputed to him, it would conversely tend to prove the State's circumstantial case even better because it would take out any claim that the very weapon that [defendant] was alleged to have possessed was not in that home."

¶ 17 Counsel further explained that even if he had known of the witnesses, as he had just told defendant, he would not have called them because his "job" was not to prove the State's case. The court then asked counsel whether prior to trial he spoke to defendant about trial strategy, and counsel answered yes. The court then asked whether defendant ever told counsel that he wanted his brother "and/or" his brother's girlfriend to testify, and counsel answered no. The court finally asked whether counsel first learned about these witnesses that day, and counsel said yes.

¶ 18 Defendant responded that before trial, he told counsel to subpoena his brother Sam, who was in custody on another case. Defendant stated that Sam said he would take the "weight" and say that it was his gun.

¶ 19 The court then stated that, having read defendant's motion, it was not necessary to appoint counsel. The court noted that the

> "standard that has to be shown at this time is that any alleged ineffective assistance of counsel would be an objective standard of representation that had counsel done what defendant wanted him to do, it would have changed the outcome of the case

> and that it was not reasonable in the practice of law to make the decision that trial counsel made."

The court then stated that counsel "made a representation" to the court that he had not been apprised of any witnesses prior to that day, and that even if he had been he would not have called them to testify. The court further noted that there was no indication that one of defendant's alleged witnesses, his brother Sam, would not have been able to claim his fifth amendment right against self-incrimination. The court therefore denied defendant's motion for a *Krankel* hearing.

¶ 20 The court then asked defendant whether he wished counsel to continue to represent him, and defendant answered no. The trial court ultimately granted counsel leave to withdraw and an assistant public defender was appointed to represent defendant at sentencing

¶ 21 The State argued that defendant had a "lengthy" criminal history that included a juvenile background. The defense responded that the only person injured in this case was defendant himself and that his family was present in court. The defense further argued that defendant had a "vital" place in the lives of his two children and was employed.

¶ 22 In sentencing defendant, the court noted that defendant harmed himself and no one else, which was a mitigating factor. The court then noted, however, that defendant's presentence investigation report (PSI) showed that his criminal background began at the age of 14 when he was "convicted as a juvenile" of residential burglary. Defendant was also convicted of burglary, robbery, and a second residential burglary as a juvenile. As an adult, defendant was previously convicted of aggravated battery, robbery, and misdemeanor obstruction of justice. The court then noted that defendant had a "loving and supporting family" but that "for some reason you just cannot conform your conduct to what our society expects of you." Therefore, after considering

the evidence in aggravation and mitigation, the trial court sentenced defendant to 15 years in prison for armed habitual criminal and to a concurrent 7-year sentence for the unlawful use or possession of a weapon by a felon.

¶ 23 On appeal, defendant first contends that the cause should be remanded for a *Krankel* hearing and the appointment of new counsel because the trial court relied upon the wrong standard to evaluate his claims when the court "improperly jumped straight to evaluating" whether defendant's claims "satisfied" *Strickland v. Washington*, 466 U.S. 668 (1984). Defendant further contends that his allegations demonstrate "at least" a possible neglect of his case by trial counsel.

¶ 24 When a defendant raises a *pro se* posttrial claim of ineffective assistance of counsel, the trial court is not required to automatically appoint new counsel. *People v. Ayres*, 2017 IL 120071, ¶ 11. Rather, the court should first examine the factual basis of the defendant's ineffective assistance of counsel claim. *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003). When making the inquiry, "some interchange between the trial court and trial counsel regarding the facts and circumstances surrounding the allegedly ineffective representation is permissible and usually necessary in assessing what further action, if any, is warranted on a defendant's claim." *Id.* at 78. In other words, the trial court may discuss the defendant's allegations with both the defendant and counsel in order to determine whether further action on the defendant's allegations is warranted. *Id.*

¶ 25 If the court determines that the defendant's claims lack merit or pertain to only matters of trial strategy, then the court need not appoint new counsel and may deny th*e pro se* motion. *Id.* On the other hand, if the court determines that defendant's allegations of ineffective assistance of

counsel show trial counsel possibly neglected the case, the court should appoint new counsel to investigate the claims and to represent defendant on his ineffective assistance of counsel claim. *Id*. Where, as here, the court reached a decision on the merits of a defendant's ineffective assistance of counsel claim, that ruling will not be disturbed on review unless there was manifest error. *People v. Tolefree*, 2011 IL App (1st) 100689, ¶ 25. "Manifest error" is error which is clearly plain, evident, and indisputable. *Id.*

¶ 26 To the extent that defendant contends that the circuit court relied upon the wrong standard when it denied his motion for a *Krankel* hearing, we note that we review the court's judgment, not its reasoning, and we may affirm on any basis in the record. See *People v. Wright*, 194 Ill. 2d 1, 16 (2000); *Bjorkstam v. MPC Products Corp*., 2014 IL App (1st) 133710, ¶ 23 (a reviewing court may affirm on any basis in the record, regardless of whether the circuit court relied on that basis or whether its reasoning was correct).

¶ 27 Here, the record reflects that the court conducted a proper preliminary inquiry pursuant to *Krankel* when it inquired into defendant's claim that trial counsel failed to call certain witnesses at trial and questioned both defendant and counsel regarding the alleged witnesses. See *Ayres*, 2017 IL 120071, ¶ 24 ("[t]he purpose of the preliminary inquiry is to ascertain the underlying factual basis" for defendant's claims of ineffective assistance of counsel). In other words, although the court referenced *Strickland*, it did not rely upon the wrong standard in conducting the preliminary *Krankel* inquiry and evaluating defendant's allegations; rather, the court inquired into the factual basis of defendant's claim and gave defendant the chance to explain and support his claim.

¶ 28 Upon questioning by the court, trial counsel told the court that he spoke to defendant prior to trial about trial strategy and that defendant never told counsel about the witnesses. The court specifically asked counsel if he learned about the witnesses on the same day that defendant filed the *pro se* motion alleging ineffective assistance of counsel, and counsel answered yes. Counsel further told the court that he believed that it would have been "imprudent" to call a witness who could tie the handgun recovered in the case to the house. Counsel concluded that even if he had known of the witnesses, he would not have called them. The court then questioned defendant regarding the witnesses. Defendant responded that prior to trial, he told counsel to subpoena his brother Sam, who was in custody on another case. Defendant further stated that Sam was willing to take the "weight" and claim ownership of the handgun.

¶ 29 Upon the record before us, we cannot agree that the circuit court's ruling was manifestly erroneous. The record reflects that the court inquired into defendant's specific claim of ineffective assistance of counsel during the preliminary inquiry and discussed the claim with both defendant and counsel. See *Moore*, 207 Ill. 2d at 78 (a preliminary inquiry includes "some interchange between the trial court and trial counsel regarding the facts and circumstances surrounding the allegedly ineffective representation" in order to determine "what further action, if any, is warranted"). While defendant claimed that he told counsel about the witnesses and that his brother would have claimed ownership of the gun, the trial court noted that counsel "made a representation" to the court that counsel did not know about the witnesses prior to that date. The court also stated that counsel had explained that even if he had been aware of the witnesses, he would not have presented them at trial. Based upon the record before us, we cannot say that it

was manifestly erroneous for the court to decline to appoint new counsel when defendant's claim both lacked merit and pertained only to matters of trial strategy.

¶ 30 Defendant next contends, and the State concedes, that his conviction for unlawful use or possession of a weapon by a felon must be vacated pursuant to the one-act, one-crime rule because it arose from the same physical act as his conviction for armed habitual criminal.

¶ 31 Defendant did not raise his one-act, one-crime challenge in the circuit court and, therefore, forfeiture applies. *People v. Harvey*, 211 Ill. 2d 368, 388-89 (2004). However, one-act, one-crime violations are subject to review under the second prong of the plain error doctrine. *Id.* at 389.

¶ 32 Pursuant to the one-act, one-crime doctrine, "a defendant may not be convicted of multiple offenses that are based upon precisely the same physical act." *People v. Johnson*, 237 Ill. 2d 81, 97 (2010). When a challenge is raised under the one-act, one-crime doctrine, the court first determines whether the defendant's conduct consisted of a single physical act or separate acts. *People v. Coats*, 2018 IL 121926, ¶ 12. If only one physical act was undertaken, then multiple convictions are improper. *People v. Artis*, 232 Ill. 2d 156, 165 (2009). We review whether the one-act, one-crime doctrine has been violated *de novo*. *Coats*, 2018 IL 121926, ¶ 12.

¶ 33 We agree with the parties that both of defendant's convictions are based upon the same physical act, that is, the possession of a single firearm. When, as here, there is a violation of the one-act, one-crime doctrine, the reviewing court should vacate the sentence imposed on the less serious offense. *Artis*, 232 Ill. 2d at 170.

¶ 34 Here, armed habitual criminal is a Class X offense (720 ILCS 5/24-1.7(b) (West 2012)), and unlawful use or possession of a weapon by a felon, in this case, is a Class 2 offense (720

ILCS 5/24-1.1(e) (West 2012)). Therefore, unlawful use or possession of a weapon by a felon, a Class 2 felony, is the less serious offense. See *Artis*, 232 Ill. 2d at 170 (when "determining which offense is the more serious, a reviewing court compares the relative punishments prescribed by the legislature for each offense," as greater punishment is mandated for the more serious offense). Under the circumstances of this case, the sentence imposed for unlawful use or possession of a weapon by a felon must be vacated.

¶ 35 Defendant finally contends that his 15-year sentence for armed habitual criminal is excessive and must be reduced to the statutory minimum when his conduct was not "particularly serious," he was the only person harmed, and the "bulk" of his criminal history occurred when he was a juvenile. He further contends that the trial court improperly considered his previous convictions for armed robbery and aggravated battery in aggravation when they were already considered as elements of the offense of armed habitual criminal.

¶ 36 Defendant acknowledges that he did not preserve this issue in a motion to reconsider sentence, but asks that we review it for plain error. See *People v. Hillier*, 237 Ill. 2d 539, 544 (2010) (in order to preserve a claim of sentencing error, a defendant must make a contemporaneous objection and file a written postsentencing motion raising the error). In the alternative, defendant contends that he was denied the effective assistance of counsel when counsel failed to file a motion to reconsider sentence.

¶ 37 The plain error doctrine permits a reviewing court to consider unpreserved errors when either " 'the evidence in a criminal case is closely balanced or *** the error is so fundamental and of such magnitude that the accused was denied a right to a fair trial.' " *Harvey*, 211 Ill. 2d at

387 (quoting *People v. Byron*, 164 Ill. 2d 279, 293 (1995)). The first step in plain error review is to determine whether any error occurred. See *People v. Herron*, 215 Ill. 2d 167, 187 (2005).

¶ 38 A trial court's sentencing decisions are entitled to great deference on review and a reviewing court will only reverse a sentence when it has been demonstrated that the trial court abused its discretion. *People v. Patterson*, 217 Ill. 2d 407, 448 (2005). The trial court has broad discretionary powers to impose sentence because it has a superior opportunity "to weigh such factors as the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age." *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). Absent some indication to the contrary, other than the sentence itself, we presume the trial court properly considered all relevant mitigating factors presented. *People v. Sauseda*, 2016 IL App (1st) 140134, ¶ 19. When reviewing a defendant's sentence, this court will not reweigh these factors and substitute its judgment for that of the trial court merely because it would have weighed them differently. *People v. Busse*, 2016 IL App (1st) 142941, ¶ 20. Moreover, a sentence which falls within the statutory range is presumed to be proper and " 'will not be deemed excessive unless it is greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense.' " *People v. Brown*, 2015 IL App (1st) 130048, ¶ 42 (quoting *People v. Fern*, 189 Ill. 2d 48, 54 (1999)).

¶ 39 Here, we cannot agree that the trial court abused its discretion in sentencing defendant to 15 years in prison. Defendant was convicted of armed habitual criminal, a Class X offense with a sentencing range of between 6 and 30 years in prison. 720 ILCS 5/24-1.7(b) (West 2012); 730 ILCS 5/5-4.5-25(a) (West 2012). A 15-year sentence "was well within the applicable sentencing range and is, therefore, presumptively valid." *Sauseda*, 2016 IL App (1st) 140134, ¶ 12. "To

rebut this presumption, defendant must make an affirmative showing that the sentencing court did not consider the relevant factors." *People v. Burton*, 2015 IL App (1st) 131600, ¶ 38.

¶ 40 Contrary to defendant's argument, the record shows the trial court did consider in mitigation the fact that defendant only harmed himself and had a loving and supportive family. The court then discussed defendant's criminal history, which began when he was 14 years old and included residential burglary, burglary, and robbery. The trial court then listed defendant's adult convictions of aggravated battery, robbery, and misdemeanor obstruction of justice. The court concluded that "for some reason" defendant could not "conform [his] conduct to what society expects." A trial court is not required to explain the value it assigned to each factor in mitigation and aggravation (*People v. Brazziel*, 406 Ill. App. 3d 412, 434 (2010)), and the presence of mitigating evidence does not either require a minimum sentence or preclude a maximum sentence (*People v. Harmon,* 2015 IL App (1st) 122345, ¶ 123).

¶ 41 Given this record, defendant essentially asks us to reweigh the sentencing factors and substitute our judgment for that of the trial court. This we cannot do. See *Busse*, 2016 IL App (1st) 142941, ¶ 20 (a reviewing court may not substitute its judgment for that of the trial court merely because it would have weighed these factors differently). In light of this record, defendant cannot show that the court failed to consider the mitigating evidence presented at sentencing. See *Sauseda,* 2016 IL App (1st) 140134, ¶ 19 (absent some indication to the contrary, other than the sentence itself, it is presumed that the trial court properly considered all relevant mitigating factors presented).

¶ 42 Defendant further argues that the trial court improperly relied on his prior convictions for armed robbery and aggravated battery when imposing sentence, because those convictions were inherent in the offense of armed habitual criminal.

¶ 43 In determining the propriety of a sentence, we must consider the record as a whole and not focus on a few words or statements made by the trial court. *People v. Walker*, 2012 IL App (1st) 083655, ¶ 30. When the trial court mentions an improper factor, but gives insignificant weight to that factor and it does not result in a greater sentence, the case need not be remanded for resentencing. *Id.* The trial court is generally prohibited from considering a factor implicit in the offense as an aggravating factor at sentencing. *People v. Phelps*, 211 Ill. 2d 1, 11 (2004). In other words, one factor cannot be used as both an element of the offense, and as a basis for imposing a sentence that is harsher than what might otherwise have been imposed. *Id*. at 11-12. The court, however, may consider the nature of the offense when imposing a sentence, including the circumstances and extent of each element as committed. *People v. Robinson*, 391 Ill. App. 3d 822, 842 (2009). Whether the trial court considered an improper factor at sentencing is reviewed *de novo*. *People v. Bowen*, 2015 IL App (1st) 132046, ¶ 49.

¶ 44 In imposing sentence, the trial court stated, in pertinent part, that defendant's criminal background began at the age of 14 when he was "convicted as a juvenile" of residential burglary. The court then listed the remainder of defendant's juvenile criminal history, followed by his adult criminal history, that is, convictions for aggravated battery, robbery, and misdemeanor obstruction of justice. The court concluded that although defendant had family support, he could not conform his conduct to society's expectations.

¶ 45 The circuit court did not improperly rely on a factor implicit in the offense when sentencing defendant. Rather, when read in context, the court's comment was a reference to defendant's criminal history, and the nature of the offense of armed habitual criminal. Accordingly defendant cannot meet his burden of proof that the court's reference to his previous convictions for armed robbery and aggravated battery led to a greater sentence. As defendant has failed to establish that an error occurred, his plain error argument must fail. See *Herron*, 215 Ill. 2d at 187 (the first step of plain-error review is determining whether any error occurred).

¶ 46 Moreover, because there was no error, defendant cannot demonstrate that he was prejudiced by his trial counsel's failure file a motion to reduce sentence. To establish ineffective assistance of counsel, a defendant must demonstrate that his counsel's performance was fundamentally deficient and that, but for counsel's deficient performance, the result of the proceeding would have been different. *People v. Coleman*, 183 Ill. 2d 366, 397 (1998) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984)). The failure to file a fruitless motion does not establish deficient representation. *People v. Givens*, 237 Ill. 2d 311, 331 (2010). Therefore, as defendant's sentence was not excessive, his claim of ineffective assistance of counsel must also fail. *Patterson*, 217 Ill. 2d at 438 (the failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel).

¶ 47 Therefore, we vacate defendant's sentence for unlawful use or possession of a weapon by a felon (count II). We affirm the judgment of the circuit court in all other aspects.

¶ 48 Affirmed in part; vacated in part.