2019 IL App (1st) 171374-U

No. 1-17-1374

June 28, 2019

First Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 15 CR 19299
	)	
BRENTON GREEN,	)	Honorable
	)	Kevin M. Sheehan,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE WALKER delivered the judgment of the court.
Presiding Justice Mikva and Justice Pierce concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's void prior conviction for aggravated unlawful use of a weapon is vacated pursuant to *In re N.G.*, 2018 IL 121939. Cause remanded for resentencing because the trial court relied on the void conviction in aggravation.

¶ 2 Following a bench trial, defendant Brenton Green was convicted of delivery of a controlled substance and sentenced to seven years in prison. He appeals, arguing that he is entitled to a new sentencing hearing because the trial court improperly considered in aggravation a prior conviction for aggravated unlawful use of a weapon (AUUW) that was based on a

statutory provision held to be unconstitutional in *People v. Aguilar*, 2013 IL 112116. Defendant also asks us to vacate the AUUW conviction.[1] We (1) vacate the AUUW conviction, (2) vacate defendant's sentence for delivery of a controlled substance, and (3) remand for a new sentencing hearing for delivery of a controlled substance.

¶ 3 Defendant and Elvis Graves[2] were each charged in the same indictment with one count of delivery of a controlled substance for allegedly selling less than one gram of heroin (720 ILCS 570/401(d) (West 2014)), and one count of delivery of a controlled substance for allegedly selling heroin within 1000 feet of a school (720 ILCS 570/407(b)(2) (West 2014)). They were tried in a joint bench trial, where the State proceeded on only the former count.

¶ 4 The State began its case-in-chief by calling Chicago police officer Harris,[3] who testified that he was working undercover as part of a narcotics team at approximately 12:48 p.m. on October 30, 2015. After Harris identified Graves as the man he met in the 1500 block of North Lorel Avenue in Chicago at that time, defendant's counsel informed the court that defendant "raised some issue with me." The court held an off-the-record conversation with the parties, and then allowed defense counsel to articulate his position for the record. Counsel stated that defendant did not understand the court's jury waiver admonishments, and despite having signed a waiver form, wanted to have a jury trial. Consequently, defense counsel asked for a continuance "to see if there's any case law to support" withdrawing a jury waiver after a witness has already been sworn. The court granted defense counsel's request.

[1] In his initial brief on appeal, defendant also argued that the trial court misapprehended the applicable sentencing range for the present conviction. In his reply brief, he has withdrawn the argument.

[2] Graves is not a party to this appeal.

[3] The transcript does not contain Harris's first name.

¶ 5 The next day, defendant was not present. Defense counsel informed the court that he did not find any case law that would allow defendant to withdraw his jury waiver. After waiting three hours for defendant to appear, the trial court proceeded with the bench trial *in absentia*.

¶ 6 Harris resumed his testimony, stating that he approached Graves on foot and asked where he could find "Little B," defendant's nickname. Graves advised that defendant would arrive shortly. Defendant then drove up through the nearby alley and asked "how many." Harris told him that he wanted "three," and defendant drove out of sight. Defendant reappeared on foot minutes later and instructed Harris to pay Graves. Harris gave Graves $30, and Graves and defendant disappeared behind a building. When they returned minutes later, defendant handed Graves three clear capsules of suspected heroin, which Graves then handed to Harris. Harris gave his team the predetermined signal for a successful purchase, pocketed the capsules, and left the area.

¶ 7 Chicago police officer Anthony Ceja, the team's surveillance officer, corroborated Harris's testimony. From his vehicle, Ceja continued to observe defendant and Graves after Harris left, and saw them engage in two additional hand-to-hand transactions with other people.

¶ 8 Defendant then entered the back seat of a gray Toyota, which Ceja followed until other officers pulled it over on the next block. Ceja drove back to his original position and saw that Graves was still standing on the sidewalk. Other officers detained Graves, who was not taken into custody, but released "for a further narcotics investigation." Harris drove by and identified both defendant and Graves as the men who sold him the capsules.

¶ 9 The State entered a stipulation that a forensic chemist analyzed one of the three capsules and concluded that it tested positive for 0.2 grams of heroin. The combined weight of the three capsules was 0.7 grams.

¶ 10 Defendant's counsel rested without presenting evidence.

¶ 11 At the close of trial on February 2, 2017, the court found defendant guilty of delivery of a controlled substance. On March 1, 2017, the next court date, defendant was still not present. Defendant's counsel advised the court that he was not ready to argue his motion for a new trial in defendant's absence, and the court granted a continuance. Defendant surrendered to police on March 9, 2017, and was present for the following court date on March 16, 2017. The trial court continued the case to allow for the completion of a presentence investigation (PSI) report.

¶ 12 On April 13, 2017, the court denied defendant's motion for a new trial and conducted a sentencing hearing. The State called Harris in aggravation, who testified that he was also working undercover in the 1500 block of North Lorel on October 29, 2015, the day before the incident in the present case. He approached Graves and asked if he had any "D," a street term for heroin. When Graves stated that he did, Harris gave him $20 and ordered "two." Graves and defendant had a conversation, and then walked to the side of a building. When they returned, Harris saw defendant hand Graves two clear capsules of suspected heroin, which Graves gave to Harris. Harris asked defendant for his phone number, and defendant complied. Harris then signaled to his team that he made a successful narcotics purchase, and left the area. He later learned that one of the capsules tested positive for heroin.

¶ 13 After Harris's testimony, the State mentioned that defendant had two prior felony convictions, one for AUUW in 2008 (case No. 08 CR 15489) and another for residential burglary

in 2010. The State informed the court that defendant received probation for the AUUW conviction, which he violated and was subsequently sentenced to one year in prison. Defendant initially received boot camp for the residential burglary conviction, but was later resentenced to four years in prison. Finally, the State noted that defendant was absent for multiple court dates despite defense counsel's best efforts to ensure his attendance.

¶ 14 Defense counsel emphasized in mitigation that defendant was raised in "a drug and gang infested neighborhood," did not have a relationship with his parents, and was expelled from high school. Counsel also argued that defendant was "almost arguably in a better position" than he would have been had he attended trial, as his decision to surrender knowing he had been found guilty showed a "sense of maturity [and] responsibility." Defendant was in a relationship with the mother of his child, who paid his bonds and was employed.

¶ 15 In allocution, defendant apologized for his failure to appear and stated that he was "going to grow from whatever happen[s]."

¶ 16 In announcing its decision, the trial court stated that it "carefully considered each and every statutory factor in aggravation and mitigation," the PSI report, defendant's allocution, the trial evidence, and Harris's testimony at sentencing. While the court acknowledged the "financial impact of incarceration," it noted that defendant was ineligible for probation based on his prior residential burglary conviction.

¶ 17 The court further opined that defendant "g[o]t the break of his life" by receiving boot camp, rather than prison time, for the residential burglary. However, the court noted that "he didn't take advantage of that" because he violated the conditions of boot camp and received the minimum sentence of four years in prison. The court then stated that:

> "[p]revious to that in 2008 on a gun case when he was probationable he got probation, [but] probation didn't seem to wake him up at all.
>
> It was violated and he went to the penitentiary the first time so he's been to the penitentiary twice and obviously based on his behavior in these two cases both the case that he's been sentenced on today and *** the case that was used in aggravation *** the neighborhood that he happens to be in is infested with narcotics *** because of him.
>
> He's a part and parcel of infesting that neighborhood with narcotics *** and he got caught. Also the fact that does not escape the Court's mind [is] that the case was set for trial *** and then he took of[f] [and] intentionally and willfully abs[ented] himself from the jurisdiction of the Court."

Accordingly, the court sentenced defendant to seven years in prison. Defendant's motion to reconsider the sentence was denied.

¶ 18 On appeal, defendant first argues, and the State concedes, that this court should vacate his 2008 AUUW conviction. We agree, as defendant was convicted of AUUW under section 24-1.6 (a)(1), (a)(3)(A) of the Criminal Code of 1961, a provision which our supreme court later held to be facially unconstitutional in *Aguilar*. See also *People v. Burns*, 2015 IL 117387, ¶ 25 (clarifying *Aguilar*). As such, defendant's AUUW conviction was void *ab initio*, and therefore "may be attacked at any time in any court," even after the time for appeal has expired. *In re N.G.*, 2018 IL 121939, ¶ 57. "Indeed, if the constitutional infirmity is put in issue during a proceeding that is pending before a court, the court has an independent duty to vacate the void judgment and may do so *sua sponte*." *Id.* Thus, we vacate defendant's 2008 conviction for AUUW in case number 08 CR 15489.

¶ 19 Defendant next argues that the trial court in the present case improperly considered his void AUUW conviction in aggravation at sentencing. The State concedes that a trial court may not consider a void conviction in aggravation, but maintains that the court properly considered defendant's violation of probation on the AUUW conviction in assessing his potential for rehabilitation.

¶ 20 Defendant acknowledges that he failed to preserve the issue for appeal, but asks this court to review it pursuant to the plain error doctrine, or, alternatively, as we elect here, to consider it as a matter of ineffective assistance of trial counsel.

¶ 21 To succeed on a claim of ineffective assistance of counsel, a defendant must demonstrate both that (1) counsel's performance was objectively unreasonable, and (2) there is a reasonable probability that, but for counsel's deficiency, the result of the proceeding would have been different. *People v. Henderson*, 2013 IL 114040, ¶ 11. With respect to the first prong, counsel's performance is evaluated from his perspective at the time of his actions and will be considered constitutionally deficient only where it fell below the standard established by prevailing professional norms. *People v. Wilson*, 392 Ill. App. 3d 189, 198 (2009). The second prong requires a defendant to show that there is a "reasonable probability that the result of the proceeding would have been different" but for his counsel's unprofessional errors. *People v. Houston*, 229 Ill. 2d 1, 4 (2008).

¶ 22 *People v. Billups*, 2016 IL App (1st) 134006, is instructive. In *Billups*, the defendant was found guilty of two counts of delivery of a controlled substance. *Id.* ¶ 7. His PSI report listed, *inter alia*, two felony convictions for possession of a firearm based on statutory provisions that were later found to be unconstitutional in *Aguilar*. *Id.* ¶ 8. Defense counsel did not object or offer

any amendments to the PSI report. *Id.* ¶ 9. At sentencing, the trial court noted that the defendant had " 'been in the penitentiary for narcotics cases and gun cases,' " and sentenced him to concurrent six-year prison terms. *Id.*

¶ 23 On appeal, the defendant argued that the trial court improperly considered his firearm convictions in aggravation. *Id.* ¶ 11. He recognized that his counsel did not raise the issue in the trial court, but asked this court to review the matter under ineffective assistance of counsel. *Id.* ¶ 13.

¶ 24 This court found that "[c]ompetent counsel should have known" that the defendant's convictions were void under *Aguilar*, and that "[t]he failure to object to the use of the two convictions in aggravation cannot have served any strategic purpose." *Id.* ¶ 15. Consequently, we concluded that counsel's performance fell below an objective standard of reasonableness. *Id.*

¶ 25 We also rejected the State's argument that the defendant had not shown prejudice from counsel's errors. Instead, we noted that the trial court referenced the defendant's " 'gun crimes' " in announcing its sentencing decision, and found that there was a "reasonable probability" that the trial court would have imposed a lesser sentence had it not considered the void convictions. *Id.* ¶ 16.

¶ 26 Here, as in *Billups*, defendant's AUUW conviction was void *ab initio*, meaning that it "must be treated by courts as if it did not exist, and it cannot be used for any purpose under any circumstances." *In re N.G.*, 2018 IL 121939, ¶ 36. Similar to *Billups*, we see no strategic reason why defense counsel failed to argue that defendant's AUUW conviction was void. We also find that there is a reasonable probability that defendant would have received a different sentence without counsel's error. The trial court stated that it considered defendant's criminal history in

aggravation, and noted in particular that he had already served two different terms in prison, one of which was for the void AUUW conviction. Thus, there is a reasonable probability that defendant would have received a lesser sentence had defense counsel informed the court that defendant's AUUW conviction was void. See *People v. Smith*, 2016 IL App (2d) 130997, ¶ 18 (remanding for resentencing where it "might well have lessened the sentence" if the trial court had "only two felony weapons convictions to consider, instead of three").

¶ 27 For the foregoing reasons, we (1) vacate defendant's conviction for AUUW in case number 08 CR 15489, (2) vacate his sentence for delivery of a controlled substance, and (3) remand for a new sentencing hearing for delivery of a controlled substance.

¶ 28 Vacated in part and remanded.