

THIRD DIVISION
JULY 30, 2014

No. 1-12-2839

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,)	Appeal from the
)	Circuit Court of
)	Cook County.
v.)	
)	No. 11 CR 7737
KWAMANE JACKSON,)	
)	The Honorable
Defendant-Appellant.)	Michael Brown,
)	Judge Presiding.
)	

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Hyman and Justice Mason concurred in the judgment.

ORDER

¶ 1 *Held:* Defense counsel's sentencing arguments and failure to file a motion to reconsider the sentence did not deprive defendant of effective assistance of counsel. Defendant correctly contended that various fines and fees should not have been assessed and should be vacated and the total reduced.

¶ 2 Following a bench trial, defendant Kwamane Jackson was convicted of vehicular hijacking and possession of a stolen motor vehicle (PSMV), and was sentenced to a seven-year prison term for vehicular hijacking and ordered to pay \$600 in various fines and fees. The trial court found that the PSMV count merged into the vehicular hijacking conviction. Defendant did not file a post-sentencing motion. On appeal, defendant contends that he received ineffective assistance of counsel during the sentencing hearing because of comments by defense counsel who, instead of advocating for a minimum sentence, argued that defendant had "rightfully earned himself a trip to the penitentiary," was "going to have to receive a stiff prison sentence," and could not receive a sentence that was "a love tap." Defendant contends that he was also denied effective assistance of counsel because defense counsel repeatedly and incorrectly argued that defendant had six (rather than five) prior narcotics convictions and failed to file a motion to reconsider the sentence. Finally, defendant also contests various fines and fees.

¶ 3 Defendant was charged with one count of aggravated vehicular hijacking with a firearm and one count of PSMV. During pretrial proceedings, the assistant State's Attorney informed the court that the State had offered defendant a sentence of 10 years, which was "substantially under the minimum" of 21 years, but that all offers had been revoked.

¶ 4 The State presented three witnesses at trial: Romisha Taylor, Shalonda Young, and Officer Jason Lanski. Defense counsel conducted cross-examinations, moved for a judgment of acquittal at the conclusion of the State's case, and presented arguments, but the defense did not present any evidence.

¶ 5 The State's evidence disclosed that at approximately 9 p.m. on May 3, 2011, Romisha Taylor and Shalonda Young went to the latter's aunt's house at 5640 South Green Street in Chicago to pick up keys. Romisha Taylor waited in the car, which was parked under a

streetlight. Shalonda Young left the car's engine on and the keys in the ignition while she got out of the car to pick up the keys from her aunt. Romisha Taylor saw defendant knock on the car door or window with what she was certain was a black gun, but she had never seen a gun in person and she was shaken up and terrified. Defendant held the bottom of the gun with his left hand and the trigger with his right hand, and he told her to get out of the car. She got out of the car and defendant got in and drove it away. She immediately called Shalonda Young and they both called the police, who arrived within five or six minutes and apprehended defendant in the car around one-half mile to one mile away at 6258 South Racine Avenue, where Romisha Taylor positively identified him as the offender. No firearm was recovered from defendant or the car, but a black cell phone was recovered. Officer Lanski did not see defendant discard anything out of the car window, but he did not search the route from 5640 South Green Street to 63rd Street and Racine Avenue to see if a black handgun had been discarded.

¶ 6 Through arguments and cross-examination of the witnesses, particularly Officer Lanski, defense counsel created reasonable doubt as to the existence of a gun and downplayed defendant's criminal capabilities. Defense counsel elicited that defendant had driven the stolen car past a police station at 61st Street and Racine Avenue. Defense counsel argued that defendant was "apparently no criminal genius" and had only a cell phone, not a gun, because he had driven the stolen car past a police station at 61st Street and Racine Avenue while wearing the same clothing immediately after the crimes and therefore would have had no time to dispose of a gun.

¶ 7 The trial court was not convinced that Romisha Taylor had experience recognizing guns, and therefore found defendant guilty of the lesser offense of vehicular hijacking, along with PSMV.

¶ 8 During argument on defendant's post-trial motion, defense counsel argued that both vehicular hijacking and PSMV were carved out of the identical act of taking the vehicle. Although the trial court denied the post-trial motion, the trial court observed that it understood defense counsel's argument and therefore would merge the PSMV into the vehicular hijacking so that there would be only a single sentence.

¶ 9 The presentence investigative report (PSI) and the sentencing hearing reflected that defendant was born in 1990, attended school through the 11th grade, was studying for a GED, was single, had two children by two different women, did not provide child support payments, had five prior convictions for Class 1 and Class 2 narcotics felonies and one prior Class 4 felony for unlawful use of a weapon, had worked part-time at McDonald's for \$7.50 per hour totaling \$900 per month while residing with his parents and during periods of unemployment was supported by his family or was incarcerated, had no physical or psychological health problems, had no gang involvement, had no military background, used alcohol but not illegal drugs, and was not under the influence of alcohol or illegal drugs at the time of his arrest in this case.

¶ 10 During the sentencing hearing, the assistant State's Attorney erroneously stated that defendant had six separate convictions in 2009 for manufacture/delivery of a controlled substance. She stated more than once that there were six prior convictions. She argued that defendant's employment at McDonald's and the help he received from his parents with whom he resided, should be considered in aggravation because defendant stole a car from college students despite having a job and "a roof over his head."

¶ 11 Defense counsel presented a laudatory letter from defendant's manager at McDonald's, indicating that she would offer to rehire defendant upon his release from prison. Defense counsel argued that he did not think that defendant, who was 21 years old, understood the

severity of the trouble that he had caused for himself, facing 4 to 30 years in prison, by taking a car that did not belong to him by threat or by pretending to have a firearm. Defense counsel also argued the following. Defendant had six [*sic*] felony convictions for delivery of a controlled substance. Defendant successfully completed boot camp, and defense counsel thought that defendant had also undergone a drug treatment program. Prior thereto, defendant had received probation for possession of a firearm. Defendant had almost completed high school except for a few credits, he enrolled in a GED program, he had a job at McDonald's, and he lived with his parents. Defendant was fortunate that he was not killed during the incident because there were people who would have produced a gun and shot him. Although he "apparently" had "some smarts," he had "just rightfully earned himself a trip to the penitentiary." He had been lucky in the past to be out of prison with his criminal record, to get boot camp on six [*sic*] cases after having committed a gun crime, and to get a job despite his "radioactive" criminal history. He committed the present crime "[f]or some silly reason" such as to take the rims from the car because he had a similar car, which was the thinking of the 21-year-old defendant. He drove away past the police station, which was "really silly." Defense counsel was "not trying to deprecate the seriousness;" rather, defense counsel thought that defendant "doesn't get it." Defendant did not understand how much trouble he was in, how seriously he could be hurt, and how long he could be away from his family. Defense counsel did not think that defendant was getting the message and was sure that at the penitentiary defendant would figure out that that was not what he wanted to do "but he's just not playing with a full deck if you ask me." The sentence would impress upon defendant that this was not "play time anymore." There was no juvenile history, and defense counsel did not think that defendant was a violent person, "but he did commit a somewhat violent crime here. For which he's going to have to receive a stiff prison

sentence" and, based on defendant's criminal record, the court could not "give him a love tap." Defense counsel hoped that defendant would understand that his days as a criminal were done. "Otherwise, he's going to be spending the rest of his life in prison." Defendant seemed to have "smarts" because he almost completed high school, he had a job, he had a car, and he lived with his parents. "It's like he's on a joy ride." It was silly for defendant, with his criminal record, to steal rims, when he could have paid for rims, "and now he's earned himself a trip to the penitentiary." It was a sad day for defendant, "but I hope he's getting the message that you don't have a sense of humor about this."

¶ 12 In allocution, defendant apologized and stated that he had been employed, had been working on his GED, was a member of a church, had successfully completed a drug program, and understood the effect of his absence on his family. He requested a sentence of probation and he presented a letter from his mother to the court. Defense counsel then stated that he had explained to defendant that probation was not available because of his criminal record.

¶ 13 The court stated that it had considered the facts and circumstances of the case, the statutory factors in aggravation and mitigation, the PSI, the letter that defendant's mother wrote, and defendant's comments in allocution. The court then said it would merge count 2 (PSMV) into count 1 (vehicular hijacking), and would sentence defendant on count 1 to a 7-year prison term. The court ordered \$600 in fines and fees, and granted credit of \$5 per day for the 469 days that defendant had spent in custody.

¶ 14 On appeal, defendant contends first that he received ineffective assistance of counsel under both *Strickland v. Washington*, 466 U.S. 668, 690, 694 (1984), and *United States v. Cronin*, 466 U.S. 648, 659 (1984), because the remarks by defense counsel during the sentencing hearing that favored a strict sentence, misstated defendant's prior criminal history and made

statements outside the scope of the evidence adduced at trial. He also observes that defense counsel failed to correct the State when the State also misstated his prior criminal history. He argues that he was prejudiced by defense counsel's comments during sentencing which resulted in a seven-year sentence that was almost double the four-year minimum for vehicular hijacking. He argues further that he was prejudiced by defense counsel's failure to file a post-sentencing motion and therefore satisfied the *Strickland* standard for ineffective assistance of counsel. He maintains that he was completely denied counsel during sentencing as counsel failed to subject the State's case to meaningful adversarial testing and therefore satisfied the *Cronic* standard for ineffective assistance of counsel even without a showing of prejudice. He argues that defense counsel failed to investigate properly and prepare a sentencing defense and failed to advocate on his behalf. He also maintains that he was denied effective assistance of counsel by counsel's failure to file a motion to reconsider the sentence, and that the matter should be remanded for a new sentencing hearing.

¶ 15 The standards set forth in *Strickland v. Washington*, 466 U.S. 668, 690, 694 (1984), govern claims of ineffective assistance of counsel. Pursuant to *Strickland*, the defendant must establish both deficient representation by his attorney, and resulting prejudice. See *People v. Manning*, 227 Ill. 2d 403, 412 (2008); *People v. Hall*, 217 Ill. 2d 324, 335 (2005); *People v. Graham*, 206 Ill. 2d 465, 476 (2003). A showing of prejudice sufficient to support a claim of ineffective assistance of counsel consists of a reasonable probability that, but for the attorney's errors, the outcome would have been different. *Hall*, 217 Ill. 2d at 336; *Graham*, 206 Ill. 2d at 476. A reasonable probability undermines confidence in the outcome. *Graham*, 206 Ill. 2d at 476. "[P]rejudice is not presumed for purposes of an ineffective assistance of counsel claim." *People v. Peterson*, 311 Ill. App. 3d 38, 52 (1999). If a claim of ineffective assistance can be

disposed of because the defendant suffered no prejudice, it is not necessary to consider whether counsel's performance was deficient. *Graham*, 206 Ill. 2d at 476.

¶ 16 Defendant, however, maintains that he need not show prejudice because he was denied effective assistance of counsel under *United States v. Cronin*, 466 U.S. 648, 658-62 (1984), which presumes prejudice where there was a "complete denial of counsel" due to a lack of "meaningful adversarial testing." See *People v. Metcalfe*, 202 Ill. 2d 544, 560 (2002).

¶ 17 In this case, there was no complete denial of counsel or failure to provide meaningful adversarial testing. Counsel conducted cross-examination and crafted arguments that resulted in defendant's conviction of a lesser offense (vehicular hijacking) than the charged offense of aggravated vehicular hijacking with a firearm. Counsel's efforts also resulted in a lesser sentence than the State had offered for a plea negotiation, and only one sentence, not an additional sentence for PSMV. Clearly counsel was acting as a meaningful advocate for defendant; therefore, defendant's reliance on *Cronin* was misplaced, and we will review defendant's claim of ineffective assistance of counsel under the *Strickland* standard.

¶ 18 The record rebuts any plausible allegations of prejudice pursuant to *Strickland*. Defendant cannot show prejudice because there was no reasonable probability that the trial court would have acquitted him or given him a more lenient sentence if counsel had not made the challenged arguments. The trial evidence disclosed that there was overwhelming evidence of defendant's guilt for the crimes of vehicular hijacking and PSMV. Through arguments and cross-examination of the witnesses, particularly Officer Jason Lanski, defense counsel raised reasonable doubt as to the existence of a gun. Defense counsel argued that defendant was "apparently no criminal genius" and had only a cell phone, not a gun, because he drove the stolen car past a police station while wearing the same clothing immediately after having committed the

crimes and therefore would have had no time to dispose of a gun. Thus, defense counsel's strategy was to downplay defendant's criminal expertise and to show that he was neither bright nor an experienced criminal and did not have a gun. Defense counsel's arguments outside the scope of the record regarding the stealing of rims that he could have purchased were also designed to portray defendant as silly.

¶ 19 Nor did the disputed arguments affect the sentence. Although defendant complains that his seven-year sentence was almost double the minimum, it was three years less than the State's pretrial offer of a 10-year sentence and nowhere near the maximum sentence for his crime. In determining defendant's sentence, the trial court stated that it had considered the facts and circumstances of the case, the statutory factors in aggravation and mitigation, the PSI, the letter that defendant's mother wrote, and defendant's comments in allocution. The trial court did not indicate that it relied on the remarks by defense counsel that defendant challenges.

¶ 20 If defense counsel had not made the disputed arguments, there is no reasonable probability that the outcome would have changed, because the trial evidence clearly established defendant's guilt and he had an extensive criminal background. Therefore, defendant failed to show that, but for trial counsel's alleged errors, he would likely have secured a more lenient outcome at trial or sentencing, and he cannot establish the prejudice prong of the *Strickland* standard. Thus, defendant received effective assistance of counsel because the disputed arguments did not prejudice him. Given that defendant cannot establish the prejudice prong of the *Strickland* test, we need not inquire into the deficiency prong. *People v. Hirsch*, 312 Ill. App. 3d 174, 180-81 (2000).

¶ 21 We also note that defendant predicates his argument upon isolated excerpts from the report of the sentencing proceedings. Transcripts must be read in context. *People v. Haggard*,

332 Ill. App. 3d 46, 49-51 (2002). Read in context, the record reveals that defense counsel's strategy was to minimize the seriousness of defendant's conduct and also to portray him as a young and silly individual who did not fully appreciate the seriousness of his conduct. Thus, defendant's arguments about alleged ineffective assistance of counsel are unfounded. We have considered, and rejected, all of defendant's arguments on appeal concerning alleged ineffective assistance of counsel.

¶ 22 Next, defendant contends that his fines and fees should be reduced from \$600 to \$383. He argues that the court failed to subtract his \$5 per day presentence custody credit from his fines, and that the court improperly assessed a \$100 street gang fine, a \$20 local anti-crime program contribution fine, a \$5 electronic citation fee, and a \$20 violent crime victims assistance fine that should be reduced to \$8. He requests a new fines and fees order reflecting the corrected amount of \$383. The State agrees.

¶ 23 The \$100 street gang fine (730 ILCS 5/5-9-1.19 (West 2012)) is vacated because there was no evidence that defendant was a street gang member at the time of the offense. Defendant denied that he was.

¶ 24 The \$20 local anti-crime program contribution fine (730 ILCS 5/5-6-3.1(c)(13) (West 2012)) is supposed to be imposed as an incident or condition of supervision (730 ILCS 5/5-6-3.1 (West 2012)). Defendant received a prison sentence, not a disposition of supervision. Therefore, the \$20 local anti-crime is vacated.

¶ 25 The \$5 electronic citation fee (705 ILCS 105/27.3e (West 2012)) was improperly assessed because defendant's conviction for vehicular hijacking is not one of the offenses ("traffic, misdemeanor, municipal ordinance or conservation case") enumerated in section 27.3e

of the Clerks of Courts Act. 705 ILCS 105/27.3e (2012). Therefore, the \$5 electronic citation fee is not applicable to defendant's conviction for vehicular hijacking and is vacated.

¶ 26 The \$20 violent crime victims assistance fund fine (725 ILCS 240/10(c)(2) (West 2004)) formerly applied only when no other fine was imposed. Here, even after the \$20 local anti-crime program contribution fine and the \$100 street gang fine are vacated, various fines remain that were properly imposed. Defendant and the State concur that this \$20 fine should be reduced to \$8. See 725 ILCS 240/10(b) (West 2004). We reduce the \$20 violent crime victims assistance fine to \$8 (\$4 for the first \$40 of fines, and \$4 for the next \$40). See *People v. Jamison*, 229 Ill. 2d 184, 193 (2008); *People v. Keck*, 226 Ill. App. 3d 937, 940 (1992).

¶ 27 Pursuant to section 110-14(a) of the Code of Criminal Procedure of 1963 (725 ILCS 5/110-14(a) (West 2012)), and Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), we modify the costs and fees order to reflect a credit of \$80 against the fines (\$5 per day) (725 ILCS 5/110-14(a) (West 2012)) toward the \$10 mental health court fine (55 ILCS 5/5-1101(d-5) (West 2012)), the \$5 youth diversion/peer court fine (55 ILCS 5/5-1101(e) (West 2012)), a \$5 drug court fine (55 ILCS 5/5-1101(f) (West 2012)), a \$30 children's advocacy center fine (55 ILCS 5/5-1101(f-5) (West 2012)), and a \$30 fine to fund juvenile expungement (730 ILCS 5/5-9-1.17 (West 2012)). Defendant was entitled to \$5 per day in credit, times 469 days, or \$2345 in credit toward his fines. However, only \$80 worth of his costs are fines that are eligible for credit: a \$10 mental health court fine, a \$5 youth diversion/peer court fine, a \$5 drug court fine, a \$30 children's advocacy center fine, and a \$30 fine to fund juvenile expungement. We therefore reduce defendant's costs by \$80, and the fines, fees, and costs order is ordered modified to reflect the corrected total of \$383. The judgment of the circuit court is otherwise affirmed.

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¶ 28 The judgment of the circuit court is affirmed as modified and the fines, fees, and costs order is ordered modified.

¶ 29 Affirmed as modified.