2011 IL App (1st) 092192-U

FOURTH DIVISION
November 10, 2011

No. 1-09-2192

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 08 CR 20141
	)	
TIMOTHY WHITFIELD,	)	Honorable
	)	Arthur F. Hill, Jr.,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE LAVIN delivered the judgment of the court.
Justices Pucinski and Sterba concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant's conviction for delivery of a controlled substance is affirmed as modified where (1) his confrontation rights were not violated when the trial court precluded defense counsel from cross-examining the police officer regarding his exact surveillance location, (2) his nine-year sentence is not excessive, (3) defendant is required to serve a three-year term of mandatory supervised release rather than the two years required for Class 2 felony convictions because he was sentenced as a Class X offender, (4) the $5 Court System fee and $200 DNA ID System fee are vacated because they were improperly assessed, and (5) defendant is entitled to $5 per day presentence incarceration credit against his $1,000 controlled substance fine.

¶ 2 Following a bench trial, defendant Timothy Whitfield was convicted of delivery of a controlled substance and sentenced to nine years' imprisonment as a Class X offender based upon his criminal history. On appeal, defendant contends that he was denied his right to confront the witness when the trial court precluded defense counsel from cross-examining the police officer about his exact surveillance location. Defendant also argues that his sentence is excessive. In addition, defendant asserts that his three-year term of mandatory supervised release (MSR) must be reduced to two years because he was convicted of a Class 2 felony. Finally, defendant contends, and the State agrees, that he was erroneously assessed a $5 Court System fee and a $200 DNA ID System fee, and that he is entitled to presentence incarceration credit which fully offsets his $1,000 controlled substance fine. We vacate the Court System and DNA fees, apply the presentence credit to offset the controlled substance fine, and affirm defendant's conviction and sentence in all other respects.

¶ 3 At trial, Chicago police officer Watson testified that about 5:30 p.m. on September 21, 2008, he was conducting surveillance in a location known for high narcotics activity. The officer was situated in an elevated location with a "clear and unobstructed" view of the area, and was approximately 60 feet away from defendant. Officer Watson observed a woman, later identified as Ms. Shaw, approach defendant and engage him in a brief conversation. Shaw handed defendant money in exchange for a small item, and she then left the area. Officer Watson contacted the enforcement officers, gave them a description of Shaw, and she was taken into custody. Officer Watson then observed a second woman, Ms. Joseph, approach defendant, and after a brief conversation, she gave him money in exchange for a small item and left the area. Officer Watson again contacted the enforcement officers, gave them a description of Joseph, and she was taken into custody. Thereafter, Office Watson saw a man driving a small turquoise Saturn pull up to defendant, and after a brief conversation, handed defendant money in

exchange for a small item and drove away. Officer Watson contacted the enforcement officers about the Saturn, but they were unable to respond because they were still engaged with Joseph, and the vehicle was not stopped. Officer Watson later identified Shaw and Joseph.

¶ 4 Officer Watson instructed the enforcement officers to apprehend defendant and told them he was wearing a white T-shirt and light blue basketball shorts. He then saw the officers arrive on the scene in a squad car, and defendant looked at them and fled. Officer Watson was able to see defendant until he turned the corner and ran down the adjacent street. Shortly thereafter, defendant was arrested. An hour later, Officer Watson and Sergeant Kane interviewed defendant at the police station. After being advised of his *Miranda* rights, defendant told the officers "I sell. I do what I do for my family."

¶ 5 On cross-examination, Officer Watson acknowledged that his surveillance location was approximately 50 to 60 feet away from defendant, and that he was elevated rather than at ground level. When defense counsel asked the officer if he was located "in an apartment building," the State objected and argued that there was no motion pending in regards to the officer's surveillance location. Defense counsel then responded:

> "I am not inquiring about the specific surveillance location. I am inquiring about as to his ability to observe, certainly if he was in an apartment building which has windows and curtains or blinds versus a storefront where there is perhaps a large window or no curtains and blinds.
>
> You know, I am not asking for an address. I am not asking for an apartment location. I am asking – my questions are trying to get as to this officer's ability to observe. He has testified that he was approximately 50 to 60 feet elevated, looking down on the scene that's at ground level."

¶ 6 The trial court noted that Officer Watson actually testified that he was 60 feet away from defendant, not 50 to 60 feet, and that he was elevated. The court then advised counsel that she could continue with her questioning. Counsel asked Officer Watson if he was viewing the scene through a window, and the State objected. The trial court overruled the objection and the officer answered "[n]o." Officer Watson acknowledged that he was approximately 60 feet from the scene he was observing. When counsel asked the officer if he was on the first floor or second floor, and if he was "60 feet looking down or 60 feet down and over," the trial court sustained the State's objections as "to the form of the question[s]" and allowed counsel to continue with her questioning. When counsel asked the officer if the scene was directly below him, the court sustained the State's objection on the basis that the defense had not filed a motion regarding disclosure of the surveillance location. The court then explained:

> "I get the feeling that this is a sensitive area. I would – if the defense had filed that motion, then I'd have a better idea about, after having an in camera discussion with this officer, I'd have a better idea about that location, the actual location, and could give a better – I could have a better record in terms of this whole line of questioning.
>
> I think there is nothing wrong at this stage with questions involving how far away the transaction – how far away the officer was from the transaction; if he was elevated, how many feet, over what distance he might have been elevated.
>
> There has already been questions at least on direct as to any obstructions regarding his line of sight at least on direct examination. So that's my rationale."

The court then advised defense counsel that she could continue questioning the officer. When counsel asked the officer if he was "60 feet elevated," the court overruled the State's objection, and Officer Watson answered "[n]o." When counsel asked the officer how many feet high he

was elevated, the court again overruled the State's objection and Officer Watson answered that he was two to three stories high. Counsel asked the officer approximately how many feet two stories was, and he estimated that it was about 20 feet elevated. Counsel then changed topics and continued cross-examining Officer Watson for several more minutes.

¶ 7 Chicago police officer Patrick Wherfel testified that he detained both Shaw and Joseph, and recovered one item from Shaw and three items from Joseph. All four of those items were yellow tinted clear plastic bags, each containing a white rock-like substance that he suspected was crack cocaine. Officer Watson then instructed Officer Wherfel to detain a man at the scene wearing a white T-shirt and light blue basketball shorts. Officer Wherfel and Sergeant Kane arrived at the scene in an unmarked squad car, and as they exited the vehicle, defendant fled. After a short chase, Officer Wherfel arrested defendant. During a custodial search, the officer recovered $111 from defendant. Officer Wherfel acknowledged that a police inventory sheet indicated that he also recovered a digital video recorder from defendant, but he did not recall recovering that item. After the arrests, Office Watson identified defendant, Shaw and Joseph.

¶ 8 The parties stipulated that forensic chemist Gale Gutierrez would testify that the one item recovered from Shaw tested positive for 0.1 gram of cocaine. She would further testify that she tested two of the three items recovered from Joseph, and they were both positive for cocaine, one for 0.1 gram and the other for less than 0.1 gram. The total estimated weight of the three tested items was more than 0.2 gram, but less than 0.3 gram. The trial court found defendant guilty of two counts of delivery of a controlled substance.

¶ 9 At sentencing, the State noted that defendant had eight prior felony convictions, seven of which were for narcotics offenses. The State further noted that in the presentence investigation report (PSI), defendant asked the court for leniency and said that his criminal history was due to

his drug usage. The State argued that defendant was subject to mandatory sentencing as a Class X offender and asked the court to impose a term of 15 years' imprisonment.

¶ 10 In mitigation, defense counsel argued that defendant had been employed as a maintenance man at an apartment complex and as a barber, and that he gave his mother $250 a month for household needs. Counsel argued that all but one of defendant's prior convictions were drug related and pointed out that the PSI indicated that he began using drugs at the age of 11. Counsel presented the court with a certificate indicating that defendant had completed a 120-day drug treatment program with the Gateway Foundation while in custody for this case. She specifically noted that defendant was never given drug treatment for any of his prior convictions, that this was his first experience with treatment, and that he successfully completed the program. In elocution, defendant informed the court that this was the first time he ever received any help with his drug addiction, that he learned a lot, and that he would like to continue with treatment.

¶ 11 The trial court expressly stated that it "considered all the factors that need to be considered, that are statutorily required to be considered regarding this defendant's sentencing." The court found that defendant was subject to mandatory sentencing as a Class X offender based on his criminal background and noted that the minimum sentence was six years. The court found that a 15-year sentence was not necessary, but that "a substantial sentence beyond the minimum" was appropriate. The court specifically stated that defendant's conduct and background caused it concern in relation to his rehabilitation, as well as the public safety. The trial court merged the two counts together and sentenced defendant to a term of nine years' imprisonment. It also awarded him credit for 317 days in custody, and assessed him $1,610 in fines, fees and court costs. The court denied defendant's motion to reconsider his sentence.

¶ 12 On appeal, defendant first contends that he was denied his sixth amendment right to confront the witness when the trial court precluded defense counsel from cross-examining

Officer Watson about his exact surveillance location. Defendant argues that the trial court incorrectly sustained the State's objections without conducting an *in camera* hearing to determine if the officer's exact location should have been disclosed. Defendant asserts that knowledge of the surveillance location was necessary to establish the limits of Officer Watson's observations as the case rested largely on his testimony.

¶ 13 The State argues that the trial court properly exercised its discretion when it minimally limited defendant's cross-examination of Officer Watson's exact surveillance location while still allowing extensive inquiry into the officer's ability to observe the narcotics transactions. The State notes that defense counsel informed the trial court that she was not inquiring about the specific surveillance location, but instead, was only asking about the officer's ability to observe. The State asserts that trial counsel expressly disavowed the argument now being advanced on appeal, and that defendant is prohibited from now claiming that the trial court erred when the court agreed with counsel's statement that the location need not be revealed.

¶ 14 Defendant has a constitutional right to confront the witnesses against him and conduct a reasonable cross-examination. *People v. Davis*, 185 Ill. 2d 317, 337 (1998). However, the trial court may limit the scope of that cross-examination, and the appellate court will not disturb the trial court's ruling unless there has been a clear abuse of discretion that prejudiced defendant. *People v. Frieberg*, 147 Ill. 2d 326, 357 (1992); *People v. Bell*, 373 Ill. App. 3d 811, 818 (2007). To determine whether defendant's confrontation right has been violated, the reviewing court does not look at what defendant was prohibited from doing, but instead, analyzes what he was allowed to do. *People v. Sykes*, 341 Ill. App. 3d 950, 978 (2003). Defendant's confrontation right is satisfied when he is allowed to expose facts from which the fact finder can assess the witness' reliability and credibility. *Bell*, 373 Ill. App. 3d at 818.

¶ 15 Our supreme court has stated that a defendant's agreement to a procedure that he later challenges on appeal "goes beyond mere waiver" and is sometimes referred to as estoppel. *People v. Harvey*, 211 Ill. 2d 368, 385 (2004), citing *People v. Villarreal*, 198 Ill. 2d 209, 227 (2001). It is well settled that " 'under the doctrine of invited error, an accused may not request to proceed in one manner and then later contend on appeal that the course of action was in error.' " *Id.*, citing *People v. Carter*, 208 Ill. 2d 309, 319 (2003). "To permit a defendant to use the exact ruling or action procured in the trial court as a vehicle for reversal on appeal 'would offend all notions of fair play' (*Villarreal*, 198 Ill. 2d at 227), and 'encourage defendants to become duplicitous' ([*People v.*] *Sparks*, 314 Ill. App. 3d [268,] 272 [2000])." *Harvey*, 211 Ill. 2d at 385.

¶ 16 Here, the record reveals that when the State objected to defense counsel's question of whether Officer Watson was located in an apartment building and argued that there was no motion pending regarding the surveillance location, counsel expressly informed the trial court that she was "not inquiring about the specific surveillance location." Counsel stated that she was "not asking for an address" or for an apartment location, but instead, was inquiring about "this officer's ability to observe." The record shows that the trial court advised counsel that there was nothing wrong with her asking questions about the officer's distance from the transaction. The court then allowed counsel to ask several questions related to Officer Watson's ability to observe defendant. The record further shows that the trial court overruled three of the State's objections to counsel's questions, and two of the objections it sustained were based on the form of the questions, and counsel was permitted to rephrase those questions. Pursuant to counsel's questioning, Officer Watson testified that he was not looking through a window, that he was in a location that was two to three stories high, and he estimated his location to be about 20 feet elevated from the ground. We find that counsel was given the exact leeway she requested. Accordingly, defendant cannot now claim on appeal that the procedure to which he agreed was

error. We find no abuse of discretion by the trial court in its minimal limitation of counsel's questioning, and no violation of defendant's right to confront the witness.

¶ 17 We note that defendant alternatively argues that trial counsel rendered ineffective assistance when she failed to file a motion to disclose Officer Watson's exact surveillance location. Defendant acknowledges that counsel stated that she was not trying to determine the officer's specific surveillance location, but instead, was only inquiring about his ability to observe. He argues, however, that counsel had no strategic reason not to file the motion. Defendant conclusively asserts that such motion would have been granted and that the outcome of his trial would have been different.

¶ 18 Claims of ineffective assistance of counsel are evaluated under the two-prong test handed down by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Graham*, 206 Ill. 2d 465, 476 (2003). To support a claim of ineffective assistance of trial counsel, defendant must demonstrate that counsel's representation was deficient, and as a result, he suffered prejudice that deprived him of a fair trial. *Strickland*, 466 U.S. at 687. To establish prejudice, defendant must show there is a reasonable probability that, but for counsel's deficient performance, the result of the trial would have been different. *Id.* If defendant cannot prove that he suffered prejudice, this court need not determine whether counsel's performance was deficient. *Graham*, 206 Ill. 2d at 476. Counsel's determination of whether or not to file a motion is a matter of trial strategy, and is given great deference. *People v. Bryant*, 128 Ill. 2d 448, 458 (1989).

¶ 19 Here, we find that defendant has failed to show how he was prejudiced by counsel's failure to file a motion to disclose the surveillance location. Defendant's conclusory statements that the motion would have been granted and the outcome of the trial would have been different are unpersuasive. Moreover, as stated above, the record shows that counsel had determined that

Officer Watson's exact surveillance location was not necessary. Counsel was only concerned with being able to inquiry about the officer's ability to observe the transactions, and she was permitted to ask questions to test that ability. Based on this record, we find that counsel did not render ineffective assistance.

¶ 20 Defendant next contends that his nine-year sentence is excessive in light of his recent treatment for his drug addiction, his strong potential for rehabilitation demonstrated by his employment history and financial support of his family, and the nonviolent nature of his criminal background. He further contends that the sentence is manifestly disproportionate to the nature of the offense which was nonviolent and did not result in physical harm to anyone. He also claims that the trial court failed to consider his drug addiction and treatment as a mitigating factor.

¶ 21 Defendant acknowledges that he is subject to mandatory Class X sentencing based upon his eight prior felony convictions, seven of which were for narcotics offenses. Class X offenders are subject to a statutory sentencing range of 6 to 30 years' imprisonment (730 ILCS 5/5-8-1(a)(3) (West 2008)), and in this case, we find no abuse of discretion by the trial court in sentencing defendant to a nine-year prison term that falls within that range. *People v. Jones*, 168 Ill. 2d 367, 373-74 (1995). It is presumed that the trial court considered the mitigating evidence contained in the record, and although defendant's potential for rehabilitation must be considered, it is not given greater weight than the seriousness of the offense. *People v. Anderson*, 325 Ill. App. 3d 624, 637 (2001).

¶ 22 Here, the trial court expressly stated that it "considered all the factors that need to be considered, that are statutorily required to be considered regarding this defendant's sentencing." Those factors included defendant's mitigating evidence, which defense counsel noted in detail. Counsel pointed out defendant's employment history, his financial support of his family, his lengthy drug addiction, and his successful completion of the drug treatment program. In

elocution, defendant also commented on his drug treatment and expressed his desire to continue that treatment. The trial court noted that the State requested a sentence of 15 years and found that was not necessary, but that "a substantial sentence beyond the minimum" of 6 years was appropriate. The record shows that the trial court gave express consideration to defendant's potential for rehabilitation when it specifically stated that defendant's conduct and criminal background caused it concern in relation to his rehabilitation, as well as the public safety.

¶ 23 It is not this court's function to weigh the sentencing factors differently and substitute our judgment for that of the trial court. *People v. Fern*, 189 Ill. 2d 48, 53 (1999). Based on this record, we cannot say that the nine-year sentence is manifestly disproportionate to the nature of the offense or that it departs significantly from the intent and purpose of the law. *Id.* at 56.

¶ 24 Defendant next contends that the trial court erred when it imposed a three-year term of MSR because, although he was sentenced as a Class X offender, he was convicted of a Class 2 felony, and therefore, should serve a two-year term of MSR. Defendant argues that the MSR term is based on the class of felony committed, not the sentencing range imposed. Defendant acknowledges that this court rejected the same argument he presents here over 10 years ago in *People v. Anderson*, 272 Ill. App. 3d 537, 541-42 (1st Dist. 1995), and *People v. Smart*, 311 Ill. App. 3d 415, 417-18 (4th Dist. 2000). He argues that those decisions should not be followed because our supreme court's subsequent decision in *People v. Pullen*, 192 Ill. 2d 36 (2000), dictates a different result. In *Pullen*, the court considered the issue of the maximum aggregate length of consecutive sentences a court could impose.

¶ 25 Defendant further acknowledges that several recent cases have considered the issue in light of *Pullen* and have continued to reject his argument, finding that *Pullen* does not change our court's previous conclusion as held in *Anderson* and *Smart*. See *People v. Rutledge*, 409 Ill. App. 3d 22, 26 (1st Dist. 2011); *People v. Lampley*, 405 Ill. App. 3d 1, 13-14 (1st Dist. 2010);

People v. Holman, 402 Ill. App. 3d 645, 652-53 (2d Dist. 2010); *People v. McKinney*, 399 Ill. App. 3d 77, 82-83 (2d Dist. 2010); *People v. Lee*, 397 Ill. App. 3d 1067, 1072-73 (4th Dist. 2010). Defendant also notes that in *People v. Watkins*, 387 Ill. App. 3d 764, 766-67 (3d Dist. 2009), his argument was rejected without mentioning *Pullen*. See also *People v. Allen*, 409 Ill. App. 3d 1058, 1078 (4th Dist. 2011). Defendant urges this court not to follow these cases, claiming they were wrongly decided in that they misread the plain language of the MSR statute and conflict with the logic of *Pullen*. We decline to depart from the reasoning of our earlier decisions, which has been followed by all of the districts of this court that have considered the issue. We therefore find that the three-year term of MSR imposed on defendant as a Class X offender was proper.

¶ 26 Defendant next contends, and the State agrees, that the $5 Court System fee under section 5-1101(a) of the Counties Code (55 ILCS 5/5-1101(a) (West 2008)) was erroneously assessed to him as that fee applies only to violations of the Illinois Vehicle Code. Here, defendant was not convicted of a violation of the Vehicle Code. We therefore vacate that part of the Fines, Fees and Costs order assessing the $5 Court System fee.

¶ 27 The parties also agree that the $200 DNA ID System fee under section 5-4-3(j) of the Unified Code of Corrections (730 ILCS 5/5-4-3(j) (West 2008)) was erroneously assessed to defendant because he was already assessed the fee on four prior occasions and submitted a DNA sample in June 2003 while imprisoned for a prior conviction. See *People v. Marshall*, 242 Ill. 2d 285 (2001). We therefore vacate the $200 DNA fee from the Fines, Fees and Costs order.

¶ 28 We note that in defendant's opening brief, he also argued that the $25 Court Services fee should be vacated because it did not apply to his offense. The State correctly responded that the fee applies to all criminal cases. Defendant then abandoned the issue in his reply brief.

¶ 29 Finally, the parties agree that defendant is entitled to the $5 per day presentence incarceration credit pursuant to section 110-14 of the Code of Criminal Procedure of 1963 (725 ILCS 5/110-14 (West 2008)) to be applied to his $1,000 controlled substance fine. Defendant spent 317 days in presentence custody. He is therefore entitled to a credit of $1,585, which offsets his $1,000 fine in full. Pursuant to our authority (Ill. S. Ct. R. 615(b)(1) (eff. Aug. 27, 1999)), we direct the clerk of the circuit court to amend the Fines, Fees and Costs order to reflect a full credit against the $1,000 controlled substance fine. The parties agree that defendant's adjusted total assessment should be $405.

¶ 30 For these reasons, we vacate the $5 Court System fee and $200 DNA ID System fee from the Fines, Fees and Costs order and direct the clerk of the circuit court to further amend that order to reflect a full credit against defendant's controlled substance fine. We affirm defendant's conviction and sentence in all other respects.

¶ 31 Affirmed as modified.