No. 1-10-0129

FIFTH DIVISION
February 25, 2011

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. 09 CR 3254
	)	
ALEJANDRO ANGUIANO,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge Presiding.

JUDGE EPSTEIN delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Joseph Gordon concurred in the judgment.

O R D E R

HELD: Where the record did not reveal defendant had any viable defense to the charge of delivery of a controlled substance, his trial attorney's failure to mount a defense did not constitute ineffective assistance of counsel; the trial court's judgment was affirmed.

Following a bench trial, defendant Alejandro Anguiano was convicted of delivery of a controlled substance (more than 2,000

grams of cocaine) and sentenced to the minimum prison term of 15 years. On appeal, defendant contends his trial attorney was presumptively ineffective for pursuing an unavailable defense and failing to present an available viable defense. We affirm.

Defendant and three codefendants were charged with delivery of more than 900 grams of cocaine in violation of section 401(a)(2)(D) of the Illinois Controlled Substances Act (Act) (720 ILCS 570/401(2)(D) (West 2008)), a Class X felony carrying a penalty of 15 to 60 years in prison. Prior to trial, defendant's attorney and attorneys for two of the codefendants, Alberto Hernandez and Jose Raul Calvillo, requested conferences in the hope of negotiating pleas to reduced charges. The State objected and the court declined to hold the conferences. Defendant and Hernandez were tried together by the court; Calvillo was tried separately.[1]

At the bench trial of defendant and Hernandez, the State presented the testimony of State Police Officer Gil Gutierrez. On January 20, 2009, Gutierrez was part of a Narcotics and Currency Interdiction (NARCINT) team and was working undercover

[1] Codefendant Hernandez was found "guilty of attempt delivery of a controlled substance, Class I offense on the amount that we have." Codefendant Calvillo was tried in a separate bench trial before the same trial judge and was found guilty of "attempt deliver [*sic*] of controlled substance Class 1 felony."

as a purported purchaser of cocaine from defendant. Prior to that date, Gutierrez had spoken by telephone with defendant once or twice. At 4:39 p.m. on January 20, Gutierrez telephoned defendant to determine whether he was available to set up a meeting for the purpose of negotiating the purchase price of a large amount of cocaine. At about 5:30 p.m., Gutierrez and defendant spoke again by telephone and agreed on the purchase by Gutierrez of two kilos of cocaine. They arranged to meet at a Sam's Club in Countryside, Illinois.

Gutierrez arrived at Sam's Club with a "flash roll" of currency to show he had money to purchase cocaine and wore a device obtained by a court order that would record any conversation he had with defendant and allow other officers to hear him. After defendant arrived at about 6:30 p.m., he and Gutierrez agreed on a sale price for the cocaine of $25,000 per kilo for the two kilos of cocaine, and Gutierrez showed defendant the flash roll. Defendant then left.

Gutierrez phoned defendant again at about 7 p.m. Minutes later, the two men met at a Burger King in Chicago where defendant entered Gutierrez's truck and made a phone call. It was then agreed the purchase would take place at Pete's Fresh Market on South Pulaski. Gutierrez drove himself and defendant to Pete's Fresh Market and parked in the parking lot, where defendant made several more phone calls. In a short time, a blue

Ford Explorer occupied by two people drove up and parked on the driver's side of Gutierrez's car. Defendant in the passenger seat of Gutierrez's car exchanged places with the driver of the Explorer (codefendant Calvillo). After entering Gutierrez's car, Calvillo asked to see the money. Gutierrez told Calvillo the money was in a locked box in the trunk, that defendant had already seen it, and that Gutierrez wanted to see the cocaine.

A passenger in the Explorer made a phone call, after which a red Mitsubishi Eclipse arrived and parked on the passenger side of Gutierrez's car. Codefendant Hernandez exited the Eclipse with an orange bucket and handed the bucket to Calvillo who gave it to Gutierrez. Gutierrez exited his vehicle with the bucket, opened the trunk of his car pretending to retrieve the money, and viewed two black taped brick-shaped objects in the bucket. Gutierrez gave the arrest signal; police officers appeared and arrested defendant and his cohorts.

Following his arrest, defendant gave an oral statement to Officer Gutierrez and other officers, acknowledging that he had arranged the sale of the two kilos of cocaine. Defendant also stated he did not know the other men who had been arrested with him and that the main perpetrator was not among them.

Defendant's trial attorney cross-examined Gutierrez and elicited the fact that he had never seen defendant before the day of the incident. Gutierrez admitted that when he displayed the

flash roll, defendant never asked for or received money from Gutierrez, was never in possession of cocaine, and was not present in Gutierrez's truck when the bucket containing the cocaine was handed to Gutierrez.

Gutierrez's testimony was substantially corroborated by his field supervisor, Frank Spizziri, who had conducted surveillance at Pete's parking lot and observed the delivery of the cocaine.

The parties stipulated to the chain of custody of the cocaine and to the weight of the cocaine as being 2,018 grams.

The State rested. The attorneys for defendant and codefendant Hernandez moved the court for directed findings, which the court denied, and both rested without presenting evidence. The attorneys then gave closing arguments. At that time defendant's attorney argued that the State had failed to prove defendant had the intent of a constructive or actual delivery of cocaine where defendant never handled the bucket containing the cocaine and had no control over it. Defendant's attorney argued there was no evidence defendant had dealt in selling drugs before the date in question and contended, "Judge, this isn't the type of case or conduct that was contemplated when the Super X statute was initiated. This doesn't even fall even close to that situation."

The trial court found that the officers who testified were "credible and compelling, credible beyond a reasonable doubt."

The court found defendant guilty as charged and found Hernandez guilty of attempted delivery. The court observed that defendant "was orchestrating all of what occurred," whereas codefendant Hernandez was less culpable than defendant.

Subsequently, defendant's attorney filed a written motion for a new trial, which was denied. Defendant was sentenced to the minimum prison term of 15 years.

On appeal, defendant contends that his trial attorney was *per se* ineffective by failing to mount a defense to the charge and instead pursuing a futile strategy of what defendant terms judicial nullification. Defendant observes that his trial counsel did not file any pretrial motions, did not make an opening statement, and did not cross-examine Spizziri.

A defendant's claim of ineffective assistance of counsel is guided by the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), which requires deficient performance by counsel and prejudice to the defendant from the deficient performance. *People v. Hodges*, 234 Ill. 2d 1, 17 (2009). Some circumstances of ineffective counsel, however, are so likely to cause prejudice to the accused that prejudice will be presumed. *Strickland*, 466 U.S. at 692, citing *United States v. Cronic*, 466 U.S. 648 (1984). The *Cronic* standard applies where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." *Cronic*, 466 U.S. at 648.

Here, defendant cites *Cronic* in arguing that his trial attorney abandoned adversarial testing of the State's case in favor of pursuing an ineffective "theory of mercy -- asking the judge to ignore the evidence in the case and convict defendant of an unavailable charge of attempt delivery of a controlled" substance. He relies on *People v. Stupka*, 226 Ill. App. 3d 567 (1988), which held that the attempt to deliver an unlawful substance is not a separate crime under the applicable statute. "The express inclusion of an attempt in the substantive offense appears to demonstrate a legislative intent to equate an attempted delivery with the seriousness of a completed delivery if a controlled substance." *Stupka*, 226 Ill. App. 3d at 574. The statute under which defendant was charged defines delivery as "the actual, constructive, or attempted transfer of possession of a controlled substance, with or without consideration, whether or not there is an agency relationship." 720 ILCS 570/102(h) (West 2008).

Defendant argues that his trial attorney was asking for "judicial nullification" or leniency in a bid for a guilty finding of a lesser offense which defendant claims was not available. We view defense counsel's strategy as a request for the application of the rule of lenity, which is followed by Illinois courts and requires that any ambiguity in a criminal statute must be resolved in the way that favors the accused.

People v. Gutman, 401 Ill. App. 3d 199, 215 (2010). Applying the rule is especially appropriate with an enhancement provision. *People v. Maldonado*, 402 Ill. App. 3d 1068, 1074 (2010).

Here, where the trial court found codefendants Hernandez and Calvillo guilty of attempted delivery of a controlled substance, defendant's attorney sought to achieve the same result for his client. In his closing argument to the trial court, defendant's attorney contended: "Judge, this isn't the type of case or conduct that was contemplated when the Super X statute was initiated. This doesn't even fall even close to that situation." His attorney was obviously making a plea for lenity by asserting that the rigid sentencing provision sought to be applied here, which enhances the penalty under the Act for delivery of more than 900 grams of cocaine, was inappropriately applied to defendant where he had no contact with the cocaine or the purchase money. This was a legitimate strategy which was initiated even before trial when the attorneys for defendant and for codefendants Hernandez and Calvillo had requested Rule 402 hearings for their clients, though the requests were denied when the State refused to reduce the charges. Defendant's attorney apparently hoped that the trial court would find defendant guilty of a lesser offense. That hope was not unrealistic and constituted a valid avenue of defense where both codefendants, Hernandez and Calvillo, were found guilty of the lesser charge of

attempted delivery of a controlled substance and were given sentences for a Class 1 felony rather than for a Class X felony.

Defendant's attorney exerted considerable effort in attempting to achieve for defendant the favorable outcome that his codefendants achieved. In closing argument, defendant's attorney argued there was no evidence that defendant knew cocaine was inside the bucket, he never handled the bucket, and had no control over the bucket. Defendant's attorney argued there was no evidence Gutierrez was aware defendant had ever sold any drugs prior to the date in question, that all defendant had done was to make phone calls in Gutierrez's presence without Gutierrez hearing the conversations at the other end, and that the State had failed to prove defendant had the intent of a constructive or an actual delivery of cocaine.

After defendant was found guilty as charged, his attorney filed a written motion for a new trial in which he argued that defendant never was in possession of the cocaine or the purchase money and did not bring the cocaine to the transaction site, and that there was no evidence as to what, if anything, defendant was to be paid for his part in the transaction. The motion also asserted defendant was not more culpable than codefendant Hernandez, who brought the cocaine to the transaction site but was found guilty only of attempted delivery. In presenting the motion, defendant's attorney argued that defendant was being

punished more severely than the men who actually brought the cocaine to the scene and delivered it to the undercover officer. Defendant's attorney's strategy failed, his client was convicted as charged, and the motion for a new trial was denied.

The strategy, however, was legitimate. It failed only because the evidence demonstrated beyond a reasonable doubt that defendant committed the offense charged and was more culpable than his codefendants. Defendant does not challenge the sufficiency of the evidence on appeal. Although defendant did not have actual physical possession of the cocaine, he facilitated its unlawful delivery and was present at the time of its delivery to an undercover police officer. As the trial court noted, defendant orchestrated the transaction. Defendant negotiated with the undercover agent the amount of cocaine to be sold, he negotiated the price, and his series of phone calls set up the actual transaction. Despite the trial court's finding of the two codefendants guilty only of attempted delivery, the court stated at the posttrial motion hearing that neither the State nor the court owed defendant the same result.

Defendant concedes the proposition that his trial attorney had no duty to manufacture a defense where no valid defense exists. *People v. Elam*, 294 Ill. App. 3d 313, 323 (1998). However, defendant urges this court to apply the standard of *per se* ineffectiveness of counsel announced in *Cronic* and followed in

People v. Hattery, 109 Ill. 2d 449, 461 (1985). In *Hattery*, defendant's attorney conceded his counsel's guilt. Here, defendant's brief admits his attorney did not actually concede defendant's guilt and attempted his best to minimize defendant's involvement in the drug transaction. However, this was a case where defendant literally had no defense. "A weak or insufficient defense does not indicate ineffectiveness of counsel in a case where a defendant has no defense." *People v. Ganus*, 148 Ill. 2d 466, 474 (1992).

Defendant contends, however, that prejudice must be presumed because a "viable defense was apparent in this case" which defendant's trial counsel failed to pursue and that this *per se* presumption relieves him of demonstrating prejudice under *Strickland*. Defendant's brief seems to suggest a defense of entrapment because defendant's attorney "went to great lengths arguing that 'this is a one-shot meeting' and the officer had only met defendant that day." Defendant's brief further argues, "Defendant even cried out entrapment at sentencing: 'I am Alejandro Anguiano. I am not a drug dealer. I was just a drug abuser. And his cousin he was the one that induced me to do what I did, to find these guys for the cocaine.' "

Defendant does not explain on appeal how the record indicates he was entrapped to commit the offense merely by the fact someone's cousin induced him to find buyers for cocaine. His

argument of an entrapment defense, unsupported by any reasoning, citation of authorities, or evidence relied on, fails to comply with Supreme Court Rule 341(h)(7) (eff. July 1, 2008) and is waived.

We conclude defendant has not shown that his trial counsel was presumptively ineffective under *Hattery* and *Cronic*, and he has not argued prejudice under *Strickland*. Defendant has shown no available alternative defense that his attorney might have pursued at trial and has failed to show that incompetence by his trial attorney resulted in an unfair trial. Consequently, we affirm the judgment of the trial court.

Affirmed.