SECOND DIVISION
Opinion Filed March 20, 2012
Modified Upon Denial of Rehearing May 1, 2012

No. 1-10-0583

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. 07 CR 21472
	)	
DANIEL CROCKETT,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Quinn and Justice Cunningham concurred in the judgment.

O R D E R

Held: Defense counsel was not ineffective for failing to argue that defendant's sentence for attempted first degree murder should be reduced because he was provoked within the meaning of 720 ILCS 5/8-4(c)(1)(E) (West 2010). Defendant's convictions for one count of attempted murder and aggravated battery with a firearm violated the one-act, one-crime doctrine. Defendant is entitled to one additional day of presentence custody credit.

¶ 1 Following a bench trial, defendant Daniel Crockett was convicted of two counts of attempted first degree murder and one count of aggravated battery with a firearm. He was sentenced to concurrent prison terms of 31 years for each count of attempted murder, which

included the mandatory enhancement for personally discharging a firearm, and 10 years for aggravated battery with a firearm. On appeal, defendant contends that his trial counsel was ineffective for failing to argue that his sentence for attempted murder should have been reduced where he was provoked by the victim. He also contends that his conviction for aggravated battery with a firearm and one of his convictions for attempted murder should be vacated under the one-act, one-crime doctrine, and that he is entitled to one additional day of presentence custody credit.

¶ 2 The record shows that at about 11 p.m. on June 20, 2007, defendant shot Darrin Carter multiple times near the intersection of Oak and Crosby Streets in Chicago. Defendant was subsequently arrested and charged with multiple offenses, including attempted first degree murder and aggravated battery with a firearm.

¶ 3 During opening statements, defense counsel argued that defendant worked for the victim, Darrin Carter, selling drugs. Carter confronted defendant because he believed that defendant was not being truthful with him. During the confrontation, Carter threatened defendant with a gun, but defendant disarmed Carter. According to defense counsel, defendant fired shots at Carter in self-defense and then escaped.

¶ 4 At trial, Darrin Carter, a convicted felon, testified that he was 30 years old and has known defendant since Carter was 13. Carter and defendant sold drugs together, and, at about 11 p.m. on June 20, 2007, he was meeting with defendant at Oak and Crosby Streets. Defendant asked Carter to walk around the corner with him, and the two men started walking in an alleyway and talking. As they came out of the alleyway, they stopped talking and defendant shot Carter in the back. When Carter fell to the ground, defendant stood over him and asked him where the drugs were located. Carter told defendant that the drugs were in his pocket, and defendant took the drugs and money from his pocket. Carter then got up, started running, and defendant shot him

several more times. Carter fell to the ground near a police van, lost consciousness, and woke up in the hospital. Carter did not have a gun with him at the time he was shot. Police spoke to Carter at the hospital on July 24, 2007, and, about a week later, the police returned to the hospital and showed Carter a photo array. Carter identified defendant in the array as the shooter.

¶ 5 Officer Vargas testified that at about 11 p.m. on June 20, 2007, he was working with his partner Officer John Kelyana in Cabrini Green and heard a gunshot. Vargas drove to where he heard the sound and saw defendant firing a handgun at another person. The victim ran towards the police and collapsed near them. The victim did not have a gun on his person, and Kelyana stayed with him while Vargas followed defendant, but Vargas lost sight of him. Vargas went back to the scene of the crime and an ambulance took the victim to the hospital. The next day, defendant was taken into custody and Vargas identified him as the shooter. Officer Kelyana, who also identified defendant as the shooter, testified similarly to Vargas.

¶ 6 Amy Maynard testified on behalf of defendant that in the late evening hours of June 20, 2007, she heard gunshots outside of her residence located at 1014 North Crosby Street, but did not see a shooter. When she observed an individual lying in the street from her window, she exited her residence. Maynard did not see any individuals running from the area, but did observe police on the scene. Stephen Deshler, who lived with Maynard, testified similarly to her.

¶ 7 Detective Rich Szczepkowicz testified that on July 24, 2007, he was investigating the shooting in question. Detective Szczepkowicz interviewed Carter in the hospital. Carter told him that on June 20, 2007, he and defendant were friends, he was initially carrying defendant's gun, and they were driving around together. Carter decided to go to a store near the intersection of Larrabee and Oak Streets, parked his car, and was about to start walking when defendant asked Carter for his gun. After Carter gave him the gun, defendant shot him.

¶ 8 Defendant testified that he worked for Carter selling drugs. On June 20, 2007, Carter

visited defendant at his mother's residence at Oak and Crosby Streets. Defendant invited Carter inside the house, but Carter stated that he wanted to go with defendant to a drug house at 660 West Division Street. As they were walking to the building, Carter accused defendant of selling drugs for another dealer. Defendant denied the accusation, but Carter told defendant that he was lying, pulled out a gun, and pointed it at him. Defendant grabbed the gun from Carter, who started kicking defendant. As Carter kicked defendant, defendant lost his balance, shot the gun four times, and ran. Defendant did not see where he shot Carter, and denied seeing any police officers at the scene. When defendant reached his car, he drove away and got into a car accident. Despite getting into a car accident, defendant continued driving until the police called him from his house phone. The police told defendant to return home, he complied, and was subsequently arrested.

¶ 9 During closing arguments, defense counsel stated that Carter brought the gun to the scene, threatened defendant, was the aggressor, and defendant was ultimately able to grab the gun from Carter and shoot him. The trial court found defendant guilty of two counts of attempted murder and one count of aggravated battery with a firearm. In doing so, the court stated that defendant did not engage in self-defense after he allegedly grabbed the gun from Carter and started shooting. Moreover, the trial court found defendant's testimony to "not be credible at all," and that he was "making it up as he went along."

¶ 10 Before sentencing, defense counsel sought to recall his witnesses, Maynard and Deshler, who contacted defense counsel after the trial with additional information. The court agreed, and an evidentiary hearing was held. At the hearing, Maynard testified that after she heard the shooting and looked out of her window, she saw a man fall in the street. When she saw him fall, she did not see anybody else in the street with him, nor did she see any vehicles or police. Maynard went to the roof of her building to get a better look at the scene, and saw several police

and police vehicles, including a police van. The van stopped about 30 to 40 feet away from the person lying on the ground, and police exited the van to check on him. Deshler testified that after hearing four shots he looked outside of his window and saw a man lying in the street. He did not initially see any police vehicles at the scene, but a few seconds later he saw a police van arrive. After counsel presented arguments based on the additional evidence, the trial court considered the new evidence, stated that Maynard and Deshler only observed events that occurred after the shooting, and found that it made no errors in its initial finding of guilt.

¶ 11 At the sentencing hearing, before the parties presented their arguments in aggravation and mitigation, the trial court stated, "I'm concerned about all these mandatory extra bits of time that the legislature adds on in a lot of these cases. That said the case is what it is. This is a cold-blooded shooting in this court's mind right in front of the police in a residential neighborhood. I cannot escape the conclusion that he's trying to kill this man ***." In sentencing defendant, the trial court stated, "I agree with [defense counsel] that the minimum sentence for the shooting of a drug dealer even in the manner it happened will by far meet the interest of justice and perhaps beyond so because I have to I'll give him the minimum." The court then sentenced defendant to two concurrent prison terms of 31 years for each attempted murder count, and a concurrent term of 10 years for aggravated battery with a firearm.

¶ 12 On appeal, defendant first contends that defense counsel was ineffective for failing to argue that his sentence for attempted first degree murder should be reduced to a Class 1 felony pursuant to section 8-4(c)(1)(E) of the Criminal Code of 1961 (Code) (720 ILCS 5/8-4(c)(1)(E) (West 2010)), on the ground that he was acting under a sudden and intense passion resulting from a serious provocation. Defendant maintains that he was provoked when Carter pulled out a gun and threatened him during a heated confrontation in which Carter accused him of selling drugs to another dealer.

¶ 13 Section 8-4(c)(1)(E) of the Code provides that attempted first degree murder is a Class X felony, except that:

> "if the defendant proves by a preponderance of the evidence at sentencing that, at the time of the attempted murder, he or she was acting under a sudden and intense passion resulting from serious provocation by the individual whom the defendant endeavored to kill, or another, and, had the individual the defendant endeavored to kill died, the defendant would have negligently or accidentally caused that death, then the sentence for the attempted murder is the sentence for a Class 1 felony." 720 ILCS 5/8-4(c)(1)(E) (West 2010).

A "serious provocation" for purposes of section 5-4 has long been limited by our common law to only four categories: (1) substantial physical injury or assault, (2) mutual quarrel or combat, (3) illegal arrest, and (4) adultery with the offender's spouse. See *People v. Lauderdale*, 2012 IL App (1st) 100939, ¶ 24.

¶ 14 In order to succeed on an ineffective assistance of counsel claim, defendant must demonstrate that (1) his counsel's representation fell below an objective standard of reasonableness and that (2) he was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *People v. Enis*, 194 Ill. 2d 361, 377 (2000) (citing *Strickland*, 466 U.S. at 697).

¶ 15 In this case, defendant relies on the "mutual combat" category for his argument that Carter's shooting was the result of a serious provocation. It is certainly true that, as defendant argues, there was some evidence presented at trial that Carter pulled a gun on defendant and

threatened him, and that defendant only shot Carter after defendant was able to wrest the weapon away from him during the fight. It is arguable (and in fact the State concedes) that this evidence, if believed, would be sufficient to prove by a preponderance of the evidence that defendant was acting under an intense passion due to mutual combat when he shot Carter.

¶ 16 The problem for defendant is that the record is very clear that this evidence was *not* believed by the trier of fact. The only evidence of mutual combat came from defendant's own testimony, and the trier of fact emphatically rejected defendant's version of events. In its ruling, the court specifically stated that "[t]he fact of the matter is I find [defendant's] testimony to not be credible at all on those counts. He was just making it up as he went along. He's a multi-convicted felon. I do not believe he's credible." The court also found that defendant shot Carter in the back, and it stated that Carter's testimony was corroborated by the testimony of the police officers who witnessed the shooting. At the sentencing hearing, the court reiterated that it believed Carter's account of the shooting, noted that the shooting happened in front of police, and stated that defendant shot the victim in cold blood. The inescapable conclusion from the trial court's rejection of defendant's testimony is that, even if defense counsel had advanced the claim that defendant was provoked, such a claim had no chance of success. There was no other evidence in the record that supported defendant's claim of mutual combat, so there is no reason to believe that the trial court would have accepted a section 8-4(c)(1)(E) argument at the sentencing hearing. There is no reasonable probability that the result would have been different had the argument been raised, meaning that defendant was not prejudiced by counsel's decision not to raise the issue. Because there was no prejudice, defense counsel was not ineffective.

¶ 17 We note in passing that defendant also argues that the trial court's opinion about the severity of the minimum sentence for this offense supports his claim that counsel was ineffective for failing to invoke section 8-4(c)(1)(E) of the Code. Defendant specifically relies on the court's

comments relating that the minimum sentence of 31 years was a long sentence for someone who shot a drug dealer who recovered. However, the fact that the trial court stated that the minimum sentence was too harsh in this case does not show that it would have been receptive to the argument that defendant was provoked, so defendant's argument on that point is unpersuasive.

¶ 18 Defendant next maintains, and the State concedes, that this court should vacate his conviction for aggravated battery with a firearm and one of his two convictions for attempted first degree murder because they violate the one-act, one-crime rule.

¶ 19 The one-act, one-crime doctrine prohibits multiple convictions when the convictions are carved from precisely the same physical act. *People v. Miller*, 238 Ill. 2d 161, 165 (2010); *People v. King*, 66 Ill. 2d 551, 566 (1977). If the same physical act forms the basis for two separate offenses charged, a defendant could be prosecuted for each offense, but only one conviction and sentence may be imposed. *People v. Segara*, 126 Ill. 2d 70, 77 (1988). Where guilty verdicts are obtained for multiple counts arising from the same act, a sentence should be imposed on the most serious offense. *People v. Garcia*, 179 Ill. 2d 55, 71 (1997).

¶ 20 Here, the mittimus shows that the trial court found defendant guilty of attempted first degree murder (count 1), attempted first degree murder, including the firearm enhancement (count 2), and aggravated battery with a firearm (count 5), based on the shooting of the victim. Because the convictions are based on the same physical act, the three convictions cannot stand under the one-act, one-crime rule. We thus vacate defendant's convictions for aggravated discharge of a firearm and the attempted first degree murder conviction that does not include the firearm enhancement, because they are the less serious offenses. See *People v. Mimes*, 2011 IL App. (1st) 082747, ¶46 (vacating the defendant's conviction for aggravated battery with a firearm where he was also convicted of attempted murder based on the same physical act). Pursuant to our authority under Illinois Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), we vacate

defendant's convictions and sentences for attempted first degree murder (count 1) and aggravated battery with a firearm (count 5).

¶ 21 Defendant finally maintains, and we agree, that the mittimus must be amended to reflect one additional day of presentence custody credit. The record establishes that defendant was arrested on June 21, 2007, and sentenced on January 29, 2010. The mittimus incorrectly awards defendant only 952 days of presentence custody credit. Defendant specifically maintains that the mittimus must be amended to reflect a total of 953 days of credit against his sentence. The State does not respond to defendant's contention.

¶ 22 A reviewing court may correct the mittimus at any time. *People v. Quintana*, 332 Ill. App. 3d 96, 110 (2002). The right to receive per diem credit is mandatory, and normal waiver rules do not apply. *People v. Williams*, 328 Ill. App. 3d 879, 887 (2002). A defendant is statutorily entitled to credit for all "time spent in custody as a result of the offense for which the sentence was imposed." 730 ILCS 5/5-4.5-100(b) (West 2010); *People v. Latona*, 184 Ill. 2d 260, 270 (1998). A defendant held in custody for any part of a day should be given credit against his sentence for that day. *People v. Smith*, 258 Ill. App. 3d 261, 267 (1994). However, a defendant is not entitled to presentence custody credit for the date of sentencing. *People v. Williams*, 239 Ill. 2d 503, 510 (2011). Therefore, we award defendant presentence custody credit from June 21, 2007, through January 28, 2010, which amounts to 953 days.

¶ 23 Accordingly, we vacate the judgments entered on defendant's convictions of attempted first degree murder (count 1) and aggravated battery with a firearm (count 5); order the clerk of the court to correct the mittimus to reflect a single conviction for attempted murder, including the mandatory enhancement for personally discharging a firearm (count 2); amend the mittimus to award 953 days of presentence custody credit to defendant; and affirm the judgment of the trial court in all other respects.

¶ 24 Affirmed in part; vacated in part; mittimus corrected.