2013 IL App (1st) 103013-U

FIFTH DIVISION
September 6, 2013

No. 1-10-3013



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| PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County, Illinois |
| v. | ) | |
| | ) | No.2009 CR 11857 |
| RICHARD FRANKLIN, | ) | |
| | ) | Honorable |
| | ) | Victoria Stewart and |
| | ) | Honorable |
| Defendant-Appellant. | ) | Willaim J. Kunkle |
| | ) | Presiding |

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JUSTICE BILL TAYLOR delivered the judgment of the court.
Justices McBride and Palmer concurred in the judgment

**O R D E R**

¶ 1 *Held:* (1) After defendant's request for new counsel, the trial court's allowing trial counsel to argue a posttrial motion he had filed on defendant's behalf and appointing a public defender, first as standby and then for sentencing purposes, violated defendant's sixth amendment right to counsel of his choice; and (2) the court properly imposed the term of mandatory supervised release for Class X sentencing pursuant to the statute for enhanced sentencing of repeat felony offenders; also defendant's mittimus will be reduced to reflect days spent in presentencing

custody.

¶ 2 BACKGROUND

¶ 3 Following a bench trial, defendant Richard Franklin was found guilty of four counts of unlawful use of a weapon by a felon. He was sentenced as a Class X felon to 10 years in the Illinois Department of Corrections.

¶ 4 The evidence at trial established that on June 2, 2009, several officers executed a search warrant at 520 West 104th Street in Chicago. The complaint for the search warrant and the search warrant itself were issued on June 2, 2009, and listed Michael Franklin and the premises of 520 West 104th Street as the person and place to be searched. Michael Franklin is defendant's brother.

¶ 5 Officer Foertsch, present when the search warrant was executed, testified that when the police entered, several people scattered. Eventually, everyone was gathered and placed in the dining room to secure the premises. The officers then conducted a search of the premises. Foertsch went upstairs and observed defendant lying on the floor being handcuffed. Foertsch testified there were three or four bedrooms on the second floor and after entering one he observed a plate of food and narcotics in plain view.

¶ 6 A K-9 team then searched the all the bedrooms and Foertsch did a systematic search of the bedroom he had entered. He found two loaded 9–millimeter handguns under blankets and 9–millimeter ammunition under the bed. Further search of the bedroom revealed several documents addressed to defendant at 520 West 104th Street in Chicago.

¶ 7 Officer Kasper testified he was also part of the team that executed the search warrant.

Kasper was informed that two handguns were recovered in one of the bedrooms on the second floor as well as documents containing defendant's name and the address of the residence. Kasper testified he found defendant in the dining room with the other individuals. He asked to speak to defendant in the kitchen along with Officer Mohammad. Kasper then advised defendant of his *Miranda* rights and asked defendant about the guns. Defendant admitted the guns were his; at which time he was taken into custody.

¶ 8 Thereafter, the State tendered a certified copy of a prior conviction for defendant, which was entered into evidence.

¶ 9 After the State rested, defendant called Ida Johnson. Johnson testified she was a resident of 520 West 104th Street in June of 2009, and lived there with her five children. She also testified that for at least five days prior to defendant's arrest he did not stay at the residence because he was staying at his sister's house. She stated defendant arrived about 15 to 20 minutes prior to the execution of the search warrant. She said defendant never left the dining room and she never heard him receive his *Miranda* rights or make a comment about the guns. On cross-examination, Johnson admitted that defendant resided at 520 West 104th Street and received mail there. Johnson also testified that no one except for Barbara Franklin, the owner of the house, had their own bedroom and that she herself slept on the couch.

¶ 10 Sakita Burks, a family friend, testified she was in an upstairs bedroom at the time of the execution of the search warrant. As police escorted her to the dining room she did not see defendant on the second floor but found him sitting in a chair in the dining room. She did not see officers take defendant into the kitchen.

¶ 11 Anita Franklin, defendant's sister, testified that defendant stayed at her house every night from May 29 until he was arrested. She admitted she could not account for his whereabouts between 6:30 a.m. and 8:30 p.m.

¶ 12 Barbara Franklin, defendant's mother, testified, she owned the residence at 520 West 104th Street. She testified defendant lived at the residence and received mail there. She stated that for the five days prior to defendant's arrest he was staying at his sister's house. She testified that when she was brought to the dining room and told to lie on the floor, defendant was in the dining room and she never saw him leave the dining room. She testified she did not hear officers give defendant his *Miranda* rights or hear defendant say the guns were his.

¶ 13 Defendant, testifying on his own behalf, stated that on June 2, 2009, he was at 520 West 104th Street having arrived about 30 minutes before the police arrived. He said he had been staying at his sister's house for the five-day period before his arrest. He testified he never went upstairs, never was taken to the kitchen, never was read his *Miranda* rights, and never told the police the guns were his. On cross-examination, defendant testified he had given 520 West 104th Street to his parole officer as his place of residence. He also stated he lived at his mother's and his sister's homes.

¶ 14 Michael Franklin was called as a witness and was not questioned once he asserted his fifth amendment right to remain silent. Defense then rested.

¶ 15 After hearing closing arguments, the trial court found defendant guilty of all charges. The court specifically determined that defendant's principal place of abode was 520 West 104th Street. The court found defendant possessed the weapons within the meaning of the statute and

was a convicted felon.

¶ 16 On December 29, 2009, defendant's retained trial counsel filed a motion for new trial. On January 22, 2010, defendant filed a *pro se* motion to vacate the judgment and a *pro se* motion for a new trial. Defendant alleged he was not proven guilty beyond a reasonable doubt and trial counsel was ineffective for not moving to quash the arrest or suppress evidence.

¶ 17 On January 28, 2010, at a hearing at which trial counsel waived defendant's appearance, the trial court informed counsel of the *pro se* motions filed by defendant. Trial counsel indicated he had never received a copy and the motions were withdrawn at trial counsel's request.

¶ 18 On February 14, 2010, trial counsel filed an amended motion for a new trial. On February 17, 2010, at a hearing on the motion, trial counsel argued that the trial court erred in rulings on the admission of evidence and that the State failed to prove defendant guilty beyond a reasonable doubt. Furthermore, trial counsel informed the court that defendant did not want trial counsel to represent him. Defendant then chose to be represented by a public defender. The trial court then appointed a public defender, as standby counsel for the motion on a new trial and then as counsel for sentencing. Trial counsel then argued his motion for a new trial, the State argued in response and the trial court denied the motion for a new trial.

¶ 19 Trial counsel then withdrew. The trial court indicated defendant's previously withdrawn *pro se* motion was untimely and the court continued the matter for sentencing.

¶ 20 On May 27, 2010, the case came before the trial court for sentencing. The court noted that defendant had five felony convictions which were greater than Class 2. Based on this background, the trial court found defendant was a Class X felon and sentenced him to 10 years in

the Illinois Department of Corrections. Defendant asked to present witnesses in mitigation. The trial court noted that she had already sentenced defendant, and she would re-open sentencing to allow defendant time to gather witnesses and any evidence that he wished to present.

¶ 21 On September 17, 2010, the case was before another judge for sentencing. Defendant presented three witnesses in mitigation and also spoke on his own behalf. After hearing arguments in aggravation and mitigation, the court sentenced defendant to 10 years imprisonment and three years mandatory supervised release.

¶ 22 ANALYSIS

¶ 23 On appeal, defendant contends the trial court erred in the following ways: (1) denying his sixth amendment right to counsel by permitting his retained trial counsel to argue posttrial motions when defendant had previously indicated that he no longer wished to be represented by that attorney, (2) failing to conduct a hearing under *People v. Krankel*, 102 Ill. 2d 181 (1984), on defendant's *pro se* posttrial motion alleging ineffective assistance of counsel, and (3) imposing a three–year mandatory release term instead of the two–year mandatory supervised release term imposed for Class 2 felonies because he was convicted of a Class 2 felony and only sentenced as a Class X offender because of his criminal history. He also contends his mittimus should be corrected to reflect accurately presentencing credit. We consider these contentions in turn.

¶ 24 Initially, we respond to the issue of timeliness of the filing of defendant's *pro se* motion of ineffective assistance of counsel. During a hearing on defendant's motion for a new trial, the trial court stated that his *pro se* motion of ineffective assistance of counsel was untimely. Our supreme court said in *Patrick*: "It is true that section 116-1(b) says a defendant must file a written

motion for a new trial within 30 days of the entry of a finding of or the return of a verdict. However, an exception to that rule is if a defendant is seeking a new trial based on claims of the ineffective assistance of counsel and the claim is raised before a notice of appeal is filed." *People v. Patrick*, 2011 IL 111666, ¶ 42; see 725 ILCS 5/116-1 (West 2006). We find the exception applies in the case at bar.

¶ 25 Defendant's first contention that he was denied his sixth amendment right to counsel of his choice when he told the court he wanted to proceed with the public defender on his posttrial motion for a new trial instead of his privately retained attorney and the trial court appointed the public defender to act as standby counsel while the privately retained attorney argued the motion. The State counters that defendant was afforded his right to counsel of his choice by the appointing of the public defender. We agree with defendant.

¶ 26 The sixth amendment to the United States Constitution provides: "[i]n all criminal prosecutions, the accused shall enjoy the right *** to have the Assistance of Counsel for his defense." U.S. Const. Amend. VI. "The Supreme Court has held that the right to retained counsel of choice is included in the sixth amendment right to counsel." *People v. Baez*, 241 Ill. 2d 44, 104-105 (2011) (citing *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147-48 (2006) and *Wheat v. United States*, 486 U.S. 153, 159 (1988)). "The Illinois Constitution's guarantee that 'the accused shall have the right to appear and defend in person and by counsel,' likewise encompasses the right to counsel of choice."*Baez,* 241 Ill. 2d at 105 *(quoting* Ill. Const. 1970, art. I, § 8, and citing *People v. Holmes*, 141 Ill. 2d 204, 217 (1990)). "Violations of the right to counsel of choice are structural errors not subject to harmless–error review, and they therefore do

not depend on a demonstration of prejudice by defendant." *Baez,* 241 Ill. 2d at 106 (quoting *Gonzalez-Lopez*, 548 U.S. at 147-48).

¶ 27 However, " 'while the right to select and be represented by one's preferred attorney is comprehended by the Sixth amendment, the essential aim of the amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers.' " *Baez*, 241 Ill. 2d at 105 (quoting *Wheat,* 486 U.S. at 159). "Thus, the right to counsel of choice is circumscribed in several important respects." *Baez,* 241 Ill. 2d at 106 (quoting *Gonzalez-Lopez* 548 U.S. at 144, quoting *Wheat,* 486 U.S. at 159); see *People v. Tucker*, 382 Ill. App. 3d 916, 920 (2008) ("[t]he right to counsel of choice, while fundamental, may be limited in some instances). The courts have recognized a trial court's 'wide latitude in balancing the right to counsel of choice against the needs of fairness and against the demands of its calender.' " *Baez,* 241 Ill. 2d at 106 (quoting *Gonzalez-Lopez*, 548 U.S. at 152).

¶ 28 In the case at bar, at the hearing on trial counsel's amended motion for a new trial, defendant indicated that he wanted to discharge his private counsel. The trial court gave defendant three choices: (1) proceed with trial counsel; (2) continue the case so he could hire a new counsel; or (3) proceed with a public defender. Defendant said he wanted a public defender. The trial court then appointed a public defender on a standby basis and allowed trial counsel to argue the motion before withdrawing.

¶ 29 Defendant relies on *People v. Abernathy*, 399 Ill. App. 3d 420 (2010), as instructive. In *Abernathy*, during posttrial proceedings, the trial court denied the defendant's request to

discharge his privately retained attorney and to appoint the public defender. *Abernathy*, 399 Ill. App. 3d at 430-31. When the court considers a defendant's desire to discharge a privately retained counsel in favor of court-appointed counsel, no special showing other than indigence is required. *Id.* at 429 (citing *People v. Ortis*, 800 P.2d 547, 553 (Cal. 1990)). This court found that the trial court should have allowed the defendant to show whether he was indigent and appoint a new counsel if that were the case. *Id.* at 431. The court held that the trial court's failure to make the inquiry violated defendant's fundamental right to counsel. *Id.* "Where the court fails to determine eligibility for appointed counsel for a defendant who requests it, the appropriate remedy is reversal and remand with directions to the court to ascertain the defendant's financial status and, if it determines that he or she is indigent, to appoint counsel." *Abernathy*, 399 Ill. App. 3d at 427 (citing *People v. Dass*, 226 Ill. App. 3d 562, 566 (1992)). We find *Abernathy* inapposite. In the case at bar, at defendant's request, the trial court appointed a public defender, first, on a standby basis, and then for sentencing purposes. The trial court denied defendant's choice of counsel when defendant requested a public defender to argue his posttrial motion and the court allowed defendant's trial counsel to argue this motion.. "A choice-of-counsel violation occurs whenever the defendant's choice is wrongfully denied." (Emphasis omitted.) *Gonzalez-Lopez,* 548 U.S. at 150. Once defendant indicated his desire to discharge his trial counsel and avail himself of the services of a public defender, trial counsel should have been discharged and the public defender appointed. In light of the above, we find defendant was denied his sixth amendment right to counsel of his choice. We remand for a hearing on a motion for a new trial.

¶ 30 The State further contends that defendant's silence must be viewed as acquiescence in the

trial court's decision to delay the appointment of new counsel until after the posttrial motion had been argued. It is well settled that "[w]here a defendant does not object to his counsel's representation, he is deemed to have acquiesced in that representation." *People v. Assenato*, 257 Ill. App. 3d 1026, 1029 (1994) (citing *People v. Herrera*, 96 Ill. App. 3d 851, 855 (1981)). In the instant case, the record indicates two instances where defendant requested new counsel; thus, *Assenato* is inapposite. Moreover, having concluded that defendant was denied his counsel of choice, we need not address this argument.

¶ 31 Because we are already remanding for a hearing on defendant's motion for a new trial, we need not consider defendant's contention that the trial court erred by failing to conduct a *Krankel* hearing to determine whether defendant should have had other counsel appointed to argue his posttrial motion alleging ineffective assistance of counsel. See *Krankel,* 102 Ill. 2d at 181.

¶ 32 We now turn to defendant's argument that his three–year mandatory supervised release (MSR) should be reduced to a two–year MSR based on his Class 2 felony conviction and should not be based on his Class X sentencing provision. The State maintains that MSR is a mandatory component of sentencing and that defendant's three–year MSR is mandated by statute and is correct. We agree.

¶ 33 When defendant committed the underlying offense, four counts of unlawful use of a weapon by a felon was a Class 2 felony. 720 ILCS 5/24-1,1(a) (West 2008). He had also been convicted of multiple prior felonies. In 2009, when defendant committed the felonies at issue in this case, section 5.4.5-95(b), previously 5-5-3(c)(8), of the Unified Code of Corrections (Code) provided that an offender of defendant's age with defendant's criminal history shall be sentenced

as a Class X offender. 730 ILCS 5/5-4.5-95(b) (West 2010). Section 5-8-1(d) provides that "every sentence shall include as though written therein [an MSR] term in addition to the term of imprisonment." 730 ILCS 5/5-8-1(d) (West 2008). Section 5-8-1(d)(1) requires a three–year MSR term "for *** a Class X felony." 730 ILCS 5/5-8-1(d)(1) (West 2008). This additional MSR is a part of a defendant's sentence. *People v. Mckinney*, 399 Ill. App. 3d 77, 80-81 (2010); *People v. Whitfield*, 217 Ill. 2d 177, 188 (2005).

¶ 34 Defendant contends that even though the law mandates that he be sentenced as a Class X offender, the offense of which he was found guilty, *i.e.*, four counts of unlawful use of a weapon by a felon, is a Class 2 felony. Thus, defendant argues that he should receive a two–year MSR term, which is the MSR term imposed on those defendants who are convicted of Class 2 felonies. Defendant concedes this court has repeatedly held that a defendant sentenced as a Class X offender receives the Class X MSR term of three years. See *People v. Brisco,* 2012 IL App (1st) 101612*,* ¶¶ 59-62*; People v. Allen,* 409 Ill. App. 3d 1058, 1078 (2011); *People v. Rutledge*, 409 Ill. App. 3d 22, 26 (2011); *People v. Lee*, 397 Ill. App. 3d 1067, 1072-73 (2010); *People v. Watkins*, 387 Ill. App. 3d 764, 766-67 (2009); *People v Smart*, 311 Ill. App. 3d 415, 417-18 (2000); *People v. Anderson*, 272 Ill. App. 3d 537, 541-42 (1995). Nevertheless, defendant claims that our supreme court's decision in *People v. Pullen*, 192 Ill. 2d 36 (2000), dictates that a defendant convicted of a Class 2 felony, but sentenced as a Class X offender, should receive the term of MSR for Class 2 felonies.

¶ 35 Defendant argues that *Pullen* stands for the proposition that Class X sentencing eligibility under section 5-5-3(c)(3) will not trump a sentencing statute written in terms of felonies

committed. This argument overlooks a critical difference between the MSR statute at issue in the case at bar and the consecutive sentencing provision considered in *Pullen*. The former specifies part of the sentences for a defendant's offense, while the latter delineates how separate sentences for separate crimes are served. In *Pullen*, because of his prior convictions, the defendant was sentenced as a Class X offender following his negotiated plea of guilty to five counts of burglary. *Pullen*, 192 Ill. 2d at 42-43. Defendant's sentence resulted in an aggregate term of 30 years imprisonment, two years greater than the sum of maximum permissible extended–term sentences for two Class 2 offenses. *Id*. There was no dispute that the defendant was to be sentenced as a Class X offender, but the issue was whether the maximum was the sum of the maximum permissible extended-term sentences for Class X or Class 2 offenses. *Pullen,* 192 Ill. 2d at 46. The *Pullen* court concluded that the offense was explicitly defined as a Class 2 felony and the character and classification of those offenses remained, regardless of whether the defendant was subject to the sentence enhancement or not. *Id*. Therefore, since the sentence imposed exceeded the maximum aggregate term for Class 2 felonies, the sentence was void. *Id*., see *People v. Lampley*, 405 Ill. App. 3d 1, 13-14 (2010). "The statute considered in *Pullen*, does not specify what sentence a Class X offender receives. Rather, it merely limits the extent to which separate sentences for separate offenses may be served consecutively." *McKinney*, 399 Ill. App. 3d at 83 (citing *Lee,* 397 Ill. App. 3d at 1073). Therefore, in the case at bar, we disagree with defendant's application of *Pullen* and agree with the State that defendant was properly sentenced.

¶ 36 Defendant further argues that the plain language of the applicable statute controls and it dictates that having been convicted of four counts of a Class 2 felony, he is subject to a two–year

MSR. The State counters that the plain language of the applicable statutes dictates that defendants sentenced as Class X offenders shall receive the same three–year MSR term imposed on defendants convicted of Class X felonies. In fact, the *Lee* court specifically rejected defendant's argument that *Pullen* mandates a change in his MSR term. If a defendant satisfies the provisions of section 5-5-3(c)(8) of the Code (730 ILCS 5/5-5-3(c)(8) (West 2006)), that section provides "such defendant shall be sentenced as a Class X offender." Section 5-8-1(d) of the Code (730 ILCS 5/5-8-1(d) (West 2008)) states "every sentence shall include as though written therein a term in addition to the term of imprisonment." As noted in *Smart,* 311 Ill. App. 3d at 417-18, that provision makes the MSR term part of the sentence. *Lee,* 397 Ill. App. 3d at 1072-73. Both the *McKinney* and *Lee* courts considered the application of *Pullen* and held that a defendant sentenced as a Class X offender is required to serve the Class X MSR term of three years. *Rutledge*, 409 Ill. App. 3d at 26; *McKinney,* 399 Ill. App.3d at 83; *Lee,* 397 Ill. App. 3d at 1073. Defendant acknowledges *McKinney* and *Lee*, but argues that they were wrongly decided. We, however, see no reason to depart from these well–reasoned decisions.

¶ 37 "The fundamental rule of statutory construction is to give effect to the intent of the legislature." *Smart,* 311 Ill. App. 3d at 417 (citing *A.P. Properties , Inc. v. Goshinsky*, 186 Ill. 2d 524, 532 (1999)). " 'In determining legislative intent, courts consider the reason and necessity for the statute, the evils to be remedied, and the objectives to be obtained. Courts avoid construing the statute so as to defeat its purpose or yield an absurd or unjust result.' " *Smart,* 311 Ill. App. 3d at 418 (quoting *In re K.B.J.*, 305 Ill. App. 3d 917, 921 (1999)). "It would make little sense for the legislature to provide that Class 2 offenders eligible under section 5-4.5-95(b) of the Code for an

enhanced term of imprisonment are ineligible for an enhanced term of mandatory supervised release." *Smart*, 311 Ill. App. 3d at 418. " 'It is clear that the gravity of conduct offensive to the public safety and welfare, authorizing Class X sentencing, justifiably requires lengthier watchfulness after prison release than violations of a less serious nature.' " *Smart,* 311 Ill. App. 3d at 417 (quoting *Anderson*, 272 Ill. App. 3d at 541). Further, "conduct so offensive that it justifies a longer term of imprisonment surely justifies lengthier supervision after release." *Id.* at 418. Thus, we find that the plain language of the statute, the MSR term, is part of the sentence.

¶ 38 At the time that defendant committed the underlying felony, the Code imposed an MSR term of three years on offenders sentenced as Class X offenders. Thus, when defendant was sentenced as a Class X offender pursuant to section 5-4.5-95, a three–year MSR term was mandated by the statute. In light of the above, we conclude that defendant who was convicted of a Class 2 felony and sentenced as a Class X offender because of his criminal history, is subject to an MSR term of three years. This court has held that a defendant subject to mandatory Class X sentencing under section 5-5-3 (c)(8) of the Code based on prior convictions is required to serve a three–year MSR term. *Lee,* 397 Ill. App. 3d at 1072 (citing *Smart*, 311 Ill. App. 3d at 417-18). Imposing a three–year period of MSR is appropriate if defendant's conviction and sentence are upheld on remand.

¶ 39 Lastly, defendant contends that his mittimus should be corrected to reflect 472 days spent in presentencing custody, instead of the 463 days currently reflected therein. The State agrees. The question of whether defendant's mittimus should be corrected is a purely legal issue, subject to *de novo* review (*People v. Jones*, 397 Ill. App. 3d 651, 656 (2009)), and this court has

authority to order the clerk of the circuit court to issue a corrected mittimus (Ill. S. Ct. 615(b)(1)). The record shows that defendant was arrested on June 2, 2009, and was sentenced on September 17, 2010. Accordingly, we order the mittimus be amended to reflect 472 days of presentencing credit.

¶ 40 CONCLUSION

¶ 41 For the foregoing reasons, we modify the mittimus to reflect 472 days of presentence credit and remand with directions for issuance of a corrected mittimus. We remand this matter for a new hearing on the motion for a new trial while giving defendant leave to amend his motion to include the allegation of ineffective assistance of counsel.

¶ 42 Affirmed in part; cause remanded with directions.