

No. 1-11-2086

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(3)(1).

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.)	09 CR 9935
)	
CLEVELAND LYONS,)	Honorable
)	William J. Kunkle,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE NEVILLE delivered the judgment of the court.
Justices Hyman and Pierce concurred in the judgment.

ORDER

¶ 1 *Held:* Aggravated vehicular hijacking, as defined in section 18-4(a)(4) of the Criminal Code (720 ILCS 5/18-4(a)(4) (West 2008)), does not violate the proportionate penalties clause of the state constitution. Where the trial court did not ask the defendant or his counsel about the factual basis for the defendant's posttrial allegations of ineffective assistance of counsel, the appellate court should remand the case to the trial court for an appropriate inquiry into the basis for the defendant's allegations.

¶ 2 Following a bench trial, the trial court found the defendant, Cleveland Lyons, guilty of

aggravated vehicular hijacking. Lyons challenges the constitutionality of the aggravated vehicular hijacking statute, and he asks this court to remand the case to the trial court for a hearing on his posttrial allegations that his counsel provided ineffective assistance. He also raises several issues concerning his sentence. We find the statute constitutional, but we remand for a hearing on the allegations of ineffective assistance of counsel. If that hearing does not lead to a new trial, we direct the trial court to hold a new sentencing hearing due to the court's improper consideration in aggravation of a factor inherent in the offense.

¶ 3 BACKGROUND

¶ 4 Shortly after midnight on May 16, 2009, as Bruce Hamlin parked his car in his garage, two men entered the garage and pointed guns at him. The two men stole Hamlin's wallet, phone and car. Hamlin reported the robbery to police.

¶ 5 Hamlin and his cousin drove around the neighborhood later that day. They saw Hamlin's car parked at a nearby car shop. Hamlin called police. Police arrested Lyons in the car shop when Hamlin identified him as one of the men who entered his garage earlier that day. Prosecutors charged Lyons with aggravated vehicular hijacking, as defined in section 18-4(a)(4) of the Criminal Code (Code) (720 ILCS 5/18-4(a)(4) (West 2008)).

¶ 6 At trial, the public defender challenged Hamlin's ability to identify the men who robbed him. The trial court found Lyons guilty. Lyons's attorney filed a posttrial motion and Lyons sent to the court several posttrial written motions in which he alleged that his trial counsel provided ineffective assistance. Lyons claimed that his counsel elicited damaging testimony on cross-examination of witnesses, failed to interview and subpoena witnesses, and failed to consult with Lyons. In support

1-11-2086

of the motion, Lyons named Domonchea Magsby as a witness his counsel failed to interview, and Terry Pritchett as another witness his counsel failed to present at trial.

¶ 7 At the hearing on the motions, Lyons requested time, and access to a law library, so that he could flesh out his motions. The judge said, "I'm not giving you another date. *** [Y]ou have counsel. You don't need to be in the law library."

¶ 8 The judge admitted that he had not seen Lyons's motions prior to the date of the hearing. The judge said,

"Mr. Lyons, I do not have to consider these [pro se motions alleging ineffective assistance of counsel]. ***

*** [Y]ou have filed what you have entitled a Post-Trial Motion For Ineffective Assistance of Counsel, and a memorandum in support of that motion. While the law does not require me *** to even consider it, *** I am going to *** rule on your motions nevertheless."

¶ 9 The judge then asked Lyons if he "wish[ed] to make any oral argument in addition to that material" Lyons submitted to the court. Lyons answered, "the points in these motions *** are legit. I'm not making anything up *** just to be, you know, wasting your time." The court did not ask Lyons or Lyons's attorney about the factual basis for Lyons's complaints. The court then listed each of Lyons's claims of error and noted that the motion lacked factual allegations supporting the claims. Concerning the failure to subpoena and interview witnesses, the court said, "Without listing any specific witnesses ***, it is without merit." The court denied the posttrial motions.

¶ 10 At the sentencing hearing, the parties stipulated that Lyons had one prior conviction, for aggravated unlawful restraint. The parties also agreed that the court could impose a sentence between a minimum of 22 years and a maximum of 45 years in prison. Defense counsel pointed out that Lyons obtained a GED during his prior incarceration.

¶ 11 The court said:

"[P]ersons who use guns in these types of crimes are creating situations where murder is awaiting to occur. There is no more dangerous type of individual to society than one who will take a firearm into this kind of a crime with a stranger. When there are domestic disputes, when there are bar fights, even as repugnant as they are, *** when there are gang fights, there is some measure of invited *** combat. *** But in these kinds of crimes, where an innocent citizen is approached on their own property by an armed felon and their life is threatened and if things go wrong may very well be taken for nothing, the only more serious crime is when that victim is, in fact, killed.

And on that basis, the sentence will be 30 years in the Illinois Department of Corrections."

¶ 12 The court also ordered Lyons to pay fines, fees and costs totaling \$700, including \$100 for the Trauma Fund, \$200 for the State DNA ID System, \$5 for the Court System, and \$25 for Court Services. Lyons now appeals.

¶ 13

ANALYSIS

¶ 14

Constitutionality of Aggravated Vehicular Hijacking Statute

¶ 15 Lyons argues first that this court must vacate the conviction because the trial court convicted him of the violation of an unconstitutional statute. Because this argument challenges the constitutionality of a statute, we review the trial court's judgment *de novo*. *People v. Sharpe*, 216 Ill. 2d 481, 486-87 (2005).

¶ 16 In *People v. Andrews*, 364 Ill. App. 3d 253 (2006), the appellate court held that section 18-4(a)(4) imposed disproportionate penalties on persons found guilty of aggravated vehicular hijacking rather than armed violence predicated on vehicular hijacking, although the two crimes had identical elements. Defendants prosecuted for aggravated vehicular hijacking faced sentences of 21 to 45 years, while defendants convicted of armed violence predicated on vehicular hijacking faced a sentencing range of only 15 to 30 years. The *Andrews* court specified that the unconstitutionality rendered subsection 18-4(a)(4) void *ab initio*. *Andrews*, 364 Ill. App. 3d at 282. The State argues that the legislature revived the crime of aggravated vehicular hijacking, under subsection 18-4(a)(4), by amending the armed violence statute to eliminate the crime with the disproportionate penalty. See P.A. 95-688 (eff. Oct. 23, 2007), amending 720 ILCS 5/33A-2 (West 2008).

¶ 17 Our supreme court effectively resolved this issue in *People v. Blair*, 2013 IL 114122, when the court considered the effect of P.A. 95-688 on the constitutionality of the armed robbery statute. In 2007, our supreme court held that the sentencing enhancement in section 18-2(b) of the Code (720 ILCS 5/18-2(b) (West 2000)), for the offense of armed robbery while armed with a firearm, violated the proportionate penalties clause. *People v. Hauschild*, 226 Ill. 2d 63, 86-87 (2007). The statute

provided for more severe sentencing than the sentencing available for the indistinguishable offense of armed violence based on robbery with a category I or II weapon (720 ILCS 5/33A-3(a) (West 2000)). The legislature amended the armed violence statute to eliminate robbery as a predicate offense for a charge of armed violence. P.A. 95-688 (eff. Oct. 23, 2007), amending 720 ILCS 5/33A-3 (West 2008); see *Blair*, 2013 IL 114122, ¶ 21. Our supreme court held that because P.A. 95-688 eliminated the proportionate penalties problem, it revived the offense of armed robbery while armed with a firearm and permitted the use of the statutory enhanced sentencing range for that offense. *Blair*, 2013 IL 114122, ¶¶ 27-38.

¶ 18 P.A. 95-688 also eliminated the proportionate penalties problem for aggravated vehicular hijacking by eliminating vehicular hijacking as a predicate offense for armed violence. P.A. 95-688 (eff. Oct. 23, 2007), amending 720 ILCS 5/33A-3 (West 2008). Following *Blair*, we hold that P.A. 95-688 effectively revived section 18-4(a)(4) of the Code. *Blair*, 2013 IL 114122, ¶¶ 27-38; 720 ILCS 5/18-4(a)(4) (West 2008). Thus, the trial court here did not convict Lyons for the violation of an unconstitutional statute.

¶ 19 Adequacy of Inquiry

¶ 20 When a criminal defendant makes a pro se posttrial motion for a new trial due to ineffective assistance of counsel, and the trial court denies the motion, our standard of review depends on the basis for the challenge to the court's decision. If the defendant argues that the court made an error of law, and misapprehended the applicable standards for deciding the motion, this court reviews the trial court's decision *de novo*. *People v. Moore*, 207 Ill. 2d 68, 75 (2003); *People v. McCarter*, 385 Ill. App. 3d 919, 941 (2008). However, if the defendant contends only that the court erred in its

application of the correct standard, we review the court's decision for manifest error. *McCarter*, 385 Ill. App. 3d at 941.

¶ 21 Our supreme court in *Moore* laid out the procedures for the trial and appellate courts to follow when a defendant in a criminal trial makes a *pro se* posttrial motion for a new trial based on ineffective assistance of counsel:

"[W]hen a defendant presents a *pro se* posttrial claim of ineffective assistance of counsel, the trial court should first examine the factual basis of the defendant's claim. If the trial court determines that the claim lacks merit or pertains only to matters of trial strategy, then the court need not appoint new counsel and may deny the *pro se* motion. However, if the allegations show possible neglect of the case, new counsel should be appointed. [Citations.] The new counsel would then represent the defendant at the hearing on the defendant's *pro se* claim of ineffective assistance. ***

The operative concern for the reviewing court is whether the trial court conducted an adequate inquiry into the defendant's *pro se* allegations of ineffective assistance of counsel. [Citation.] During this evaluation, some interchange between the trial court and trial counsel regarding the facts and circumstances surrounding the allegedly ineffective representation is permissible and usually necessary in assessing what further action, if any, is warranted on a

defendant's claim. Trial counsel may simply answer questions and explain the facts and circumstances surrounding the defendant's allegations. [Citations.] A brief discussion between the trial court and the defendant may be sufficient. [Citations.] Also, the trial court can base its evaluation of the defendant's *pro se* allegations of ineffective assistance on its knowledge of defense counsel's performance at trial and the insufficiency of the defendant's allegations on their face."

Moore, 207 Ill. 2d at 77-79.

¶ 22 Here, as in *Moore*, the trial judge's comments show that he did not apply appropriate standards. Twice the judge said that he did not have any obligation to consider Lyons's motion because counsel represented Lyons. *Moore* clarified that the judge has a duty to make some inquiry into the basis for a defendant's allegations of ineffective assistance of counsel, even though the defendant has counsel representing him. *Moore*, 207 Ill. 2d at 77-78. The trial judge conducted a limited inquiry and incorrectly said that Lyons had not listed any witness his counsel failed to subpoena or interview.

¶ 23 When a defendant alleges that his counsel incompetently failed to interview or present witnesses, "a court conducting a preliminary investigation *** ought to inquire into matters such as the identities of the witnesses, the substance of their proposed testimony, and the extent to which defendant's counsel knew and acted upon the existence of such witnesses." *McCarter*, 385 Ill. App. 3d at 942. Here, the court asked Lyons only if he wished to make any oral argument, or if he had anything else to argue beyond that which he raised in the motions. The court did not ask Lyons or

Lyons's attorney what witnesses counsel should have presented, what those witnesses would have said, what damaging evidence came out on cross-examination of prosecution witnesses, or what evidence counsel could have elicited had he consulted with Lyons. If Lyons's counsel had provided ineffective assistance, the judge's inquiry would not have elicited facts that would have helped show counsel's ineffectiveness. Therefore, we find the judge's inquiry into the facts and circumstances that led Lyons to claim he received ineffective assistance of counsel insufficient in this case. See *Moore*, 207 Ill. 2d at 79; *People v. Barnes*, 364 Ill. App. 3d 888, 899 (2006).

¶ 24 Accordingly, we remand for an appropriate inquiry under *Moore* into the factual basis underlying Lyons's claims that he received ineffective assistance of counsel. If the inquiry reveals possible neglect or other indications of ineffective assistance of counsel, the court should appoint new counsel to help Lyons with an amended posttrial motion for a new trial based on ineffective assistance of counsel.

¶ 25 Petition for Rehearing

¶ 26 In a petition for rehearing, Lyons asks us to address sentencing issues he raised in his initial appeal, to obviate the need for a second appeal if the *Moore* inquiry does not lead to a new trial. Lyons argues first that we must vacate the sentence because the trial court considered in aggravation a factor inherent in the offense.

¶ 27 "[A] single factor cannot be used both as an element of an offense and as a basis for imposing a 'harsher sentence than might otherwise have been imposed.'" *People v. Phelps*, 211 Ill. 2d 1, 11-12 (2004), quoting *People v. Gonzalez*, 151 Ill. 2d 79, 83-84 (1992). To prove aggravated vehicular hijacking under section 18-4(a)(4) of the Criminal Code, the State needed to prove that Lyons carried

a firearm when he hijacked the car. 720 ILCS 5/18-4(a)(4) (West 2008). The trial court's comments show that the court improperly considered this element of the offense as an aggravating factor. See *People v. Walker*, 392 Ill. App. 3d 277 (2009).

¶ 28 The trial court's consideration of an improper factor need not lead to resentencing, if the record shows that the trial court placed no significant weight on the improper factor, so that consideration of that factor did not lead to a greater sentence. *People v. Bourke*, 96 Ill. 2d 327, 332 (1983). However, "[w]here the reviewing court is unable to determine the weight given to an improperly considered factor, the cause must be remanded for resentencing." *Bourke*, 96 Ill. 2d at 332. The record here shows that the court imposed a sentence 9 years more than the minimum available sentence (see 720 ILCS 5/18-4(b) (West 2008)), and in imposing the sentence the court especially emphasized the presence of a firearm as a justification for the sentence. We cannot say that the trial court placed no significant weight on its consideration of the improper factor here. Accordingly, we must vacate the sentence. If the court reaffirms the conviction following the *Moore* inquiry, it must hold a new sentencing hearing. The parties agree that (1) a sentencing range of 21 to 45 years (not 22 to 45 years) applies to the charge against Lyons, (2) the trial court should not have ordered Lyons to pay fees for the Trauma Fund, the State DNA ID System and the Court System, and (3) the mittimus should have shown a conviction under section 18-4(a)(4) (not 18-4(a)(3)) of the Criminal Code. We trust that, if the court reaffirms the conviction and holds a new sentencing hearing, the court and the parties will avoid the mistakes made in the original sentencing.

¶ 29

CONCLUSION

¶ 30 Following *Blair*, we find that the trial court did not convict Lyons for violating an

unconstitutional statute. We remand for the court to conduct an appropriate inquiry into the facts and circumstances surrounding Lyons's posttrial allegations that his counsel provided ineffective assistance. If the court finds that the allegations could have merit, the court must appoint new counsel to assist Lyons with the presentation of an amended posttrial motion for a new trial. If the court finds that the allegations have no possible merit, the court should leave standing Lyons's conviction and resentence him for aggravated vehicular hijacking.

¶ 31 Remanded with directions.