2019 IL App (1st) 160887-U

No. 1-16-0887

Order filed March 29, 2019.

Second Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	13 CR 1092
	)	
TIMMAINE TIMBERLAKE,	)	The Honorable
	)	Lawrence Edward Flood,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Mason and Justice Pucinski concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's trial counsel subjected his case to meaningful adversarial testing. His conviction was not subject to reversal. Affirmed.

¶ 2 Following a jury trial, defendant Timmaine Timberlake was found guilty of first degree murder, then sentenced to a total of 60 years' imprisonment. Defendant argues we should reverse his conviction under *United States v. Cronic*, 466 U.S. 648 (1984) and its progeny. We affirm.

¶ 3 BACKGROUND

¶ 4 Defendant was arrested on December 10, 2012, after engaging in a high-speed chase with police while driving the victim, Rene Reyna's Mercedes Benz. On the driver's side floorboard, police found the same handgun that had been used to kill Reyna, who was discovered dead the day before with a gunshot wound to the head. Defendant was subsequently charged with Reyna's murder.

¶ 5 Defendant's conviction rested on eyewitness testimony, video evidence, and other circumstantial evidence. At trial, Natalie Cordova testified that around 9:30 p.m. on December 9, 2012, she was at her second-floor back window when she observed a Lincoln Navigator and a little black car parked in the well-lit alley below. A man wearing a knit hat and black jacket, who was later identified as defendant, was arguing with another person, although she could not see that individual. Defendant then lifted his hand, pointed gun, and Cordova heard a shot while defendant walked south. Through the gaps in the line of houses, Cordova observed defendant chasing another man but lost sight of them both, as she heard shots fired throughout the chase. By that time, the black car had already left. Defendant subsequently drove off in the Lincoln Navigator. Several days later, Cordova identified defendant in a line-up as the shooter and also made an in-court identification of him.

¶ 6 Latreasa Norwood testified next that around 9:30 p.m. the same day[1], she drove through the aforementioned alley but was blocked by a dark SUV. As she stopped, she observed an African American man wearing a dark jacket, hoodie, dark pants, and a black skull cap. The man, later identified as defendant, shoved another Hispanic individual, Reyna, into his truck but then pulled him out. Reyna, who was "very terrified," walked towards Norwood's car and banged on her window, stating "[H]elp me, help me. This guy [is] trying to rob me." After this,

[1]The State mistakenly identified the day of the crime as "December 12, 2012," when questioning Norwood. The State, however, later noted that Norwood had identified defendant in a line-up on December 11, 2012, several days after the shooting occurred, proving the above-quoted December 12 date to be a mistake.

defendant walked towards Reyna and Norwood's car while pulling out a gun from his waistband. Reyna saw the gun and "took off running" southbound down the alley, and defendant then followed him. As Norwood drove off, she heard two gunshots behind her. After calling 911, she returned to the alley where she saw three people standing over a bloodied Reyna, the same man who had banged on her window moments before. Several days later, she identified defendant as the shooter. A video clip corroborated that her car and the SUV were in the alley on the day in question.

¶ 7 Defendant's girlfriend, Ashley Woodson, testified that defendant drove her to work in the black Lincoln Navigator around 5 p.m. on the day in question but then failed to pick her up around 11 p.m., as scheduled, and instead texted that Woodson needed to find another way home and he had "fucked up." He was wearing a black hoodie and black skull cap hat. From the video clip of the crime scene, Woodson identified her Lincoln Navigator in the alley.

¶ 8 Although Woodson denied this at trial, her written statement to police revealed that she had seen defendant with a gun 10 to 12 times. Woodson also testified that she was at their apartment when on December 12 police recovered the victim's cell phone, which Reyna had in his possession before the murder.

¶ 9 In addition, trial evidence showed that before the murder, defendant had stolen Reyna's Mercedes. A video clip taken around 6 p.m. on the evening in question from outside a liquor store (where his friend Ronnie Robinson worked) shows defendant driving the Mercedes and wearing a hoodie. Evidence showed he wore a black jacket and black skull cap at that time and also showed that on the evening in question, he drove off in the Navigator around 7 p.m. while also wearing the same outfit.

¶ 10 The State also presented testimony showing that defendant could not have been in his apartment at the time of the crime, as defendant had testified for his alibi. Instead, records of cell phone activity suggested defendant was at or near the crime scene on the day and at the time in question. And, contrary to defendant's claims, evidence also showed that he knew the victim well and had communicated with him many times via text prior to the crime. In fact, text messages time-stamped several hours before the murder from the phone numbers associated with defendant and the victim indicated that defendant had Reyna's car and Reyna wanted it back. Likewise, gunshot residue was found on defendant's skull cap.

¶ 11 The jury found defendant guilty, and as stated, he was sentenced to a total of 60 years' imprisonment.

¶ 12 ANALYSIS

¶ 13 Defendant now argues his case should be reversed because his defense counsel, David Wiener, was subject to disciplinary proceedings during trial. In particular, defendant notes that on August 29, 2014, more than a year after Wiener filed his appearance for defendant, the Illinois Attorney Registration and Disciplinary Commission (ARDC) had filed a complaint against Wiener as to his representation of other clients in criminal matters.[2] On September 21, 2015, the Illinois Supreme Court entered an order suspending Wiener from practicing law for one year until further court order, with the suspension stayed in its entirety by a two-year probation period. See Ill. S. Ct. R. 762(b) (eff. July 1, 2017). The supreme court noted that Wiener had drug, alcoholism, and mental health problems contributing to his misconduct. But, Wiener was permitted to continue practicing law under the specified conditions, including

[2]Although defendant has only attached the disciplinary documents to his brief and referenced the ARDC website, we may take judicial notice of them. See *People v. Mata*, 217 Ill. 2d 535, 539-40 (2005) (reviewing courts may take judicial notice of public documents); *BAC Home Loans Servicing v. Popa*, 2015 IL App (1st) 142053, ¶ 21 (we can take judicial notice of ARDC's online records).

treatment, and ARDC supervision without posing a risk to the public, profession, or courts. See Ill. S. Ct. R. 772 (eff. Feb. 1, 2018).

¶ 14 Wiener did just that. About two months later, in November 2015, defendant's nine-day trial took place. Sentencing concluded several months after trial on February 25, 2016. On April 11, 2016, the supreme court revoked Wiener's probation because he failed to avoid alcohol and missed alcohol screening tests. The supreme court then vacated the stay and ordered a full suspension. Notably, this resulted in Wiener being unauthorized to practice law during the suspension.

¶ 15 Defendant now complains he was denied counsel under *Cronic* given Wiener's probationary status during his trial and sentencing. He asserts Wiener failed to subject the State's case to meaningful adversarial testing and, as such, prejudice should be presumed. See *Cronic*, 466 U.S. at 659-61. We reject defendant's arguments for several reasons.

¶ 16 First, in instances where an attorney is subject to disciplinary proceedings, when analyzing the defense attorney's effectiveness, courts apply the standard under *Strickland v. Washington*, 466 U.S. 668 (1984), not *Cronic*. *People v. Perry*, 183 Ill. App. 3d 534, 541 (1989); see also *People v. Gilbert*, 2013 IL App (1st) 103055, ¶ 22. It's well established that pending disciplinary proceedings against an attorney do not by themselves render him incompetent to represent a defendant charged with a crime. *Id.*; see also *People v. Long*, 208 Ill. App. 3d 627, 642-43 (1990). As stated, the supreme court permits lawyers on probation to continue practicing until they are suspended or disbarred. *Id.*; Ill. S. Ct. R. 772 (eff. Feb. 1, 2018); *cf.* Ill. S. Ct. R. 774 (eff. Feb. 1, 2018); *People v. Gamino*, 2012 IL App (1st) 101077, ¶¶ 7, 22, 24 (noting, where the defendant's trial attorney appeared to have been suspended from practicing law absent his knowledge when she represented him at trial, the defendant was entitled to a postconviction

evidentiary hearing). Because Wiener was on probation, with his suspension stayed, he was permitted to represent defendant in this case, and *Cronic* does not apply.

¶ 17 Second, defendant waived this matter. Midway through trial, in defendant's presence, the trial court asked Wiener if he had informed defendant of his ARDC status. Wiener responded, "yes," and that he'd been sanctioned by the ARDC and was currently on probation. Wiener added that he was taking a course in professional responsibility, he had a mentor, and he was required to establish an "IOTA" account. In response to the court's query, defendant agreed that Wiener had informed him of his disciplinary status. Defendant further stated he had no objection to Wiener representing him. Although defendant now contends Wiener did not adequately inform him of the basis for his probation, that contention is speculative and finds no record support. See *Perry*, 183 Ill. App. 3d at 539-40 (rejecting a similar contention).

¶ 18 Third, it's well-established that *Cronic* is inapplicable in a case like the present, where defense counsel subjected the prosecution's case to meaningful adversarial testing. See *Cronic*, 466 U.S. at 659. Since *Cronic* was decided our supreme court has found *per se* ineffectiveness under the adversarial testing approach only two times. *People v. Cherry*, 2016 IL 118728, ¶ 27. For *Cronic* to apply, the attorney's failure must be complete, *i.e.* counsel must have failed to oppose the prosecution throughout the proceeding. *Id*. ¶ 26. Indeed, the cases defendant relies on, where *Cronic* was applied, involved egregious instances of misconduct where the defense counsel conceded the defendant's guilt, presented no defense strategy whatsoever, or insisted on a legally unavailable defense.[3] See, *e.g.*, *People v. Hattery*, 109 Ill. 2d 449, 464 (1985); *People v. Kozlowski*, 266 Ill. App. 3d 595, 601 (1994).

[3]Defendant attempts to rely on *People v. Williams*, 93 Ill. 2d 309 (1982), a pre-*Cronic* case. While he references the case name correctly in his brief, he provided an incorrect citation of "144 Ill. 2d 525 (1991)," which is actually associated with *People v. Szabo* and no pincite. This court is not a repository for an appellant to foist burden

¶ 19 This was not such a case.[4] Here, counsel argued in opening and closing, cross-examined key State witnesses, presented a theory of defense, and presented defendant's testimony. In particular, Wiener presented a defense theory that defendant's friend Robinson committed the crime while defendant remained at his apartment, and Wiener's cross of the State's witnesses was consistent with that theory. Defendant testified it was Robinson who had defendant's cell phone leading up to and at the time of the murder (a fact Wiener suggested was corroborated when defendant's cell phone called the victim's several hours after Reyna was already dead, when defendant had his phone in his possession again). Wiener emphasized that Robinson had four felony convictions, including for a gun offense (whereas, defendant's prior related only to drugs); Robinson showed up at defendant's apartment several hours after the shooting driving the victim's car; and Wiener presented some evidence that Robinson, instead of defendant, was driving the victim's car just before their apprehension by police.

¶ 20 Wiener also challenged the eyewitness identifications. In cross-examining the State's occurrence witness, Cordova, defense counsel elicited that Cordova had omitted any mention of facial hair when describing defendant to police even though his line-up photo depicted him with facial hair. Defense counsel also attempted to challenge Cordova's ability to make an accurate identification given her time and opportunity to view the crime. Defense counsel cross-examined Norwood in a similar manner. In closing argument, counsel also focused on the inability of these

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of argument and research. *Enadeghe v. Dahms*, 2017 IL App (1st) 162170, ¶ 23; Ill. S. Ct. Rule 341(h)(7) (eff. Nov. 1, 2017). Regardless, *Williams* has been distinguished many times over and need not be discussed further.

[4]Defendant complains that Wiener filed no substantive pre-trial motions but then states "it is difficult to determine what substantive motions Wiener could have filed." But, Wiener made an oral motion *in limine* to exclude reference to defendant's gang affiliation and argued against the State's introduction of text messages between the victim and defendant. Now, defendant fails to identify what motions Wiener should have filed, fails to develop his argument in that regard, and fails cite proper legal authority, thus forfeiting his claim. See Ill. S. Ct. Rule 341(h)(7) (eff. Nov. 1, 2017). Also, many of the instances of "neglect" that defendant points to involve either minor errors or are errors that do not result in a lack of adversarial testing.

witnesses to make accurate identifications, along with the lack of any DNA evidence implicating defendant, and again asserted that it was Robinson who committed the murder.

¶ 21 Wiener further filed and argued a motion for a new trial after the verdict. At sentencing, Wiener presented witnesses in mitigation while arguing for leniency given defendant's nonviolent criminal background. He filed a motion to reconsider the sentence, and he generally advocated for defendant throughout the pretrial, trial, and posttrial process. See *Hattery*, 109 Ill. 2d at 461. The adversary process was not presumptively unreliable. Thus, defendant's *Cronic* argument fails.

¶ 22 As the State notes, defendant has not argued *Strickland*, likely because he would be hard-pressed to succeed in establishing prejudice. See *Cherry*, 2016 IL 118728, ¶¶ 30-31. But, we need not consider the matter further because it has been forfeited. See *id*.

¶ 23 CONCLUSION

¶ 24 For the reasons stated above, we affirm the circuit court's judgment.

¶ 25 Affirmed.