2011 IL App (2d) 100433-U
No. 2-10-0433
Order filed November 15, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Winnebago County.
Plaintiff-Appellee,	)	
v.	)	No. 08-CF-4860
KENNETH A. CLANKIE,	)	Honorable Richard A. Lucas,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Justices Hutchinson and Birkett concurred in the judgment.

ORDER

Held: The trial court did not fail to meaningfully exercise its discretion when considering whether to admit a prior conviction under *Montgomery*: although the court did not explicitly apply the balancing test, the parties explicitly referenced it, such that we would not presume that the court ignored it.

¶ 1 Following a jury trial, defendant, Kenneth A. Clankie, was found guilty of aggravated driving with a revoked license (625 ILCS 5/6-303(d-3) (West 2008)). The trial court sentenced him to one year in prison. Defendant appeals, contending that the trial court erred by admitting evidence of a prior conviction without balancing the probative value of the conviction against the prejudice to defendant. We affirm.

¶ 2 Defendant was charged with one count of aggravated driving with a revoked license. Before trial, the State moved to admit for impeachment purposes defendant's prior conviction of unlawful possession of a certificate of title. The State's motion noted that, under *People v. Montgomery*, 47 Ill. 2d 510 (1971), the trial court had to balance the probative value of the conviction against the prejudice to defendant from admitting it. At the hearing, the prosecutor stated that she had a "*Montgomery* motion." Defense counsel opposed the motion, arguing that the prejudice to defendant outweighed the conviction's probative value. The trial court granted the State's motion, stating, "We are going to allow that."

¶ 3 At trial, Rockford police officer Lynn Cochran testified that she was on routine patrol when she saw a silver Dodge Caravan with expired license plates. She got behind the van as it entered a parking lot at Flynn Middle School. She spoke to the driver, whom she identified in court as defendant. Charles Owens was a passenger in the van.

¶ 4 Cochran asked for defendant's driver's license, but he gave her a State identification card instead. She ran defendant's name through a computer and learned that his driver's license had been revoked since 1997. Cochran arrested defendant, and Owens, who had a valid driver's license, drove off in the van.

¶ 5 Defendant testified that he operated a recycling business. On the date in question, he was helping his friend, Owens, haul an old riding lawn mower. Defendant took a bus to Owens's house and loaded the mower into a van, which defendant co-owned. Owens drove the van to an address on 23rd Avenue. Defendant rode in the passenger seat. They unloaded the mower and, with Owens again driving, went to Flynn Middle School to pick up scrap. Defendant was loading scrap into the back of the van when an officer approached him. He told the officer that he had not driven the van,

but she arrested him anyway. The State introduced a certificate of conviction of unlawful possession of a certificate of title.

¶ 6 The jury found defendant guilty. The trial court sentenced him to one year in prison. After the trial court denied defendant's motions for a new trial and to reconsider the sentence, defendant timely appealed.

¶ 7 Defendant contends that the trial court erred by admitting his prior conviction without conducting the *Montgomery* balancing test. Defendant does not argue that the trial court abused its discretion in admitting the conviction. Rather, he contends that, by granting the State's motion without comment, the court did not exercise its discretion at all, effectively abdicating its role to balance probative value against prejudice.

¶ 8 The State responds that a trial court need not explicitly mention *Montgomery*'s balancing test so long as the record shows that the court was aware of it. We agree with the State on this issue.

¶ 9 Evidence of prior crimes is not admissible merely to suggest that a witness has a propensity to commit crimes. *People v. Williams*, 161 Ill. 2d 1, 39 (1994). However, evidence of a prior conviction is admissible for impeachment if: (1) the witness's crime was punishable by imprisonment for more than one year or the crime involved dishonesty or false statement regardless of the punishment; (2) the witness's conviction or release from confinement, whichever was later, occurred within 10 years of the trial date; and (3) the danger of unfair prejudice does not substantially outweigh the conviction's probative value. *Montgomery*, 47 Ill. 2d at 516. The trial court has discretion in deciding whether a prior conviction should be admitted. *People v. Cox*, 195 Ill. 2d 378, 383 (2001).

¶ 10 The trial court need not expressly articulate its balancing of prejudice and probative value, so long as the record shows that the court was aware of *Montgomery*. See *People v. Williams*, 173

Ill. 2d 48, 83 (1996) ("there is no reason to suppose that the trial judge failed to weigh the probative value of the impeachment against its possible prejudicial effect"). There, the court found sufficient evidence that the trial court was aware of *Montgomery* where the parties referred to its balancing test in their arguments. *Id.*

¶ 11 Here, the State's written motion set out the *Montgomery* balancing test. At oral argument, the prosecutor stated that she had a "*Montgomery* motion," and defense counsel opposed the motion on the ground that the prejudice outweighed the probative value. Thus, the parties expressly referenced *Montgomery* both orally and in writing, so there is "no reason to suppose" that the court ignored the balancing test in ruling on the motion. *Id.*

¶ 12 The cases defendant cites are distinguishable. In *People v. Whirl*, 351 Ill. App. 3d 464 (2004), the trial court admitted seven prior convictions—virtually the defendant's entire criminal history. In reversing his conviction, this court stated, "We cannot find that the trial court abused its discretion, because the court failed to exercise its discretion." *Id.* at 467. This court noted that, in announcing its decision, the trial court had stated that convictions that were similar to the crime for which the defendant was on trial were particularly relevant, whereas cases held that such convictions should be admitted with caution. *Id.* (citing *Cox*, 195 Ill. 2d at 384). Thus, the court's affirmative misstatement of the law prevented it from meaningfully exercising its discretion.

¶ 13 In *People v. Newborn*, 379 Ill. App. 3d 240 (2008), the defendant sought to impeach a witness with his juvenile adjudications. The trial court denied the motion, stating its (incorrect) belief that juvenile adjudications were never admissible for impeachment. The appellate court reversed, holding that the trial court's misstatement of the law meant that it did not exercise its discretion at all. *Id.* at 248.

¶ 14 Neither *Whirl* nor *Newborn* stands for the proposition that the trial court must expressly mention the *Montgomery* balancing test when ruling on a motion to admit a prior conviction. In fact, in both cases, the trial courts' remarks affirmatively evinced a misunderstanding of the law and, as a result, the courts failed to meaningfully exercise their discretion. Here, the trial court did not affirmatively misstate the law.

¶ 15 In his reply brief, defendant argues that the cases the State cites for the proposition that a trial court need not specifically mention the *Montgomery* test when deciding whether to admit a prior conviction were decided prior to *People v. Williams*, 161 Ill. 2d 1. However, that case, while admonishing trial courts not to apply *Montgomery* mechanically, did not mandate that courts specifically refer to *Montgomery* or the balancing test. Indeed, in at least two cases after *Williams*, the supreme court has continued to adhere to the rule that trial courts need not explicitly recite the *Montgomery* test. *Williams*, 173 Ill. 2d at 83; *People v. Atkinson*, 186 Ill. 2d 450, 462-63 (1999); see also *People v. Mullins*, 242 Ill. 2d 1, 16 (2011) (citing the second *Williams* and *Atkinson* with approval).

¶ 16 In his reply brief, defendant further argues that the trial court could not have exercised its discretion because it did not notice that the conviction occurred more than 10 years before the date of trial. However, defendant concedes that, although he was initially given probation, the probation was revoked at some point and he was imprisoned. He thus implicitly concedes that his release date was within 10 years of the trial date. See *Montgomery*, 47 Ill. 2d at 516 (conviction may be admitted if conviction or release from confinement, whichever was later, occurred within 10 years of the trial date). Moreover, defendant did not object on this basis in the trial court. We cannot say that the trial court failed to exercise its discretion when it did not raise, *sua sponte*, an objection that defendant himself did not raise.

¶ 17 As noted, defendant does not contend that the trial court's ruling was an abuse of discretion. The court admitted a single conviction, which was not for an offense similar to the one for which defendant was on trial. The conviction of unlawful possession of a certificate of title would appear to involve dishonesty, which is particularly relevant to testimonial credibility. See *Williams*, 161 Ill. 2d at 37 (citing *Gordon v. United States*, 383 F.2d 936, 940 (D.C. Cir. 1967)). Accordingly, the trial court did not err in admitting the prior conviction.

¶ 18 The judgment of the circuit court of Winnebago County is affirmed.

¶ 19 Affirmed.