No. 3--09--0207

Order filed March 4, 2011

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellee,	)	
v.	)	No. 07--CF--1661
BRANDON HITE,	)	Honorable Robert P. Livas,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court. Justices Wright and Holdridge concurred in the judgment.

ORDER

Held: Posttrial counsel was not laboring under an actual conflict of interest merely because she worked in the same public defender's office as the defendant's trial counsel. In addition, the defendant could not make out an ineffective assistance of counsel claim because he did not suffer prejudice as a result of his posttrial counsel's failure to speak at his hearing.

After a jury trial, the defendant, Brandon Hite, was convicted of two counts of armed robbery (720 ILCS 5/18--2(a) (West 2006)) and sentenced to two concurrent terms of 15 years in

the Department of Corrections. On direct appeal, the defendant argues that the case should be remanded because his posttrial counsel was laboring under a conflict of interest or, alternatively, she was ineffective. We affirm.

FACTS

The defendant was accused of robbing two individuals on August 4, 2007 at a Budget Inn located in Joliet, Illinois. Specifically, the victims, Elona Rios and Lee Foster, claimed that the defendant was armed with a shotgun when he forcibly took money and other items from their motel room.

At trial, the State presented the testimony of four witnesses who placed the defendant at the scene of the crime. The first witness, Bridgette Studer, testified that she and the victims had been using cocaine in the motel room the previous evening. She also stated that she traveled back and forth from the room several times that night in order to deliver drugs for Rios. She testified that when she went to deliver cocaine to the defendant, another man known as "Capri" pulled a gun from a duffel bag and told her to take them upstairs to Rios. Studer took the defendant and Capri to the room.

Studer, Rios, and Foster gave varying accounts of what happened once the defendant and Capri were in the motel room. However, each witness claimed that the defendant was present and participated to some degree in the robbery. Rios testified that,

after several minutes, she slapped the gun out of the defendant's hands and chased after the men. A woman who worked at the Budget Inn motel wrote down the license plate number of the fleeing car and called the police.

The fourth witness, Krystal Miller, testified that she saw the defendant and "Caprice" after she arrived at a crack house in Joliet. The defendant told her that he needed a ride to the Budget Inn so he could get more cocaine. The defendant, Caprice, Miller, and a man whom Miller had met earlier in the evening started to drive to the Budget Inn. However, once the man saw the shotgun he got out and told them to take his car.

Miller stated that once the man left she drove to the motel. When they arrived, Studer slid into the backseat of the car, and Caprice pulled out the shotgun. Then Caprice, Studer, and the defendant went into the motel. A few minutes later, the men ran back into the car with the defendant saying "go, go, go." According to Miller, they went to the defendant's sister's home.

At the close of the State's case, the defendant was debating whether he would testify. The trial court warned him twice that the decision to testify was completely up to him, and ultimately he decided not to testify. The jury returned a guilty verdict for both counts of armed robbery.

Before sentencing, the defendant filed a *pro se* "Motion for New Trial" which contained claims of ineffective assistance of

counsel. The motion alleged that the defendant's trial counsel, Michelle Hansen, was ineffective because she failed to call witnesses on his behalf, provided erroneous advice that persuaded the defendant not to testify, failed to admit police statements into evidence in order to contradict the State's witnesses, and incriminated him in her closing argument.

Due to the claims of ineffectiveness, Stephanie Speakman, an attorney from the same public defender's office, was appointed to represent the defendant. Speakman filed a motion for a hearing pursuant to *People v. Baltimore*, 292 Ill. App 3d 159 (1997), so that the defendant could be heard on his posttrial motion.

The defendant's hearing was held on November 13, 2008. Speakman appeared and the following exchange occurred:

> "THE COURT: I haven't appointed counsel, have I?
>
> MS. SPEAKMAN: You did, but then I filed that motion for a hearing in accordance with *People v. Baltimore*.
>
> THE COURT: Correct.
>
> MS. SPEAKMAN: Based on that, you then ordered--you then set it for [a] *Baltimore* hearing, which is what it's here for today, which is why Ms. Hansen is here and Mr. Koch [assistant State's Attorney] is here and I'm here for the defendant.
>
> Pursuant to case law, I'm kind of a phantom attorney."

Shortly thereafter, the defendant was informed that he would

be representing himself until the court found there was some validity to his argument. The court questioned the defendant about each of his allegations and allowed Hansen an opportunity to respond. With regard to failure to call witnesses, the defendant stated that Hansen failed to call his sister, LeDina Hite, who would have testified that, contrary to Miller's testimony, the group did not go to his sister's house after the robbery. In addition, Hansen did not call Kaprison Holmes who wanted to come forward with a statement that said he actually committed the crime.

In response, Hansen stated that she was never informed about Holmes prior to or during the trial. She further stated that she was only made aware of LeDina as a possible witness after Miller testified. She acknowledged that she made a decision not to call LeDina because she was not sure whether the defendant was going to testify and, if he were to testify, Hansen believed that the two witnesses would give contradictory testimony. Speakman stood silent throughout the hearing.

At the conclusion of the hearing, the trial court denied the defendant's posttrial motion and refused to appoint counsel. He was sentenced on March 6, 2009, to two concurrent terms of 15 years in prison. The defendant appealed.

ANALYSIS

On appeal, the defendant argues that his posttrial counsel,

attorney Speakman, was operating under a conflict of interest because she was an assistant public defender from the same office as the defendant's trial counsel. Alternatively, he claims that Speakman was ineffective because she remained silent throughout his posttrial hearing. Both arguments are reviewed *de novo*. See *People v. Hardin*, 217 Ill. 2d 289 (2005); *People v. Coleman*, 183 Ill. 2d 366 (1998).

I. Conflict of Interest

The right to effective assistance of counsel includes the right to counsel free from conflict. *People v. Taylor*, 165 Ill. App. 3d 1016 (1988). Our supreme court created a framework for analyzing conflict of interest cases in *People v. Spreitzer*, 123 Ill. 2d. 1 (1988). The first step is to determine whether a *per se* conflict of interest exists. *Spreitzer*, 123 Ill. 2d. 1. If there is a *per se* conflict then the defendant does not have to show prejudice resulting from the conflict in order to obtain relief. *Spreitzer*, 123 Ill. 2d 1. A *per se* conflict does not arise simply because one public defender must question the effectiveness of another public defender. *People v. Banks*, 121 Ill. 2d 36 (1987).

If there is no *per se* conflict, the analysis depends on when the defendant raised the issue. *Spreitzer*, 123 Ill. 2d 1. A defendant who raises the issue for the first time on appeal must show that "'an actual conflict of interest adversely affected'

counsel's performance." *Spreitzer*, 123 Ill. 2d at 18, quoting *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980). While a defendant is not required to prove that the conflict caused the result of the proceedings, there must be the presence of an actual conflict of interest. *Spreitzer*, 123 Ill. 2d 1; *Banks*, 121 Ill. 2d 36.

The defendant urges us to find an actual conflict of interest in the fact that Speakman remained silent throughout the *Baltimore* hearing. He argues that Speakman must have felt conflicted about questioning the effectiveness of her coworker Hansen. However, *Banks* and its progeny require something more than mere speculation. *Hardin*, 217 Ill. 2d at 302; quoting *Banks*, 121 Ill. 2d at 46-47 (stating " '[i]n the absence of an evidentiary record of conflict, one should not be created based on mere speculation' "). The record is devoid of any indication of an actual conflict between Speakman and Hansen. Speakman and Hansen were not trial partners in the defendant's case, there is no suggestion that either attorney supervised the other, and the defendant has not presented any information on the size, structure, or organization of the Will County public defender's office to suggest that Hansen and Speakman worked in close proximity. See *Hardin*, 217 Ill. 2d 289. Moreover, Speakman gave a reason for her silence at the defendant's *Baltimore* hearing: she believed that she was acting pursuant to case law. Without any evidence to suggest that a conflict existed between Speakman

and Hansen, apart from the fact that they worked for the same office, the defendant's claim must fail.

II. Ineffective Assistance of Counsel

In order to prevail on a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that he was prejudiced as a result of the deficient performance. *Strickland v. Washington*, 466 U.S. 668 (1984). We do not need to decide whether counsel's performance was deficient if the defendant suffered no prejudice as a result of the alleged errors. *People v. Ford*, 368 Ill. App. 3d 562 (2006). A defendant suffers prejudice when there is " 'a reasonable probability' " that the results of the proceeding would have been different but for counsel's deficient performance. *Ford*, 368 Ill. App. 3d at 571, quoting *People v. Mack*, 167 Ill. 2d 525, 532 (1995).

We note that it is unclear from the record whether Speakman was appointed to represent the defendant at his *Baltimore* hearing. However, even assuming that Speakman was appointed, the defendant cannot succeed on an ineffective assistance claim because he was not prejudiced by Speakman's silence.

Our supreme court has set forth the procedure to follow when a defendant files a *pro se* motion alleging his trial counsel's incompetence. *People v. Moore*, 207 Ill. 2d 68 (2003). The trial court must first determine whether the claim has merit. *Moore*,

207 Ill. 2d 68. If the defendant makes a case of "possible" neglect, then new counsel should be appointed and a hearing held on the merits. *Moore*, 207 Ill. 2d at 78. Therefore, the defendant must show that there is a reasonable probability that, but for Speakman's silence, the trial court would have held a full hearing on the merits.

In this case, the defendant claims that he was prejudiced because Speakman did not argue that Hansen's failure to call LeDina was an error. Specifically, he claims that LeDina could have been called once the defendant decided not to testify, because then Hansen did not need to be concerned about contradictory testimony. However, even if Speakman had made this argument, there is no reasonable possibility that the trial court would have ruled differently. The court had some knowledge of what LeDina would have testified to[1] and still found that Hansen was effective. In other words, even if Speakman had further scrutinized Hansen's decision not to call LeDina, it seems highly unlikely that the trial court would have reached a different decision since LeDina's testimony only questioned a small part of

[1] The defendant did not attach an affidavit of LeDina's purported testimony to his motion for a new trial, and so the trial court only had the defendant's assertions when evaluating his claim. LeDina passed away during the course of these proceedings.

one witness's testimony.

In addition, the court added that there was not "much else [Hansen] could have done differently in this particular case." Four eyewitnesses testified that the defendant actively participated in the robbery. In light of the strong evidence against the defendant, we are confident that even if Speakman had zealously advocated on behalf of her client the result of the proceeding would have been the same. See *People v. Miles*, 176 Ill. App. 3d 758 (1988) (holding that even the testimony of one eyewitness can constitute overwhelming evidence of guilt for the purpose of evaluating prejudicial hearsay testimony).

Accordingly, we hold that there is no evidence to suggest that there was an actual conflict of interest between Speakman and Hansen. Moreover, the defendant was not prejudiced by Speakman's failure to speak at his posttrial hearing because there is no reasonable probability the trial court would have reached a different result.

CONCLUSION

For the foregoing reasons, the judgment of the circuit court of Will County is affirmed.

Affirmed.