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2012 IL App (3d) 100851-U

Order filed August 7, 2012

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,	) Appeal from the Circuit Court
	) of the 10th Judicial Circuit,
Plaintiff-Appellee,	) Peoria County, Illinois,
	)
v.	) Appeal No. 3-10-0851
	) Circuit No. 09-CF-171
	)
DONALD R. JONES,	) Honorable
	) James E. Shadid,
Defendant-Appellant.	) Judge, Presiding.

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JUSTICE McDADE delivered the judgment of the court.  
Justices Lytton and Carter concurred in the judgment.

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**ORDER**

¶ 1 *Held:* The record does not demonstrate a clear basis of ineffective assistance of counsel so as to impose a duty on the trial court to conduct a *sua sponte* inquiry into counsel's representation of defendant.

¶ 2 Pursuant to a partially negotiated plea agreement, defendant, Donald R. Jones, pled guilty to armed robbery (720 ILCS 5/18-2(a)(2) (West 2008)). The trial court sentenced defendant to 18 years of imprisonment. Defendant's attorney filed a combined motion to withdraw guilty plea and reconsider sentence, but he subsequently withdrew the motion to reconsider sentence

because the sentence had been imposed pursuant to the negotiated plea terms. The trial court denied defendant's motion to withdraw his guilty plea. Defendant appeals. Defendant argues that the trial court should have conducted a *sua sponte* inquiry into whether defendant's counsel was acting under a conflict of interest during his representation of defendant on his motion to withdraw guilty plea. The basis for defendant's claim is that counsel had apparently failed to inform defendant that, by accepting the plea agreement, he was surrendering his right to later challenge his sentence. We affirm.

¶ 3

### FACTS

¶ 4 Defendant was charged with armed robbery (count I), aggravated battery (count II), and mob action (count III). The armed robbery charge was a Class X felony that was punishable by 6 to 30 years of imprisonment (730 ILCS 5/5-4.5-25(a) (West 2008)). On July 20, 2009, under a partially negotiated plea agreement, defendant pled guilty to the charge of armed robbery, and the State agreed to cap defendant's sentence at 18 years of imprisonment and dismiss defendant's other pending criminal charges in this case and in a separate case. The factual basis for defendant's guilty plea was that the evidence would show that the victim was attacked while he was walking by defendant and two or three of defendant's companions. The victim suffered multiple skull and face fractures and a brain bleed, which required surgical intervention. In a statement to police, defendant admitted that he was one of the individuals who physically struck the victim.

¶ 5 At the plea hearing, defendant confirmed that no one was forcing him to plead guilty and no one made any promises to him to induce him to plead guilty, other than an agreed sentencing range of 6 to 18 years of imprisonment. The trial court accepted defendant's guilty plea and

sentenced defendant to 18 years of imprisonment. The trial court informed defendant of his appeal rights, indicating that he must first file a motion to withdraw the plea within 30 days and, if allowed, the guilty plea would be set aside, all charges would be reinstated, and the case would be set for trial. If the motion to withdraw guilty plea was denied, defendant would have 30 days to appeal.

¶ 6 Defendant filed a combined motion to withdraw his guilty plea and to reconsider the sentence. At the hearing on the motion, defendant's counsel stated:

"I had filed the amended motion to withdraw guilty plea and reconsider sentence, but as I recall now this is actually a case where there was a cap that was involved, so I believe the current state of law indicates that he would not be able to reconsider the sentence. So just to clarify this, this is actually just an amended motion to withdraw guilty plea."

¶ 7 Defendant testified that his plea was not knowing and voluntary because he "didn't really understand what [he] was pleading for." Defendant indicated that he understood the charge and that he had a right to trial, "but the other stuff [he] didn't understand." Specifically, defendant claimed that he did not understand the amount of prison time he was facing. Defendant stated that he did not remember "doing" the plea because he "didn't pay attention" at the guilty plea hearing. He did not know why he was not paying attention. The trial court denied defendant's motion to withdraw guilty plea. Defendant appealed.

¶ 8 ANALYSIS

¶ 9 On appeal, defendant argues that the trial court should have inquired into whether his

counsel was acting under a *per se* conflict of interest during his representation of defendant on the motion to withdraw his guilty plea. Defendant claims that his counsel's loyalties were divided between advocating for defendant on the motion to withdraw guilty plea and defending his representation of defendant because he never made defendant "aware—prior to the time he pled guilty—that he was surrendering the right to appeal any sentence that was imposed within the range of six-to-eighteen years' imprisonment." Defendant bases his claim on counsel's filing and withdrawing the motion to reconsider sentence, which defendant contends should have indicated to the court that counsel had not informed defendant before he entered his guilty plea that he would be unable to challenge a sentence that was imposed within the limits of the plea agreement. Thus, defendant argues that the trial court had a duty to conduct a *sua sponte* inquiry into whether defendant's counsel was acting under a *per se* conflict of interest. Defendant requests that this court remand this matter for an inquiry into the possibility that his counsel was unable to provide conflict-free representation.

¶ 10 A criminal defendant's sixth amendment right to effective assistance of counsel includes an undivided loyalty of counsel, free from conflicting interests or inconsistent obligations.

*People v. Morales*, 209 Ill. 2d 340 (2004); *People v. Moore*, 189 Ill. 2d 521 (2000). Typically, in determining whether a defendant received conflict-free representation, we must first determine whether counsel labored under a *per se* conflict, which would result in an automatic reversal of defendant's conviction. *Morales*, 209 Ill. 2d 340. A *per se* conflict exists if certain facts about defense counsel's status, by themselves, are held to engender a disabling conflict. *Moore*, 189 Ill. 2d 521. A *per se* conflict of interest has been found in situations where defense counsel: (1) had a contemporaneous relationship with the victim, prosecution, or an entity assisting the

prosecution; (2) contemporaneously represented a prosecution witness; or (3) was a former prosecutor involved in the prosecution of defendant. *Morales*, 209 Ill. 2d 340.

¶ 11 Even if a *per se* conflict is not present, a defendant may establish a violation of his right to effective assistance of counsel by showing an actual conflict of interest that adversely affected his counsel's performance. *Id.* In doing so, defendant must show that some specific defect in his counsel's strategy, tactics, or decision making attributed to a conflict. *Id.* Speculative allegations and conclusory statements are not sufficient to establish that an actual conflict of interest affected counsel's performance. *Id.*

¶ 12 Generally, a trial judge's duty to inquire about a potential conflict of interest is triggered only where defendant or his counsel brings the conflict to the court's attention. *Id.* However, where there is a clear basis for an allegation of ineffectiveness of counsel, a defendant's inaction does not necessarily result in a waiver of the issue. *People v. Ephraim*, 323 Ill. App. 3d 1097 (2001); *People v. Williams*, 224 Ill. App. 3d 517 (1992).

¶ 13 In this case, defendant contends that the trial judge should have conducted a *sua sponte* inquiry into the possibility of a conflict of interest because the filing of the motion to reconsider sentence indicated that defendant was never informed prior to entering his plea that he would not be able to challenge a sentence that was within the terms of a negotiated plea without first withdrawing his guilty plea. See *People v. Linder*, 186 Ill. 2d 67 (1999) (a defendant must first withdraw his guilty plea prior to challenging a sentence resulting from a negotiated plea with a motion to reconsider). However, defendant never brought the issue of his counsel's competence and performance to the court's attention.

¶ 14 Also, there was no clear basis for an allegation of ineffectiveness of counsel that would

have triggered the need for a *sua sponte* inquiry into counsel's performance. Although defendant claims that his attorney did not tell him he could get an 18-year sentence that he could not challenge on appeal, this argument is undercut by his concession that he "didn't pay attention" at the guilty plea hearing. Counsel's filing of a postplea motion to reconsider sentence and subsequent withdrawal of that motion did not constitute a clear basis for an allegation of ineffectiveness. Defendant cites no authority for his position that counsel was required to inform him that he would be unable to challenge a sentence imposed within the negotiated sentencing range, or that failing to do so created a *per se* conflict of interest in representing defendant on the motion to withdraw guilty plea. Defendant does not argue that his counsel affirmatively misrepresented information to indicate that he would be able to challenge the sentence after entering a guilty plea. See *People v. Correa*, 108 Ill. 2d 541 (1985) (any affirmative misrepresentation by counsel that causes defendant to plead guilty results in prejudice); *People v. Edmonson*, 408 Ill. App. 3d 880 (2011).

¶ 15 Here, defendant merely speculates that his counsel may have been burdened by a conflict of interest based on the fact that his counsel filed a motion to reconsider the sentence and then subsequently withdrew that motion. However, errors in judgment or matters of trial strategy do not establish incompetence even if clearly wrong in retrospect. *People v. Davis*, 337 Ill. App. 3d 977 (2003). There is nothing in the record to indicate a clear basis of an actual conflict of interest existed so as to impose a *sua sponte* duty upon the trial court to inquire into counsel's performance.

¶ 16

## CONCLUSION

¶ 17 For the foregoing reasons, we affirm the judgment of the circuit court of Peoria County.

¶ 18 Affirmed.