2013 IL App (4th) 120274-U

NO. 4-12-0274

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
October 31, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
STEVEN D. MONROE,	)	No. 11CF49
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas J. Difanis,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Turner and Holder White concurred in the judgment.

ORDER

¶ 1 *Held:* We grant appointed counsel's motion to withdraw under *Anders v. California*, 386 U.S. 738 (1967), and affirm the trial court's judgment where counsel concludes no meritorious issues could be raised on appeal as to the following: whether (1) defendant received ineffective assistance of counsel; (2) defendant was eligible for a Class X sentence; (3) defendant's sentence is excessive; and (4) the trial court violated the rule against double enhancement. We also find no colorable argument could be raised on appeal as to the following: whether defendant's due process rights were violated when the State failed to give notice to defendant of its intent to seek an enhanced sentence in the charging instrument.

¶ 2 This appeal comes to us on the motion of the office of the State Appellate Defender (OSAD) to withdraw as counsel on appeal because no meritorious issues can be raised in this case. We agree and affirm.

¶ 3 I. BACKGROUND

¶ 4 In the evening on January 7, 2011, defendant, Steven D. Monroe, was driving with

two of his friends, Roy Duckworth and Joseph Emery. Duckworth drove to pick up another friend, Darren Mosley. The four men went to a food mart in Rantoul, Illinois, and purchased a bottle of vodka. The four men drove around Rantoul, drinking the vodka. The four men decided to purchase some marijuana. They drove to the Bell Apartments complex, located just outside the Rantoul village limits, expecting to buy marijuana.

¶ 5 The testimony differed as to what occurred after arriving at Bell Apartments. Defendant testified after the four men arrived at Bell Apartments, defendant and Duckworth exited the vehicle and went to Marcus Brown's apartment. After speaking with Brown briefly inside the apartment, defendant and Duckworth asked Brown if he could sell them some marijuana. Brown stated he had a small amount for sale, and defendant purchased the marijuana. Defendant and Duckworth then went next door to try to obtain more marijuana but were unsuccessful. Defendant and Duckworth returned to the car and were getting ready to leave when Emery asked Duckworth to stop the vehicle because he had to use the restroom. Emery exited the vehicle, and returned after about five minutes. When Emery returned to the car, he was carrying a video game and a laptop computer. Emery later told defendant and Duckworth he robbed Brown, and, during a struggle, shot him.

¶ 6 Mosley had a different account of what occurred. Mosley testified after the four arrived at Bell Apartments, Duckworth exited the vehicle and walked toward the apartments. Duckworth returned after about five minutes and asked to speak with defendant and Emery outside the car. Mosley stated he did not overhear any of the conversation between defendant, Duckworth, and Emery. Mosley testified the three men then walked back to the apartments. After a short while, Duckworth came back to the vehicle, followed shortly thereafter by

defendant, and later, by Emery, who was holding a laptop computer.

¶ 7 After leaving Bell Apartments, the four men returned to Rantoul and went their separate ways. Later, Dennis Droughns and two women picked up defendant. Defendant entered the vehicle, and a Ruger .22-caliber handgun he was carrying accidentally discharged, and a bullet struck Droughns in the back. The bullet also grazed the defendant's leg. Droughns drove his vehicle back to his home. Defendant left the scene and went back to the house where he was staying. When officers arrived, the two women with Droughns indicated defendant left the scene and told the officers where they could find defendant.

¶ 8 Police officers went to the home where they were told they could find defendant. They searched the home and found defendant asleep in the basement. The officers searched the rest of the home and the area outside the home, and found a Ruger .22-caliber handgun in a barbeque grill located outside the back entrance to the home.

¶ 9 On January 8, 2011, Rantoul police officers responded to a call for an unresponsive body at Bell Apartments. The officers were later joined by emergency medical services (EMS) personnel and members of the Champaign County sheriff's department. They found Brown's dead body. The evidence showed no signs of struggle in the apartment. The autopsy confirmed Brown's death was the result of a close-range gunshot wound to the back of the head.

¶ 10 In January 2011, the State charged defendant by information with aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2010)), aggravated unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a), (e) (West 2010); 730 ILCS 5/5-5-3(c)(2)(F) (West 2010)), reckless discharge of a firearm (720 ILCS 5/24-1.5(a) (West 2010)), and aggravated

battery with a firearm (720 ILCS 5/12-4.2(a) (West 2010)). All but the charge for aggravated unlawful possession of a weapon by a felon were dropped. The State charged defendant with Brown's murder in a separate case. The two cases were consolidated for trial. In December 2011, the jury convicted defendant of the unlawful possession of a weapon by a felon charge, but it could not reach a verdict on the murder charge. In January 2012, the trial court sentenced defendant as a Class X offender under section 5-4.5-95 of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5-4.5-95 (West 2010)) to the maximum 30-year sentence.

¶ 11 After sentencing, defendant filed a notice of appeal. The trial court appointed OSAD to represent defendant. This appeal followed.

¶ 12 II. ANALYSIS

¶ 13 On appeal, OSAD contends the record shows no meritorious issues can be raised. Specifically, OSAD contends (1) defendant did not receive ineffective assistance of counsel when defense counsel conceded defendant's guilt on the weapons charge and advised defendant to testify and admit he possessed a firearm when he was a convicted felon and on mandatory supervised release, (2) defendant was eligible for a Class X sentence, (3) the trial court did not abuse its discretion in sentencing defendant to 30 years in prison, and (4) the trial court did not violate the rule against double enhancement. The record shows service on defendant. On its own motion, this court granted defendant leave to file additional points and authorities. Defendant submitted a brief and contends the State failed to give notice of its intent to seek an enhanced sentence pursuant to section 111-3(c) of the Code of Criminal Procedure of 1963 (Procedure Code) (725 ILCS 5/111-3(c) (West 2010)). The State has responded. After examining the record and executing our duties in accordance with *Anders*, we grant OSAD's

motion and affirm the trial court's judgment.

¶ 14 A. Ineffective Assistance of Counsel

¶ 15 OSAD first contends the defendant did not receive ineffective assistance of counsel when defense counsel conceded defendant's guilt on the weapons charge and advised defendant to testify and admit he had possessed a firearm when he was a convicted felon and on mandatory supervised release. We agree.

¶ 16 1. *The Applicable Test to the Ineffective Assistance Argument*

¶ 17 A claim of ineffective assistance of counsel typically requires a defendant to meet the two-part test of *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Nieves*, 192 Ill. 2d 487, 494, 737 N.E.2d 150, 154 (2000). A defendant must show (1) his counsel's performance was deficient as measured against an objective standard of reasonableness under prevailing professional norms, and (2) defense counsel's deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687-88.

¶ 18 Where, as here, counsel concedes defendant's guilt, the defendant need not always show defense counsel's performance prejudiced the defendant. *People v. Hattery*, 109 Ill. 2d 449, 461, 488 N.E.2d 513, 517 (1985). Prejudice to the defendant will be presumed "[w]here 'counsel entirely fails to subject the prosecution's case to meaningful adversarial testing.' " *Id.* (quoting *United States v. Cronic*, 466 U.S. 648, 659 (1984)). It is not, however, *per se* ineffectiveness where defense counsel concedes his client's guilt to offenses on which there is overwhelming evidence against defendant, especially "when counsel presents a strong defense to the other charges." *People v. Johnson*, 128 Ill. 2d 253, 269, 538 N.E.2d 1118, 1124-25 (1989).

¶ 19 In this case, defense counsel conceded defendant's guilt on the weapons charge

and advised defendant to admit possessing the weapon in violation of the statute. Defense counsel extensively cross-examine the State's two star witnesses on the murder case. Defense counsel strongly argued to the jury defendant's innocence on the murder charge. Defense counsel did subject the State's case to meaningful adversarial testing, (see *Nieves*, 192 Ill. at 499, 737 N.E.2d at 156 (finding the State's case had been subjected to meaningful adversarial testing where counsel "thoroughly cross-examined the State's witnesses, presented a witness in support of [the] defense, and vigorously argued that the defendant should be found 'not guilty' ")), and prejudice will not be presumed. Defendant must meet the *Strickland* test.

¶ 20 2. *Strickland Analysis*

¶ 21 "Claims of ineffective assistance of counsel may be disposed of on the ground that the defendant suffered no prejudice from the claimed errors, without deciding the first prong, whether the errors were serious enough to constitute less than reasonably effective assistance." *Johnson*, 128 Ill. 2d at 271, 538 N.E.2d at 1125. If defendant cannot show he was prejudiced as a result of counsel's assistance, we need not examine nor question defense counsel's trial strategy.

¶ 22 To show the required prejudice, a defendant must show that counsel's performance denied defendant the right to a fair trial. *Strickland*, 466 U.S. at 687. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. Said differently, "defendant must show that there is a 'reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.' " *Johnson*, 128 Ill. 2d at 271, 538 N.E.2d at 1125 (quoting *Strickland*, 466 U.S. at 695).

¶ 23 The evidence against defendant on the aggravated unlawful possession of a weapon by a felon charge was overwhelming. Defense counsel apparently developed a strategy in which the defense would concede and admit to the weapons charge to gain credibility with the jury to fight the murder charge. Although the parties disputed how and when defendant came into possession of the gun, there was no dispute defendant did possess the Ruger .22-caliber handgun at some point. Defense counsel conceded defendant possessed the handgun, and defendant admitted this during his testimony. The evidence strongly corroborated the concession and admission.

¶ 24 Droughns' ex-wife testified on the night in question, defendant entered her home holding his ankle. Defendant asked her to call an ambulance because defendant accidentally shot himself and Droughns. Dominique Douglas testified she had been in the car with defendant and Droughns on the night Droughns was shot. Douglas heard a muffled gunshot and saw a flash as defendant entered the car Droughns was driving. Douglas also testified Droughns said he had been shot and repeatedly called defendant stupid for shooting him. Douglas also testified she directed the police to where they could find defendant.

¶ 25 Defendant was found at the residence where Douglas told police they could find defendant. He was found in the basement, apparently sleeping. The police also recovered the gun in a barbeque grill located outside the back door to the residence. In light of the evidence corroborating defendant's admission as to possessing the weapon, we find counsel's concession as to defendant's possession of the gun did not prejudice defendant. Absent defense counsel's concession, the State presented sufficient evidence to convict defendant on the weapons charge. No colorable argument can be made defendant received ineffective assistance of trial counsel.

¶ 26 B. Class X Sentence

¶ 27 1. *Eligibility*

¶ 28 OSAD next contends no colorable argument can be made defendant was not eligible for a Class X sentence. We agree.

¶ 29 Defendant was sentenced as a Class X offender pursuant to section 5-4.5-95 of the Unified Code (730 ILCS 5/5-4.5-95 (West 2010)) (formerly section 5-5-3(c)(8) of the Unified Code (730 ILCS 5/5-5-3(c)(8) (West 2008))). Whether defendant was eligible for the Class X sentence depends on whether the defendant's criminal record satisfied the requirements of section 5-4.5-95 of the Unified Code. Questions involving the application of a statute are questions of law. *County of Kankakee v. Anthony*, 304 Ill. App. 3d 1040, 1044, 710 N.E.2d 1242, 1245 (1999). Questions of law are reviewed *de novo*. *Id*. at 1044-45, 710 N.E.2d at 1246.

¶ 30 Section 5-4.5-95 of the Unified Code provides a defendant convicted of a Class 1 or a Class 2 felony may be sentenced as a Class X offender. 730 ILCS 5/5-4.5-95(b) (West 2010). The statute requires the defendant to have been twice before convicted of a Class 2 or greater felony. 730 ILCS 5/5-4.5-95(b) (West 2010). Subsection (b) of section 5-4.5-95 "does not apply unless (1) the first felony was committed after February 1, 1978 (the effective date of Public Act 80-1099); (2) the second felony was committed after conviction on the first; and (3) the third felony was committed after conviction on the second." 730 ILCS 5/5-4.5-95(b)(1), (2), (3) (West 2010).

¶ 31 We find the defendant was eligible to be sentenced as a Class X offender. In this case, defendant was ultimately convicted of aggravated unlawful possession of a weapon by a felon, a Class 2 felony, pursuant to section 24-1.1(e) of the Criminal Code of 1961 (Criminal

Code) and section 5-5-3(c)(2)(F) of the Unified Code. 720 ILCS 5/24-1.1(e) (West 2010); 730 ILCS 5/5-5-3(c)(2)(F) (West 2010). The State sought an enhanced sentence of 30 years based on defendant's criminal history. In sentencing defendant to the Class X sentence, the trial court relied on a Class 2 felony drug conviction from 2001 and a Class 2 felony weapons conviction from 2006. Each of the previous convictions arose out of separate facts. The first conviction occurred after the effective date of section 5-4.5-95 of the Unified Code. The second conviction occurred after the first, and the third conviction (the one before this court) occurred after the second. No colorable argument can be made defendant was not eligible for a Class X sentence.

¶ 32 2. *Lack of Notice of Intent To Seek Enhanced Sentence in the Charging Instrument*

¶ 33 Defendant argues his right to due process was violated when he was sentenced as a Class X offender even though the State failed to provide notice of its intent to seek such sentence in the information charging defendant. We disagree.

¶ 34 Defendant failed to raise this argument in the trial court and in his motion to reconsider. Defendant asserts this issue is not waived and may be reviewed by this court under *People v. Wagener*, 196 Ill. 2d 269, 279, 752 N.E.2d 430, 438 (2001) (holding defendant's argument as to the constitutionality of a statute as applied to him was not waived by failing to raise it at trial). We agree defendant has not waived this argument because "a party may challenge the constitutionality of a statute at any time." *Id*.

¶ 35 Defendant asserts his due process rights were violated by the imposition of the Class X sentence. Defendant contends the State failed to comply with section 111-3(c) of the Procedure Code (725 ILCS 5/111-3(c) (West 2010)). Section 111-3 of the Procedure Code provides "[w]hen the State seeks an enhanced sentence because of a prior conviction, the charge

shall also state the *intention to seek an enhanced sentence* and shall state *such prior conviction* so as to give notice to the defendant." (Emphasis added.) 725 ILCS 5/111-3(c) (West 2010). This is the only portion of subsection (c) of section 111-3 defendant cites in his brief.

¶ 36 Defendant fails to cite the portion of subsection (c) we find dispositive of the case at bar, which states as follows:

> "For the purposes of this Section, 'enhanced sentence' means a sentence which is increased by a prior conviction from one classification of offense to another higher level classification of offense set forth in Section 5-4.5-10 of the Unified Code of Corrections [citation]; it does not include an increase in the sentence applied within the same level of classification of offense." 725 ILCS 5/111-3(c) (West 2010).

To explain further, "section 111-3 'explicitly excludes those situations *** where the sentence is increased because of a prior conviction, but the classification of the offense remains the same.' " *People v. Harris*, 259 Ill. App. 3d 106, 112, 630 N.E.2d 1047, 1051 (1994) (quoting *People v. Contreras*, 241 Ill. App. 3d 1023, 1026, 609 N.E.2d 949, 950 (1993)).

¶ 37 On our review of the record, we find defendant's argument to be without merit. Here, the record shows only the sentence, and not the classification of the offense itself, was increased. In its sentencing order, the court found "the defendant [was] convicted of a Class 2 offense but sentenced as a Class X offender." We find defendant was not entitled to notice of the State's intent to seek an enhanced sentence under section 111-3 of the Procedure Code, and no colorable argument can be made on this issue.

¶ 38 C. Excessive Sentence

¶ 39 OSAD contends no colorable argument can be made the trial court erred in sentencing defendant to 30 years in prison. We agree.

¶ 40 The sentencing of a criminal defendant is a matter of judicial discretion and reviewing courts will not disturb the trial court's sentence absent an abuse of discretion. *People v. O'Neal*, 125 Ill. 2d 291, 297-98, 531 N.E.2d 366, 368 (1988). The trial court's sentence is afforded great deference and "provides a trial court the latitude to impose a sentence that falls within the statutory range prescribed for the offense." *People v. Brunner*, 2012 IL App (4th) 100708, ¶ 40, 976 N.E.2d 27. An abuse of discretion will not be found unless the sentence is "greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense." *People v. Alexander*, 239 Ill. 2d 205, 212, 940 N.E.2d 1062, 1066 (2010) (quoting *People v. Stacey*, 193 Ill. 2d 203, 210, 737 N.E.2d 626, 629 (2000)).

¶ 41 Aggravated unlawful possession of a firearm by a felon is a Class 2 offense (720 ILCS 5/24-1.1(a), (e) (West 2010); 730 ILCS 5/5-5-3(c)(2)(F) (West 2010)). Defendant was eligible, based on his prior convictions, to be sentenced as a Class X offender. 730 ILCS 5/5-4.5-95 (West 2010). The statutory range for such offense is 6 to 30 years. 730 ILCS 5/5-4.5-25(a) (West 2010). The sentence defendant received was the maximum under the statutory range. The record shows the trial court considered the statutory mitigating and aggravating factors. The record also shows the trial court considered mitigating factors other than the statutory factors. No colorable argument can be made the court abused its discretion in sentencing defendant.

¶ 42 D. Double Enhancement

¶ 43 In his motion to reconsider sentence, defendant alleged the trial court violated the

rule against double enhancement. OSAD contends no colorable argument can be made the trial court violated the rule. We agree.

¶ 44 The rule against double enhancement states "a factor implicit in the offense for which the defendant has been convicted cannot be used as an aggravating factor in sentencing for that offense ***." *People v. Ferguson*, 132 Ill. 2d 86, 97, 547 N.E.2d 429, 433 (1989). "A double enhancement occurs when either (1) a single factor is used both as an element of an offense and as a basis for imposing a harsher sentence than might otherwise been imposed, or (2) the same factor is used twice to elevate the severity of the offense itself." *People v. Guevara*, 216 Ill. 2d 533, 545, 837 N.E.2d 901, 908 (2005). The issue of double enhancement is one of statutory construction, and thus, is reviewed *de novo*. *People v. Phelps*, 211 Ill. 2d 1, 12, 809 N.E.2d 1214, 1220 (2004).

¶ 45 In his motion to reconsider sentence, defendant specifically alleges "[t]hat in sentencing the Defendant the court used as aggravation his prior criminal history which is the same factor that enables the sentence to greater than a Class 2 sentence." Two of defendant's prior convictions were cited to support defendant's eligibility for a Class X sentence. The trial court considered his criminal history in aggravation of his sentence. This does not constitute double enhancement. See *People v. Thomas*, 171 Ill. 2d 207, 229, 664 N.E.2d 76, 88 (1996) (holding "a sentencing court's use of prior convictions to impose a Class X sentence under section 5-5-3(c)(8) does not preclude the court from considering those same prior convictions as an aggravating factor under section 5-5-3.2(a)(3)"). No colorable argument can be made the trial court violated the rule against double enhancement.

¶ 46 III. CONCLUSION

¶ 47 We agree with OSAD that no meritorious issues can be raised on appeal, and grant OSAD's motion to withdraw as counsel for defendant and affirm the trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2012).

¶ 48 Affirmed.