2013 IL App (5th) 110249-U

NO. 5-11-0249

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Madison County.
	)	
v.	)	No. 05-CF-3139
	)	
RICHARD TAYLOR,	)	Honorable
	)	James Hackett,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Justices Goldenhersh and Wexstten concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant's conviction is affirmed where the State presented sufficient evidence to prove beyond a reasonable doubt that the defendant possessed methamphetamine by knowingly participating in its manufacture, and his sentence is affirmed where he was not denied his constitutional right to effective assistance of counsel, as his attorney did not labor under a *per se* conflict of interest when representing him at a hearing on his motion to reconsider sentence.

¶ 2 The defendant, Richard Taylor, appeals from his conviction for one count of knowingly possessing more than 15 grams but less than 100 grams of a substance containing methamphetamine, in violation of section 60(b)(3) of the Methamphetamine Control and Community Protection Act (720 ILCS 646/60(b)(3) (West 2008)). At the defendant's bench trial, the State argued that he was guilty of the offense under an accountability theory. On appeal, the defendant argues that (1) his conviction should be reversed, as the evidence was insufficient to support a finding of guilt because it was based on the incredible testimony of convicts and drug addicts, each with motive to falsely accuse the defendant, and additionally

that his health was so poor, he was unable to control the activity on his property; and (2) his case should be remanded for appointment of new counsel, as the attorney representing him at the hearing on the motion to reconsider sentence had a *per se* conflict of interest in requesting probation for the defendant after entering into an agreement that the defendant would not argue for probation at sentencing. For the reasons that follow, we affirm.

¶ 3 On January 5, 2006, a grand jury returned a one-count indictment charging the defendant with unlawful possession of a controlled substance weighing 900 grams or more, an enhanced Class X felony subject to a term of imprisonment of not less than 10 years and not more than 50 years, and a fine not to exceed $300,000. 720 ILCS 646/60(b)(6) (West 2008). At a pretrial conference on October 15, 2009, the State and the defendant entered into an agreement (pretrial agreement) in which the State agreed to reduce the charge against the defendant to unlawful possession of a controlled substance weighing 15 or more grams but less than 100 grams, a Class 1 felony subject to a term of imprisonment not less than 4 years and not more than 15 years. 720 ILCS 646/60(b)(3) (West 2008). The sentencing guidelines for a Class 1 felony include a term of probation. 730 ILCS 5/5-4.5-30(d) (West 2008). The defendant stated he was of sound mind and agreed in exchange to waive his right to a jury trial in favor of a bench trial and to not argue for probation at sentencing.

¶ 4 The following evidence was adduced at the defendant's two-day bench trial. We will set forth only those facts pertinent to our disposition of the specific issues on appeal.

¶ 5 Detective Kevin Hendricks testified that he was a police officer with the Glen Carbon police department in December 2005, and on or about December 22, 2005, Jennifer Lietard came to the police department with information regarding an active methamphetamine lab on the defendant's property. Hendricks testified that he had also received a letter from Ricky Flatt offering information against the defendant. Hendricks stated that he obtained a search warrant based on this information and executed it on the defendant's recreational vehicle

(RV). Hendricks testified that the RV was more than 20 but less than 100 yards from the house. Hendricks testified that there was a strong chemical smell, similar to cat urine or rotten eggs, coming from the RV, and that methamphetamine materials were discovered in the RV and in a van parked near the RV. He stated that the defendant was on the property that day, but not in the RV, and a prescription bottle bearing the defendant's name was found in the RV. Hendricks agreed that the medication, a cholesterol-lowering drug, is not commonly used for the production of methamphetamine, and he could not testify as to when or how the bottle got to the RV. He stated that he did not have knowledge of how the RV was powered. He noted that no methamphetamine or methamphetamine precursors were found in the house, and nothing in the house indicated that methamphetamine was being manufactured in the house. Hendricks testified that several people told him that the defendant's "card" had been used to purchase supplies for the methamphetamine cooking. Hendricks stated that he did not subpoena the defendant's credit card records during the course of the investigation. Hendricks testified that the defendant was ambulatory at this time; he saw the defendant walk into the police department under his own power on the day he was arrested, and in previous incidents regarding the defendant's dilapidated vehicles, Hendricks saw the defendant walking about the property in order to move vehicles.

¶ 6 Sean King, an Illinois State Police officer and member of the Methamphetamine Response Team, participated in the execution of the search warrant on the defendant's property. He testified that he is familiar with the smell of methamphetamine cooking and that the smell surrounding the RV was consistent with his knowledge of a methamphetamine lab's odor. King agreed that the RV was approximately 100 yards from the residence, and it was likely not possible to smell the laboratory from that distance. He stated that the materials found in and around the RV, such as tubing, spoons, propane canisters, gallon jugs, and match strips, were consistent with those required to manufacture methamphetamine using

the "red phosphorus" method. King did not recall whether there was an extension cord running from the residence, but agreed that he would not have inventoried it or made a report of its existence if there was. King stated that the lab was operational but not in production, and agreed that there was no way to determine where the methamphetamine that was found was produced other than through interviews.

¶ 7 Robert Brown, a former methamphetamine addict, testified that he knew and was friends with the defendant at the time of the investigation. Brown agreed that in consideration for his testimony against the defendant, he was being released from prison early. He stated that during that time period, when he was not incarcerated, he was living with the defendant and working on cars. He stated that the defendant knew he was a methamphetamine addict and had used it with him. Brown testified that he had made methamphetamine in the basement of the defendant's house with Kirk Mosier while the defendant was present upstairs. Brown stated that the defendant knew that he and Mosier were cooking methamphetamine in the basement, though the defendant did not come to the basement. Brown stated that the defendant helped him with production by letting him use the house, and on a few occasions, gave him money to purchase pseudoephedrine pills or cooking supplies. Brown put the methamphetamine into capsules for the defendant and said that he witnessed the defendant use them. He testified that he was familiar with the RV and with Mosier cooking methamphetamine in the RV because his girlfriend at the time, Jennifer Lietard, told him about it, but Brown never cooked in the RV and was not present on the date of the arrest as he was in jail at the time. Brown stated that a lot of people from the "meth game" were in and out of the defendant's house.

¶ 8 Ricky Flatt testified that he was currently incarcerated, and he was also incarcerated at the time of the execution of the search warrant on the defendant's property. Flatt testified that he sent a letter to Detective Hendricks, stating that he had information on the defendant.

Flatt agreed that he had an extensive criminal history and that in exchange for his truthful testimony, he was receiving six months off of his sentence. He testified that he had known the defendant for about eight years; they had met through the defendant's daughter, Virginia "Jenny" Karahoff, whom Flatt was dating in December 2005. Flatt stated he spent almost every night at the defendant's residence from September 2005 to December 2005 and that prior to December 22, 2005, methamphetamine was being made on the property by Mosier almost every night. Flatt stated that he saw the defendant give his credit card to Mosier, who used it to purchase materials for methamphetamine manufacturing, though he did not hear the defendant tell anyone to go buy supplies. Flatt agreed that he had never seen methamphetamine being made in the RV, but noted that there was a foul odor coming from the area where the RV was located, and that "[Mosier] would come back [to the residence] with hoses and pills and be out at the table popping the pills out of the packages." He also stated that he saw an extension cord running from the defendant's residence to the RV. He testified that he overheard Mosier say he always had to give the defendant half of the methamphetamine that he produced, though Flatt agreed that he never saw Mosier give methamphetamine to the defendant. He recalled that the defendant spent a majority of his time in his bedroom.

¶ 9 Jennifer Lietard testified that she is a recovered methamphetamine addict; she had been sober for three years but was an addict at the time of the arrests. She testified that around that time, she managed the gas station across the road from the defendant's property, but was fired in August 2005 for being arrested on a cannabis delivery charge. She admitted that she went to the police with information about the methamphetamine lab on the defendant's property because she wanted to get her boyfriend, Robert Brown, early release from prison, but she denied planting evidence on the defendant's property. Lietard testified that she overheard the defendant talking to Mosier and Brown about making

methamphetamine and that the defendant told her that he used to get prescribed methamphetamine for narcolepsy. She stated that Mosier and Brown were known methamphetamine cooks, and she had witnessed Brown cook in the defendant's residence. She agreed that the defendant was not in the basement when methamphetamine was being cooked. She testified that she had also witnessed the RV's methamphetamine lab in use on December 21, 2005, and had helped Mosier with the matches. She stated that she never saw the defendant go out to the RV, but recalled an extension cord running from the residence to the RV. She stated that she saw the defendant give a credit card or gift card to Mosier to buy methamphetamine-manufacturing supplies and that the defendant knew that they were buying supplies with the card. She agreed that she helped Mosier buy supplies to make methamphetamine. She testified that she gave the defendant methamphetamine that had been manufactured by Mosier on several occasions, but did not see him consume it. Lietard agreed that the defendant spent the majority of his time in his room, but also that he was ambulatory and able to drive a car.

¶ 10 Prior to Kirk Mosier's testimony, the State disclosed that it had entered into a cooperation agreement with Mosier where a Class X felony charge of methamphetamine possession was being reduced to a Class 1 felony charge of possession of methamphetamine over 15 grams but less than 100 grams, with a sentencing range of probation up to 15 years in prison. The State also withdrew a petition to revoke probation. Kirk Mosier testified that he was a recovered methamphetamine addict and that he was a methamphetamine cook who was arrested in the search of the defendant's property on December 22, 2005. He stated that he had a brief relationship with Jennifer Lietard after Brown went to prison, in the beginning of December 2005. Mosier believed that because he began dating another girl in mid-December 2005, Lietard retaliated by going to the police with her information. Mosier agreed that while he was using, he had lapses from reality. He admitted that on the day of

the arrest, he was highly intoxicated. Mosier stated that he met the defendant through Robert Brown, that he and Brown were both methamphetamine cooks at that time, and that the purpose of his introduction to the defendant was to manufacture methamphetamine with Brown on the defendant's property. Mosier testified that he talked with the defendant about manufacturing and that he witnessed the defendant using the methamphetamine that had been manufactured on the property. Mosier stated that the defendant wanted the laboratory moved from the basement to the RV. Mosier believed this was because there were a lot of people coming in and out of the house and the smell was strong.

¶ 11 Prior to getting arrested on December 22, 2005, Mosier manufactured six or seven times on the defendant's property, two to four times in the basement and two to four times in the RV. He recalled that the RV was powered by an extension cord that ran from the porch, and that he manufactured in the RV for approximately two or three weeks before the arrest. Mosier believed the RV was approximately half of a football field away from the house. Mosier stated that he never saw the defendant go to the RV, but thought that he had been there at some point because the defendant had told him that he needed to clean up the mess around the RV. Mosier testified that the defendant was not present during the cooking, but was aware of it and provided his credit card twice to "get what [was] needed" from Lowe's. Mosier stated that the defendant knew that the items being purchased were for the manufacture of methamphetamine. He agreed that the defendant spent most of his time in his room and used a breathing apparatus that likely prevented him from smelling the cooking until he woke up.

¶ 12 Nicole Owens testified that she worked in the gas station across the street from the defendant's residence from 2001 to 2009 and that she lived with the defendant for about six months in 2001. She stated that in December 2005, perhaps the day after the arrests at the defendant's residence, she overheard a telephone conversation in which Lietard stated to the

caller that if she "gave them something" on the defendant, they would let Brown out of prison. Owens stated that based on her subsequent conversation with Lietard, she assumed Lietard then arranged to have people set up a lab on the defendant's property and then called the police. Owens stated that Lietard said she did it because she loved and missed Brown.

¶ 13 Terri Adams testified that she has worked at the gas station across from the defendant's residence for eight years and knew the defendant through a friendship with his daughter. Adams testified that she heard Lietard have a telephone conversation the day after the drug raid; Adams inferred from Lietard's statements that she arranged to plant evidence on the property in order to get a reduced sentence for Brown. Adams stated that she visited the residence perhaps a couple of dozen times in 2005 and never saw a methamphetamine lab or witnessed the defendant use methamphetamine. She stated that the defendant had health problems in 2005, and he spent most of his time in his room upstairs. Adams admitted that she had never been in the basement or out to the RV.

¶ 14 Shavern Jones testified that he stayed at the defendant's residence sometime between 2003 and 2004. He visited the property in 2005 because his girlfriend, Stacy Edwards, was staying with the defendant at that time. He stated that he met Brown, Mosier, and Lietard while at the defendant's residence, that Brown and Mosier were "always there," and that they had told him that they were on the property to do drugs. Jones testified that before the raid, Lietard had said that the police said they would help her if she helped them. He stated that he never saw or smelled a methamphetamine lab on the defendant's property, never saw the defendant consume methamphetamine, and never heard any conversations between the defendant and Brown, Mosier, or Lietard. Jones said that it was rare to see the defendant out of bed. Jones testified he had used the RV in the past for sexual relations, and he did not see a methamphetamine lab, but admitted that he did not see the RV between late September of 2005 and December 22, 2005.

¶ 15 Michael Stiles testified that he had known the defendant for 10 years and that he resided at the defendant's house periodically before his arrest in October 2005. He stated that he was living in the defendant's basement in October 2005, and he never saw Mosier or Brown come down and cook methamphetamine in the basement. Stiles stated that he saw Brown on the property two or three times, and never saw Mosier. Stiles testified that he had used the RV for sexual relations, and he never saw a methamphetamine lab out there. He admitted that after his arrest on October 25, 2005, he does not know what happened in the basement or in the RV. Stiles testified that he spoke to Brown while they were both incarcerated and that Brown told him that Lietard was going to set up the defendant by putting "some stuff" on the property, and thereby get Brown out of his charges. Stiles stated that he wrote the defendant and told him about the conversation, but the defendant did not write back. Stiles testified that after Mosier was incarcerated, Mosier's cellmate said that Mosier was going to put all of the charges off on the defendant. Stiles agreed that the defendant had health problems, and it was rare to see the defendant out of his bedroom. Stiles believed that due to his health problems, the defendant could not walk all the way out to the RV, and he had never seen the defendant go out to the RV or into the basement. Stiles agreed that the defendant sometimes left the property and had the ability to drive his own vehicle.

¶ 16 The defendant testified that he did not participate in the manufacture of methamphetamine. He testified that he did not give Mosier or Brown permission to manufacture methamphetamine on his property, including in the RV. He stated that he gave Lietard and Mosier permission to use the RV in December 2005, but he thought that they were using it for sexual relations. He testified that the last time he went out to the RV was when he was mowing the lawn around it in August or September 2005, and he did not see a methamphetamine lab at that time. He also testified that he never smelled a lab in the

house, and he rarely went to the basement. The defendant admitted that Brown had borrowed money from him, but stated that Brown did not tell him how the money was being used. He stated that he did not know that Lietard, Brown, or Mosier were methamphetamine addicts. The defendant stated that at the time of the arrest, he was 62 years old, 365 pounds, and suffered from sleep apnea, which required him to use an oxygen tank when sleeping. He also testified that he had high blood pressure and an aneurysm. The defendant testified that methamphetamine was prescribed to him in high school, but that he had not used it since that time. The defendant believed that ingesting methamphetamine "would probably kill [him]." He agreed that his house had been a "crash pad" over the course of several years, and he could not say how many people came and went. He stated that he charged rent to those who could afford it, but said he did not have any way of controlling who came and went on the property. He agreed that Lietard had full access to the house. The defendant testified that he would not leave his second-floor bedroom for six to eight hours at a time and that he did not often have firsthand knowledge of who was on the property. The defendant said that he received Stiles's letter, but did not take it seriously because he did not know how Brown could "set him up" when he so rarely got out of bed.

¶ 17 On October 22, 2009, the defendant was found guilty of unlawful possession of a controlled substance under the theory of possession by accountability. A motion for new trial was filed on November 20, 2009, and denied at a hearing on March 30, 2010, though the judge noted that defense counsel's motion was "very well formed and very thorough" and "[did not] leave any possibility out there." The defendant's sentencing hearing was held on June 1, 2010; the State requested seven years' imprisonment, and the defendant's counsel requested the minimum available sentence. The defendant stated that he did not understand why he could not get probation as a sentence for a first offense. The judge sentenced the defendant to four years in the Illinois Department of Corrections, based on the sentencing

structure, the judgment entered, and the pretrial agreement. The judge stayed issuance of a mittimus in order for the defendant to visit with his doctors and attend to his medical circumstances.

¶ 18 On June 15, 2010, the defendant filed *pro se* a motion to amend or reduce sentence, claiming that the judge should have considered probation in sentencing due to the defendant's numerous health problems. At a hearing held that day, defendant's counsel, William Carroll, stated that he intended to file a motion to withdraw; he felt that the defendant's motion posed an ethical quandary for him because the pretrial agreement was that the defendant's attorney could not argue for probation at sentencing. The judge informed the defendant of his procedural options and continued the case. On June 29, 2010, Carroll filed a subsequent motion to amend sentence which reflected the claims in the defendant's *pro se* motion. At a hearing on May 26, 2011, regarding the defendant's motion to amend sentence, the trial judge asked the defendant if he wanted a different attorney representing him on the motion, and the defendant replied that he did not. The judge felt that Carroll could represent the defendant on both motions by adopting the defendant's *pro se* motion, and Carroll agreed to do so. The defendant then testified that he misunderstood the pretrial agreement, that he believed that he had the right to argue for a sentence of probation at the sentencing, and that his poor health would make a sentence of imprisonment difficult for him. The trial judge denied the motions, noting that he did consider the defendant's health circumstances at the time of sentencing. The defendant appeals.

¶ 19 In his first point on appeal, the defendant challenges the sufficiency of the evidence to support the trial judge's finding of guilt beyond a reasonable doubt. The defendant argues that his conviction should be reversed because the evidence against him was provided by untrustworthy witnesses who made advantageous deals with the State in exchange for their testimony, and that his poor health prevented him from knowing about or having control over

the activity taking place on his property.

¶ 20 In reviewing a challenge to the sufficiency of the evidence, the reviewing court must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational tier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Smith*, 185 Ill. 2d 532, 541 (1999). A conviction may be reversed where the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt. *Id*. Proof beyond a reasonable doubt does not require the exclusion of every possible doubt, and a conviction may be sustained upon wholly circumstantial evidence if it leads to a reasonable certainty that the defendant committed the crime. *People v. Shevock*, 335 Ill. App. 3d 1031, 1037 (2003).

¶ 21 The defendant puts a great deal of emphasis on the fact that Lietard, Brown, and Mosier were all criminals and former drug addicts, and argues that each had a motive to falsely accuse the defendant, as they received advantageous deals in exchange for their testimony. However, viewing the foregoing evidence in the light most favorable to the prosecution, we cannot say that the trial judge's decision was unreasonable. When considering a challenge to the sufficiency of the evidence, it is not the function of a reviewing court to retry the defendant. *People v. Collins*, 214 Ill. 2d 206, 217 (2005). Rather, in a bench trial, it is for the trial judge, sitting as the trier of fact, to determine the credibility of witnesses, to weigh evidence and draw reasonable inferences therefrom, and to resolve any conflicts in the evidence. See *People v. McDonald*, 168 Ill. 2d 420, 448-49 (1995). The trial judge was in best position to weigh the credibility of the witnesses, and this court will not disturb a finding of a trier of fact on an issue that was fully explored at the defendant's trial. Indeed, at closing arguments, the trial judge noted:

> "[N]ormally you don't get an explanation of the Court's verdict, but I will tell you how I view this, and the balancing interests here.

> I do recognize that several of the State's witnesses have some motivation, or have a criminal record. I look–I try to look beyond that as to reliability and consistency and the exclusion of alternative explanations. To some extent almost every witness has some motivation of some sort. Some of the witnesses have–presented by the State–have more extensive records, some have less, what I would call current motivation to testify as they did in the trial here."

The trial judge clearly indicated that he was aware of the State witnesses' shortcomings and that he was making an informed judgment regarding the issue. Because the issue of the witnesses' credibility was fully explored at trial, and further, confirmed as having been considered, we decline to substitute our own evaluation of witness credibility for that of the trial judge.

¶ 22 The defendant also argues that the evidence was insufficient to sustain his conviction because his poor health rendered him incapable of controlling what occurred on his property, and that the State presented no believable evidence that he knew a methamphetamine lab existed or knowingly aided in its operation.[1]

¶ 23 The defendant was found guilty of methamphetamine possession under an accountability theory. A person is guilty of methamphetamine possession if he knowingly possesses methamphetamine or a substance containing methamphetamine (720 ILCS 646/60(a) (West 2008)) and is legally accountable for the conduct of another when, with the intent to promote or facilitate commission of a crime, he knowingly aids in the planning or the commission of a crime. See 720 ILCS 5/5-2(c) (West 2008); *People v. Kessler*, 57 Ill. 2d 493, 497 (1974). Accountability may be established through a person's knowledge of and

[1]We note that, as to the defendant's comment about "believable" evidence, we have already concluded on the issue of witness credibility and therefore will not revisit the defendant's argument concerning the State witnesses' testimonies.

participation in the criminal scheme, even though there is no evidence that he directly participated in the criminal act itself. *People v. Velez*, 388 Ill. App. 3d 493, 512 (2009) (citing *People v. Perez*, 189 Ill. 2d 254, 266 (2000)). A defendant's mere presence at the scene is insufficient to prove accountability; however, a common purpose or design may be inferred based on surrounding circumstances, and words of agreement are not necessary to establish such purpose or design. *Id.*

¶ 24 We find that, when viewed in the light most favorable to the State, the record reflects sufficient evidence to find that the defendant's health did not prevent him from knowing that methamphetamine was being manufactured and used on his property, or from participating in the criminal scheme. In regards to the defendant's knowledge of the manufacture and use of methamphetamine on his property, the defendant presented evidence of his infirmities that kept him bedridden and incapable of consuming methamphetamine. However, the State countered with ample evidence showing that the defendant was ambulatory around the time of the execution of the search warrant and, even if the defendant never physically saw the lab or consumed the methamphetamine, the State also presented evidence of the defendant's knowledge of his possession of methamphetamine through the manufacturing and use of it on his property. We think that the defendant's knowledge was extensively demonstrated; among other evidence, Brown testified that the defendant asked him to move the lab to the RV and that the defendant had seen him take methamphetamine, several witnesses testified that there was a strong odor coming from where the RV was located, Brown and Mosier were "known methamphetamine cooks" that were "always there," Flatt testified that Mosier would prepare manufacturing materials in the defendant's home, and Lietard testified that she heard the defendant talking to Mosier and Brown about making methamphetamine and had personally given him some. We also believe the evidence sufficiently demonstrates that he knowingly participated in the scheme, as Lietard, Flatt, and Mosier all testified that the

defendant provided financial assistance for the purchase of methamphetamine-manufacturing supplies. We therefore agree with the trial court that the defendant's health did not prevent him from knowing of the methamphetamine and participating in the scheme, therefore rendering him accountable for its possession.

¶ 25 In his second point on appeal, the defendant asks that his sentence be remanded for appointment of new counsel to represent him on his motion to reconsider sentence. The defendant argues that he was denied his constitutional right to the effective assistance of counsel, as his attorney at the hearing on the motion to reconsider sentence has a *per se* conflict of interest.

¶ 26 Stemming from the constitutional right to the effective assistance of counsel is the right to conflict-free counsel. *People v. Hernandez*, 231 Ill. 2d 134, 142 (2008). A conflict of interest may be *per se* or actual; a *per se* conflict exists where " 'facts about a defense attorney's status *** engender, *by themselves*, a disabling conflict.' " (Emphasis in original.) *Hernandez*, 231 Ill. 2d at 142 (quoting *People v. Spreitzer*, 123 Ill. 2d 1, 14 (1988)). When a defendant's attorney has a tie to a person or entity that would benefit from an unfavorable verdict for the defendant, a *per se* conflict arises. *Id.* Our supreme court has identified three *per se* conflicts in the criminal context that require reversal: (1) defense counsel has a prior or contemporaneous association with the victim, the prosecution, or an entity assisting the prosecution; (2) defense counsel contemporaneously represents a prosecution witness; or (3) defense counsel is a former prosecutor who had been personally involved in the defendant's prosecution. *Id.* at 143-44. When the record shows that the facts are undisputed, the issue of whether a *per se* conflict exists is a legal question that this court reviews *de novo*. *Id.* at 144.

¶ 27 The defendant argues the existence of a *per se* conflict of interest because his attorney should have alleged his own ineffectiveness in the motion to reconsider sentence. The

defendant agrees that an attorney arguing his own effectiveness is not one of the listed *per se* conflicts, but asserts that the list in *Hernandez* is not exhaustive and that the *Hernandez* court was simply applying the same standard for determining whether or not a *per se* conflict of interest exists that it had used in the past. However, as the State points out, an attorney arguing his own ineffectiveness does not fall within any of the enumerated categories, and subsequent decisions of the appellate court indicate that a *per se* conflict of interest does not exist merely because a defense attorney's competence is questioned by his client during posttrial proceedings; rather, the underlying allegations of incompetence determine whether an actual conflict of interest exists. *People v. Perkins*, 408 Ill. App. 3d 752, 762 (2011) (citing *People v. Davis*, 151 Ill. App. 3d 435, 443 (1986)). There is no *per se* rule requiring appointment of new counsel to represent a defendant on his claim of ineffective assistance of trial counsel, particularly when the defendant does not request a new attorney. *People v. Davis*, 151 Ill. App. 3d 435, 442-43 (1986). We find instructive the example of *People v. Jones*, 219 Ill. App. 3d 301 (1991). In *Jones*, the defendant filed a motion to withdraw his guilty plea, stating that he was confused when he entered his plea and was inadequately represented by counsel. *Id.* at 303-04. At a hearing on the motion, the defendant stated that he had not known what to do at the time he entered his plea, other than being told it was best for him to take the bargain. *Id*. at 303. The court asked the defendant if he remembered agreeing that he was satisfied with his representation, and the defendant replied that he did. *Id*. On appeal, the defendant opined that his attorney arguing his own ineffectiveness at the posttrial motion presented a *per se* conflict of interest; however, the appellate court rejected this argument, noting that the defendant was permitted to testify on his contention and his counsel did not make any arguments to refute the contention. *Id.* at 304.

¶ 28 Similarly, we reject the argument that the defendant's counsel had a *per se* conflict of interest. Like in *Jones*, the defendant was permitted to testify at a hearing, uncontradicted

by his attorney, as to his confusion regarding the bargain at issue. The trial judge asked the defendant if he wanted a different attorney representing him on the motion, and the defendant replied that he did not. The defendant proceeded to testify as to his confusion regarding the unavailability of probation, and Carroll did not refute any of the defendant's assertions. Thus, we conclude that no *per se* conflict of interest exists when applied to the facts of this case.

¶ 29 Though the defendant does not appear to advance an argument regarding an actual conflict of interest, we note that the underlying allegations of incompetence in this case do not give rise to such a claim. If a *per se* conflict is not found, a defendant may show that he was denied his right to the effective assistance of counsel due to the existence of an actual conflict of interest. *Hernandez*, 231 Ill. 2d at 144. The underlying allegations of incompetence determine whether an actual conflict of interest exists. *Perkins*, 408 Ill. App. 3d at 762. A defendant claiming ineffective assistance of counsel must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced him. *Jones*, 219 Ill. App. 3d at 305; *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

¶ 30 Even if the defendant could show a deficiency in his counsel's performance, he cannot demonstrate a prejudicial outcome. The defendant's argument–that his counsel was ineffective because to fully argue the *pro se* motion, Carroll was obliged to argue that either he did not adequately inform the defendant of the terms of the negotiation or he negotiated an agreement against the wishes of his client, and that Carroll did not make such an argument–fails to demonstrate an adverse effect. The defendant's clearer understanding of the terms of the pretrial agreement would not have changed his counsel's inability to argue for probation because the defendant's original charge, a Class X felony, did not offer probation as a possible sentence. See 720 ILCS 646/60(b)(6) (West 2008); 730 ILCS 5/5-4.5-25(d) (West 2008); 730 ILCS 5/5-5-3(c)(2)(C) (West 2008). Thus, even if the defendant was inadequately informed of the terms of the agreement or agreed to a bargain against his

wishes, both the original charge and the lesser charge pursuant to the pretrial agreement prevented probation as a sentencing consideration. The defendant cannot show that defense counsel could have argued for probation at sentencing, regardless of the existence of the pretrial agreement, and therefore the defendant also cannot demonstrate an actual conflict of interest in Carroll's representation of the defendant.

¶ 31 In sum, we find that the evidence was sufficient to support the defendant's conviction of possession of methamphetamine under the theory of accountability, because the trier of fact's conclusions on witness credibility and weight of the evidence will not be disturbed, and because the defendant's poor health did not prevent him from committing the offense. Further, we find that the defendant was not denied his constitutional right to the effective assistance of counsel, as his attorney at the hearing on the motion to reconsider sentence did not labor under a *per se* conflict of interest, and additionally that the defendant's allegations could not demonstrate a prejudicial outcome. For the foregoing reasons, the judgment of the trial court is affirmed.

¶ 32 Affirmed.