

NOTICE

Decision filed 06/01/23. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2023 IL App (5th) 220057-U

NO. 5-22-0057

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE

This order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Christian County.
)	
v.)	No. 20-CF-322
)	
JERRY L. BURTON,)	Honorable
)	Bradley T. Paisley,
Defendant-Appellant.)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Justices Moore and McHaney concurred in the judgment.

ORDER

¶ 1 *Held:* Where defendant’s profanity-laced tirade justified finding him in contempt, he had completed his sentence, making any challenge moot, and he waived any conflict of interest by defense counsel, any challenge to the contempt proceedings would plainly lack merit. Thus, we grant appointed appellate counsel leave to withdraw and affirm the circuit court’s judgment.

¶ 2 Defendant, Jerry L. Burton, appeals the circuit court’s order finding him in direct criminal contempt. Defendant’s appointed appellate counsel, the Office of the State Appellate Defender (OSAD), has concluded that there is no reasonably meritorious argument that reversible error occurred. Accordingly, it has filed a motion to withdraw as counsel along with a supporting memorandum. See *Anders v. California*, 386 U.S. 738 (1967). OSAD has notified defendant of its motion, and this court has provided him with ample opportunity to respond. However, he has not done so. After considering the record on appeal, OSAD’s memorandum, and its supporting

brief, we agree that this appeal presents no reasonably meritorious issues. Thus, we grant OSAD leave to withdraw and affirm the circuit court's judgment.

¶ 3

BACKGROUND

¶ 4 Defendant was charged with failing to register as a sex offender. When he failed to appear for a scheduled hearing on September 20, 2021, the court issued a warrant for his arrest. He was arrested on October 26, 2021, and appeared at a hearing later that day.

¶ 5 The hearing included an exchange during which defendant repeatedly directed threats and profanity toward the court. Defendant stated at one point, "You guys keep dragging me back in here on this crap. Something's got to stop here, man, or somebody's going to get hurt."

¶ 6 The court found defendant in contempt and sentenced him to 180 days in jail. Later that day the court issued a written order stating that defendant "started yelling obscenities and making threats that 'someone was going to get hurt' " and that defendant "refused orders to stop." The court further noted that this conduct "occurred in the presence of [the] Court while in open session, impeded and interrupted [the] Court's proceedings, lessened the dignity of the Court, and tended to bring the administration of justice into disrepute."

¶ 7 Defendant filed a *pro se* notice of appeal. The court struck it because he was represented by counsel at the time, but shortly thereafter ordered a notice of appeal filed on his behalf. This appeal was docketed as No. 5-21-0341.

¶ 8 At a pretrial hearing several days later, defendant told the court that he wanted to discharge his public defender because she had a conflict of interest. He argued that, during defense counsel's tenure as an assistant state's attorney in Macon County, he was prosecuted there for failing to register as a sex offender. Counsel had no recollection of appearing in any case involving

defendant while she was an assistant state's attorney and, based on the dates of his cases there, thought it unlikely. However, she conceded that it was "not impossible."

¶ 9 The court offered to appoint new defense counsel, but defendant seemingly changed his mind. The court then set another pretrial conference November 5, 2021, with the intent that defendant discuss his concerns with counsel. At the November 5 hearing, defense counsel told the court that defendant was willing to continue with her representing him.

¶ 10 On November 19, 2021, defendant moved to reconsider the contempt finding and resulting sentence. At a subsequent hearing, defendant testified that, when the contempt occurred, he was upset due to his mistaken belief that the case for which he failed to appear had been dismissed. He apologized to the court. The court accepted defendant's apology and reduced his sentence to 90 days in jail, noting that he would still have to serve an additional 15 days.

¶ 11 On January 24, 2022, OSAD moved to dismiss the appeal in No. 5-21-0341 on the basis that the notice of appeal was premature because of the subsequently filed motion to reconsider. On January 27, 2022, we struck defendant's *pro se* notice of appeal and dismissed that appeal. On January 28, 2022, defendant filed a *pro se* motion for leave to file a late notice of appeal. Defendant's motion was granted, the appeal was docketed as No. 5-22-0057, and OSAD was appointed to represent him. OSAD subsequently filed an amended motion for leave to file a late notice of appeal, which we granted.

¶ 12 ANALYSIS

¶ 13 OSAD concludes that there is no reasonably meritorious argument for reversing the contempt finding or sentence. We agree.

¶ 14 OSAD first contends that the court did not err in finding defendant in direct criminal contempt. Direct criminal contempt is that occurring "in the very presence of the judge, making

all of the elements of the offense matters within his own personal knowledge.’ ” *People v. Simac*, 161 Ill. 2d 297, 305-06 (1994) (quoting *People v. Harrison*, 403 Ill. 320, 323-24 (1949)). Direct criminal contempt may be found and punished summarily because all the elements are before the court and, therefore, come within its immediate knowledge. *Id.* On appeal, we consider whether there is sufficient evidence to support the finding of contempt and whether the judge considered facts outside of his or her personal knowledge. *Id.* The court must fully set out the basis of the contempt finding in an order, or the facts supporting the finding must appear in the transcript of the proceedings at which the contempt finding was made. *In re Marriage of Betts*, 200 Ill. App. 3d 26, 50 (1990).

¶ 15 Here, there is little question that defendant’s profanity-laced tirade, in which he also threatened that “somebody’s going to get hurt,” was contemptuous. See *id.* at 47 (the most readily recognizable examples of direct contempt are “outbursts during court proceedings”). Defendant’s outburst was recorded in the transcript of the hearing, and the court’s order further elaborated on the basis for the contempt finding. Thus, there is no reasonably meritorious argument that the court’s contempt finding was erroneous.

¶ 16 OSAD further concludes that defendant could not successfully challenge his sentence because he had completed it. When the court reduced defendant’s sentence to 90 days, it observed that he had to serve 15 more days. That time has long since passed. Thus, any challenge to defendant’s sentence is moot. See *People v. Roberson*, 212 Ill. 2d 430, 435 (2004).

¶ 17 Finally, OSAD concludes that there is no reasonably meritorious argument that the court erred by allowing defendant to proceed with his original appointed counsel after defendant raised the possibility of a conflict of interest.

¶ 18 A criminal defendant's sixth amendment right to effective assistance of counsel includes the right to conflict-free representation. *People v. Hernandez*, 231 Ill. 2d 134, 142 (2008). The Illinois Supreme Court has designated certain types of conflicts as *per se* conflicts. Where such a conflict exists, a defendant need not show that he was prejudiced by counsel's actions. A *per se* conflict is one in which "facts about a defense attorney's status *** engender, *by themselves*, a disabling conflict." (Emphasis in original; internal quotation marks omitted.) *Id.* One such *per se* conflict occurs when defense counsel was a former prosecutor who had been personally involved in the defendant's prosecution. *Id.* at 143-44.

¶ 19 Here, defense counsel acknowledged having been in the Macon County State's Attorney's office at approximately the same time defendant was prosecuted there. However, she did not remember personally participating in any such prosecution. The record contains no contrary evidence. Thus, the record does not establish a *per se* conflict. But even if it did, defendant waived it. After the court continued the matter to allow defendant to discuss the situation with counsel, he agreed to continue with her as his attorney. Thus, defendant effectively waived any conflict. See *id.* at 143 (unless a defendant waives his right to conflict-free counsel, a *per se* conflict is grounds for automatic reversal).

¶ 20 CONCLUSION

¶ 21 As this appeal presents no issue of arguable merit, we grant OSAD leave to withdraw and affirm the circuit court's judgment.

¶ 22 Motion granted; judgment affirmed.