2017 IL App (1st) 142207-U

FOURTH DIVISION
March 16, 2017

No. 1-14-2207

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 13 CR 19111
	)	
HENRY DAVIS,	)	Honorable
	)	Nicholas R. Ford,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE ELLIS delivered the judgment of the court.
Justices McBride and Burke concurred in the judgment.

O R D E R

¶ 1 *Held*: Conviction and sentence affirmed. Counsel did not provide ineffective assistance by filing form motion to reconsider sentence.

¶ 2 Following a jury trial, defendant Henry Davis was convicted of possession of a controlled substance with intent to deliver and sentenced to 22 years' imprisonment. On appeal, defendant

contends that defense counsel rendered ineffective assistance by filing a generic, form motion to reconsider sentence. We affirm.

¶ 3 The State charged Defendant with one count of possession with intent to deliver between 3 and 15 grams of heroin. At trial, three police officers testified and established that defendant approached 8 to 10 people near a bus stop in Chicago on September 2, 2013, yelling, “blows, blows,” “gather up,” and “get your money out.” The officers detained defendant and found him in possession of 26 mini Zip-Loc baggies containing white powder. A forensic scientist testified that the contents of 10 of the baggies weighed 4.335 grams and tested positive for heroin. The jury found defendant guilty of possession of a controlled substance with intent to deliver.

¶ 4 At sentencing, the State requested a “significant” prison term due to defendant's “lengthy” criminal history. Defendant's felony convictions included attempted armed robbery (1986), residential burglary (1990), unauthorized use of a weapon by a felon (1992), armed robbery (1994), burglary (1998), manufacturing or delivery of cannabis within 1,000 feet of a school (2003), possession of a controlled substance (2004), and manufacturing or delivery of a controlled substance (2005). In mitigation, defense counsel stated that defendant had a “25 year history of drug use,” and requested a “rehabilitative” sentence at a facility that would provide drug treatment. Defendant declined to speak in allocution.

¶ 5 According to the presentence investigation report (PSI), defendant was 44 years old at the time of the offense and 45 years old at sentencing. He reported having a “normal” childhood for his neighborhood, which he described as “gang and drug infested.” He belonged to the Conservative Vice Lords street gang from age 13 to 27. He was expelled from high school following an arrest but obtained his GED in prison and worked as a cook in Indiana from 2007 to

2012. Since 2012, he lived in Chicago and was supported by his wife, who suffered from schizophrenia and received "SSDI benefits." Defendant had an adult son from a previous relationship.

¶ 6 The court sentenced defendant to 22 years' imprisonment. The court reviewed defendant's criminal history and observed that he had been convicted of numerous violent and nonviolent felonies during a period of more than 20 years. The court noted that defendant had worked in Indiana but did not provide "meaningful" financial support to other people. Instead, the court stated, defendant moved back to Chicago and resumed a criminal lifestyle. The court stated:

> "In certain circumstances when a background is this substantial, when a career of recidivism is this profound and long it forces a court, this court into a position where it has to issue a sentence on a non-violent offense that is a serious sentence. A sentence that reflects the defendant's consistent and constant failure to stop committing crimes in our society."

¶ 7 Defense counsel immediately requested leave to file a motion to reconsider sentence. The court asked counsel whether he wanted to present oral argument, but he stated that he would "rest" on a typed motion, which is included in the record. The motion stated that "[o]n June 30, 2014, the Honorable Court sentenced Defendant to ___ years for the offense of Possession of a Controlled Substance with Intent to Distribute." The numeral "22" was handwritten in the space above the line. The motion alleged that: (1) defendant's sentence was "excessive" based on his "background and the nature of his participation in the offense"; (2) the court "improperly considered in aggravation matters that are implicit in the offense"; (3) the State did not prove defendant's eligibility for an "enhanced penalty or extended term"; and (4) the sentence

"improperly penalized defendant for exercising his right to trial." The court denied the motion and counsel requested leave to file a notice of appeal, which the court granted. Afterwards, the court admonished defendant regarding his right to appeal his sentence and conviction. The court told defendant that "[a]ny issue or claim of error regarding the sentence" or sentencing hearing omitted from the written motion would be waived.

¶ 8 On appeal, defendant contends that defense counsel rendered ineffective assistance in connection with his motion to reconsider sentence. According to defendant, the motion was drafted before sentence was imposed and contains general assertions of error that were inapplicable to his case or insufficient to preserve issues for appeal. Moreover, defendant notes that counsel did not continue the matter to consult with him before drafting the motion and rejected the court's invitation for oral argument. Consequently, defendant submits that counsel did not act as a "true advocate," and therefore, his performance was presumptively prejudicial. Alternatively, defendant maintains that prejudice occurred where, based on his recent nonviolent criminal history and the discrepancy between the State's offer and the sentence imposed by the court, effective advocacy likely would have caused the court to reduce his sentence.

¶ 9 We reject defendant's argument that counsel's performance was presumptively prejudicial. Under the test set out in *United States v. Cronic*, 466 U.S. 648, 659 (1984), prejudice may be presumed when counsel entirely fails to subject the prosecution's case to meaningful adversarial testing. But this court has declined to apply *Cronic* to the decision to file a motion to reconsider sentence because it "is a matter of discretion." *People v. Bailey*, 364 Ill. App. 3d 404, 408 (2006). Counsel's failure to file such motion cannot "*per se* amount to ineffective assistance of counsel, as some basis must exist to make the motion." *Id.* Accordingly, this court has found

that the omission of an issue in a motion to reconsider sentence "constitutes ineffective assistance only where such failure prejudiced defendant." *Id*.

¶ 10 We now turn to defendant's claim of ineffective assistance under the two-prong test set out in *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). See *People v. Henderson*, 2013 IL 114040, ¶ 11. Under this test, a defendant must establish that (1) "counsel's performance fell below an objective standard of reasonableness," and (2) "a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. "A defendant's failure to establish either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel." *Id*. Thus, "if an ineffective-assistance claim can be disposed of because the defendant suffered no prejudice, we need not determine whether counsel's performance was deficient." *People v. Graham*, 206 Ill. 2d 465, 476 (2003).

¶ 11 In this case, even were we to assume that counsel's performance fell below an objective standard of reasonableness, defendant has not established prejudice. At the sentencing hearing, the trial court heard arguments in mitigation and aggravation, including defendant's history of drug use and eight prior felony convictions. The PSI described defendant's family relationships, gang involvement, and limited employment history. The issues that defendant claims that counsel should have raised in the motion pertain to information that was already before the court—*i.e.*, the facts of the offense, defendant's criminal history, and the discrepancy between the State's plea offer and the sentence imposed. As the court was aware of these circumstances when it imposed sentenced, defendant was not prejudiced by counsel's failure to argue the same facts in the written motion or in oral argument. See *People v. Burnett*, 237 Ill. 2d 381, 387 (2010) ("The purpose of a motion to reconsider sentence is not to conduct a new sentencing hearing, but

rather to bring to the circuit court's attention changes in the law, errors in the court's previous application of existing law, and newly discovered evidence that was not available at the time of the hearing."). Consequently, defendant has not shown any prejudice to support his ineffectiveness claim.

¶ 12 In reaching this conclusion, we find *People v. Brasseaux*, 254 Ill. App. 3d 283 (1996), on which defendant relies, distinguishable. In *Brasseaux*, the defendant filed a *pro se* motion for reconsideration of sentence that contained no allegations of error or prayer for relief. *Id*. at 286. The defendant was not present for the hearing on the motion, and the attorney who appeared on his behalf did not consult with him or amend the motion. *Id*. at 289. The court denied the motion. *Id*. at 286. Defendant subsequently sent a letter to the court, listing facts that he believed warranted a lesser sentence. *Id*. at 287. This court held that counsel was ineffective where a reasonable probability existed that the hearing on the motion to reconsider sentence would have had a different outcome had counsel consulted with defendant, amended the *pro se* motion, and argued the motion before the court. *Id*. at 289.

¶ 13 Unlike *Brasseaux*, where the defendant presented additional facts in his letter that may have led to a different sentence, defendant has not pointed to any information that counsel should have included in his motion to reconsider sentence. Rather, defendant claims that counsel should have simply rehashed information that the trial court already considered when initially sentencing him. Defendant cannot establish that, but for counsel's failure to remind the court of those facts, his sentence would have been lower.

¶14 We cannot emphasize strongly enough that the only issue before us on appeal is whether trial counsel was ineffective for failing to more thoroughly litigate the motion to reconsider

sentence. And all we have held is that defendant failed to show a reasonable probability that the arguments that he claims should have been more thoroughly raised in the motion to reconsider would have changed the outcome—because those facts had already been taken into account by the trial court.

¶ 15 Despite the surprisingly harsh sentence imposed by the trial court, defendant has *not* argued that the sentence was unconstitutionally excessive under either our state or federal constitution. The State had previously offered defendant a 4-year sentence, and repeated that offer in front of the trial judge just before trial, indicating that it was willing to amend the charges and plead the case down below the mandatory minimum of 6 years for a Class X felony conviction. We presume the State was agreeable to a 4-year sentence because the last violent felony for which defendant had been convicted was in 1994, a full 19 years earlier than the crime charged here in 2013, and defendant's last three prior convictions had been drug-related, nonviolent offenses, the last of which was in 2006.

¶ 16 After defendant demanded a jury trial at which he was convicted, however, the State changed its tune remarkably, asking for a "significant sentence" given defendant's "lengthy [criminal] history." And the trial court agreed with that recommendation, sentencing this 45-year-old defendant to 22 years in prison—more than five times the sentence he was offered before trial.

¶ 17 But defendant has raised no claim of a constitutionally excessive sentence or that he was taxed for exercising his right to a jury trial on direct appeal, so we are powerless at this time to consider that issue. *People v. Givens*, 237 Ill. 2d 311, 323 (2010) (" '[A] reviewing court should not normally search the record for unargued and unbriefed reasons to *reverse* a trial court

judgment.' " (Emphasis in original.) (quoting *Saldana v. Wirtz Cartage Co.*, 74 Ill.2d 379, 386 (1978))).

¶ 18 We affirm the judgment of the trial court.

¶ 19 Affirmed.