

No. 1-16-0697

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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. 10 CR 19430
)	
THEOPHEUS JONES,)	Honorable
)	Kevin Michael Sheehan,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Cobbs and Justice Lavin concurred in the judgment.

ORDER

- ¶ 1. *Held:* Defendant’s conviction and sentence for armed habitual criminal are affirmed; defendant has not shown the trial court’s finding he was not deprived of effective assistance of counsel was manifestly erroneous; defendant failed to show the trial court abused its discretion sentencing defendant to a term of imprisonment well within the sentencing guidelines for armed habitual criminal.
- ¶ 2. This case comes before us in an unusual posture. This is the direct appeal of defendant’s conviction, as well as defendant’s appeal from an adverse ruling on his postconviction petition alleging ineffective assistance of trial counsel. Our supreme court has held a direct appeal and a postconviction petition may proceed simultaneously:

“There is no provision in the Act barring a postconviction case from proceeding at the same time as a direct appeal.” *People v. Harris*, 224 Ill. 2d 115, 126 (2007).

After a jury trial, defendant, Theopheus Jones, was convicted of armed habitual criminal and unlawful use of a weapon by a felon. Several months later defendant filed a *pro se* postconviction petition alleging: 1) counsel coerced defendant to go to trial rather than pleading guilty; 2) failed to call witnesses at trial; and 3) failed to file a timely notice of appeal from defendant’s conviction and sentence. An amended petition was filed after counsel was appointed. After a third-stage evidentiary hearing, the trial court found defendant could file a direct appeal because the failure to timely file an appeal was not due to the fault of defendant. The trial court also found defendant was not deprived of effective assistance of counsel. On appeal from the denial of his postconviction petition, defendant maintains his trial counsel was ineffective. On direct appeal from his trial, defendant argues the trial court abused its discretion in sentencing him to 12 years’ imprisonment because that sentence is excessive. For the reasons that follow, we affirm the judgment of the trial court denying defendant’s postconviction petition alleging ineffective assistance of counsel, and affirm the trial court’s sentence of 12 years’ imprisonment.

¶ 3.

BACKGROUND

¶ 4. On September 30, 2010, Chicago police conducted a raid on a used car dealership in South Chicago. An undercover police officer in plainclothes walked into the trailer on a used car lot asking for help buying a car. Once back outside with two employees, the officer radioed his team to proceed with a raid. Police arrived on the lot yelling “Chicago police. Search warrant. Let me see your hands.” The undercover officer returned to the trailer and saw defendant open a desk drawer, pick up a gun from the drawer, and begin to move toward the back of the trailer

with the gun. The officer announced he was police and defendant dropped the weapon.

Defendant was subsequently arrested and charged with armed habitual criminal and unlawful use of a weapon by a felon based on defendant's two prior felony convictions.

¶ 5. Pretrial Motions and Hearings

¶ 6. After his arrest, defendant was represented by defense attorney Dennis Sherman. At a pretrial hearing on December 8, 2010, counsel filed a written bond motion, arguing he would raise a defense of compulsion because defendant believed a robbery was occurring. After hearing arguments from both parties, the court denied defendant's motion to reduce bond.

¶ 7. At a hearing on April 28, 2011, counsel informed the court he would raise a defense of self-defense after reading the cases the state presented on a defense of compulsion. The court found a compulsion defense is not based on the subjective feeling of defendant, but on objective factors.

¶ 8. A hearing was held on June 21, 2011 on the state's motion to strike defendant's affirmative defense of self-defense. At this hearing, Sherman argued there existed an exception to a state's right to reasonably restrict the right to bear arms: self-defense. He claimed self-defense is a plenary right under the second amendment. The court adjourned and heard further arguments on the state's motion to strike defendant's affirmative defense of self-defense on August 2, 2011.

¶ 9. At the August 2, 2011 hearing, the state argued that neither "defense nor necessity may be raised against a charge of knowing possession of a firearm by a felon." Sherman argued "defendant's possessory interest in this gun was so momentary, so temporary, that, in fact, he simply got this gun because of the screaming men running with guns." He further argued defendant had an absolute constitutional right to protect his life, and that this type of momentary

possession is necessary when defendant felt his life was threatened.

¶ 10. The court granted the state's motion to strike defendant's affirmative defense of self-defense. The court found this was a reasonable restriction on the right to bear arms by a convicted felon. The court also explained that under Illinois law, a defense of being a Good Samaritan is unavailable against the charge of unlawful use of a weapon by a felon. The court indicated that in another case, a criminal defendant was convicted of unlawful use of a weapon by a felon even though the defendant only picked up the gun to prevent children from getting the weapon. The court found

“well settled here that individual reasons to get a gun or hold a gun when you are a convicted felon are under much more scrutiny than simply a UUW case where you may never possess a gun. The law says you can't, even if you are trying to be a Good Samaritan.”

The court reasoned there would be too many subjective exceptions to the rule if defendant was allowed to present his defense of self-defense or necessity or compulsion to the charges of armed habitual criminal and unlawful use of a weapon by a felon. Accordingly, the court allowed the state's motion to strike the affirmative defense of self-defense.

“Now, Mr. Sherman, you can certainly argue what you argued about possession. Possession is knowledge and control. The facts. The case as you see them, you can argue anything you want about the firm definition of possession, the knowledge and control.

I am not precluding you from arguing that. What I am simply saying is the well settled defense of self-defense which is viable in a murder case, as is the case of *Hennigan*. You will be precluded from arguing self-defense. You are

certainly not precluded from arguing most of what you argued which is the possessory definition in this particular case.”

Defendant’s jury trial began on December 12, 2011.

¶ 11. Trial

¶ 12. I. Testimony of Officer Jefferson

¶ 13. Officer Jefferson testified that on September 30, 2010, just before noon, he and other police officers executed a search warrant at a used car dealership in Chicago. There was a large car lot with a trailer on the premises where business was conducted. Officer Jefferson parked an unmarked car around the corner from the dealership and walked into the trailer undercover, he was in plainclothes. He asked for help purchasing a vehicle. When he went back outside with some of the dealership employees he radioed his team. About 5-10 officers then drove onto the scene in unmarked cars.

¶ 14. Once his team arrived, Officer Jefferson walked back into the trailer. He saw some other people looking out of the window. Outside the window he saw officers running in, wearing police raid vests, and yelling “search warrant.” Defendant was standing by the window looking out, when Officer Jefferson saw him leave the window, reach into a drawer, and grab a revolver before running to the back of the trailer. At that point Officer Jefferson announced himself as a police officer and told defendant to stop. Defendant stopped and dropped the gun. Officer Jefferson picked up the gun, found it was loaded, and removed the bullets.

¶ 15. II. Testimony of Sergeant Hawkins

¶ 16. Officer Jefferson went on to the car lot while Sergeant Hawkins assembled his team half a block south of the dealership. There were at least three unmarked police vehicles with “M” plates, and at least seven officers. They were wearing either raid jackets visibly marked with

Chicago Police or mesh vests with “the visible Chicago Police logo and Chicago Police across the back.” The officers were also wearing their police stars.

¶ 17. Once he pulled up near the trailer area of the dealership, Sergeant Hawkins announced “search warrant,” and then went inside the trailer. Sergeant Hawkins was approximately seven feet from the trailer when he yelled “search warrant.” The other police officers exiting their vehicles yelled “search warrant” as well. When Sergeant Hawkins entered the trailer he saw Officer Jefferson chasing and attempting to detain defendant. Sergeant Hawkins first saw a gun when Officer Jefferson was picking up a gun from the floor. Sergeant Hawkins testified he did not see where the gun came from. He also did not hear Officer Jefferson announce his office from inside the trailer.

¶ 18. III. Testimony of Officer Hope McKeown

¶ 19. Officer McKeown testified she was operating as an evidence officer, responsible for caring for evidence recovered, for the operation on September 30, 2010. She was in an unmarked “M” plate Chicago police car and was dressed in civilian clothes with a Chicago police raid jacket (described above by Officer Jefferson). Officer McKeown also wore her police star on the outside of her vest. After Officer Jefferson radioed the team, Officer McKeown exited her car by the street and went to the trailer. While she was moving to the trailer, she was shouting “Chicago Police. Search warrant. Let me see your hands.” She testified the other officers were also shouting “Chicago police. Let me see your hands. Search warrant.” When Officer McKeown entered the trailer, she saw Officer Jefferson and some detained individuals, including defendant. Officer Jefferson handed her a gun and bullets, which she placed in an evidence envelope.

¶ 20. The testimony of Officer McKeown brought a close to state’s case. Defendant’s counsel

made a motion for directed finding. The trial court found for the state and the defense proceeded to put on its case.

¶ 21. Defendant's Testimony

¶ 22. Defendant testified that he was working at the auto dealership on September 30, 2010. He had been employed there for eight years and was then an assistant manager. On September 30, 2010, defendant was in the trailer on the lot and Officer Jefferson walked in. Defendant walked over to the desk and asked how he could help Officer Jefferson. The officer "didn't say anything." Defendant stood from his desk and again asked how he could help. Officer Jefferson "didn't say anything." Defendant then "opened up the drawer to get the receipt book. [He was] assuming that [Officer Jefferson] was an upset customer. *** [He] looked up and saw the manager and the owner raise their hands." Defendant saw the manager and the owner raise their hands outside in the parking lot through the window in the trailer. He "heard some shouting, but it was muffled." Defendant claimed the only thing he saw were the manager and owner "raise their hands, that's all." Defendant "automatically assumed [the owner] was being robbed. [He] grabbed the gun and tried to go to the back to hide the gun and get on the phone." He had only taken a few steps towards the rear of the trailer when he heard Officer Jefferson say "Chicago police, drop the gun." Defendant dropped the weapon and was then arrested.

¶ 23. On cross-examination, defendant admitted he intended to pick up the gun, that he picked up the gun, it was in his hand when he picked it up, and he held onto the gun until he began to run to the back of the office. Defendant also testified that he could only see the manager and owner standing outside with their arms raised, but he thought a robbery was occurring and that people he couldn't see were coming in.

¶ 24. Closing Arguments

¶ 25. The state argued it was irrelevant what defendant claimed he thought was transpiring when police raided the dealership because defendant was a twice convicted felon who knowingly possessed a firearm. Defendant picked up the gun, held on to it, turned and ran, and then threw the gun to the ground when Officer Jefferson announced himself as police.

¶ 26. Defense counsel argued in closing argument that defendant thought a robbery was occurring. Defendant was afraid, so he reached for a gun and attempted to run to the back room to hide and call the police. Defense counsel attempted to sway the jury to grant the defendant “justice.” He told the jury “when you go back and that door is closed, you are monarchs, you are kings, you are answerable to no person. You go back there, you decide what is just and what is not. *** All I’m asking for you, ladies and gentlemen, is to do the right thing, to do the just thing.” Defense counsel told the jury defendant had no criminal intent, he was simply concerned with “self-preservation, self-protection.”

¶ 27. In rebuttal, the state argued defendant’s account of thinking the police raid was a robbery was incredible. The state claimed defendant’s account that he went back to hide the gun instead of using a phone at the front of the trailer to call 911 meant defendant did not actually think there was a robbery going on. Three officers testified police were wearing police jackets and screaming “police, search warrant, show us your hands.” The state reminded the jury that they could consider defendant’s prior felony convictions for the limited purpose of assessing the credibility of defendant’s testimony.

¶ 28. Motion for New Trial and Sentencing Hearing

¶ 29. On January 19, 2012, the court held a hearing on defendant’s motion for new trial and for sentencing. Defense counsel argued in his motion for a new trial that the jury should have been instructed on self-defense because people have an absolute right to self-defense under the second

amendment. The court denied defendant's motion for a new trial:

“The law in the state of Illinois is clear, necessity is not a defense to the charge of armed habitual criminal. The criminal law is clear self-defense is not a defense to this crime, and this court agrees with that.”

The court also found defendant's version of events was not credible. Defendant did not take the gun for self-defense, “he took the gun and ran to the back so the cops would not find the gun.”

Because defendant possessed the gun, the trial court denied the motion for a new trial

¶ 30. At the sentencing phase of the hearing, the court merged the counts of armed habitual criminal and unlawful use of a weapon under the one act one crime doctrine. Armed habitual criminal is a Class X felony subject to a sentencing range of between 6 and 30 years in prison. 720 ILCS 5/24-1.7(b) (West 2012); 730 ILCS 5/5-4.5-25(a) (West 2012). The state recommended beyond the minimum sentence because defendant's “entire criminal history involves the use of weapons. *** It's clear that he does not understand that he cannot possess a firearm at this point, and the state has no reason to believe that he will not continue to do so upon any release.” Defense counsel argued for defendant to receive only the minimum sentence. Defendant did not possess the gun for any nefarious purpose, only taking it in the course of employment to hide it.

¶ 31. The court found defendant's account of a robbery occurring and defendant's need to defend himself incredible. The court did not “believe a word that he thought that place was going to get overrun by criminals coming into the place not for a moment. He is a liar.” The court then indicated armed habitual criminal is a status offense, defendant had two prior felonies, and the gun was in his hand. The court found defendant has “quite a significant background involving guns. He is convicted of the Class C offense of armed robbery back in 1984 ***. He

got the minimum then. He learned little, if any, since his brush with the law with the Class X statute in 2004.” The court “considered the evidence presented at trial *** the pre-sentence investigation report, the evidence offered in aggravation and mitigation, the court has carefully considered the statutory factors in aggravation and mitigation.” The court then allowed defendant his right of allocution.

¶ 32. Defendant told the court he “believe[d] there was an armed robbery happening. I didn’t try to do anything wrong.” The dealership had been robbed before, so he grabbed the gun and was going to the bathroom to hide from robbers. The court then sentenced defendant to 12 years’ imprisonment, with credit for 478 days served. The court informed defendant of his right to appeal, and that the “right to appeal the judgment of conviction will be preserved only if a notice of appeal is filed within the trial court within 30 days from the date on which the sentence is imposed.”

¶ 33. Defense counsel informed the court that he would file a motion to reconsider prior to filing a notice of appeal. However, he filed the motion to reconsider sentence on February 28, 2012. At a hearing on March 6, 2012, the court found the motion was not timely filed because the court sentenced defendant on January 19, 2012, and February 28 was outside the 30 day window to file.

¶ 34. Postconviction Proceedings

¶ 35. Defendant filed a postconviction petition alleging ineffective assistance of counsel for not timely filing a notice of appeal, and for failure to call witnesses and coercing defendant. The trial court noted there were no supporting affidavits or supporting documents. Accordingly, there was no factual basis for the claims of failure to call witnesses and coercion. The court docketed a hearing on defendant’s claim of ineffective assistance of counsel for failure to file a

timely notice of appeal. A public defender was appointed for defendant.

¶ 36. A third-stage evidentiary hearing was held on December 10, 2015. At the hearing, defendant's postconviction counsel argued the state made defendant an offer of six years and defense attorney Sherman advised defendant to reject the state's offer and go to trial because he could beat the case. Postconviction counsel argued Sherman was ineffective for 1) advising defendant "to reject the state's offer and proceed to trial when he really had no defense; 2) his defense at trial consisted of having his client testify and admit his guilt; and, 3) he was ineffective where he failed to timely file a motion to reconsider sentence and notice of appeal."

¶ 37. I. Testimony of defendant

¶ 38. Defendant testified Sherman told him to reject the plea offer made by prosecutors because Sherman could beat the case. After defendant was convicted of armed habitual criminal, he asked Sherman to file an appeal. That appeal was filed after the 30 day period for filing an appeal expired. The motion to reconsider sentence was also filed late. Under cross-examination, defendant testified he did not tell Sherman that he "could not do six years in the penitentiary at 85 percent." He testified that was not the reason he rejected the offer. Defendant discussed the trial strategy with Sherman. Defendant understood that Sherman would initially put in a defense of compulsion. After the court found defendant could not invoke the defense of compulsion, Sherman then decided to go with a defense of self-defense. After the court found defendant could not raise self-defense as a defense, defendant did not speak about his case with Sherman. Defendant also testified under cross-examination that it was his subjective belief that he had a chance to beat the state's case against him.

¶ 39. II. Testimony of defense attorney Sherman

¶ 40. Sherman testified he was a criminal defense attorney licensed to practice in Illinois since

1969. When he began representing defendant, Sherman told defendant he faced a minimum sentence of six years at 85 percent, and a maximum of up to 30 years imprisonment for the charge of armed habitual criminal and unlawful use of a weapon by a felon. The state made a plea offer of six years at 85 percent. Sherman conveyed this offer to defendant. Defendant chose to not accept the offer because it was too much time. After defendant told Sherman it was too much time, Sherman replied: "I agree with you, let's go to trial then." Sherman told defendant that if he wanted to go to trial then his best chance was with a jury trial. They discussed possible defenses.

¶ 41. Sherman testified he considered defenses of "necessity, compulsion, self-defense." He did not think any of these were viable defenses because they

"didn't apply to armed habitual criminals or to possession of a weapon by a felon. So I thought maybe we could convince a jury that the defendant had no criminal intent, that he was simply trying to protect himself.

Q. So essentially a jury nullification?

A. Basically. What else do we have? Defendant was seen with the gun. He had been convicted of two felonies. It was armed habitual criminal."

Defendant did not ask Sherman to see if the state would accept the plea deal they originally offered. Sherman further testified he did not think he could beat the state's case and did not advise defendant to reject the offer. The only reason Sherman gave for going to trial was because defendant said he could not bear serving that much time in prison. Sherman told defendant that if he took a jury trial, defendant would receive greater than the minimum sentence. Sherman told defendant self-defense and compulsion were not available as defenses after the court made its ruling on the defenses. At that point Sherman felt his only hope was for

jury nullification. After sentencing, Sherman filed post-trial motions and a notice of appeal, but he “didn’t know it was late. I don’t recall why it was late. I filed the notice, and I don’t remember hearing anything until years later.” The trial court then heard arguments from both sides and scheduled a hearing to issue its ruling.

¶ 42. The court issued its ruling at a hearing on February 4, 2016. The court found Sherman was not ineffective. The court found Sherman “was a credible witness as to his strategy, and I believe Mr. Sherman’s representation served Mr. Jones well.” The court then granted defendant’s petition on the issue of late notice of appeal. The court granted defendant “an opportunity to file a late notice of appeal on this particular case because of the circumstances that were beyond his control.” This appeal timely followed.

¶ 43. ANALYSIS

¶ 44. On appeal from the denial of his postconviction petition following a third-stage evidentiary hearing, defendant argues his trial counsel provided ineffective assistance such that he was deprived of his constitutional right to counsel. Defendant also argues on direct appeal from his conviction that the trial court abused its discretion in sentencing him to 12 years’ imprisonment because that sentence is excessive.

¶ 45. The Post-Conviction Hearing Act (Act) allows a convicted criminal to challenge his conviction by raising a claim that “in the proceedings which resulted in his or her conviction there was a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both.” 725 ILCS 5/122-1 (West 2016). In this appeal, defendant argues counsel provided prejudicially defective performance at trial. At the evidentiary hearing on his petition, defendant bears the burden of making a substantial showing of a deprivation of his constitutional rights. *People v. Coleman*, 206 Ill. 2d 261, 277 (2002). The trial court here found

defendant failed to show trial counsel provided prejudicially defective performance and denied his postconviction petition claiming ineffective assistance of counsel. Because the trial court made its finding following a third-stage evidentiary hearing, we will not disturb the court's ruling unless it is manifestly erroneous. *Id.* A trial court's ruling is manifestly erroneous only if the error is "clearly evident, plain, and indisputable." *Id.* The trial court also found defendant was not culpable for the late filing of the notice of appeal and granted him the ability to file a late notice of appeal directly challenging his conviction. Defendant filed his late notice of appeal, and on appeal claims his sentence is excessive. Because defendant's sentence of 12 years' imprisonment is within the statutory guidelines of 6-30 years (720 ILCS 5/24-1.7(b) (West 2012); 730 ILCS 5/5-4.5-25(a) (West 2012)), we will not disturb defendant's sentence absent an abuse of discretion by the trial court. *People v. Cabrera*, 116 Ill. 2d 474, 494 (1987). "[A] sentence within statutory limits will be deemed excessive and the result of an abuse of discretion by the trial court where 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. Stacey*, 193 Ill. 2d 203, 210 (2000).

¶ 46. Although Supreme Court Rule 606 only allows for a timely notice of appeal to be filed "within 30 days after the entry of the final judgment appealed from," there is a limited exception to the rule allowing a trial court to file a late notice of appeal following postconviction proceedings. Ill. S. Ct. R. 606 (b) (eff. July 1, 2017).

"Section 122-6 is flexible enough to include leave to file a late notice of appeal among the remedies available to a trial court in a postconviction proceeding. The Act, thus construed, constitutes a very limited exception to Rule 606. We hold that when a postconviction petitioner demonstrates that defense counsel was

ineffective for failing to file a notice of appeal, the trial court may allow the petitioner leave to file a late notice of appeal.” *People v. Ross*, 229 Ill. 2d 255, 271 (2008).

The trial court here found trial counsel was ineffective for failing to timely file a notice of appeal and allowed defendant to file a late notice appeal. We therefore have jurisdiction over the matter. *Id.*

¶ 47. Defendant’s Claim of Ineffective Assistance of Trial Counsel

¶ 48. Defendant claims there was a breakdown of adversarial testing because defendant’s trial counsel acknowledged defendant’s guilt and failed to raise potentially effective defenses against the state’s case. Although the two-prong *Strickland* test is normally used to evaluate claims of ineffective assistance of counsel, defendant argues he need not show prejudice under *United States v. Cronin*, 466 U.S. 648 (1984), because trial counsel failed to subject the state’s case to meaningful adversarial testing. See *People v. Hattery*, 109 Ill. 2d 449, 458-59 (1985).

¶ 49. In *Strickland v. Washington*, the Supreme Court of the United States held that a defendant raising a claim of ineffective assistance of counsel must prove both that counsel’s alleged error was objectively unreasonable and prejudiced defendant. *Strickland v. Washington*, 466 U.S. 668, 693 (1984). To prove counsel’s performance prejudiced defendant, defendant must show “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.

¶ 50. In *Cronin*, the Supreme Court stated “[t]he right to the effective assistance of counsel is thus the right of the accused to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” *United States v. Cronin*, 466 U.S. 648, 656 (1984). “[I]f

counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *Id.* at 659. In such circumstances defendant does not need to show he was prejudiced by counsel's performance because prejudice is inferred from the breakdown of the adversarial process. *Id.*

¶ 51. Defendant, relying on *Hattery*, 109 Ill. 2d at 458-59, argues trial counsel's admission of defendant's guilt amounted to a breakdown of the adversarial process such that he only has to meet the test in *Cronic* and not *Strickland*. However, simply because a concession of guilt was made does not mean defendant can forgo the two-prong *Strickland* test. "[I]f a concession of guilt is made, ineffectiveness may be established; however, the defendant faces a high burden before he can forsake the two-part *Strickland* test." *People v. Johnson*, 128 Ill. 2d 253, 269-70 (1989). A concession of defendant's guilt is neither *per se* ineffectiveness nor is it necessarily indicative of a breakdown of adversarial testing.

"[W]e explained in a subsequent case that *Hattery* did not hold that it is *per se* ineffectiveness whenever the defense attorney concedes his client's guilt in the face of overwhelming evidence and the defendant's consent does not appear in the record. Rather, a defendant must still meet the *Strickland* test unless the case involves a complete failure to subject the State's case to meaningful adversarial testing." *People v. Nieves*, 192 Ill. 2d 487, 500 (2000).

Our supreme court made clear defendant must still meet the two-prong *Strickland* test unless there has been a complete breakdown of adversarial testing, and defendant has not shown there was a breakdown of adversarial testing here.

"Defendant's contention that the defense tactics employed by his counsel are

analogous to those employed by the defense counsel in *Hattery* cannot withstand even the most superficial scrutiny. The record reveals that the instant defendant's counsel was his advocate throughout the proceedings. He presented both opening and closing arguments; cross-examined virtually all of the State's witnesses; presented several witnesses, including the defendant, on the defendant's behalf; objected often and strenuously to the admission of adverse evidence; and moved for a mistrial on several occasions. It is untenable to suggest that the proceedings below approached the adversarial breakdown of the *Hattery* proceedings, where defense counsel acted not as an advocate for the accused but as a proponent for the prosecution. Accordingly, we reject defendant's invitation to discard the two-prong *Strickland* test in reviewing his ineffective assistance claim." *People v. Shatner*, 174 Ill. 2d 133, 145-46 (1996).

Defense counsel here did not act as a proponent for the prosecution. Rather, counsel presented both opening and closing arguments, cross-examined all of the state's witnesses, and filed motions to raise different affirmative defenses. In closing arguments, counsel argued for jury nullification. There was not an adversarial breakdown of the proceedings here and defendant must still prove both prongs of the *Strickland* test to succeed in his ineffective assistance of counsel claim. *Id.*

¶ 52. Defendant argues he can still prove both prongs of the *Strickland* test. He claims trial counsel was ineffective for admitting defendant held a firearm, and that there would be a reasonable probability the result of his trial would have been different had counsel not made this concession. However, we have previously held an admission of guilt may be a trial strategy decision that is the result of counsel's reasonable professional judgment.

“Woods elected to go to trial on the armed robbery and felony murder charges, and the evidence against him was overwhelming. His counsel admitted that his strategy, in part, was to argue jury nullification by appealing to the jurors’ sympathy and sense of fairness. ‘[I]t is not necessarily *per se* ineffective assistance for a defense attorney to advance a nonlegal defense, such as a plea for jury nullification * * * when the circumstances of the case render other defensive strategies unavailable.’ [Citation.] Although counsel may not argue that jurors should ignore the law in coming to a decision, he may present a defense evoking the ‘empathy, compassion or understanding and sympathy’ of the jurors. [Citation.] As the court in *Ganus* stated, ‘[j]ury nullification is always a possibility’ when counsel attempts such arguments. [Citation.] Furthermore, defense counsel may have attempted to preserve his credibility in the eyes of the jury by conceding guilt of armed robbery in light of the overwhelming evidence against Woods. ‘[W]here there is overwhelming evidence of guilt and no defense, if counsel contests all charges he is liable to lose credibility with the trier of fact’ with regard to the entire case. [Citation.] Under the circumstances here, we do not find counsel’s performance deficient with respect to his theory of the defense.” *People v. Woods*, 2011 IL App (1st) 092908, ¶ 34.

In this case, the state presented overwhelming evidence defendant possessed a firearm and defendant’s trial counsel testified defendant’s only chance for acquittal was to sway the jury for nullification. Counsel attempted to convince the jury that defendant thought there was an armed robbery occurring and that his actions were reasonable such that the law should not criminalize his conduct in such circumstances. Counsel’s decision to concede defendant physically held a

firearm is consistent with the trial strategy we found was not deficient performance under the first prong of *Strickland* in *People v. Woods*. Therefore, defendant failed to show counsel's performance was objectively unreasonable under the first prong of *Strickland* and he cannot support a claim of deprivation of his right to effective assistance of counsel. *Id.*

¶ 53. Defendant argues that if his trial counsel had argued defendant did not legally possess the gun or raised a defense of necessity then there would be a reasonable probability the result of his trial would have been different. We disagree. The evidence that defendant possessed a firearm was overwhelming, and no defense of necessity was available to defendant here.

¶ 54. The state's evidence defendant possessed a firearm was overwhelming. Under Illinois law, "[i]t is unlawful for a person to knowingly possess on or about his person or on his land or in his own abode or fixed place of business *** any firearm or any firearm ammunition if the person has been convicted of a felony." 720 ILCS 5/24-1.1 (West 2012). In addition, in Illinois "[a] person commits the offense of being an armed habitual criminal if he or she receives, sells, possesses, or transfers any firearm after having been convicted a total of 2 or more times of any combination of" certain enumerated offenses. 720 ILCS 5/24-1.7 (West 2012). Possession may be established by proving either actual physical possession or constructive possession.

"Actual possession is proved by testimony which shows defendant exercised some form of dominion over the unlawful substance, such as trying to conceal it or throwing it away. [Citation.] Constructive possession exists without actual personal present dominion over the controlled substance but with an intent and capability to maintain control and dominion over it." *People v. Scott*, 152 Ill. App. 3d 868, 871 (1987).

Defendant asserts his trial counsel could have contested legal possession, and there is a

reasonable probability the outcome of his trial would have been different if counsel had contested legal possession. We disagree. Here defendant opened the drawer with a gun in it, and knowingly and intentionally picked up the gun. Defendant knew he had two prior felony convictions involving firearms and could not legally possess a firearm. He nonetheless picked up a handgun and began moving with it toward the back of the trailer to hide the weapon. He therefore exercised possession of the weapon during that period of time. Defendant claims he could not have possessed the weapon because he did not intend to exercise exclusive possession of the handgun. Instead, he only wanted to hide the weapon temporarily. However, “exclusive possession does not mean that possession may not be joint. [Citations.] If two or more people share immediate and exclusive control or share the intention and power to exercise control, then each has possession.” *Id.* Defendant’s action of knowingly picking up a handgun with intent to carry it to another room to hide it constituted possession of the handgun. The evidence of defendant possessing a firearm was overwhelming and the trial court’s ruling denying defendant’s postconviction petition alleging ineffective assistance of counsel was not manifestly erroneous.

¶ 55. Nevertheless, defendant claims there is a reasonable probability the result of his trial would have been different if trial counsel had raised a defense of necessity. There are two elements for an affirmative defense of necessity: “(1) the person claiming the defense was without blame in occasioning or developing the situation, and (2) the person reasonably believed that his conduct was necessary to avoid a greater public or private injury than that which might reasonably have resulted from his conduct.” *People v. Janik*, 127 Ill. 2d 390, 399 (1989). Defendant argues he was without blame in occasioning the police raid and that he thought it was an armed robbery. Based on his belief an armed robbery was occurring, defendant testified he

thought it was necessary to take the gun and hide it in the back room while phoning for help.

“Necessity involves a choice between two admitted evils where other optional courses of action are unavailable. [Citation.] The conduct chosen must promote some higher value than the value of literal compliance with the law. [Citation.] Conduct that would otherwise be illegal is justified by necessity only if the conduct was the sole reasonable alternative available to the defendant under the circumstances. [Citation.] When other alternatives exist, which if carried out would cause less harm, then the accused is not justified in breaking the law.”

People v. Kratovil, 351 Ill. App. 3d 1023, 1034 (2004).

Defendant cannot support his argument no alternative existed that would have caused less harm. Defendant could more easily have picked up a telephone in the room of the trailer he was already in. Additionally, the trial court found defendant’s account was not credible. It is incredible for defendant to state that he observed the manager and owner raising their arms and heard a commotion indicating an armed robbery, but at the same time did not at all see or hear police announcing the execution of a search warrant. Even under defendant’s improbable tale that he believed an armed robbery was occurring, he still testified he picked up the gun to hide it, not to use it in self-defense. Defendant’s own testimony indicated he had reasonable alternatives and was not seeking to use the gun out of necessity to protect himself or cause the least amount of harm. Therefore, the evidence here did not support an instruction of an affirmative defense of necessity. “Both the State and defendant are entitled to appropriate instructions which present their theories of the case to the jury when and if the evidence supports such theories.” *Janik*, 127 Ill. 2d at 398.

“However, an instruction is not warranted if the evidence before the trial court is

so clear and convincing that the court finds the affirmative defense unavailable as a matter of law. [Citations.] Having previously determined that the defense of necessity was not available to the defendant as a matter of law, the trial court did not err in denying a jury instruction on necessity.” *Kratovil*, 351 Ill. App. 3d at 1035.

Defendant had other reasonable alternatives that would have caused less harm than picking up a handgun, even assuming defendant believed an armed robbery was occurring. We find as a matter of law that a defense of necessity was not available to defendant. Defendant could not have received such a jury instruction and there is no reasonable probability the outcome of his trial would have been different had trial counsel raised a defense of necessity. Therefore, defendant has not shown the trial court’s denial of his postconviction petition was manifest error.

¶ 56. Defendant has not shown there was a breakdown of adversarial testing such that prejudice can be presumed and the *Strickland* test foregone. *Shatner*, 174 Ill. 2d at 145-46.

Defendant failed to show trial counsel provided deficient performance, and failed to show there would be a reasonable probability of a different outcome of his trial if trial counsel had argued the elements of possession or raised a defense of necessity. *Kratovil*, 351 Ill. App. 3d at 1035.

Accordingly, the trial court’s denial of defendant’s postconviction petition asserting deprivation of his right to effective assistance of counsel was not manifestly erroneous.

¶ 57. Defendant’s Sentence

¶ 58. Defendant claims his sentence of 12 years’ imprisonment is excessive, and that the trial court abused its discretion not giving him a lesser sentence. On direct appeal, defendant seeks a sentence of nine years’ imprisonment. As noted above, the trial court allowed defendant to file a late notice of appeal as postconviction relief for trial counsel’s failure to timely file a notice of

appeal. Accordingly, we have jurisdiction over defendant's claim under the Act. 725 ILCS 5/122-6 (West 2016); *Ross*, 229 Ill. 2d at 271.

¶ 59. Although defendant's sentence of 12 years' imprisonment is within the statutory limits of 6-30 years for armed habitual criminal, defendant maintains his sentence is excessive and the trial court abused its discretion handing down a 12 year sentence.

“To begin, defendant concedes his sentence was within the statutory limits but maintains his sentence was ‘exceedingly harsh’ and at the ‘high end’ of the Class X sentencing range. A sentence within statutory limits will not be deemed an abuse of discretion unless it is at variance with the spirit and purposes of the law or is manifestly disproportionate to the nature of the offense. [Citation.] In determining an appropriate sentence, relevant considerations include the nature of the crime, the protection of the public, deterrence and punishment, as well as the defendant's rehabilitative prospects.” *People v. Bryant*, 2016 IL App (1st) 140421, ¶ 14.

Defendant has not shown a 12 year sentence here is at variance with the spirit and purpose of the law, nor is it manifestly disproportionate to the offense. Defendant claims he only grabbed a handgun for a few moments, and only to hide it during a robbery. He had been employed at the same place of business for about eight years, and he maintained he was reformed because of the gap of years between his previous felony convictions. However, the trial court considered all of these factors and determined defendant had nevertheless not reformed because all of defendant's felony convictions involved firearm related offenses. The trial court considered the nature of a third firearm related felony committed by defendant in deciding to not give the minimum sentence, as defendant knew he could not pick up a firearm and did so anyway.

¶ 60. Defendant argues the trial court abused its discretion sentencing him because the court in part based its greater than minimum sentence on defendant committing perjury. We find defendant cannot support his claim the trial court abused its discretion when the court examined defendant's pre-sentence investigation report, the evidence adduced at trial, evidence supporting aggravating and mitigating factors, and defendant's prior criminal history. Defendant contests the sentence is excessive because he thought a robbery was occurring, he had been employed at his job for eight years, and he was now a supportive family man. However, the court found defendant had a history of felony convictions relating to firearms, and that defendant had not learned from those convictions he could not possess a firearm. Defendant claims he was not hurting anyone and no other aggravating factors were present other than defendant's protestations of innocence. However, our legislature determined a convicted felon's possession of a weapon is inherently dangerous, no matter whether it is for a short period of time. "The legislature similarly intended the armed habitual criminal statute to help protect the public from the threat of violence that arises when repeat offenders possess firearms. [Citation.] The State has a legitimate interest in protecting the public from the dangers posed by felons in possession of firearms." *People v. Davis*, 408 Ill. App. 3d 747, 750 (2011). The trial court here found a 12 year sentence was warranted largely because all of defendant's felony convictions involved firearms. Despite defendant's protestations of reform, the trial court found defendant's repeated recidivism with firearm related offenses indicated a lack of reform. We cannot say the trial court here abused its discretion by sentencing defendant within the statutory guidelines after it considered the nature of defendant's offense, the evidence adduced at trial, defendant's criminal history as well as defendant's presentence investigation report. *Bryant*, 2016 IL App (1st) 140421, ¶ 14.

¶ 61. Defendant has not shown he was deprived of the effective assistance of trial counsel because there was not a breakdown of adversarial testing, and defendant has not shown that if counsel had raised a defense of necessity there would be a reasonable probability the result of the proceedings would have been different. The evidence showing defendant possessed a firearm was overwhelming. Defendant's sentence of 12 years' imprisonment is within the statutory sentencing limit and defendant has not shown the trial court abused its discretion sentencing defendant. Therefore, defendant's sentence and the judgment of the trial court denying defendant's postconviction petition are affirmed.

¶ 62. **CONCLUSION**

¶ 63. For the foregoing reasons the judgment of the circuit court of Cook County is affirmed.

¶ 64. Affirmed.