2018 IL App (2d) 160337-U
No. 2-16-0337
Order filed March 14, 2018

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 12-CF-2466
	)	
THOMAS HOLLOWAY,	)	Honorable
	)	Liam C. Brennan,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Zenoff and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: Where the defendant was tried *in absentia*, the trial court properly accepted an evidentiary stipulation, defense counsel was not ineffective, and the defendant was proved guilty beyond a reasonable doubt.

¶ 2 On February 18, 2016, the defendant, Thomas Holloway, was convicted *in absentia* of unlawful delivery of a controlled substance and sentenced to 20 years' imprisonment. In this appeal, the defendant argues that the trial court erred in accepting an evidentiary stipulation in his absence, he received ineffective assistance of counsel, and he was not proved guilty beyond a reasonable doubt. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On December 12, 2012, the defendant was charged by complaint with one count of unlawful delivery of a controlled substance (720 ILCS 570/401(c)(1) (West 2012)), for knowingly delivering between 3 and 15 grams of a substance containing heroin. An arrest warrant was issued for the defendant the same day. On April 25, 2014, the warrant was executed and a public defender was appointed to represent the defendant. On April 26, 2014, the defendant posted bail in the amount of $5000 and was released from custody. On July 21, 2014, the defendant was admonished that failure to appear could result in a trial *in absentia* and that he would give up his right to question the State's witnesses. On August 18, 2014, private defense counsel filed an appearance.

¶ 5 On June 2, 2015, following a hearing on the State's motion to increase bond, which was granted, the matter was set for jury trial on August 25, 2015. On August 13, 2015, at a hearing on the State's motion to admit evidence of other crimes, the defendant executed a waiver of trial by jury.

¶ 6 On August 25, 2015, the defendant failed to appear for trial. Defense counsel informed the trial court that he had spoken to the defendant 20 minutes earlier and the defendant said he was in the parking lot. Defense counsel tried to call the defendant, but the defendant did not answer. The trial court issued a bond forfeiture and a no-bond warrant for the defendant. The matter was continued. On October 7, 2015, a judgment on the forfeiture of the bond was entered and the matter was continued for trial.

¶ 7 On February 18, 2016, the matter proceeded to a bench trial *in absentia*. Joe Saenz testified that he was a Woodridge police officer for 15 years. In late 2012, he was assigned to the Du Page County tactical narcotics team task force. He was working with an informant in conducting an investigation into an individual later identified as the defendant. The informant

told Saenz that there was an individual known as "K Tom" that was selling heroin. The informant gave Saenz the suspect's cell phone number and a physical description. Through the cell phone number, Saenz learned that the suspect's name was "Thomas Holloway" and was able to get a registered address. Saenz was also able to find a driver's license photo of "Thomas Holloway" and it was a picture of the defendant. The driver's license matched the physical description that was given by the informant.

¶ 8 Saenz further testified that he then started using the defendant's cell phone number to set up narcotics transactions. Saenz contacted the defendant by phone call and text to arrange for the purchase of heroin. They agreed on an amount and price in advance. They would later meet at a Burger King in Du Page County to conduct the drug transaction. Saenz testified that such transactions took place on September 27, October 2, and October 11, 2012. Surveillance was present for each drug transaction. Each time, the defendant arrived in a black Pontiac Grand Am with license plate P351108. The defendant exited the car and entered Saenz's vehicle. Saenz testified that the man who entered his car was "Thomas Holloway." The defendant handed Saenz a bag of raw/uncut heroin and Saenz paid him. Saenz identified People's Exhibits 1, 2, and 3 as the evidence envelopes in which he had packaged the heroin he purchased from the defendant on the three dates above. Saenz knew they were the same envelopes because he created the labels and put his initials and the date on the seals. He identified People's Exhibits 1A, 2A, and 3A as the contents of the evidence envelopes, which were the baggie corners with the suspected heroin that the defendant sold to him.

¶ 9 Saenz identified People's Exhibits 4 and 5 as surveillance photographs of his vehicle and the defendant's vehicle in the Burger King parking lot on October 2nd. Exhibit 4 was a picture of the defendant exiting his own vehicle before entering Saenz's vehicle. Saenz further testified

that, at some point, the defendant was arrested by another police department and that concluded his investigation of the defendant. Charges were filed against the defendant for the drug transaction that occurred on October 11, 2012.

¶ 10 On cross-examination, Saenz acknowledged that the driver's license and car registration both indicated that the defendant's residence was in Bellwood. However, during surveillance, the police officers repeatedly followed the defendant back to an address that was not in Bellwood. Saenz acknowledged that he had met the defendant once before meeting him at the Burger King on September 27. During their four in-person encounters, the defendant never stated his name. Saenz acknowledged that on October 11, the cell phone number he called had been answered by someone other than the defendant.

¶ 11 Michael Potatczak testified that he was a police officer for West Chicago since 1995. In 2012, he was assigned to the Du Page County Sheriff's narcotics unit. On September 27 and October 2, 2012, he provided surveillance and cover for Saenz during the undercover drug purchases. Saenz provided the defendant's name and a description of the black Pontiac Grand Am and the license plate number. Potatczak saw a photograph of the defendant prior to September 27. After the September 27 transaction, he followed the defendant's vehicle back to 2301 South Kostner. The defendant parked there and used a key to enter a basement or garden-level apartment. Potatczak acknowledged that the Grand Am was registered to the defendant but not at the Kostner address. Potatczak identified People's Exhibit 5 as a photograph of the defendant's vehicle that he had followed on September 27 and October 2. He identified People's Exhibit 4 as the defendant exiting his vehicle and approaching Saenz's undercover vehicle on October 2. Potatczak identified the individual exiting the vehicle as the individual that he followed during the surveillance he provided.

¶ 12 The parties stipulated that People's Exhibits 1A, 2A, and 3A, the suspected heroin sold to Saenz by the defendant, all tested positive for the presence of heroin. The parties also stipulated as to the weights of the heroin in each Exhibit. They further stipulated that the chain of custody and foundational requirements were satisfied. The parties also stipulated that People's Exhibit 7 was a certified document from the Secretary of State regarding a 1998 Pontiac Grand Am that was registered to the defendant at the address of 150 Eastern in Bellwood.

¶ 13 Thereafter, the State rested. Defense counsel made a motion for directed finding, which the trial court denied. The defense then rested. In closing argument, defense counsel argued that the only evidence tying the defendant to the alleged crime was a driver's license photograph that the individual who sold the heroin supposedly matched. Defense counsel contended that this was not sufficient to establish identity beyond a reasonable doubt.

¶ 14 Following closing argument, the trial court rendered its ruling. The trial court noted that there was no driver's license photograph admitted into evidence, which would have helped to prove that the person selling the drugs to Saenz was the charged defendant. The trial court stated, however, that identity could be proved by circumstantial evidence and noted that the cell phone number and Pontiac Grand Am had been tied back to the defendant. Further, Saenz testified that the person who sold him the heroin was the person in the driver's license photo of the defendant. Finally, People's Exhibit 7, the certified packet from the Secretary of State, included something with the defendant's signature and that signature matched the defendant's signature on the bail bond receipt. The trial court concluded that the State had proven that the defendant was the person who sold the heroin to Saenz and entered a finding of guilty. The trial court ordered a criminal history report and set March 11, 2016, for the report and any posttrial motions.

¶ 15 On March 11, 2016, defense counsel made an oral motion for a new trial because the State had not sustained its burden of proof. Defense counsel stated, according to the transcript in the record, that he was "just basically peer leading for any appellate purposes." The trial court denied the motion for a new trial. In light of the defendant's extensive criminal history, the trial court sentenced the defendant to 20 years' imprisonment. Defense counsel then made a request for the exoneration of the bond, and the trial court ordered attorney fees of $5,000 to be paid out of the bond. Defense counsel did not file a motion to reconsider sentence or a notice of appeal. Appellate counsel requested leave to file an untimely notice of appeal, which this court granted.

¶ 16 II. ANALYSIS

¶ 17 The defendant's first argument on appeal is that his constitutional rights were violated when defense counsel entered an evidentiary stipulation at trial. The defendant is specifically referring to the stipulations that People's Exhibits 1A, 2A, and 3A had tested positive for heroin, as to the weight of the substances, and that the chain of custody and foundation were satisfied. The defendant argues that, because he was not present at trial, the trial court should not have accepted any stipulations.

¶ 18 At the outset, we note that this contention is forfeited because the defendant did not object at trial or raise the argument in a posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (explaining that both a trial objection and a written posttrial motion are required to preserve an error for review). The defendant argues, however, that this issue can be reviewed for plain error. The plain-error doctrine allows courts to review arguments that have been forfeited when: (1) the evidence is close, regardless of the seriousness of the error; or (2) the error is so serious that the defendant was denied a substantial right, regardless of the closeness of the evidence. *People v. Herron*, 215 Ill. 2d 167, 187 (2005). The defendant relies on the second

prong of the plain-error doctrine—that entering the stipulation outside his presence was an obvious error so serious that it affected the fairness of his trial, and challenged the integrity of the judicial process. There can be no plain error, however, unless we first determine that error occurred. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010).

¶ 19 "[A]n attorney is authorized to act for his client and determine for him procedural matters and decisions involving trial strategy and tactics." *People v. Phillips*, 217 Ill. 2d 270, 280 (2005). Stipulations are generally favored, as they promote the efficient disposition of cases, simplify issues, and reduce the expense of litigation. *People v. Woods*, 214 Ill. 2d 455, 468 (2005). Stipulations will be enforced unless unreasonable, procured by fraud, or violative of public policy. *Fitzpatrick v. Human Rights Comm'n*, 267 Ill. App. 3d 386, 390 (1994). "Concerning the legal effect of a stipulation, the standard of review is *de novo*." *Id.*

¶ 20 The defendant is essentially arguing that the subject stipulation should not be enforced as it is against public policy because he was not present at trial. The defendant relies on *Phillips*, 217 Ill. 2d 270. In *Phillips*, the defendant, Joanne Phillips, was convicted of possession of a controlled substance with intent to deliver. *Id.* at 272. The issue was whether Phillips' constitutional rights were violated when defense counsel entered into an evidentiary stipulation as to the identity and weight of narcotics recovered from Phillips' vehicle. The *Phillips* court reiterated its previous holding that "'defense counsel may waive a defendant's right of confrontation as long as the defendant does not object and the decision to stipulate is a matter of trial tactics and strategy.'" *Id.* at 283 (quoting *People v. Campbell*, 208 Ill. 2d 203, 217 (2003)). It further clarified that a defendant must personally waive the right of confrontation "'when the State's entire case is to be presented by stipulation and the defendant does not present or preserve a defense ***, or where the stipulation includes a statement that the evidence is sufficient to

convict the defendant.'" *Id.* (quoting *Campbell*, 208 Ill. 2d at 218). In other words, a defendant must be personally admonished about a stipulation, and must personally agree, only when the stipulation renders the defendant's trial the practical equivalent of a guilty plea. *Id.* at 286.

¶ 21 In determining that the stipulation in *Phillips* was not improper, the *Phillips* court specifically noted that Phillips was present and never objected when the State repeatedly referred to the stipulation at issue or when defense counsel announced that he had no objection to the stipulated evidence. *Phillips*, 217 Ill. 2d at 286-87. Further, the *Phillips* court found that the stipulation was a matter of trial strategy because there was no basis to contest the results of the chemical testing, doing so would have highlighted the nature of the drug, and Phillips was better served by focusing on her main defense—that she did not knowingly possess the controlled substance. *Id.* at 285. Finally, the *Phillips* court noted that Phillips presented a defense, and the stipulation did not include a statement that the evidence was sufficient to convict. *Id.* at 288.

¶ 22 The defendant's reliance on *Phillips* does not support his argument that his conviction should be vacated. Here, as in *Phillips*, the decision to stipulate to the substances at issue, their weights, and the foundation and chain of custody, was a matter of trial strategy. The defendant has not indentified any basis on which defense counsel could have challenged the evidence and defense counsel instead focused on the main defense—that the State had not proven that it was the defendant that actually sold the narcotics to Saenz. Further, the State's entire case was not presented by stipulation, defense counsel presented a defense by arguing that the State had not proved identity, and the stipulation did not include a statement that the evidence was sufficient to convict the defendant. Thus, the stipulation did not render the defendant's trial the practical equivalent of a guilty plea. Also, as in *Phillips*, the defendant did not object at trial. For these

reasons, *Phillips* supports the proposition that it was not improper for the trial court to accept the stipulation.

¶ 23 In arguing that the trial court should not have accepted the stipulation, the defendant emphasizes that the stipulation was proper in *Phillips* because Phillips was present and did not object to the stipulation. Because he was not present at trial, and thus could not object, the defendant contends that *Phillips* supports a determination that the trial court should not have accepted the evidentiary stipulation at issue in this case. We disagree with this contention. Here, the defendant was admonished that if he did not appear for trial he forfeited his right to question the State's witnesses. Regardless, he voluntarily absented himself from trial. Under these circumstances, the defendant cannot assert that the stipulation was improper due to the lack of his opportunity to object because if he had wanted that opportunity, he should have appeared for trial. See *People v. Condon*, 272 Ill. App. 3d 437, 443 (1995), overruled on other grounds by *People v. Phillips*, 242 Ill. 2d 189 (2011), (noting that if defendant "wanted a say in counsel's tactical approach to sentencing, he should have attended the hearing").

¶ 24 The defendant acknowledges that he was admonished that he would forfeit his right to confront witnesses if he did not appear for trial, but argues that stipulations are different. However, the defendant does not cite any authority to support this assertion and the argument is thus forfeited. *People v. Macias*, 2015 IL App (1st) 132039, ¶ 88 (citing Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008) (argument must be supported by citation to authority)). Further, in *Phillips*, the court specifically stated that "[s]ince an evidentiary stipulation is, in effect, nothing more than an acknowledgement of what a witness *would* testify to if called, and a concomitant decision not to challenge the testimony the witness would give, a stipulation is not much different from a decision not to cross-examine." (Emphasis in original.) *Phillips*, 217 Ill. 2d at

284. In the present case, the stipulation was nothing more than a failure to confront the witnesses that would have provided the testimony as to People's Exhibits 1A, 2A, and 3A. The defendant was admonished that he would forfeit this right by failing to appear for trial. Thus, the defendant's argument that stipulations are different is without merit. Because the stipulation was not tantamount to a guilty plea, the trial court did not err in accepting the stipulation. *Phillips*, 217 Ill. 2d at 287. As no error occurred, there can be no plain error.

¶ 25 The defendant's second contention on appeal is that he was denied the effective assistance of counsel. Specifically, the defendant contends that defense counsel rendered ineffective assistance because he did not adequately prepare for trial, failed to contact the defendant, should not have entered the evidentiary stipulation, did not present any posttrial motions, did not adequately argue at sentencing, and failed to file a timely notice of appeal.

¶ 26 A defendant has a sixth amendment right to effective assistance of counsel. See *People v. Taylor*, 237 Ill. 2d 356, 374 (2010). We review claims of ineffective assistance of counsel according to the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984) (adopted by the Illinois Supreme Court in *People v. Albanese*, 104 Ill. 2d 504, 525-26 (1984)), which requires a defendant to show both that: (1) as determined by prevailing professional norms, counsel's performance fell below an objective standard of reasonableness; and (2) the defendant was prejudiced by counsel's deficient performance. The failure to establish either prong of *Strickland* is fatal to the claim. *People v. Clendenin*, 238 Ill. 2d 302, 317-18 (2010).

¶ 27 The defendant first argues that defense counsel was ineffective in failing to prepare for trial because defense counsel did not file any pretrial motions *in limine* and did not discuss, with the defendant, discovery, the theory of defense, or whether the defendant should testify. The

defendant has failed to establish that defense counsel's performance was ineffective in these regards. The defendant has not identified what pretrial motions *in limine* should have been filed and has not explained how he was prejudiced by the failure to file them. Further, there is no indication in the record as to how defense counsel prepared for trial and how often he spoke with the defendant. See *People v. Clark*, 406 Ill. App. 3d 622 (2010) (noting that claims for ineffective assistance of counsel are preferably brought on collateral review because the trial record is often inadequate and incomplete to support such claims).

¶ 28 The defendant cites to a transcript of a hearing on charges for violation of bail bond, where, according to the defendant, defense counsel testified that he only met with the defendant at his office once and that they usually met and talked outside the courtroom. Although appellate counsel filed the transcript with this court's clerk, appellate counsel was advised that a motion to supplement the record would need to be filed to make the transcript part of the record. Appellate counsel never moved to supplement the record, so the transcript is not properly before us. *People v. Whitehead*, 169 Ill. 2d 355, 372 (1996) (reviewing court may not consider matters not of record). Even if we were to consider the transcript, it does not support the defendant's contention that counsel failed to prepare him for trial. Our review of the transcript reveals that defense counsel testified that he met with the defendant at his office, although he was not sure how many times and when, and that he had spoken with the defendant numerous times by phone.

¶ 29 The defendant argues that counsel was ineffective in stipulating to the presence of heroin, its weight, and that the foundation and chain of custody were satisfied. However, the defendant has failed to provide any basis on which the evidence that was the subject of the stipulation could have been challenged. Further, as explained above, the evidentiary stipulation was a matter of

trial strategy, and a decision involving a matter of trial strategy will typically not support a claim for ineffective assistance of counsel. *People v. Watson*, 2012 IL App (2d) 091328, ¶ 32.

¶ 30 The defendant next argues that defense counsel was ineffective because he failed to (1) contact the defendant regarding the trial, (2) file a written motion for a new trial and preserving issues for appeal, and (3) present any meaningful argument or mitigation at sentencing. The defendant has failed to establish that defense counsel's performance fell below an objective standard of reasonableness in these regards. The record does not establish whether and how often defense counsel reached out to the defendant. The defendant argues that defense counsel argued nonsensically before sentencing that he was "peer leading for appellate purposes." However, this alone does not establish ineffective assistance and the defendant has failed to cite any issues that should have been preserved for appeal or identify any arguments or mitigation evidence that should have been presented at sentencing.

¶ 31 Finally, the defendant argues that defense counsel was ineffective in failing to file a timely notice of appeal. However, whether to appeal is a decision that ultimately belongs to a defendant in a criminal case. *Phillips*, 217 Ill. 2d at 281. The defendant has failed to cite any authority to support the proposition that defense counsel was required to file a notice of appeal *in absentia*. As such, the defendant has failed to establish that defense counsel's representation fell below an objective standard of reasonableness. Further, this court allowed the defendant's late notice of appeal and thus there has been no prejudice. Because the defendant has failed to establish both prongs of any of his ineffective assistance claims, they necessarily fail. *Clendenin*, 238 Ill. 2d at 317-18.

¶ 32 The defendant's third contention on appeal is that he was not proved guilty beyond a reasonable doubt. In evaluating the sufficiency of the evidence, the relevant question is

"'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" (Emphasis in original.) *People v. Collins*, 106 Ill. 2d 237, 261 (1985) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The determination of the weight to be given to the witnesses' testimony, their credibility, and the reasonable inferences to be drawn from the evidence is the responsibility of the trier of fact. *People v. Smith*, 185 Ill. 2d 532, 542 (1999); *Collins*, 106 Ill. 2d at 261-62. Likewise, the resolution of any conflicts or inconsistencies in the evidence is also within the province of the fact finder. *Collins*, 106 Ill. 2d at 261-62. These standards apply whether the evidence is direct or circumstantial and whether the verdict is the result of a jury trial or a bench trial. *People v. Cooper*, 194 Ill. 2d 419, 431 (2000). We will set aside a criminal conviction only "where the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt." *Smith*, 185 Ill. 2d at 542.

¶ 33 In the present case, the defendant argues that the State failed to prove identity beyond a reasonable doubt. The defendant notes that Saenz testified that he looked at a driver's license photograph of "Thomas Holloway" and believed it to be the man who sold the heroin to him. However, the photograph was not used as an exhibit during trial and was not entered into evidence. Because of the defendant's absence, there was no in-court identification by Saenz. The defendant argues, therefore, that the State failed to meet its burden to prove identity.

¶ 34 We hold that the evidence was sufficient to prove the defendant's identity beyond a reasonable doubt. It is well settled that circumstantial evidence alone can be sufficient to prove a necessary element beyond a reasonable doubt. *People v. Fleming*, 2013 IL App (1st) 120386, ¶ 74. Saenz received a cell phone number and a physical description from an informant. Saenz traced the cell phone number to "Thomas Holloway," and was able to get an address, which was

also registered to "Thomas Holloway." Saenz was able to find a driver's license photo of "Thomas Holloway" from the Secretary of State, and it was a picture of the person who had sold him the heroin. There was evidence that the black Pontiac Grand Am, which arrived each time Saenz purchased heroin from the suspect, was registered to the defendant. Finally, there was a certified packet from the Secretary of State, related to the ownership of the 1998 Pontiac Grand Am, that included a signature of "Thomas Holloway" and that signature matched the defendant's signature on his bail bond receipt. Based on this evidence, we cannot say that the evidence was so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt that the defendant was the person who sold the heroin to Saenz.

¶ 35 The defendant's final contention on appeal is that the cumulative effect of the alleged errors entitles him to a new trial. However, as we have failed to find any errors, it is axiomatic that there is no cumulative error.

¶ 36 III. CONCLUSION

¶ 37 For the reasons stated, the judgment of the circuit court of Du Page County is affirmed. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2012); see also *People v. Nicholls*, 71 Ill. 2d 166, 179 (1978).

¶ 38 Affirmed.