2019 IL App (1st) 161228-U

SIXTH DIVISION
September 13, 2019

No. 1-16-1228

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. 14 CR 21205
	)	
FABIAN HALL,	)	Honorable
	)	Timothy Joseph Joyce,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE MIKVA delivered the judgment of the court.
Justice Pierce concurred in the judgment.
Justice Walker dissented.

O R D E R

¶ 1 *Held*: Defendant's claims that he was denied his right to counsel of choice and his right to effective assistance of counsel are both rejected and his conviction is affirmed.

¶ 2 Defendant Fabian Hall was found guilty of several weapons offenses after a bench trial. He was sentenced as a Class X offender because of his criminal background to seven years in prison. On appeal, Mr. Hall argues that (1) his sixth amendment right to counsel of choice was violated because his privately retained trial attorney misinformed him about the outcome of

disciplinary charges that had been brought against the attorney, and (2) he received ineffective assistance of trial counsel from that attorney. For the following reasons, we reject these claims and affirm Mr. Hall's conviction.

¶ 3 I. BACKGROUND

¶ 4 Mr. Hall was charged with several counts of being an armed habitual criminal, unlawful use of a weapon by a felon, and aggravated unlawful use of a weapon, all charges based on his alleged possession of a gun just after midnight on November 23, 2014.

¶ 5 A. Trial

¶ 6 A two-day bench trial was held on October 13 and 26, 2015. The day trial began, Mr. Hall's counsel, David Wiener, disclosed the following to Mr. Hall in open court, on the record:

> "[MR. WIENER:] Mr. Hall, I want to tell you that I've been investigated by the ARDC and I've been cleared of all charges but placed on probation, do you understand that?
>
> MR. HALL: Yes.
>
> MR. WIENER: Do you still want me to be your lawyer?
>
> MR. HALL: Yes."

¶ 7 In his opening statement, Mr. Wiener told the judge that Mr. Hall would testify that "he was not armed with a weapon. He did not have a weapon. He never knew that there was a weapon involved. *** [H]e is going to tell you that he did not possess nor did he discard nor did he do anything with the weapon on that date and time in question."

¶ 8 The State called their sole witness, Chicago police officer Arthur Carlson, who testified that at approximately 12:07 a.m. on November 23, 2014, he and his two partners were on patrol in an unmarked police vehicle when they responded to a call regarding a person with a gun near

the corner of Congress Parkway and Kostner Avenue. Officer Carlson could not recall if they received a description of the person with a gun. As the officers arrived at the intersection and stopped at a red light, Officer Carlson saw a group of 15 to 20 people west of the intersection on Congress Parkway.

¶ 9 Officer Carlson then saw an individual walk away from the group and "immediately" begin running north in the alley just west of Kostner Avenue. Officer Carlson drove one block north of Congress Parkway and then turned south into that alley. As he drove through the alley, he saw a black man approximately 75 to 100 feet away, who he identified as Mr. Hall, running toward the squad car. According to Officer Carlson, Mr. Hall then "threw with his right hand a dark object and continued running north." Mr. Hall was next to a vacant lot when he made the throwing motion and the officer "could see a dark object slightly bigger than [Mr. Hall's] hand and that's all"; he could not see specifically what was thrown or exactly where it landed. Mr. Hall then kept running north in the alley toward the squad car. Officer Carlson did not see anyone else in the alley. One of Officer Carlson's partners exited the vehicle and detained Mr. Hall.

¶ 10 Officer Carlson continued south in the vehicle to the vacant lot, where he recovered a "two tone Ruger 45 caliber handgun" lying on the ground, "[r]ight in the vacant lot right there few [*sic*] feet in from the alley." The gun was loaded, with seven rounds in the magazine and one in the chamber. The parties stipulated to an unbroken chain of custody.

¶ 11 Mr. Hall was arrested and transported to the police station for processing, where Officer Carlson spoke to him in the presence of another officer. After Mr. Hall was advised of his *Miranda* rights, he told the officers that he had been drinking at his house and heard that there was a fight at Congress Parkway and Kostner Avenue. He went down to "make sure his people

were okay" and "had the gun on [him] for protection in case both sides came at [him]." Officer Carlson also testified that Mr. Hall told the officers that if they let him go, he would give them "a brand new AR 15 rifle with a 50 round magazine."

¶ 12 On cross-examination, Officer Carlson acknowledged that he could not tell what Mr. Hall had in his hand in the alley. Defense counsel also asked Officer Carlson: "And you can't be sure that the weapon that you saw in [the vacant lot] was an item [Mr. Hall] had, in fact—in fact, discarded, am I correct?" Officer Carlson responded, "It was similar in size. That's all."

¶ 13 The State then introduced certified copies of Mr. Hall's two prior convictions for the manufacture or delivery of a controlled substance (case Nos. 11 CR 0373402 and 11 CR 1270101), for which Mr. Hall received concurrent sentences on November 16, 2012. The State also introduced a certification from the Illinois State Police that, as of December 30, 2014, Mr. Hall had never been issued a FOID card or concealed carry license.

¶ 14 Mr. Wiener moved for a directed finding at the end of the State's case. First, he argued that the armed habitual criminal statute required "two significant convictions that are separate and apart from one another" and because Mr. Hall's convictions were concurrent, they could not provide the necessary predicate for the charge of armed habitual criminal. Mr. Wiener also made the following challenge to the sufficiency of the evidence:

> "Secondly, the testimony of the officer, Officer Carlson, other than the statement given by my client indicates that my client went away from a group of 15 or 20 people, went down an alley and threw an object. The officer couldn't identify whether at the time of the throwing of the object at the time that the object was recovered. (Sic) The officer indicated just a dark object. The officer indicated he did not know where the object actually landed.

> Other than the statement given my client—by my client, Judge, we'd ask that your Honor find there's no evidence even taken in the light most favorable to the State at this time to prove my client guilty beyond a reasonable doubt."

¶ 15 The trial court denied the motion on the following court date. Mr. Wiener then informed the court that Mr. Hall had elected not to testify, and the defense rested.

¶ 16 In closing, Mr. Wiener argued that Officer Carlson never saw a gun in Mr. Hall's hand "and really just [gave] a general description about where th[e] object [Mr. Hill purportedly threw] landed." He further stated: "Judge, at this time, I'm going to argue to you that these officers were truthful, candid and could have said a whole bunch of other things, but they didn't. But the evidence does not prove Mr. Hall guilty of possessing that weapon beyond a reasonable doubt."

¶ 17 In response, the attorney arguing for the State said: "I agree with Mr. Wiener that the officers were candid. They didn't exaggerate anything. They didn't add any details. They told you clearly what happened and what they saw."

¶ 18 The trial court found Mr. Hall guilty.

¶ 19 B. Posttrial Ineffective Assistance of Counsel Motion

¶ 20 In November 2015, Mr. Hall sent a letter to Mr. Wiener and the trial court saying that he had received ineffective assistance of counsel. Based on that letter, at the following court date Mr. Wiener withdrew, and the trial court appointed Assistant Public Defender Emily De Yoe to represent Mr. Hall. The matter was continued. Ms. De Yoe filed a motion for new trial on behalf of Mr. Hall, in part arguing that Mr. Hall had received ineffective assistance of counsel when Mr. Wiener (1) bolstered the testimony of Officer Carlson during closing argument by saying the officer was a credible and honest witness, (2) advised Mr. Hall not to testify and misinformed

him about the consequences of not testifying, (3) failed to adequately or effectively communicate with Mr. Hall in preparation for trial, and (4) did not inform Mr. Hall of an offer from the State before trial.

¶ 21 In February 2016, Mr. Hall's case was assigned to a new trial court judge. On March 30, 2016, the judge who had been newly assigned to the case held a hearing on Mr. Hall's motion for new trial. Mr. Hall testified on his own behalf, explaining that although he had retained Mr. Wiener three days after he was arrested in November 2014, Mr. Wiener had attended only three court dates before trial—January 16, February 27, and March 20, 2015. As for the rest of his court dates, Mr. Hall said that an assistant attorney came to some and "the rest of them [he] had bullpen continuances"—in other words, he received the next court date without coming into the courtroom and did not see a judge or his lawyer.

¶ 22 Mr. Hall further testified that he had requested visits from Mr. Wiener, but did not receive any while he was in custody. Mr. Hall also did not receive letters or phone calls from Mr. Wiener. Mr. Hall believed that his family had also unsuccessfully tried to get in touch with Mr. Wiener. Mr. Hall testified that he had provided Mr. Wiener with information—including names, addresses, and telephone numbers—for three witnesses. Mr. Wiener "just wrote them down on some legal paper and told [Mr. Hall] that he was going to get in contact with them," but, to the best of Mr. Hall's knowledge, Mr. Weiner never did. When two of the three witnesses told Mr. Hall that Mr. Wiener had never contacted them, Mr. Hall asked them "to take the initiative to contact" Mr. Wiener. To his knowledge, they had been unable to do so.

¶ 23 Mr. Hall said that the only time Mr. Wiener spoke to him about his right to testify was on the first day of trial: "He—During the trial he told me that I have to testify, but we never had a conversation as to that I was going to testify or was I not. So it was just during the trial while we

was in the courtroom that he leaned over and told me that I had to testify to why I was running." Mr. Hall testified further that Mr. Wiener "leaned over and said, Well, you know you have to testify to and you have to—he said I had to give a reason why I was running." According to Mr. Hall, however, on the second day of trial Mr. Wiener told him he should not testify "because the State was going to use my background and there was no way the judge was going to believe me and that if I didn't testify he could get my case dropped down to a three to seven. If I was to lose trial, I could be sentenced under the three to seven sentence and not the six to 30." Based on this advice, Mr. Hall chose not to testify at trial.

¶ 24 Mr. Hall also testified that he "didn't want to go to trial until [Mr. Wiener] filed a motion to suppress evidence, quash arrest, and a motion to suppress statements." But because Mr. Wiener "never came to court," Mr. Hall was never able to tell Mr. Wiener this. No pretrial motions were filed in the case.

¶ 25 On cross-examination, Mr. Hall agreed that on several occasions he saw Mr. Wiener's assistant, Jack Wilk, in court when Mr. Wiener was not there, but said that he never talked to any attorney during the "bullpen" continuances. Mr. Hall testified that he was not able to tell Mr. Wiener that he wanted to file certain pretrial motions before going to trial "because Mr. Wiener was never there." However, Mr. Hall did tell Mr. Wilk that he did not want to go to trial "without hearing the motions."

¶ 26 The trial court then asked what Mr. Hall would have testified to if he had taken the stand. Mr. Hall said he "was going to testify to the fact that [he] never had the gun, that [he] never had the gun, and that the fact that [he] was—[he] was never running from the police or running because [he] was armed." Mr. Hall also said he wanted Mr. Wiener to suppress the statement he had made to the police, and he would have testified at trial that he never made a statement to the

police. With respect to the three witnesses, they would each have testified they were present that night and that Mr. Hall did not have a gun. Mr. Hall said he did not have a gun, did not give a statement to the police, and was not given his *Miranda* warnings by the police.

¶ 27 The State called Mr. Wiener, who testified that he was hired to represent Mr. Hall before the preliminary hearing and that Jack Wilk, his associate, tried the preliminary hearing. Mr. Wiener explained that he handled cases along with Mr. Wilk, and that other attorneys in his office did the same.

¶ 28 Mr. Wiener testified that he had met Mr. Hall "a number of times in the lockup"—"as many times as the case was up for status. I don't know, six, seven, eight times." When they met, they would have a short conversation; they "discussed the nature of the case and what [Mr. Wiener] expected after the preliminary hearing and after reading the police reports what the testimony and the evidence would be in the case." Mr. Wiener testified that Mr. Hall "knew he was charged with armed habitual criminal and possession of a weapon by a felon." Mr. Wiener told Mr. Hall he should choose a bench trial over a jury trial because he believed "that Mr. Hall did not possess a weapon on the day that he allegedly was arrested."

¶ 29 Mr. Wiener testified that Mr. Hall never gave him a list of three witnesses' names, addresses, or phone numbers. If he had been given such a list, Mr. Wiener said that he "certainly would have" tried to locate and investigate whether the witnesses could be called on Mr. Hall's behalf. Mr. Wiener also said: "[T]here were no witnesses in that alley where Mr. Hall was arrested. So I can't imagine that a group of witnesses would have been able to add anything to Mr. Hall's testimony or to his case."

¶ 30 Mr. Wiener said that Mr. Hall never indicated that he did not want to go to trial. Mr. Wiener did not have any independent recollection of whether Mr. Hall had indicated he wanted

to file a motion to suppress evidence, but Mr. Wiener said "if he allegedly discarded a gun, this would be an abandonment of property. So there would be no motion that I would think after my limited experience that he could file in this particular case." Mr. Wiener also testified that he saw no reason to file a motion to suppress statements, because Mr. Hall never "made a statement inculpating himself with regard to the matters at hand in this case."

¶ 31 Mr. Wiener said that he had a conversation with Mr. Hall during the trial about whether he should testify:

> "I told him he had a right to testify or not to testify, but it was my judgment that he should not testify because [the trial judge] said at the end of the State's case that he was taking the case in the light most favorable to the State at that particular point in time and I did not feel that the State had proved Mr. Hall guilty."

Mr. Wiener testified that he never told Mr. Hall he had to testify in order to explain to the court why he was running from the police officers.

¶ 32 On cross-examination, Mr. Wiener agreed that he did not visit Mr. Hall in the bullpen at court or in prison, and he did not call Mr. Hall on the telephone. Mr. Wiener did not specifically remember receiving phone calls or messages from Mr. Hall's family, but he said "I'm certain that they did" call and leave messages. And Mr. Wiener said he "tr[ies] to return all phone calls," but had no specific recollection as to whether he spoke with Mr. Hall's family. He did not recall any witnesses calling and leaving voicemails at his office regarding this case. Mr. Wiener agreed that no pretrial motions had been filed in the case but "in [his] judgment, there should not have been."

¶ 33 Following argument from both sides, the trial court denied Mr. Hall's motion for a new trial and sentenced him on the offense of being an armed habitual criminal to seven years in

prison.

¶ 34 II. JURISDICTION

¶ 35 Mr. Hall was sentenced on March 30, 2016, and timely filed his notice of appeal the same day. We have jurisdiction pursuant to article VI, section 6 of the Illinois Constitution (Ill. Const. 1970, art. VI, § 6), and Illinois Supreme Court Rule 603 (eff. Feb. 6, 2013) and Rule 606 (eff. Dec. 11, 2014), governing appeals from final judgments of conviction in criminal cases.

¶ 36 III. ANALYSIS

¶ 37 A. Right to Counsel of Choice

¶ 38 Mr. Hall's first claim is that he was deprived of his constitutional right to counsel of his choice when Mr. Wiener misrepresented to Mr. Hall in open court the outcome of his Attorney Registration and Disciplinary Commission (ARDC) charges. Specifically, Mr. Hall contends that, rather than having been cleared of all charges, the Illinois Supreme Court found that Mr. Weiner had engaged in misconduct including failing to act with reasonable diligence and promptness in representing three criminal defendants, failing to communicate with clients, failing to refund unearned portions of several fees and making false statements about actions he had taken. Mr. Hall cites and provides the court with the decision of *In the Matter of David Paul Wiener,* No. 3012131, Commission No. 2014 PR 00117 (September 21, 2015). In that decision, our supreme court granted the ARDC's petition and, with Mr. Wiener's consent, suspended Mr. Wiener from the practice of law for one year, with the suspension stayed for a two-year period of probation, subject to certain conditions.

¶ 39 Before addressing the merits of this claim, the State raises several objections. The State argues that we are not permitted to take judicial notice of the decision of the Illinois Supreme Court imposing discipline on Mr. Wiener. However, "we may take judicial notice of matters that

are readily verifiable from sources of indisputable accuracy." *People v. Mata*, 217 Ill. 2d 535, 539, 842 (2005). This court has verified that the documents attached to Mr. Hall's appendix are available as a published decision of the ARDC of the Supreme Court of Illinois.

¶ 40 The State cites *People v. Williams*, 2012 IL App (1st) 100126, ¶ 27, in which this court refused to consider some "documentation" included in the defendant's appendix of disciplinary action taken by the ARDC. However, it is unclear from reading the *Williams* case exactly what "documentation" was included in the defendant's appendix. Because Mr. Hall asks us to consider an official disciplinary report of the ARDC that is available and verifiable on the ARDC website, we have no issue with considering its content in this case.

¶ 41 The State also argues that Mr. Hall forfeited this claim because he did not present it to the trial court. However, we agree with Mr. Hall that if, in fact, these facts supported a claim that he was deprived of his right to choose counsel, this would be a structural error in his criminal trial that would necessitate our review, notwithstanding his failure to raise this claim in the trial court. See *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006) ("Erroneous deprivation of the right to counsel of choice, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as structural error." (Internal quotation marks omitted.)).

¶ 42 On the merits, the State's first response is that the record suggests that Mr. Hall knew more than his attorney stated in court about the ARDC charges because he did not act surprised when Mr. Wiener informed him of the charges. We reject that as purely speculative. While we agree with the State that a fuller record might support its supposition that Mr. Weiner and Mr. Hall had some additional discussion about the ARDC charges, we have assumed for purposes of this appeal that the statement made in open court by Mr. Weiner was never qualified, explained, or supplemented.

¶ 43 The State also argues that Mr. Wiener's statement that he was "cleared of all charges" was accurate, because under Illinois Supreme Court Rule 772 an attorney can only be placed on probation, as Mr. Weiner was, when the attorney is "not guilty of acts warranting disbarment." But the fact that Mr. Weiner may have been not guilty of acts warranting disbarment certainly does not equate to being "cleared of all charges." We agree with Mr. Hall that what Mr. Weiner said in open court just before the trial began in this case was simply not true.

¶ 44 However even if we assume that all Mr. Hall was told was that his attorney was "cleared of all charges," and we accept Mr. Hall's argument that this was not the truth, we do not agree with Mr. Hall that this false statement interfered with his right to choose counsel. As Mr. Hall acknowledges, there is no precedent for such a claim under Illinois law.

¶ 45 The one case that Mr. Hall suggests as supportive of his position is *People v. Graham*, 2012 IL App (1st) 102351. In *Graham*, as in this case, the defendant's attorney was the subject of disciplinary charges. The defendant argued that he had "made a substantial showing that the trial court deprived him of his right to choice of counsel when it 'pressured' him not to discharge" his lawyer. *Id.* ¶ 44. The *Graham* court rejected that argument because the trial court also made it clear to the defendant that its view that the lawyer was competent was not important; what mattered was whether the defendant wanted to keep the attorney. *Id.* Mr. Hall does not even suggest in this case that the court "pressured" him into keeping Mr. Weiner as his attorney.

¶ 46 The defendant in *Graham* also claimed that he was denied his sixth amendment right to counsel of choice when the State and his defense counsel "misinformed him" on the first day of trial about the extent of the defense attorney's pending disciplinary problems. *Id.* ¶ 33. The *Graham* court also rejected that claim, expressly holding that the trial court has no "obligation"

to determine the extent of a lawyer's disciplinary issues or to make sure that the client is aware of the details thereof. *Id.* ¶ 43. This is precisely the obligation that Mr. Hall suggests the trial court had here, and we agree with the court in *Graham* that the right of a criminal defendant to choose his lawyer does not put any obligation on the court to make sure that the choice is an informed one or that the lawyer has not misled his client about his qualifications, his success rate, or even his disciplinary status. Mr. Hall attempts to distinguish *Graham* on the basis that the defendant there was not provided with "affirmative misinformation." However, the premise of the court's analysis in *Graham* is equally applicable here. The trial court simply does not have an obligation to ensure that a defendant is provided either complete or accurate information about his or her attorney.

¶ 47 Mr. Hall's claim that a client who has false or incomplete information about his or her attorney's disciplinary history is unable to exercise his right to choose counsel appears to be an attempt to work around the long line of Illinois cases in which both this court and our supreme court have held the fact that a lawyer is subject to discipline or has other problems of which his client is not aware does not, in itself, prove a claim of ineffective assistance of counsel. As the State points out, Illinois courts have routinely refused to adopt a rule that pending disciplinary proceedings establish a *per se* ineffective assistance of counsel claim. As our supreme court explained in *People v. Smith*, 177 Ill. 2d 53, 87–88 (1997), except in extreme cases—like *People v. Williams*, 93 Ill.2d 309 (1982), where the supreme court ordered a new trial for a defendant whose trial counsel was disbarred following an ARDC investigation which overlapped with the defendant's trial—claims that an attorney is facing disciplinary charges during representation are analyzed under the well-settled test for ineffective assistance of counsel established in *Strickland v. Washington*, 466 U.S. 668 (1984). See also *People v. Titone*, 151 Ill. 2d 19, 31 (1992) (fact

that attorney was facing an "avalanche of personal problems," including indictments against him and his wife's illness, did not create any *per se* claim.).

¶ 48 As we have previously stated in rejecting the kind of *per se* rule Mr. Hall seeks to impose here by labeling his claim as an interference with the right to choose counsel:

> "Nor do we accept the defendant's argument that the mere pendency of disciplinary proceedings brands an attorney incompetent to defend a person charged with a crime. The fact that the supreme court permits lawyers to continue to practice until they are suspended or disbarred should be a clear answer to that argument." *People v. Perry*, 183 Ill. App. 3d 534, 540-41 (1989).

¶ 49 In an effort to find support for this *per se* approach, Mr. Hall analogizes his right-to-choose-counsel claim to cases where courts have found that a defendant's right to choose counsel was violated because an attorney had an actual conflict of interest. But our supreme court has specifically held that a defendant has a right to conflict-free counsel because effective assistance of counsel "means assistance which entitles an accused to the undivided loyalty of his counsel and which prohibits the attorney from representing conflicting interests or undertaking the discharge of inconsistent obligations." *People v. Washington*, 101 Ill. 2d 104, 110 (1984). In contrast, our supreme court has made clear that the "*per se* conflict of interest standard" does not apply to sixth amendment claims based on attorney disciplinary issues. *Titone*, 151 Ill. 2d at 32. Moreover, we note that cases where courts *have* otherwise found a violation of the right to choose counsel generally involve some external factor that violated the defendant's right, not just the actions of attorney himself or herself. See, *e.g.*, *People v. Tucker*, 382 Ill. App. 3d 916 (2008) (and cases cited therein) (the trial court's denial of the defendant's motion to substitute counsel violated the defendant's right to counsel of choice). Here, without something akin to the extreme

circumstances that were present in *Williams*, 93 Ill.2d 309, we decline to extend the right to counsel of choice as Mr. Hall asks.

¶ 50 In short, while we agree with Mr. Hall that Mr. Weiner's ARDC record may be relevant to his ineffective assistance of counsel claim, we reject his claim that because he was not told the truth by Mr. Weiner, he was denied his right to choose his lawyer.

¶ 51 B. Ineffective Assistance of Counsel

¶ 52 Mr. Hall's second claim is that he received ineffective assistance of trial counsel based on Mr. Wiener's (1) affirmative misrepresentation of the extent of the ARDC proceedings against him, (2) failure to impeach Officer Carlson, and (3) failing to challenge the testimony that Mr. Hall provided a statement to police and, instead, bolstering Officer Carlson's credibility. Mr. Hall has dropped on appeal the remaining arguments he raised before the trial court in support of his ineffective assistance claim.

¶ 53 The State first responds that Mr. Hall has forfeited most of this claim because, aside from his argument that Mr. Wiener was ineffective for bolstering Officer Carlson's credibility, Mr. Hall did not raise the other arguments in a posttrial motion. See *People v. Enoch*, 122 Ill. 2d 176, 185-86 (1988) ("failure to raise an issue in a written motion for a new trial results in a [forfeiture] of that issue on appeal"). But, as our supreme court has clarified: "[w]e require parties to preserve issues or claims for appeal; we do not require them to limit their arguments here to the same arguments that were made below." *Brunton v. Kruger*, 2015 IL 117663, ¶ 76. Mr. Hall has not forfeited his various arguments in support of his claim that he received ineffective assistance of counsel.

¶ 54 Mr. Hall begins his ineffective assistance claim by arguing that his attorney's misrepresentation deprived Mr. Hall of his right to *waive* his right to effective assistance of

counsel. Mr. Hall analogizes his situation to *Washington*, 101 Ill. 2d at 114, where our supreme court held that there was no effective waiver of the attorney's conflict of interest because the attorney did not explain the conflict to his client. But the State's position, with which we agree, is that Mr. Hall simply does not have the right to an attorney who is not on probation, like he would have the right, absent waiver, to conflict-free counsel. Rather, as noted above, Mr. Weiner's status as an attorney on probation means that he was allowed to practice law, and while the probation may be relevant to the claim that Mr. Weiner was not effective, that claim must be analyzed under the *Strickland* standard.

¶ 55 To succeed on a claim of ineffective assistance of counsel, a defendant must show both that (1) his counsel's performance was deficient and (2) he was prejudiced by that deficient performance. *People v. Banks*, 2016 IL App (1st) 131009, ¶ 123 (citing *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)). "Failure to make the requisite showing of either deficient performance or sufficient prejudice defeats the claim." *Id.* "To establish prejudice, a defendant must show there is a reasonable probability that, but for counsel's insufficient performance, the result of the proceeding would have been different." *Id.* More specifically, "the defendant must show that the probability that counsel's errors changed the outcome of the case is sufficient to undermine confidence in the outcome." (Internal quotation marks omitted.) *People v. McCarter*, 385 Ill. App. 3d 919, 935 (2008).

¶ 56 Because we think it is quite clear that Mr. Hall cannot make an adequate showing of prejudice, there is no need to analyze whether his counsel's performance was deficient. Mr. Hall attempts to show prejudice by arguing that the trial outcome "likely" would have been different if Mr. Wiener had impeached Officer Carlson's testimony and had not bolstered Officer Carlson's credibility in closing argument. More specifically, Mr. Hall argues that Officer

Carlson's arrest report would have impeached his testimony at trial about Mr. Hall's statement. At trial, Officer Carlson testified that Mr. Hall provided a statement at the police station in which Mr. Hall said that he was drinking at his house when he heard there was a fight at Congress Parkway and Kostner Avenue, that he brought the gun for protection, and that if the officers let him go he would give them a "brand new AR 15 rifle." In contrast, the arrest report indicated only that Mr. Hall said "he was 'carrying the gun for protection in case both sides came at [him].' " According to Mr. Hall, if Mr. Wiener had "pointed out to the court that the only piece of evidence against [Mr.] Hall had significant flaws, the court would have acquitted [Mr.] Hall of the offenses charged."

¶ 57 However, these supposed "flaws" are far less "significant" than Mr. Hall suggests. Both the arrest report and Officer Carlson's testimony contained Mr. Hall's admission that he was carrying a gun. This was confirmed by Officer Carlson's testimony that he saw Mr. Hall throw an object into a vacant lot, and when he reached the lot, he recovered a handgun. No contradictory testimony or evidence was presented. Mr. Hall offers no suggestion as to how his lawyer's disciplinary record impacted the fact that he was found guilty or as to what his attorney might have done to call into question the evidence that he had, in fact, admitted to the police that he had a gun. In short, even if Mr. Wiener had impeached Officer Carlson with the arrest report and not bolstered Officer Carlson's credibility, there was no reasonable probability that the outcome at trial would have been different. Since there is no showing of prejudice there is no basis for Mr. Hall's claim that he did not receive the constitutionally required level of assistance from his counsel.

¶ 58 VI. CONCLUSION

¶ 59 For the foregoing reasons, we find Mr. Hall was not deprived of his right to choose

counsel and that Mr. Hall did not receive ineffective assistance from that counsel.

¶ 60 Affirmed.

¶ 61 JUSTICE WALKER, dissenting:

¶ 62 I respectfully dissent.

¶ 63 Article 1, section 8, of the 1970 Illinois Constitution guarantees an accused the right to representation by counsel of his or her own informed choice. *People v. Bingham*, 364 Ill. App. 3d 642, 645 (2006). Courts have no duty to advise the accused or exercise any control over his or her selection of an attorney. *People v. Walsh*, 28 Ill. 2d 405, 409 (1963). However, courts have a duty to intervene, to ensure that the accused has made a well-informed choice of counsel, when the court learns that the attorney faces a conflict of interest. *United States v. Gaines*, 529 F.2d 1038, 1043 (7th Cir. 1976). I would extend the court's duty to inquire to cases like the one now before the court, where the trial court discovered that counsel has misinformed his client about disciplinary proceedings against counsel.

¶ 64 Just as counsel bears "the responsibility ***, as an officer of the court, to initially inform his clients, of the dangers of multiple representation," (*Gaines*, 529 F.2d at 1044), counsel must bear responsibility for informing his client of disciplinary proceedings against counsel. Courts rely on attorneys to give their clients accurate information so that the clients can effectively exercise their right to choose. See *United States ex rel. Healey v. Cannon*, 553 F.2d 1052, 1056 (7th Cir. 1977) (guilty plea based on plainly erroneous advice is not an informed choice). However, trial judges should not sit idly by when they hear counsel providing "affirmative misinformation" to clients. See *People v. Graham*, 2012 Ill. App. (1st) 102351 ¶ 42.

¶ 65 In the case now on appeal, Hall's attorney, David Wiener, told Hall, in open court, that in

disciplinary proceedings Wiener was "cleared of all charges but placed on probation." I agree with the majority that denial of the right to choose counsel is a structural error in a criminal trial that necessitates our review. I also agree with the majority that "what Mr. Wiener said in open court…was simply not true." However, I disagree with the majority that the trial court, in a criminal case, has no obligation to ensure that a defendant is provided accurate information about his attorney's active disciplinary proceeding.

¶ 66 Providing no information is distinguished from providing false information. The trial judge knew the information that Mr. Wiener provided to Hall in open court was false. I would impose on the trial judge a duty to inform Hall and admonish Mr. Wiener regarding the false statement. The trial judge should have informed Hall that our supreme court imposes probation on an attorney only when the court finds the attorney guilty of misconduct. See Ill. S. Ct. R. 770(f) (eff. Jan. 25, 2017). This case is distinguished from what the majority refers to as "the long line of Illinois cases in which both this court and our supreme court have held the fact that a lawyer is subject to discipline or has other problems of which his client is not aware does not in itself prove a claim of ineffective assistance of counsel." This case involves a flagrant misrepresentation made in open court, that should have been obvious to the trial judge, the prosecution and any other lawyer present in the courtroom, but not so obvious to Hall, a lay person. This injustice is more compelling when considering the nervousness and fear that Hall must have experienced as all this transpired immediately before the start of his trial as a criminal defendant.

¶ 67 This case rises to the level of *People v. Williams*, 93 Ill. 2d 309 (1982), where the supreme court ordered a new trial for a defendant whose trial counsel had been disbarred. Mr. Wiener's false statements became pivotal because they were made in the presence of the trial

judge who knew they were false, but remained silent.

¶ 68 When Wiener misstated the outcome of disciplinary proceedings, the court should have treated the case in much the same manner as it would treat a possible conflict of interest. "[T]he court should thoroughly and carefully inform the defendant [about the inconsistency] ***. Any subsequent determination of whether there has been an intelligent [choice of] counsel must depend upon the particular facts and circumstances." *People v. Tonaldi*, 98 Ill. App. 3d 528, 531 (1981), superseded by statute on other grounds, 720 ILCS 570/100 (West 1996), as recognized in *People v. Clemons*, 275 Ill. App. 3d 1117, 1118 (1995). In particular, the trial court should ask the defendant whether he or she knows about the misconduct that led the supreme court to impose probation on his or her counsel. Knowing the false information, the trial judge did not make the appropriate inquiry here. Therefore, I would reverse the judgment and remand for a new trial. See *People v. Meng*, 54 Ill. App. 3d 357, 360-65 (1977).