

NOTICE
Decision filed 09/17/14. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2014 IL App (5th) 130108-U

NO. 5-13-0108

IN THE

APPELLATE COURT OF ILLINOIS

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).

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Fayette County.
)	
v.)	No. 09-CF-142
)	
TRAVIS WAYNE METZGER,)	Honorable
)	Ericka A. Sanders,
Defendant-Appellant.)	Judge, presiding.

JUSTICE CATES delivered the judgment of the court.
Justices Goldenhersh and Spomer concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err in reinstating criminal charges that had been nol-prossed. The defendant failed to establish that his counsel's performance rendered the proceedings fundamentally unfair.

¶ 2 Following a jury trial in the circuit court of Fayette County, the defendant, Travis Wayne Metzger, was convicted of one count of unlawful possession of methamphetamine manufacturing materials and one count of unlawful possession of methamphetamine. He was sentenced to serve a term of six years in prison for unlawful possession of methamphetamine materials and a concurrent term of five years for unlawful possession of methamphetamine. On appeal, the defendant contends that the trial court erred in

allowing the State to reinstate charges that had been nol-prossed, and that his trial counsel rendered ineffective assistance of counsel in that he failed to properly preserve the issue for review. We affirm.

¶ 3 On August 20, 2009, the defendant was charged by information with one count of unlawful possession of methamphetamine manufacturing materials in violation of section 30(a) of the Methamphetamine Control and Community Protection Act (Act) (720 ILCS 646/30(a) (West 2008)), and one count of unlawful possession of methamphetamine in violation of section 60(b)(1) of the Act (720 ILCS 646/60(b)(1) (West 2008)). A preliminary hearing was held on October 7, 2009, and the trial court found probable cause to bind the defendant over for trial. On February 1, 2010, the State filed a motion to nol-pros the case against the defendant, and the court entered an order granting the motion that same day.

¶ 4 On July 1, 2010, the State filed a motion to reinstate the charges against the defendant. In the motion, the State noted that the statute of limitations had not expired and asserted that reinstating the charges would not result in any unfair prejudice to the defendant. The motion was called for hearing on July 7, 2010, and the defendant appeared without counsel. The court advised the defendant that the State had filed a motion to reinstate the unlawful possession charges that had been nol-prossed in February 2010. The court explained to the defendant that when the State moved to dismiss the charges it did so in a way that would allow it to refile them. The court asked the defendant if he knew of any reason why the State's motion should not be granted. The court then granted the State's motion and appointed a public defender for the defendant.

The case was tried before a jury in April 2011, and the defendant was found guilty of both charges. This appeal followed. Because the defendant has not challenged the sufficiency of the evidence to support the convictions, we need not recount the evidence presented at trial.

¶ 5 On appeal, the defendant contends that the trial court erred in granting the State's motion to reinstate the charges that had been nol-prossed, because the State failed to follow the proper procedures to reinstate the charges. The defendant asserts that once the charges were nol-prossed, all further prosecution on those charges terminated and there were no charges to reinstate. The defendant argues that the State could restart the prosecution by filing a new charging instrument and conducting a preliminary hearing, or by moving to set aside the *nolle prosequi* order and reinstate the original charges.

¶ 6 A *nolle prosequi* is a formal entry of record in which the State indicates that it is unwilling to prosecute a case. *People v. Hughes*, 2012 IL 112817, 983 N.E.2d 439. It is not an acquittal or a final disposition of the case, and leaves the matter in the same condition that it was before the commencement of the prosecution. *People v. Watson*, 394 Ill. 177, 179, 68 N.E.2d 265, 266 (1946). When a *nolle prosequi* is entered before jeopardy attaches, the State is not barred from prosecuting the same charges absent a showing of harassment, bad faith, or fundamental unfairness. *Hughes*, 2012 IL 112817, 983 N.E.2d 439. There are two methods by which the State may restart the prosecution. The State may file a new information or indictment, or it may move to set aside the *nolle prosequi* order and reinstate the original charges. *Hughes*, 2012 IL 112817, 983 N.E.2d 439; *Watson*, 394 Ill. at 181-82, 68 N.E.2d at 267.

¶ 7 The record in this case shows the State filed a motion to nol-pros the charges against the defendant before jeopardy attached. A few months later, the State filed a motion to reinstate the charges, but did not expressly request that the *nolle prosequi* order be vacated in its motion to reinstate. The trial court granted the State's motion to reinstate the charges. In granting the motion, we presume that the trial court was aware that the *nolle prosequi* order had to be set aside prior to the reinstatement of the charges, and that the court considered the State's motion as a request to vacate the *nolle prosequi* order and to reinstate the original charges. See generally *People v. Gaultney*, 174 Ill. 2d 410, 420, 675 N.E.2d 102, 107 (1996) (a court of review ordinarily presumes that the trial court knows and follows the law, unless the record affirmatively indicates otherwise). There is no indication that the State's decision to reinstate the charges was made in bad faith or as a means to harass the defendant, and no indication that reinstatement of the charges resulted in fundamental unfairness to the defendant. After reviewing the record, we conclude that the trial court did not err in vacating the *nolle prosequi* order and reinstating the charges against the defendant.

¶ 8 Before leaving this issue, we note that the State, in its brief, claims that in filing its motion to reinstate, it was "quite obviously" requesting that the court set aside the *nolle prosequi* order. The State argues that a request to vacate the *nolle prosequi* order is encompassed within the motion to reinstate and that a formal request to vacate the *nolle prosequi* order is unnecessary. We do not agree. The Illinois Supreme Court has held that the State may restart a prosecution after the original charges have been nol-prossed by either filing a new charging instrument or by filing a motion to vacate the *nolle*

prosequi order and to reinstate the original charges. *Hughes*, 2012 IL 112817, 983 N.E.2d 439. In regard to the latter procedure, a request to vacate a *nolle prosequi* order is not a mere formality.

¶ 9 The defendant contends that he was deprived of effective assistance of counsel because his trial counsel failed to object to the procedure used by the State to reinstate the charges and thereby failed to preserve the issue for review. In order to reverse a conviction based on ineffective assistance of counsel, a defendant must establish that his attorney's representation fell below an objective standard of reasonableness, and that but for counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *People v. Evans*, 209 Ill. 2d 194, 220, 808 N.E.2d 939, 953 (2004). Under the prejudice prong of *Strickland*, a defendant must establish that his counsel's performance rendered the result of the trial unreliable or the proceedings fundamentally unfair. *Evans*, 209 Ill. 2d at 220, 808 N.E.2d at 953-54. To prevail, a defendant must satisfy both the unreasonable performance prong and the prejudice prong. *Strickland*, 466 U.S. at 697; *Evans*, 209 Ill. 2d at 220, 808 N.E.2d at 954. If the ineffective-assistance claim can be disposed of on the ground that the defendant did not suffer prejudice, a court need not decide whether counsel's performance was constitutionally deficient. *People v. Mahaffey*, 165 Ill. 2d 445, 458, 651 N.E.2d 174, 182 (1995). In this case, we have determined that the trial court did not err in vacating the *nolle prosequi* order and reinstating the charges against the defendant. Thus, the defendant cannot prevail on his claim that his counsel's failure to object to the procedure for reinstatement resulted in

fundamental unfairness. Since the defendant cannot satisfy the prejudice prong of *Strickland*, we need not consider whether counsel's performance was constitutionally deficient.

¶ 10 Accordingly, the judgment of the circuit court is affirmed.

¶ 11 Affirmed.