123052

IN THE

SUPREME COURT OF ILLINOIS

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| People State of Illinois,<br><br>Appellee<br><br>v.<br><br>Aaron Rios-Salazar,<br><br>Appellant | ) | Petition for Leave to Appeal from<br>Appellate Court<br>Third District<br>3-15-0524<br>10CF2114 |

ORDER

On the Court's own motion, the appeal is dismissed. In the exercise of this Court's supervisory authority, the Appellate Court, Third District, is directed to vacate its judgment in People v. Rios-Salazar, case No. 3-15-0524 (11/20/17). The appellate court is directed to remand the case to the circuit court where the defendant may raise his contentions of errors in sentencing as set forth in Supreme Court Rule 472.

Burke, J., joined by Kilbride and Neville, JJ., dissenting from the dismissal of the appeal with a supervisory order.

Dissent attached.

Order entered by the Court.

**FILED**
April 18, 2019
SUPREME COURT
CLERK

# IN THE

# SUPREME COURT

# OF

# THE STATE OF ILLINOIS

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(Docket No. 123052)

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, v.
AARON RIOS-SALAZAR, Appellant.

*Filed April 18, 2019.*

JUSTICE BURKE, dissenting from dismissal of the appeal with a supervisory order:

¶ 1 The defendant, Aaron Rios-Salazar, pleaded guilty to predatory criminal sexual assault in the circuit court of Will County. The court sentenced him to 24 years' imprisonment and imposed various fines and fees. Defendant's trial counsel did not object to any of the fines or fees.

¶ 2 On appeal, defendant did not challenge his plea or sentence. Instead, defendant argued that his trial counsel was constitutionally ineffective when he failed to object to $57 in certain fines that, according to defendant, were imposed by the circuit court in violation of the *ex post facto* clauses of the United States and Illinois Constitutions (U.S. Const., art. I, § 9; Ill. Const. 1970, art. I, § 16). Over a dissent, a majority of the appellate court rejected defendant's arguments and held that his trial counsel was not ineffective, although the two concurring justices in the majority gave different reasons for reaching this result. 2017 IL App (3d) 150524.

Defendant filed a petition for leave to appeal, which we allowed. Ill. S. Ct. R. 315 (eff. Nov. 1, 2017).

¶ 3 The parties have completed briefing. Defendant, as appellant, maintains the appellate court erred in holding that defendant's trial counsel provided effective assistance of counsel. Defendant asks this court to grant him relief by reversing the judgment of the appellate court and correcting the improperly imposed fines. The State, as appellee, contends the appellate court correctly held that defendant received effective assistance of counsel and, therefore, the judgment of the appellate court should be affirmed. Oral argument was held on January 15, 2019, and the matter stands ready for a decision on the merits of defendant's claim of ineffective assistance of counsel.

¶ 4 The majority, however, declines to address the merits. Instead, on its own motion and without notice to the parties, the majority summarily dismisses defendant's appeal.

¶ 5 The majority gives no reason why defendant's appeal must be dismissed, and I am unable to discern one. There is nothing in the record, the parties' briefs, or anywhere else that suggests a dismissal order is required. To the contrary, defendant's appeal remains properly before us, and the parties continue to await this court's decision on the merits. The majority does note that, following dismissal, defendant may continue to pursue his claims that certain fines were improperly imposed by commencing a new action in the circuit court under our recently adopted Illinois Supreme Court Rule 472 (eff. Mar. 1, 2019). But the existence of an alternative means of seeking relief does not explain why defendant should be denied relief in this case or why this court cannot address the merits of his appeal. Indeed, fairness to defendant requires that, before making him go through the time and effort of initiating an entirely new proceeding, this court first determine whether he can receive relief in the appeal that is already before us and ready for decision. Nor can the dismissal of defendant's appeal be rationalized as a matter of judicial economy for this court—the appeal has already been fully briefed and argued, and nothing is left to do but render a decision. There is, in short, no justification for dismissing defendant's appeal in this court. The merits of the case should be addressed.

¶ 6 In addition to dismissing defendant's appeal, the majority also vacates the judgment of the appellate court. No explanation is given for this action other than to state that it is done "in the exercise of this Court's supervisory authority." Again, I disagree.

¶ 7 Article VI, section 16, of the Illinois Constitution of 1970 vests this court with supervisory authority over the lower courts of this state. Ill. Const. 1970, art. VI, § 16. This authority is "unlimited in extent and hampered by no specific rules." *Gonzalez v. Union Health Service, Inc.*, 2018 IL 123025, ¶ 16. Of course, unlimited and unconstrained power risks abuse. For this reason, our case law has repeatedly cautioned that supervisory authority is to be "invoked with restraint." *Id.* ¶ 17. Supervisory orders are "disfavored" and to be used only if "the normal appellate process will not afford adequate relief." *People ex rel. Birkett v. Bakalis*, 196 Ill. 2d 510, 513 (2001).

¶ 8 There are good reasons why a supervisory order may not be used as a substitute for the normal appellate process, particularly when the purpose of the supervisory order is to summarily vacate or reverse the judgment of a lower court. Chief among them is that, unlike a supervisory order, the normal appellate process requires this court to provide a written explanation for its decision. Vacating or reversing the judgment of a lower court is not something that can be done purely at the discretion of this court; it requires a reasoned, legal basis in the law. The written opinion provides assurance to the public that the legal basis exists and that the vacatur or reversal is not simply the result of whim or caprice. It also provides assurance to the losing party that his or her arguments have been heard and fairly considered. A summary supervisory order, on the other hand, provides no such assurances. A supervisory order that permanently vacates or reverses the judgment of a lower court, and that is unaccompanied by any explanation, appears to be nothing more than the arbitrary exercise of judicial power. It is vacatur or reversal by judicial fiat.

¶ 9 In this case, the majority has improperly used the supervisory authority as a substitute for the normal appellate process. The majority has permanently vacated an appellate court judgment via a summary supervisory order and, in so doing, has avoided its obligation to explain why that action is legally justified—an explanation that would have to be provided if the majority were to review the appellate court's judgment through the normal appellate process. Merely invoking

the words "supervisory authority" is not a legal explanation or legal justification for vacating the judgment of the appellate court. The majority's failure to provide a reasoned, legal basis for its action is a clear abuse of this court's supervisory authority.

¶ 10 Moreover, the majority's vacatur of the appellate court's judgment is confusing. If the majority has taken the step of vacating the appellate court's judgment because it believes the appellate court's decision is incorrect, then this means defendant's trial counsel was constitutionally ineffective. But if trial counsel was ineffective, why is the majority dismissing defendant's appeal and denying him relief?

¶ 11 Finally, I cannot join in the majority's vacatur of the appellate court's judgment for the simple reason that it is not the legally correct thing to do. The judgment of the appellate court should be affirmed, not vacated. However, for the following reasons, I would affirm on grounds different than those set forth in either of the concurring justices' opinions in the appellate court.

¶ 12 BACKGROUND

¶ 13 On March 19, 2015, defendant pleaded guilty to predatory criminal sexual assault for conduct that occurred in 2010. The circuit court sentenced defendant to a term of 24 years' imprisonment and imposed a total of $1587 in fees and fines. Included in this total were a $100 "Violent Crime Victims Assistance" (VCVA) fine imposed pursuant to section 10 of the Violent Crime Victims Assistance Act (725 ILCS 240/10(b)(1) (West 2014)) and a $25 "judicial facilities fee" imposed pursuant to section 5-1101.3 of the Counties Code (55 ILCS 5/5-1101.3 (West 2014)).

¶ 14 On appeal, defendant did not challenge the validity of his plea or his term of imprisonment. Instead, defendant contended that his trial counsel was constitutionally ineffective because he failed to object to the $100 VCVA fine and the $25 judicial facilities fee as unconstitutional *ex post facto* punishments. With respect to the VCVA fine, defendant maintained that the circuit court relied on the wrong version of the VCVA statute. Defendant noted that, at the time of his offense in 2010, the VCVA statute did not require the imposition of a flat $100 fine.

Instead, the statute required the circuit court to impose "an additional penalty of $4 for each $40, or fraction thereof, of fine imposed" (725 ILCS 240/10(b) (West 2010)), which would have amounted to $68 in this case. However, instead of relying on this version of the statute, the circuit court looked to a later version that did require the $100 fine. See 725 ILCS 240/10(b)(1) (West 2012). According to defendant, the circuit court's reliance on the later statute resulted in an impermissible *ex post facto* overcharge of $32.

¶ 15 With respect to the $25 judicial facilities fee, defendant argued that this assessment only came into existence after his criminal conduct occurred. See 55 ILCS 5/5-1101.3 (West 2014). Moreover, according to defendant, the assessment was actually a fine, not a fee. Because it was a fine, defendant maintained that the judicial facilities assessment could not constitutionally be imposed in this case without violating *ex post facto* principles.

¶ 16 Based on the foregoing, defendant argued that his attorney overlooked two *ex post facto* arguments and that, had he raised these arguments at the time of sentencing, the circuit court would have recognized its errors and reduced defendant's total assessments by $57 ($32 for the VCVA fine and $25 for the judicial facilities "fee"). Accordingly, defendant contended that trial counsel's failure to challenge these assessments was constitutionally ineffective.

¶ 17 In a divided opinion, the appellate court rejected defendant's arguments. 2017 IL App (3d) 150524. Citing *People v. Easley*, 192 Ill. 2d 307, 344 (2000), the lead opinion in the appellate court noted that not every mistake of counsel constitutes deficient performance. 2017 IL App (3d) 150524, ¶ 8. Further, according to the lead opinion, the $57 overcharge that defendant was contesting was *de minimis*. From this, the lead opinion concluded that, even assuming defendant's *ex post facto* arguments were meritorious, his attorney's failure to raise those arguments did not amount to deficient performance. In the lead opinion's view, an attorney's "failure to object to *de minimis* fines is simply not an error of constitutional magnitude." *Id.*

¶ 18 The special concurrence also found that defendant failed to establish ineffective assistance of counsel but for different reasons. The special concurrence concluded that defendant suffered no prejudice from his attorney's failure to object to the monetary assessments. *Id.* ¶ 14 (Wright, J., specially concurring). The special

concurrence observed that, although the circuit court erroneously imposed a $57 overcharge, it also omitted a mandatory penalty surcharge under section 5-9-1 of the Unified Code of Corrections (730 ILCS 5/5-9-1(c) (West 2010)). This mandatory penalty added $10 for every $40 "or fraction thereof" in punitive fines. The special concurrence calculated that this amounted to an additional $170 in fines. In total, according to special concurrence, the circuit court undercharged defendant by $113, rather than overcharging him by $57. Because defendant "received a bargain" (2017 IL App (3d) 150524, ¶ 16), the special concurrence concluded defendant was not prejudiced by his attorney's failure to object to the $57 overcharge and, therefore, failed to establish that he was denied effective assistance of counsel.

¶ 19 The dissenting opinion agreed with defendant's contention that the challenged assessments had been imposed in violation of *ex post facto* principles. *Id.* ¶¶ 20-23 (Lytton, J., dissenting). Without offering a legal basis for overlooking defendant's forfeiture of his claims in the circuit court, the dissent concluded that the VCVA fine should be reduced to $68 and the judicial facilities assessment vacated. *Id.* ¶ 25. This appeal followed.

¶ 20 ANALYSIS

¶ 21 The sole issue raised by defendant in this appeal is whether his trial attorney rendered constitutionally ineffective assistance of counsel. To state a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficient performance prejudiced defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The failure to establish either prong—deficient performance or prejudice—is fatal to an ineffective assistance claim. *People v. Clendenin*, 238 Ill. 2d 302, 317-18 (2010). Whether counsel is ineffective is a question of law that is subject to *de novo* review. *People v. Hale*, 2013 IL 113140, ¶ 15.

¶ 22 The lead opinion in the appellate court concluded that trial counsel's performance was not deficient because any overcharge in this case was merely *de minimis*. This was error. Nothing in *Strickland* recognizes a *de minimis* exception or *de minimis* standard for measuring the level of counsel's performance. Rather, the standard articulated in *Strickland* for establishing deficient performance

is whether counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. *Strickland*, 466 U.S. at 687-88. The lead opinion's adoption of a "*de minimis*" standard is in direct contravention of *Strickland.*

¶ 23 Nevertheless, I would reject defendant's contention that trial counsel's performance was deficient under the facts of this case. To establish that his trial counsel's performance was deficient, a defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687; *People v. Wiley*, 205 Ill. 2d 212, 230 (2001). In so doing, the defendant must overcome the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Strickland*, 466 U.S. at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)); *Clendenin*, 238 Ill. 2d at 317, citing *People v. Barrow*, 133 Ill. 2d 226, 247 (1989).

¶ 24 Here, defendant has not overcome this presumption. As the State points out, at the time of defendant's offense, section 5-9-1(c) of the Unified Code of Corrections instructed sentencing courts that "[t]here shall be added to every fine imposed in sentencing for a criminal or traffic offense, except an offense relating to parking or registration, or offense by a pedestrian, an additional penalty of $10 for each $40, or fraction thereof, of fine imposed." 730 ILCS 5/5-9-1(c) (West 2010). The parties agree that at least $645 of the $1587 in fines and fees imposed by the trial court constituted fines imposed as a penalty. Based on the $645 in total fines, section 5-9-1(c) required the sentencing court to impose an additional $10 for every $40 or fraction thereof, which would equal $170. Importantly, however, the circuit court failed to assess this additional mandatory $170 surcharge as part of defendant's sentence.

¶ 25 Given this fact, defendant's trial counsel could have concluded, in the exercise of reasonable professional judgment, that it was better to remain silent rather than risk a higher total assessment of fines and fees by drawing attention to the erroneous sentencing order. Simply put, had trial counsel objected to the *ex post facto* overcharges totalling $57, counsel would have risked alerting the court to the much larger error in defendant's favor. Because remaining silent was

an objectively reasonable choice for defendant's attorney to make, we must presume that counsel's actions were a matter of trial strategy. See, *e.g.*, *People v. Evans*, 209 Ill. 2d 194, 221 (2004) (decision not to object to other crimes evidence was sound strategy to avoid drawing further attention to the evidence); *People v. Graham*, 206 Ill. 2d 465, 479 (2003) (counsel's decision not to object to hearsay was a strategic choice where it comported with defense theory).

¶ 26 Defendant contends, however, that there is nothing of record to indicate that trial counsel actually considered the propriety of the assessments imposed by the circuit court against defendant and, therefore, it is mere speculation to conclude that counsel failed to object to the assessments as a matter of trial strategy. This argument misses the mark. Where, as here, the facts of record show that, in the exercise of reasonable professional judgment, counsel's actions might be the result of trial strategy, we must presume that they are. *Strickland*, 466 U.S. at 689. It is the defendant's burden to overcome this presumption in order to establish deficient performance.

¶ 27 Defendant further maintains that trial counsel should have contested the $57 overcharge because there was always the risk that the $170 fine would be pursued by the State. Thus, according to defendant, trial counsel was required to pursue the $57 overcharge in order to eliminate the potential worst case scenario: the $170 fine is later imposed, and defendant does not get a refund of the $57. Again, this argument misses the mark. More than one trial strategy may be reasonable under the circumstances of any given case. The fact that another strategic choice might have been available to trial counsel in this case does not establish that counsel's actions were professionally deficient. *People v. Palmer*, 162 Ill. 2d 465, 476 (1994) ("the fact that another attorney might have pursued a different strategy is not a factor in the competency determination").

¶ 28 Defendant has failed to overcome the strong presumption that counsel's actions might be considered trial strategy. Therefore, defendant has not established that his trial counsel's performance was deficient under *Strickland*. For this reason, the judgment of the appellate court should be affirmed.

¶ 29 This case is one of many in which the appellate court has grappled with the problem of addressing fine and fee complaints for the first time on appeal. See, *e.g.*, *People v. Griffin*, 2017 IL App (1st) 143800, *vacated*, No. 122549 (Ill. Apr. 18,

2019) (supervisory order). In part to alleviate this problem, this court recently adopted rules that create a comprehensive framework for addressing fine and fee issues, as well as certain other sentencing claims, initially in the circuit court. See Ill. S. Ct. Rs. 452, 472, 557, 558 (eff. Mar. 1, 2019). In particular, Rule 472 establishes an explicit jurisdictional basis for the circuit court to correct at any time following judgment alleged errors in the (1) imposition or calculation of fines, fees, assessments, or costs; (2) application of *per diem* credit against fines; (3) calculation of presentencing custody credit; or (4) clerical errors in the written sentencing order or other part of the record resulting in a discrepancy between the record and the actual judgment of the court. Ill. S. Ct. R. 472(a) (eff. Mar. 1, 2019). The appellate court's judgment in this case must be affirmed because it cannot be said that, under the facts of this case, defendant received ineffective assistance of counsel. However, going forward, nothing prohibits defendant from seeking relief in the circuit court as an original matter pursuant to Rule 472.

¶ 30 For the foregoing reasons, I would affirm the judgment of the appellate court. I therefore dissent from the majority's order.

¶ 31 JUSTICES KILBRIDE and NEVILLE join in this dissent.