

Case Summary

Jon Gates appeals his conviction and sentence for Class D felony maintaining a common nuisance. We affirm.

Issues

The restated issues before us are:

- I. whether the jury was improperly informed of Gates's criminal history;
- II. whether a witness's statement implying that Gates used illegal drugs requires reversal of his conviction;
- III. whether the trial court considered an improper factor in sentencing; and
- IV. whether Gates was improperly sentenced more than thirty days after his conviction.

Facts

The evidence most favorable to the conviction reveals that on February 2, 2009, Gates was living in a house in Clinton County that he previously shared with his wife, Veca Gates. However, the two had been separated since July 2008, and Veca was living elsewhere. Living with Gates on February 2 were Veca's brother, Joshua McCollum, and another man, Matt Fickle. Gates lived primarily in the basement of the house, while McCollum stayed in a bedroom on the main floor.

On the afternoon of February 2, after Veca finished work, she attempted to call Gates to check on their twin boys, three-year-old J.G. and A.G., who were with Gates. When Veca was unable to contact Gates, she went to the house. After banging on the

door repeatedly without answer, she looked in the house and saw Gates asleep on a couch in the living room, and she also saw A.G. walking around the couch carrying a drug pipe and a cell phone. Veca then let herself in and saw J.G. asleep near Gates and Fickle asleep on another couch. Veca yelled and screamed at Gates, but he was unresponsive. She took the pipe from A.G. and threw it near Gates's head, then took the boys and left the house.

After getting home, Veca contacted the Clinton County Sheriff's Department to make a complaint of drug use and requested that someone be dispatched to Gates's house to check on his welfare. Deputies Matthew Freterick and Dan Roudebush went to the house, and smelled burnt marijuana as they approached it. After the deputies knocked on the door loudly for several minutes, Gates finally got up and answered the door. Gates then allowed the deputies inside at their request. According to the deputies, Gates was acting strangely, i.e. he was "jittery, uh twitchy, uh something that you'd call as tweaking." Tr. p. 181. Deputy Freterick saw and seized the pipe on the couch, which contained a green leafy substance. Deputy Roudebush field-tested the substance and confirmed it was marijuana. Fickle later awoke and exhibited the same strange behavior as Gates. McCollum, on the other hand, came out of the first floor bedroom and was not exhibiting any such behavior.

After Gates refused to consent to a complete search of the house, the deputies obtained a search warrant for it. The ensuing search uncovered "shake," or marijuana residue, throughout the house and garage, except in the bedroom where McCollum was

staying. Police also found a broken mirror on a bookcase in the living room that had a three-inch long line of methamphetamine powder on it. In the basement, police found items used to ingest drugs, including a hollowed-out light bulb with some residue in it, a paper towel tube with a small bowl attached to it, and a marijuana bong. Police also found a device used to grind marijuana, and a pill bottle containing marijuana. Under a couch in the basement living area was a tray that contained numerous pipes, 3.45 grams of marijuana, a hollowed-out cigar that contained marijuana, and a container with methamphetamine inside of it. In the basement bedroom, police found a small pipe and a tin with white powder in it on a nightstand, and in the bedroom closet was a two-liter soda bottle with a tube coming out of the cap.

The State charged Gates with Class D felony possession of methamphetamine, Class A misdemeanor possession of marijuana, Class D felony maintaining a common nuisance, and Class A possession of paraphernalia. A jury trial was held on January 4-5, 2011, after which the jury found Gates guilty of Class D felony maintaining a common nuisance, but it was hopelessly deadlocked as to the other three counts. The trial court entered judgment of conviction on the jury's finding on January 5, 2011, and scheduled sentencing for January 21, 2011. The sentencing hearing was continued to January 31, 2011, at Gates's request. At the conclusion of the hearing, the trial court stated its belief that Gates was addicted to methamphetamine and discussed the possibility that Gates needed treatment for that addiction. It also stated, "I find that the aggravators and mitigators balance and as such a year and a half sentence is appropriate." Tr. p. 316. The

trial court also stated that it would issue a written sentencing order more fully explaining the sentence at a later date.

On February 10, 2011, the trial court called Gates into court to read the written sentencing order to him, but continued the hearing until February 16, 2011, because Gates's attorney was ill. The written sentencing order was signed on February 10, 2011. On February 16, 2011, Gates filed a motion for change of judge, based on the trial court's comments regarding its belief that Gates was addicted to methamphetamine. At the February 16 hearing, the trial court denied that motion and further explained why it believed Gates was addicted to methamphetamine. It then read the written sentencing order to Gates, which stated that his purported methamphetamine addiction was a mitigating circumstance. The written order reiterated that the trial court was imposing a sentence of one and one-half years, fully executed, and recommended that Gates obtain substance abuse counseling while incarcerated. Gates now appeals. Additional facts will be provided as necessary.

Analysis

I. Gates's Criminal History

First, we address Gates's claim that he is entitled to a new trial because the jury may have overheard the trial court say that he has a criminal history. Specifically, before trial, the trial court granted a motion in limine barring any testimony regarding Gates's criminal history. During cross-examination, Deputy Roudebush was attempting to explain Gates's odd behavior and testified, "I have uh experience with people through my

law enforcement career who have been on methamphetamine. They react in a certain way. That's why we call it tweaking. My other answer to you is this is I have met uh the defendant on two other prior occasions." Tr. pp. 200-01. Gates objected to the last sentence of this answer and requested that it be stricken. The trial court excused the jury from the courtroom to discuss the objection and the following transpired:

Trial Court: And the request was made by defense counsel to instruct the State and the State's witnesses not to speak of Jon Gates' criminal history except under a very rare what's the matter Mr. Whittsett [defense counsel]?

Defense Counsel: Excuse me your Honor. I'm sorry to interrupt you but the jury is standing very close to here.

Trial Court: Alright.

Defense Counsel: I know from my own experience that I can hear when I'm out there what you're saying. . . . I don't know but I strongly suspect they may have the last thing that was said.

Trial Court: Well did I disclose anything about a prior criminal history Mr. Whitsett?

Defense Counsel: Uh no sir.

Id. at 203. After further discussion, the trial court overruled Gates's objection to Deputy Roudebush's testimony, and the trial proceeded. Before the jury came back in, the trial court confirmed with Gates's attorney that the door to the courtroom had been closed during their discussion.

On appeal, Gates only argues that the jury may have heard the trial court refer to his criminal history after it left the courtroom; he does not challenge Deputy Roudebush's

testimony in any way. As Gates concedes, however, he did not move for a mistrial based on the jury's alleged exposure to improper prejudicial information. Gates also did not request that the jury be admonished to disregard anything they might have heard regarding his prior criminal history. A “timely and accurate admonition is presumed to cure any error in the admission of evidence.” Banks v. State, 761 N.E.2d 403, 405 (Ind. 2002) (quoting Heavrin v. State, 675 N.E.2d 1075, 1084 (Ind. 1996)). By failing to request either an admonishment or mistrial, Gates has waived any claim of error on this issue.

Gates does contend that the failure to move for a mistrial was the result of ineffective assistance of trial counsel. However, Gates is represented on appeal by the same attorney who served as trial counsel. As an ethical matter, an attorney is not supposed to argue his or her own ineffectiveness. See Matter of Sexson, 666 N.E.2d 402, 403-04 (Ind. 1996); see also Caruthers v. State, 926 N.E.2d 1016, 1023 (Ind. 2010) (citing Ind. Professional Conduct Rule 1.7(a)). As a matter of appellate review, courts will not, under most circumstances, entertain a claim of ineffectiveness of trial counsel presented on direct appeal by the same attorney who tried the case. Etienne v. State, 716 N.E.2d 457, 463 (Ind. 1999). The only exception to this rule is when an ineffectiveness claim is sufficiently clear that immediate review is appropriate to avoid unnecessary delay in addressing it. Id. Otherwise, ruling “on the merits of such a claim on direct appeal would foreclose the defendant ‘from ever having a fresh set of eyes consider and

argue the effectiveness of his or her trial counsel.” Caruthers, 926 N.E.2d at 1023 (quoting Etienne, 716 N.E.2d at 463).

This is not a case in which there is a crystal-clear case of ineffectiveness of trial counsel that we should address immediately. Most importantly, there is no concrete evidence in the record that the jury actually heard any reference to Gates’s criminal history; there is merely speculation by Gates’s counsel that the jury might have heard something. Especially in the absence of any such evidence, we decline to address Gates’s claim of ineffectiveness of trial counsel as presented on direct appeal by trial counsel.

II. Implication of Illegal Drug Use

Next, we address Gates’s assertion that the trial court improperly failed to rule on his objection to Veca’s testimony implying that he used illegal drugs, specifically methamphetamine. During cross-examination, counsel asked Veca, “Do you recall Jon moving in with you on that house on Armstrong?” Tr. p. 83. Veca replied:

No. The conversation and the agreement was he was gonna keep the other house and get his life together and come and stay when he could at the house. And for the first I don’t know maybe week or two, he would come and go out of the house and be gone for hours and then he’d come back high. And tweaked out.

Id. at 83-84. Counsel objected to this answer, contending that it was non-responsive and speculation by a non-expert witness as to whether Gates was high. The trial court responded, “I’ll rule on this. I understand. The objection is that the . . . answer was non-responsive to the question. . . . And that’s true. Go on.” Id. at 84. The trial court did not

admonish the jury to disregard Veca's answer, nor did counsel expressly request an admonishment.

We review the admission of evidence at trial for an abuse of discretion. Bean v. State, 913 N.E.2d 243, 250 (Ind. Ct. App. 2009), trans. denied. "An abuse of discretion involves a decision that is clearly against the logic and effect of the facts and circumstances before the court." Id. An error in the admission of evidence is not grounds for setting aside a conviction unless such erroneous admission appears inconsistent with substantial justice or affects the substantial rights of the defendant. Lafayette v. State, 917 N.E.2d 660, 666 (Ind. 2009) (citing Ind. Trial Rule 61). "The improper admission of evidence is harmless error when the conviction is supported by such substantial independent evidence of guilt as to satisfy the reviewing court that there is no substantial likelihood that the questioned evidence contributed to the conviction." Id. Additionally, improper admission of evidence is harmless error if such evidence is merely cumulative of other evidence before the trier of fact. Nunley v. State, 916 N.E.2d 712, 719 (Ind. Ct. App. 2009), trans. denied.

Here, even if we were to assume the trial court erred in not explicitly sustaining Gates's objection to Veca's testimony and in not admonishing the jury to disregard her statement, any such error was harmless. In order to convict Gates of Class D felony maintaining a common nuisance, the State was required to prove that he knowingly or intentionally maintained a building that was used one or more times by persons unlawfully using controlled substances, or was used more than one time for unlawfully

manufacturing, keeping, offering for sale, selling, delivering, or financing the delivery of controlled substances. Ind. Code § 35-48-4-13(b). Although the jury was unable to agree that there was sufficient evidence that Gates possessed any drugs or paraphernalia, there was overwhelming evidence that numerous items of paraphernalia and significant quantities of drugs or drug residue, both of which were often readily visible, were present throughout Gates's house, including in the basement area of the house that Gates occupied. Furthermore, Deputy Roudebush testified without objection that he observed Gates "tweaking," and that such behavior was consistent with methamphetamine usage. Thus, Veca's testimony was merely cumulative of Deputy Roudebush's with respect to Gates's perceived use of illegal drugs. All in all, we are convinced the jury would have reached the same conclusion regarding Gates's guilt for Class D felony maintaining a common nuisance even if the trial court had stricken Veca's comment regarding Gates's "tweaking."

III. Sentencing Factors

Gates next argues that the trial court considered an improper factor in sentencing him, namely, its belief that he suffered from a methamphetamine addiction. We engage in a four-step process when evaluating a sentence. Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007). First, the trial court must issue a sentencing statement that includes "reasonably detailed reasons or circumstances for imposing a particular sentence." Id. Second, the reasons or omission of reasons given for choosing a sentence are reviewable on appeal for an abuse of discretion. Id. Third, the weight given to those reasons, i.e. to

particular aggravators or mitigators, is not subject to appellate review. Id. Fourth, the merits of a particular sentence are reviewable on appeal for appropriateness under Indiana Appellate Rule 7(B). Id.

An abuse of discretion in identifying or not identifying aggravators and mitigators occurs if it is “clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom.” Id. at 490 (quoting K.S. v. State, 849 N.E.2d 538, 544 (Ind. 2006)). Additionally, an abuse of discretion occurs if the record does not support the reasons given for imposing sentence, or the sentencing statement omits reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law. Id. at 490-91.

Gates seems to contend that the trial court ordered his eighteen-month sentence to be fully executed, with none suspended, on the basis of its belief that he was addicted to methamphetamine. As Gates notes, he was not convicted of possession of methamphetamine, but methamphetamine and related paraphernalia were recovered from his residence.

Even if we were to conclude the trial court abused its discretion in finding that Gates suffered from methamphetamine addiction, we fail to perceive how Gates was harmed by that finding. The sentencing order explicitly states that the trial court considered any such addiction to be a mitigating, not aggravating, circumstance. It also recommended that Gates participate in substance abuse counseling while incarcerated,

but it gave no indication that it was refusing to suspend any part of Gates's sentence on the basis of his supposed addiction. In sum, there is no reversible error on this point.

IV. Date of Sentencing

Gates's final contention is that the trial court sentenced him more than thirty days after he was convicted. Both Indiana Criminal Rule 11 and Indiana Code Section 35-38-1-2(b) provide that a defendant should be sentenced within thirty days of being convicted, unless there is an extension of time for "good cause." The trial court here orally announced Gates's sentence on January 31, 2011, or less than thirty days after he was convicted, but did not sign a written sentencing order until February 10, 2011. Although the trial court did not provide Gates with that order until February 16, 2011, Gates apparently views February 10, 2011, as the date he was "officially" sentenced, which was thirty-six days past his conviction date.

Regardless, Gates is entitled to no relief on this issue for several reasons. First, Gates moved for a continuance of the original sentencing date of January 21, 2011, which resulted in a ten-day delay in sentencing. A delay in sentencing caused by the defendant results in waiver of the right to be sentenced within thirty days. See Moore v. State, 154 Ind. App. 482, 496-97, 290 N.E.2d 472, 480 (1972). Additionally, a defendant's failure to object to a sentencing being scheduled beyond the thirty-day deadline also results in waiver. See Murphy v. State, 447 N.E.2d 1148, 1149 (Ind. Ct. App. 1983). Here, when the trial court stated at the conclusion of the January 31, 2011 hearing that it would later issue a written sentencing order that would initiate Gates's appeal deadline, there was no

objection or insistence by counsel that any such order be issued within thirty days of Gates's conviction.

This court also has held that where a trial court states its intention regarding a sentence within thirty days of conviction, but postpones official execution of the sentence until a later date, there has been substantial compliance with the thirty-day deadline. See State v. Kuczynski, 174 Ind. App. 215, 216, 367 N.E.2d 8, 9 (1977). That is essentially what happened in this case: the trial court stated its intention regarding sentencing on January 31, 2011, but delayed official execution of the sentence for ten (or sixteen) additional days.

Finally, the usual remedy for violation of the thirty-day sentencing deadline is not discharge of the defendant or denial of the trial court's ability to sentence the defendant, but simply that the defendant be sentenced. See McCormick v. State, 178 Ind. App. 206, 212, 382 N.E.2d 172, 177 (1978). Discharge of a defendant for delay in sentencing is required "only where extraordinary delay is involved," i.e., where a trial court has deliberately or inadvertently refused to pronounce sentence. Taylor v. State, 171 Ind. App. 476, 483, 358 N.E.2d 167, 172 (1976). Six to twelve days past the thirty-day deadline is not an "extraordinary" delay. Additionally, although Gates requests that he be released from incarceration six days early to account for any delay in his sentencing, it appears that the trial court correctly calculated the pre-sentence credit time to which Gates was entitled when it issued its written sentencing order; Gates does not argue

otherwise. There is no basis for reversing or altering the trial court's sentencing order based on any alleged delay in sentencing.

Conclusion

We decline to review Gates's claim of ineffective assistance of trial counsel as presented on direct appeal by trial counsel. The trial court did not commit any reversible error in its evidentiary rulings or in the manner in which it sentenced Gates. We affirm his conviction and sentence.

Affirmed.

ROBB, C.J., BRADFORD, J., concur.