

2012 IL App (1st) 081543-U

No. 1-08-1543

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SIXTH DIVISION
April 20, 2012

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. 07 CR 20079
)	
RICKEY STEVENSON,)	Honorable
)	James M. Obbish,
Defendant-Appellant.)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Robert E. Gordon and Justice Garcia concurred in the judgment.

ORDER

¶ 1 **HELD:** The trial court (1) did not abuse its discretion in denying the State's motion for a continuance; and (2) conducted a proper inquiry before denying defendant's request for the appointment of new counsel and *pro se* posttrial motion alleging ineffective assistance of counsel.

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¶ 2 In January 2010, this court granted defendant's motion to dismiss his first appeal of this cause as prematurely filed. When defendant filed his second appeal of this cause, we dismissed it for lack of jurisdiction. *People v. Rickey Stevenson*, 2011 IL App (1st) 093413. Thereafter, defendant filed a motion in the Illinois Supreme Court, asking the court to use its supervisory authority to reinstate his initial appeal because it had been dismissed as a result of counsel's error and through no fault of defendant. The Illinois Supreme Court granted the motion for supervisory relief, reinstated this cause for disposition, and directed us to consider the appeal on its merits, which we now do.

¶ 3 After a bench trial, defendant Rickey Stevenson was convicted of burglary and sentenced to eight years in prison. On appeal, he contends that: (1) he was denied a fair trial when the trial court denied an agreed motion for a continuance; and (2) the trial court failed to appoint independent counsel and conduct an adequate inquiry into defendant's posttrial *pro se* motion alleging ineffective assistance of trial counsel.

¶ 4 For the reasons that follow, we affirm defendant's conviction.

¶ 5 I. BACKGROUND

¶ 6 Defendant was arrested and charged with burglary and criminal damage to property where he allegedly entered a commercial building with the intent to commit a theft and damaged some windows on September 12, 2007.

¶ 7 At the February 28, 2008 bench trial, the State's evidence established that Chicago police officers Enrica Pacheco and William Wagner arrived at the scene at about 1:54 a.m. in response to a burglar alarm at a closed commercial building. The officers looked in the windows and saw

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defendant inside the building looking through a desk. When defendant saw the officers, he fled through a broken window with jumper cables in his hand. The officers pursued defendant, who discarded the cables. The officers apprehended him, searched him and recovered four sets of keys, a flashlight and a credit card. After defendant was taken from the scene by other police officers, the owner of the business property arrived and walked through her business with Officers Pacheco and Wagner. The owner identified the keys and jumper cables recovered from defendant as her property. According to her stipulated testimony, the owner did not know defendant and did not give him permission to enter her business and remove her jumper cables and keys. An inspection of the building revealed that the alarm system was disabled and torn from the walls, a few windows were broken or removed, and a cabinet was pried open.

According to the owner's stipulated testimony, when she left the premises the day before, the desk in her office was locked and intact and the alarm and windows on her property were intact.

¶ 8 Defendant testified that he did not burglarize the building. He admitted that he had a 1996 burglary conviction. According to defendant, on the day of the offense, he had been at his aunt's house moving furniture from about 10:30 a.m. to 1 a.m. In order to go home, he was walking about 14 blocks from his aunt's house to the bus terminal. At about 2 a.m., Officers Pacheco and Wagner drove up in front of him, jumped out of their car and asked him his name. His aunt's house was about eight blocks away. Defendant showed them his identification and explained that he had a bogus warrant from another state in his background. Officers Pacheco and Wagner searched and handcuffed him and took him to the police station.

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¶ 9 In rebuttal, Chicago police officer Mahmoud Haleem testified that he and his partner Sergeant Dan Shine transported defendant from the scene to the police station.

¶ 10 The trial court found defendant guilty of burglary.

¶ 11 Thereafter, defense counsel filed a motion for a new trial and also tendered to the court defendant's 39-page, *pro se* motion alleging nine different grounds for relief, including five allegations of ineffective assistance of counsel. The motion contained a memorandum of law that provided specific details in support of the allegations of ineffective assistance of counsel. The trial court continued the matter so defense counsel could review defendant's allegations of ineffective assistance. When the hearing resumed, the trial court inquired into the factual basis of defendant's allegations that he was not effectively represented by trial counsel. Defendant complained that trial counsel failed to subpoena documents that would have supported defendant's claim that the arresting police officers testified falsely against him in order to cover up their use of excessive force at the police station after his arrest. The trial court noted that the arresting police officers did not transport defendant to the police station and there was no evidence in this case of any postarrest confession or admission by defendant. Then, trial counsel briefly responded to defendant's allegations of ineffective assistance. Specifically, counsel stated that he met with defendant and discussed the trial, evidence and strategy of the case. Counsel also had an investigator photograph the crime scene so counsel could cross-examine the officers on their ability to see the burglar inside the building. Furthermore, counsel heeded defendant's request to go to trial as quickly as possible. The trial court noted defense counsel's effective representation of defendant throughout the trial and denied defendant's *pro se* motion.

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¶ 12 Immediately thereafter, the trial court addressed defense counsel's motion for a new trial. When defendant attempted to interrupt, the trial court informed him that the consideration of his *pro se* motion was done. After defense counsel argued that the arresting officers' testimony was impeached, the trial court denied defense counsel's motion for a new trial. Defendant again interrupted, objected to defense counsel's continued representation, and complained about a conflict of interest and irreconcilable differences. The trial court again informed defendant that his motion to appoint new counsel had already been denied.

¶ 13 After hearing argument concerning sentencing, the trial court determined that defendant's prior convictions mandated sentencing him as a Class X offender. The trial court sentenced defendant to an eight-year prison term and denied his subsequent motion to reconsider sentence. Defendant appealed.

¶ 14

II. ANALYSIS

¶ 15

A. Continuance Request

¶ 16 Defendant contends the trial court abused its discretion in denying a continuance requested by the State and agreed to by defendant. Defendant asserts that the denial rendered him unable to develop a theory of defense or fully confront the State's witnesses. Defendant failed to both object at trial and include this claim in his posttrial motion. Defendant argues, however, that this claim should not be considered forfeited because the conduct of a trial judge is at issue. See *People v. Rowjee*, 308 Ill. App. 3d 179, 185 (1999). Alternatively, defendant requests that we review this issue under the second prong of the plain-error analysis.

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¶ 17 The plain error doctrine allows errors not previously challenged to be considered on appeal if either: (1) the evidence is closely balanced and the guilty verdict may have resulted from the error; or (2) the error was so fundamental and of such magnitude that the defendant was denied a fair trial and the error must be remedied to preserve the integrity of the judicial process. *People v. Hudson*, 228 Ill. 2d 181, 191 (2008); *People v. Herron*, 215 Ill. 2d 167, 177 (2005).

The first step of plain error analysis is deciding whether any error has occurred. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010); *People v. Durr*, 215 Ill. 2d 283, 299 (2005).

¶ 18 The granting or denial of a continuance rests in the sound discretion of the trial court, and a reviewing court will not interfere with that decision absent a clear abuse of discretion. *People v. Chapman*, 194 Ill. 2d 186, 241 (2000). There is no mechanical test to determine the point at which the denial of a continuance in order to accelerate the judicial proceedings violates the substantive right of the accused to properly defend. *People v. Lott*, 66 Ill. 2d 290, 297 (1977). Relevant factors to consider in determining whether to grant a continuance include the movant's diligence, the defendant's right to a speedy, fair and impartial trial, the interests of justice, defense counsel's inability to prepare for trial due to counsel's involvement in a trial in another cause, the history of the case, the complexity of the matter, the seriousness of the charge, docket management, judicial economy, and inconvenience to the parties and witnesses. *People v. Walker*, 232 Ill. 2d 113, 125-26 (2009).

¶ 19 According to the record, the State filed the information against defendant in September 2007, and he was arraigned in October 2007. The parties agreed to continue the first trial date of February 4, 2008, to February 28, 2008, because neither party was ready. On February 28, the

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State explained that, although it had been prepared to commence the trial and its witnesses were present, the State now requested a continuance to view the complaint defendant had filed in October 2007 with the Office of Professional Standards (OPS) against an arresting officer. The State wanted to view the complaint in case defendant made any admissions, claimed an alibi, or listed any occurrence witnesses. The State had just learned of the complaint from defense counsel on the day of trial, and defense counsel had learned of it from defendant the day before. The officer who was the subject of the complaint had not been served with it yet. Defense counsel agreed to the continuance because, although defendant was eager to go to trial, counsel wanted to ensure that the record was complete before going forward. The parties made arrangements to stipulate to the testimony of the burglary victim.

¶ 20 The trial court denied the continuance request. The trial court stated that it was obligated to administer justice in the cases before it in an orderly manner and not waste the public's resources. The trial court found that "in view of the nature of" an OPS complaint, extra time to obtain the complaint was not a sufficient reason to delay the trial. Furthermore, the trial court stated that the government had the complaint for four months and never bothered to notify the officers, so the OPS probably was not conducting much of an investigation. The trial court also stated that if defendant chose to testify and use his allegations against the officer in some sort of a defense, the State would be able to respond through its witnesses. The State moved *in limine* to bar defendant from raising any argument contained in his complaint, and the trial court denied that motion, stating that it would not deny defendant his right to present a defense. During his trial testimony, defendant never mentioned any alleged beating by the officers.

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¶ 21 We find that the record supports the trial court's exercise of discretion to deny the State's continuance request. In denying the continuance, the trial court considered the state of its docket, the interests of judicial economy, the nature of the information that was the subject of the continuance request, the State's lack of diligence where the government had possession of the complaint for several months, and the State's ability to counter any allegations concerning the OPS complaint through its own witnesses.

¶ 22 Furthermore, defendant suffered no prejudice because the denial of the State's motion had no effect on defendant's ability to present his case. The State wanted a continuance so that it could check whether defendant's complaint had mentioned an alibi or an occurrence witness. Defendant had no need for a continuance because he was well aware of all the relevant evidence against him in this case. Moreover, he wrote the complaint letter himself and, thus, knew its contents.

¶ 23 On appeal, defendant speculates that the OPS's file might have contained information in addition to defendant's complaint, and any such information might have supported his *pro se* posttrial motion, which alleged that his trial attorney was ineffective for failing to investigate defendant's claim that the police officers beat him after he was transported to the police station, framed defendant for the burglary, and had a motive to testify falsely to cover up their misconduct. Defendant's argument lacks merit. Defendant puts forth no credible theory supporting the admissibility at trial of any speculative information from the OPS's file. Furthermore, defendant's theory that the police framed him fails to impeach the testimony of the owner of the business defendant burglarized. Defendant's police brutality theory also fails to

impeach the testimony of the arresting officers, who remained at the scene with the victim while other police officers took defendant to the police station. Because defendant was already under arrest for burglary, the subsequent alleged beating at the police station hardly served to provide a motive to prompt the arresting officers to falsely accuse him of burglary.

¶ 24 We find no error and conclude that the trial court did not abuse its discretion in denying the continuance requested by the State and agreed to by the defendant.

¶ 25 B. *Pro Se* Posttrial Motion Alleging Ineffective Assistance of Counsel

¶ 26 Defendant argues that he is entitled to a hearing with newly appointed counsel on his *pro se* posttrial motion alleging ineffective assistance of trial counsel because defendant proved possible neglect of his case. Defendant also argues that this matter should be remanded for a proper posttrial hearing because the trial court failed to properly inquire into the factual basis of four of his five allegations of ineffective assistance of trial counsel.

¶ 27 The appointment of new counsel is not required in every case where a defendant brings a *pro se* motion for ineffective assistance of trial counsel. *People v. Taylor*, 237 Ill. 2d 68, 75 (2010). The trial court should first examine the factual basis of the defendant's claim, which usually involves questioning trial counsel and the defendant regarding the facts and circumstances surrounding the alleged claims. *People v. Moore*, 207 Ill. 2d 68, 78 (2003). The trial court must conduct an adequate inquiry into the *pro se* motion before the court can dismiss it. *People v. Banks*, 237 Ill. 2d 154, 214 (2010). Whether the trial court conducted an adequate investigation into a defendant's claim of ineffective assistance of counsel is a question of law that is reviewed *de novo*. *People v. Smith*, 191 Ill. 2d 408, 411 (2000); *Moore*, 207 Ill. 2d at 75. If

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the trial court determines the claims lack merit or pertain only to matters of trial strategy, the trial court may deny the *pro se* motion without appointing new counsel. *Taylor*, 237 Ill. 2d at 75.

However, if the allegations show possible neglect of the case, new counsel should be appointed to argue the claim of ineffective assistance at a posttrial hearing. *Moore*, 207 Ill. 2d at 78. New counsel is necessary to independently evaluate the defendant's claim and avoid a conflict of interest. *Id.* The trial court's exercise of discretion will not be reversed on appeal unless the trial court's action was manifestly erroneous. *People v. McCarter*, 385 Ill. App. 3d 919, 941 (2008).

¶ 28 Defendant contends he alleged facts sufficient to show that trial counsel was ineffective for failing to investigate defendant's allegation of police brutality and his OPS complaint against the arresting officers. Defendant argues the trial court did not follow the proper protocol in assessing this claim. Defendant also contends he repeatedly tried to argue the merits of his remaining four ineffective counsel claims, but the trial court did not make a proper inquiry into those issues. Specifically, in addition to the failure-to-investigate-police-brutality claim, defendant alleged trial counsel was ineffective for (1) stipulating to the business owner's testimony and thereby denying defendant the opportunity to cross-examine her; (2) failing to investigate and interview defendant's aunt as an alibi witness, (3) failing to object to the testimony of Officers Wagner and Pacheco for lack of foundation as to the physical evidence that was presented at trial, and (4) manipulating defendant into waiving his right to a jury trial by misrepresenting his eligibility to receive an enhanced sentence.

¶ 29 We find no error in the trial court's decision not to appoint counsel because defendant failed to show possible neglect of the case. Defendant argues he showed neglect because counsel

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failed to investigate defendant's allegations of police brutality. However, according to the record, defendant informed his counsel of the OPS complaint just one day before the trial. Furthermore, defendant's theory—that the police pinned the crime on him and had a motive to fabricate their testimony against him because they beat him at the police station after his arrest—fails to support his claim of neglect. The trial court stated that the arresting police officers did not accompany defendant to the police station, where the beating allegedly took place, and no confession or admission by defendant was offered at trial, so there was no issue that defendant implicated himself as a result of the officers' alleged use of excessive force. The trial court concluded that, even if some sort of physical confrontation occurred between defendant and the officers after the arrest, it did not motivate the police to falsely accuse defendant of the burglary because he was already under arrest for that crime. Finally, the questions of what theory of defense to present and how to cross-examine the officers were matters of trial strategy, and trial counsel affirmed that he had discussed the evidence and matters of strategy with defendant before the trial.

¶ 30 We also find no merit in defendant's argument that the trial court failed to inquire into his remaining four ineffective assistance claims. The inquiry requirement can be satisfied by the court asking the trial counsel about the circumstances surrounding the claim or by asking the defendant questions about his claim. *People v. Bobo*, 375 Ill. App. 3d 966, 981 (2007). A brief discussion between the trial court and the defendant can be sufficient for the trial court to properly deny an ineffective assistance claim. *Moore*, 207 Ill. 2d at 78. "Alternatively, the court can base its determination on its personal knowledge of defense counsel's performance at trial or on the facial insufficiency of the defendant's allegations. *Bobo*, 375 Ill. App. 3d at 981.

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¶ 31 According to the record, the trial court stated that it had read the "other issues" defendant raised in his *pro se* motion and was aware that defendant had multiple "allegations" of ineffective assistance of counsel. Furthermore, before defendant commenced arguing the merits of his motion, the trial court told him, "[Y]ou may go ahead and argue what you want to argue." Our review of the record indicates that the trial court did not cut off defendant's argument. Rather, defendant himself limited his ineffective counsel argument to the claim that counsel failed to investigate the allegation of police brutality and subpoena documents to support that allegation. The transcript of the trial court's discussion of this allegation with defendant covers over five pages in the record. Contrary to defendant's argument on appeal, the trial court did not interrupt and prevent him from presenting his ineffective counsel claims. According to the record, after the trial court had conducted a sufficient inquiry into defendant's ineffective counsel claims and denied the motion, defendant continued to interrupt the proceedings and complain about trial counsel's continued representation and a conflict of interest. The record establishes that the trial court simply stopped defendant from interrupting the proceedings to reargue the motion after it had already been heard and denied.

¶ 32 When defense counsel responded to defendant's motion, counsel stated that his decisions regarding the cross-examination of the witnesses were matters of trial strategy and he discussed the evidence and strategy with defendant before the trial. The trial judge found defense counsel to be credible and stated that defendant had received "a very very, good defense." See *People v. Vargas*, 393 Ill. App. 3d 465, 478 (2009) (trial court may use its knowledge of counsel's efforts and performance during the trial as a basis for an evaluation of the *pro se* claim of ineffective

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counsel).

¶ 33 We find no error in the trial court's inquiry into defendant's ineffective counsel claims. Although defendant did not specifically argue the merits of all five claims, no further inquiry into the factual basis of the claims was necessary because the trial court had read defendant's lengthy motion, which specified the facts that defendant claimed supported his allegations of ineffective counsel. Furthermore, trial counsel's decisions to not call defendant's aunt, who would not have provided defendant with an alibi based on defendant's own testimony, and to stipulate to the testimony of the burglary victim, who was not an occurrence witness, were matters of trial strategy. In addition, defendant's argument concerning the lack of foundation for the physical evidence has no basis in the law. Finally, defendant's claim that counsel tricked him into waiving a jury trial based on defendant's eligibility for an enhanced sentence lacks merit because defendant misconstrues the sentencing statutes.

¶ 34

III. CONCLUSION

¶ 35 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 36 Affirmed.