2015 IL App (1st) 123021-U

SECOND DIVISION
Order filed December 2, 2014
Modified Upon Granting of Rehearing April 21, 2015

No. 1-12-3021

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. 10 CR 8123
	)	
VICTOR SMITH,	)	Honorable
	)	Lauren Gottainer Edidin,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LIU delivered the judgment of the court.
Justices Neville and Pierce concurred in the judgment.

O R D E R

¶ 1 *Held*: There was sufficient evidence that defendant was armed with a firearm to support his armed robbery conviction; the circuit court was not required to hold a *Krankel* hearing *sua sponte* where defendant's trial counsel was not ineffective in her preparation for cross-examining the robbery victim about his knowledge of firearms; the circuit court improperly assessed the $200 DNA testing fee.

¶ 2 Following a bench trial, defendant Victor Smith was convicted of armed robbery with a firearm and was sentenced to 21 years in prison. On appeal, he contends his armed robbery

conviction should be reduced to plain robbery because the State failed to prove that he was in possession of a firearm when he robbed the victim. Defendant also asserts his trial counsel was ineffective for failing to prepare adequately for the firearm testimony of the armed robbery victim, and he challenges the imposition of the $200 DNA testing fee. We affirm defendant's armed robbery conviction and vacate the DNA fee.

¶ 3 At trial, Jun Don testified that on March 21, 2010, he was a delivery driver for a Skokie restaurant. At about 9:30 p.m., he took a food delivery to 8258 Niles Center Road. The delivery was for a man who had identified himself during the phone order as "Randall" and who had given a telephone number. Don called that number when he arrived at the address, and the man answering the phone call instructed Don to meet him at the back door of the building. At trial, Don identified defendant as "Randall," the man who met him at the back door. When defendant told Don that someone was bringing the money to pay for the food, Don elected to make other deliveries.

¶ 4 About 15 to 30 minutes later, defendant phoned Don and asked him to return to the building. When Don did so, defendant claimed he still did not have the money. He invited Don inside, but Don declined and remained in the doorway of the building entrance. When defendant asked Don where the restaurant was located, Don turned away to point in the direction of the restaurant. When he turned back, Don saw defendant pointing a revolver at him. The revolver appeared to be black, about six to eight inches long. Don was able to see down the barrel of the gun and saw the opening from which a projectile would emerge. Defendant asked, "Do you know what this is?" Don answered, "It's pretty obvious, yes, this is a robbery." Don could feel defendant press the gun behind his neck and felt that the gun was metal.

¶ 5 Don believed the gun was real. He had seen real guns previously, and he had a FOID card and went to a firing range two or three times a year. Defendant demanded and took Don's money and the food order, then pushed Don out the door of the building and locked it. Three weeks later, Don selected defendant's photo from a police photo array. Three days after that, Don identified defendant in a police lineup. The gun used in the robbery was never recovered.

¶ 6 Sylvia Popova testified that she lived alone at 8258 Niles Center Road on the date of the incident in question. She testified that she had been in a romantic relationship with defendant and that he would come to her house about two to three times per week, but did not have a key. Popova and defendant ordered food from the restaurant where Don worked sometime in February, and possibly on other occasions as well. She believes that, on the date in February, it was defendant who went down and picked up the food.

¶ 7 Popova testified that she was not home at the time of the incident. However, she later saw police as she was driving up to her apartment. The police asked her if they could go inside her apartment, but she declined permission, turned around, and drove back to her mother's house. After defendant was arrested at her apartment, Popova received a call from police asking her to bring his phone to the station. She brought the phone that she thought was his and also gave police a phone number that she thought defendant used. The police asked Popova about black men who would visit her house, and she said she did not know their names. She told police about a man named "AJ," but did not provide them with defendant's name. She subsequently declined to provide police with any additional information.

¶ 8 Skokie police officer Robert Roque testified that he responded to an armed robbery call at Popova's building on the evening in question. He testified that Don identified his assailant as a

man named "Randall" whose phone number was 773-331-8938. He testified that Don described the gun used during the robbery as a black revolver with a barrel length of about six inches.

¶ 9 Skokie police sergeant Jay Barnes, who was assigned to investigate the armed robbery in question, testified that he showed Don a photo array on March 24, but that Don did not identify his assailant. Aware that Don had previously told police that he had been to the scene of the robbery on two separate occasions to make deliveries, Sergeant Barnes asked Don to try and identify any information about the caller who had placed those orders. He heard back from Don on April 3, 2010, went to the restaurant, and was advised that the previous orders had been placed by a woman named "Sylvia," whose phone number was 773-431-7065.

¶ 10 Sergeant Barnes drew a connection between the name "Sylvia" and Popova, whom he knew officers had spoken with on the night of the robbery. He proceeded to her building, spoke with residents there, and then created a new photo array, which included defendant's picture. On April 12, 2010, Sergeant Barnes showed Don the new photo array. Don identified defendant as the individual who had robbed him at gun point and who had picked up food from him on two previous occasions. Sergeant Barnes instructed officers to place defendant under arrest. Defendant was subsequently brought to the station and placed in a lineup on April 15, 2010. Don was initially "pretty positive" that defendant was his assailant, but could not be sure because defendant was looking away from the two-way glass. Sergeant Barnes instructed everyone to look at the glass, and at that point, Don positively identified defendant as his assailant.

¶ 11 Sergeant Barnes testified that he called Popova and requested that she bring defendant's identification and cell phone to the police station. When she arrived with defendant's cell phone, he asked her for defendant's cell phone number, and she told him it was 773-331-8938. Sergeant

Barnes called the number, and defendant's cell phone began to ring. This was the same phone number that the robbery suspect had placed his delivery order from on the night in question.

¶ 12 Skokie police officer Peter Chmiel testified that he went to Popova's apartment on April 15, 2010. He was part of a team that was seeking to locate defendant and to place him under arrest. He knocked on the door of the apartment, and when Popova answered, he told her that they were looking for defendant. Popova told him that defendant was inside, and at that point, defendant came out and was placed under arrest. As defendant was being led away, Popova asked him "what he was in trouble for." Defendant said "something about him being in trouble for some Chinese restaurant thing." Officer Chmiel had not previously said anything to defendant about the nature of the investigation.

¶ 13 Following Officer Chmiel's testimony, the State rested and defendant's motion for a directed verdict was denied. The defense presented various stipulations, which are not relevant to our disposition, and rested without presenting any testimony.

¶ 14 In closing argument, defendant's trial counsel argued there could be no armed robbery finding where no gun was recovered. Counsel also argued that although Don testified he was familiar with guns, he had no experience with different varieties of guns, *i.e.*, replica guns, air pellet guns, etc. The circuit court rejected this argument, noting that Don had a FOID card and went to a gun range two or three times annually. The court found that Don "had ample opportunity to determine whether he believed that there was a firearm."

¶ 15 Defendant's trial counsel filed posttrial motions. In paragraph three of an amended motion for new trial, defense counsel argued:

> "3. The defendant was denied due process of law in violation of the Illinois and United States Constitution where he was effectively denied access to an expert witness prior to trial. In preparing for trial, counsel asked her investigator to speak to the complaining witness regarding his knowledge of guns. The witness refused to speak to him. Thus counsel entered into trial blind as to this information. The witness did claim familiarity with guns, which this court used as 'expertise' in its finding that the weapon [defendant] wielded was indeed a firearm. Had counsel been given access to this 'expert' information pre-trial strategy would have been different. Counsel could have advised her client informed advise [*sic*] during negotiations. Further, counsel could have hired an expert on the issue of firearms and replica firearms."

¶ 16 The court sentenced defendant to 21 years in prison, the sum of the minimum 6-year sentence for armed robbery and 15-year sentence enhancement for possession of a firearm.

¶ 17 On appeal, defendant argues that we should reduce his conviction from armed robbery to robbery because the State failed to prove beyond a reasonable doubt that he was in possession of a firearm when he robbed Jun Don.

¶ 18 Under the reasonable doubt standard of review, the critical inquiry is whether, after considering the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Rowell*, 229 Ill. 2d 82, 98 (2008). The trier of fact is responsible for determining the credibility of witnesses and the weight to be given their testimony, resolution of inconsistencies and conflicts in the

evidence, and reasonable inferences to be drawn from the testimony. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). In reviewing the trial evidence, we will not substitute our judgment for that of the trier of fact on questions involving the weight of the evidence or the credibility of the witnesses. *People v. Jackson*, 232 Ill. 2d 246, 280-81 (2009). Testimony may be found insufficient only where the record evidence compels the conclusion that no reasonable person could accept it beyond a reasonable doubt. *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004).

¶ 19 Defendant was charged under section 18-2(a)(2) of the Criminal Code of 1961 (Code) with armed robbery in that he committed robbery and carried on or about his person, or was otherwise armed with, a firearm. 720 ILCS 5/18-2(a)(2) (West 2010). Section 2-7.5 of the Code (720 ILCS 5/2-7.5 (West 2010)) provides that the term "firearm" has the meaning ascribed to it in Section 1.1 of the Firearm Owners Identification Card Act (FOID Act) (430 ILCS 65/1.1 (West 2010)), namely, "any device, by whatever name known, which is designed to expel a projectile or projectiles by the action of an explosion, expansion of gas or escape of gas," but specifically excluding any pneumatic gun, spring gun, paint ball or BB gun, any device used exclusively for signaling or safety, or for the firing of industrial ammunition, and an antique firearm that is primarily a collector's item.

¶ 20 Defendant does not dispute that he robbed Jun Don, but he contends the State failed to prove he possessed a "firearm," as defined under the Code, while doing so. He notes that the alleged firearm was never recovered. The parties agree that witness testimony alone may be sufficient for the trier of fact to determine that a defendant was armed with a firearm. However, defendant asserts that Don's testimony was not sufficient to establish that the object Don described as a black revolver was actually a firearm as defined in the FOID Act, and not one of

the devices excluded from the firearm definition, such as an air gun, spring gun, BB gun, starter pistol, or antique gun. We disagree.

¶ 21 This court's decision in *People v. Malone*, 2012 IL App (1st) 110517, is instructive. The evidence there consisted of the unequivocal testimony of the victim, a Walgreens cashier, that the defendant held what appeared to her to be a gun, together with a still photograph from surveillance video showing defendant holding what looked to be an actual gun. Defendant acknowledges that in *Malone,* we held that the evidence was sufficient to uphold defendant's conviction for armed robbery while armed with a firearm. *Id.* at ¶ 52. We noted that no contrary evidence was presented "that the gun was a toy gun, a BB gun, or anything other than a 'real gun.' " *Id.* See also *People v. Lee*, 376 Ill. App. 3d 951, 955 (2007), where no handgun was found, but the defendant's conviction for armed robbery with a firearm was affirmed where an eyewitness testified defendant was holding a chrome-plated, 9-millimeter handgun, two other witnesses testified defendant was holding a silver object, and the defendant threatened to shoot the armed robbery victim.

¶ 22 In the instant case, nothing in the record suggests the object defendant had in his possession was anything other than a firearm as defined in the FOID Act. While there was no surveillance video of the crime as in *Malone*, Don had ample opportunity to view the weapon at close distance during the robbery and the area was illuminated. Don described the weapon as a revolver, black, about six to eight inches long. When defendant pressed the gun against Don's neck, he was able to determine it was "[d]efinitely metal, not plastic." Don had seen real guns before. He brought to trial his FOID card, which he had had "[q]uite a few years." Don visited a gun range in LaGrange two or three times a year. Based on his familiarity with guns, Don

believed the object in defendant's hand was a real gun. No evidence was presented that could lead the trier of fact to any conclusion other than that the weapon defendant used in the robbery was a firearm. Defendant's argument that the State was required to prove that the gun he used was not one of the devices excluded from the firearm definition, such as an air gun, spring gun, BB gun, starter pistol, or antique gun, is completely lacking in merit. *People v. Beacham*, 50 Ill. App. 3d 695, 700 (1977) (noting that the State "need not seek out and disprove every possible alternative explanation of a crime before an accused can be found guilty"). Given Don's unequivocal and uncontroverted testimony and his personal experience with guns, viewed in the light most favorable to the prosecution, we find that a rational trier of fact reasonably could have inferred that defendant possessed a real firearm during the commission of the crime to sustain his conviction for armed robbery.

¶ 23 Defendant next contends that the circuit court erred in failing to conduct *sua sponte* a preliminary inquiry pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984). Defendant claims his trial counsel admitted in her amended posttrial motion that she "entered into trial blind" about what Don would testify to concerning the weapon used in the robbery, and, upon reading the motion, the circuit court should have conducted a *Krankel* inquiry.

¶ 24 When a defendant raises a *pro se* posttrial claim of ineffective assistance of counsel, the circuit court should conduct an adequate inquiry (commonly known as a *Krankel* inquiry) to determine the factual basis for defendant's claim. *People v. Johnson*, 159 Ill. 2d 97, 125 (1994). The proper scope of a preliminary investigatory hearing to determine whether to appoint new counsel for defendant is a question of law which we review *de novo*. *People v. Fields*, 2013 IL App (2d) 120945, ¶ 39. Generally, however, where defendant fails to make a sufficient claim of

ineffective counsel, no *Krankel* inquiry is required. See *People v. Taylor*, 237 Ill. 2d 68, 77 (2010).

¶ 25 Here, at no time did defendant make an explicit or implicit claim of ineffectiveness of his trial counsel. Nevertheless, he contends the circuit court should have held a *Krankel* hearing *sua sponte*. He relies on *People v. Williams*, 224 Ill. App. 3d 517 (1992), which held that a defendant's failure in alleging ineffectiveness of trial counsel does not result in a *Krankel* forfeiture where there is a "clear basis" for such an allegation of ineffectiveness. *Id.* at 524.

¶ 26 We reject defendant's argument and find that it is unnecessary to remand the case to the circuit court for a *Krankel* hearing to determine whether defendant's trial counsel was ineffective, because we conclude there has been no showing that counsel was ineffective. In reaching that conclusion, we are impelled to comment on a serious omission in the briefs defendant has submitted to this court. Defendant argues that "the record provides a 'clear basis' of possible neglect" by trial counsel due to her failure to learn before trial the nature of Don's testimony about his knowledge of firearms, and that this possible neglect "triggered a *sua sponte* preliminary inquiry" pursuant to" *Krankel*. In support of his contention, defendant's opening brief quotes from paragraph three of trial counsel's amended posttrial motion in which she states she "entered into trial blind." Paragraph three went on to assert that if counsel knew what Don's testimony would be, she "could have hired an expert on the issue of firearms and replica firearms" because the court used Don's testimony as "expertise." She also contended that she "could have advised her client informed advise [*sic*] during negotiations." (During plea negotiations prior to trial, the State offered to recommend a prison sentence of 12 years in return for defendant's guilty plea, but he rejected the offer.)

¶ 27 Defendant contends paragraph three supports his claim of trial counsel's "lack of preparation for trial." However, a crucial portion of the paragraph immediately preceding the cited portion has been deleted: "In preparing for trial, counsel asked her investigator to speak to complaining witness Don regarding his knowledge of guns. The witness refused to speak to him. Thus counsel entered into trial blind as to this information." Nowhere in defendant's opening brief or reply brief does he mention the fact that, in paragraph three, trial counsel attributed her lack of preparation to the fact that Don refused to speak to her investigator. That refusal was Don's right, as a prosecution witness need not grant an interview to the defendant's attorney or investigator. *People v. Goff*, 137 Ill. App. 3d 108, 115 (1985), citing *People v. Peter*, 55 Ill. 2d 443, 451 (1973). When read as a whole, paragraph three flatly contradicts defendant's intimation that his trial counsel's ignorance of what Don's testimony would be was due to her failure to properly prepare for trial. The fact Don refused to be interviewed by defendant's investigator was relevant to defendant's *Krankel* claim of ineffective counsel. In omitting a relevant fact unfavorable to defendant's position, defendant's briefs have violated Supreme Court Rule 341(h)(6) (eff. Feb. 6, 2013) (mandating that the statement of facts in an appellant's brief "shall contain the facts necessary to an understanding of the case, stated accurately and fairly"). See *Kulchawik v. Durabla Manufacturing Co.*, 371 Ill. App. 3d 964, 967 n.1 (2007).

¶ 28 The circuit court was under no obligation to conduct a *Krankel* hearing *sua sponte* where defendant has shown no clear basis for an allegation of ineffectiveness. Defendant claims that trial counsel "admitted that she was unprepared to respond to Jun Don's trial testimony that he believed a gun was present, that her pre-trial strategy was flawed, and that both her trial strategy and advice to [defendant] suffered as a result." However, defendant carefully refers only to "a

potential claim of ineffective assistance" and "trial counsel's *potentially* deficient performance." (Emphasis in original.) Defendant concedes that "the record itself does not conclusively establish whether counsel was, in fact, ineffective. We do not know, for example, what expert witnesses may have been available to the defense to counter the State's firearms testimony. And we do not know how exactly trial counsel advised [defendant] regarding the State's plea offer, or whether he would have accepted the 12-year offer without counsel's potentially erroneous advice." Nevertheless, defendant contends that the record need show only "possible neglect" by counsel to merit a preliminary *Krankel* inquiry. We reject this contention here where trial counsel admitted, but defendant ignores, the fact that counsel's deficiencies now complained of were the result of Don's refusal to speak to counsel's investigator and not the result of "possible neglect" by counsel. As defendant has not shown "a clear basis for an allegation of ineffectiveness of counsel" as in *Williams*, we find no error by the circuit court in failing to conduct a *sua sponte Krankel* inquiry.

¶ 29 Finally, defendant contends and the State agrees that the imposition of the $200 DNA analysis fee pursuant to section 5-4-3 of the Unified Code of Corrections (730 ILCS 5/5-4-3) (West 2010)) must be vacated. Court records from Kendall County in the appendix of defendant's opening brief establish that on July 7, 2011, prior to his conviction in the instant case, defendant was convicted in that county of aggravated battery of a government officer or employee, a felony (720 ILCS 5/12-4(b)(18), (e) (West 2010)), and ordered to submit a DNA sample. Consequently, defendant was not required to submit another sample or pay another DNA analysis fee. *People v. Marshall*, 242 Ill. 2d 285, 302 (2011).

¶ 30 Under our authority pursuant to Illinois Supreme Court Rule 615(b), we vacate the portion of the circuit court's sentencing order that imposed a $200 DNA fee. We affirm the judgment of the circuit court in all other respects.

¶ 32 Affirmed in part and vacated in part.