2015 IL App (1st) 130481-U

FIRST DIVISION
JANUARY 26, 2015

No. 1-13-0481

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 5823
	)	
DAROUSH EBRAHMI,	)	Honorable
	)	Thomas V. Gainer, Jr.,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Delort and Justice Connors concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court did not err in declining to appoint new counsel to represent defendant with respect to his posttrial claims of ineffective assistance of counsel. The circuit court also did not err in conducting the preliminary *Krankel* inquiry into defendant's posttrial claims where the State's participation at the hearing was minimal.

¶ 2 Following a jury trial, defendant Daroush Ebrahmi was convicted of three counts of first degree murder and sentenced to natural life in prison. On appeal, defendant contends that the trial court erred by failing to appoint new counsel to represent him on his *pro se* posttrial claim that trial counsel rendered ineffective assistance by not investigating and presenting an insanity

defense. In the alternative, defendant contends that the State's adversarial participation at the posttrial hearing deprived him of his right to conflict-free counsel at a critical stage of the case. We affirm.

¶ 3 The evidence at trial showed that defendant killed his wife, Karmen Koshabeh; his sister-in-law, Karolin Koshabeh; and his mother-in-law, Ileshevah Eyvazi-Mooshabeh on February 17, 2007. The State's theory of the case was that defendant committed the murders because he felt dishonored by his wife and her family. In particular, after defendant and Karmen, who were originally from Iran, moved to the United States a few months prior to the murders, it became apparent that Karmen wanted a divorce, which Karmen's sister and mother encouraged. Defendant did not present any evidence at trial.

¶ 4 After trial, defendant filed various *pro se* motions, alleging, in pertinent part, that defense counsel Dayna Woodbury was ineffective because she failed to investigate and assert an insanity defense. In support of his claim, defendant contended that he suffered from a mental illness as a result of a traumatic brain injury he sustained in a 1997 car accident in Iran, and that counsel failed to obtain his medical records documenting his head injury and resulting psychiatric condition. During a pretrial hearing, Woodbury acknowledged that she received a telephone number to call to attempt to get defendant's medical records in Iran.

¶ 5 On November 9, 2012, the court heard argument on defendant's *pro se* allegations of ineffective assistance of counsel. The court recounted defendant's statements regarding his car accident in Iran and the resulting head injury that purportedly caused his mental illness. The court asked defense counsel what she knew about defendant's statements, and Woodbury responded that she tried to have defendant's mental health evaluated to determine if he was sane,

but had sought the evaluation for reasons other than his alleged head injury. Counsel explained to defendant the difference between being found guilty but mentally ill and not guilty by reason of insanity, but defendant refused to cooperate with a psychiatrist for an evaluation regarding his sanity. At that point in the proceedings, defendant then told the court about the car accident in question. The court indicated that Woodbury's performance did not fall below a reasonable standard of professionalism where she did a "very good job" in putting on a defense. The court further noted that defendant frustrated his counsel's efforts to present a viable insanity defense by not cooperating with the psychiatrist. The State then observed that defendant's motion conveniently indicated that the two witnesses who saw the accident were his mother, who lives out of the country, and his wife, who was murdered. The State further pointed out that despite defendant's contentions to the contrary, he was not taking psychotropic medication. The State also reiterated defense counsel's argument that defendant frustrated every attempt to have a doctor evaluate his mental condition, and indicated that defendant could have testified in his own defense but refused to do so. The court then denied defendant's *pro se* motions without appointing new counsel.

¶ 6 On appeal, defendant contends that the trial court erred by failing to appoint new counsel to investigate his *pro se* allegation that defense counsel failed to obtain medical records documenting his mental illness caused by the 1997 car accident in Iran. Defendant requests that this court remand the matter for appointment of new counsel pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984).

¶ 7 In *People v. Krankel*, 102 Ill. 2d at 187–89, our supreme court concluded that the failure to appoint new counsel to argue a defendant's *pro se* posttrial motion alleging ineffective

assistance of trial counsel was an error and remanded the cause for a new hearing on the claim. However, new counsel is not automatically required every time a defendant presents a *pro se* posttrial claim that his counsel was ineffective. Instead, the trial court must examine the factual basis of the defendant's claim in order to determine whether new counsel should be appointed. *People v. Moore*, 207 Ill. 2d 68, 77–78 (2003).

¶ 8 A trial court may conduct such a preliminary examination by questioning trial counsel about the facts and circumstances surrounding the defendant's allegations, engaging in a discussion with the defendant, or relying on its own knowledge of counsel's performance and the insufficiency of the defendant's allegations on their face. *Id*. at 78–79. If the court determines that the claim lacks merit or pertains only to matters of trial strategy, then it need not appoint new counsel and may deny the *pro se* motion. *Id*. at 78. If, however, the court finds that the allegations show possible neglect, the matter then proceeds to the second step of a *Krankel* proceeding, and new counsel must be appointed to represent the defendant at a hearing on his *pro se* claims of ineffective assistance of counsel. *Id*. This new counsel independently evaluates a defendant's ineffectiveness claim and avoids any conflict of interest that might be created were trial counsel forced to justify her actions. *Id.*

¶ 9 A trial court's decision whether to appoint new counsel after conducting a preliminary *Krankel* inquiry is normally reviewed for manifest error. *People v. Walker*, 2011 IL App (1st) 072889, ¶ 33. However, the reviewing court reviews *de novo* the manner in which the trial court conducted its *Krankel* hearing and the hearing's legal sufficiency. *People v. Fields*, 2013 IL App (2d) 120945, ¶ 39. Defendant maintains that we should review his claim *de novo* where the trial court's ruling was based on a misapprehension of the law. Specifically, defendant asserts that the

trial court did not determine whether he showed "possible neglect" of his case by defense counsel (*Moore*, 207 Ill. 2d at 78), but instead ruled that he did not show that counsel's performance was deficient under the far more stringent standard of *Strickland v. Washington*, 466 U.S. 668 (1984). Under either standard, we find that the trial court did not err in finding that defendant's posttrial allegation of ineffective assistance of counsel was meritless.

¶ 10 Initially, we note that decisions regarding which witnesses to call and what evidence to present at trial generally constitute matters of trial strategy that cannot form the basis of an ineffective assistance of counsel claim. *People v. Leeper*, 317 Ill. App. 3d 475, 482 (2000). However, counsel's failure to present available evidence to support a defense constitutes ineffective assistance of counsel. *People v. York*, 312 Ill. App. 3d 434, 437 (2000).

¶ 11 In the case at bar, when defendant indicated that he was dissatisfied with defense counsel's representation, the court questioned defendant, defense counsel Woodbury, and an assistant State's Attorney, in order to determine the basis of defendant's complaint, *i.e.*, the failure of defense counsel to present an alleged Iranian medical report documenting his mental illness resulting from a car accident. The court's inquiry revealed that defendant thwarted Woodbury's efforts by repeatedly refusing to cooperate with psychiatrists attempting to assess his sanity. The record supports this conclusion where, during a pretrial hearing on May 13, 2011, defendant told the court that he had been in an accident, wanted the court to receive the medical records from that accident, and was taking medication. The court asked Woodbury if she was aware of an injury that could have affected his capacity. In response, defense counsel stated:

"I am aware of the medications he is on at the jail. I am aware of the injury that occurred to my client around this incident.

> I am aware through phone conferences and through [defendant] that there was an accident in Iraq [*sic*]. I discussed this with the doctor. I have also discussed it with a relative of his ***. I was going to ask [defendant] if he doesn't remember the name of the hospital if he could at least say the town."

The court indicated that Woodbury discussed the matter with a doctor and was attempting to obtain the medical records, but that she needed defendant's help to complete the investigation.

¶ 12 During subsequent court dates, the record shows that defendant refused to cooperate with several psychiatrists. On June 3, 2011, defense counsel Woodbury advised the court that a doctor had scheduled two days of testing for defendant, but defendant refused to answer any of his questions. Defendant admitted that he refused to cooperate, claiming that he was afraid of the doctor and his attorney. On July 11 and 25, 2011, the trial court discussed a letter it received from forensic psychologist Dr. Cooper indicating that he attempted to interview defendant but his refusal to participate in the examination left him unable to give a clinical opinion on the issue of his fitness to stand trial and sanity at the time of the offense. According to Dr. Cooper, defendant's refusal was volitional and willful. The court next received an August 19, 2011, letter from psychiatrist Dr. Nishad Nadkarni who stated that he could not form an opinion as to defendant's mental fitness because of his refusal to cooperate. Defendant was examined by Dr. Nadkarni a second time and cooperated with the fitness part of the exam, but refused to cooperate when the questions approached the issue of his sanity at the time of the offense. On March 14, 2012, defendant requested that he meet with Dr. Oplsky, but the trial court denied the request because the case had been pending for five years and defendant refused to cooperate each

time a psychiatrist asked him questions related to his sanity at the time of the offense. As pointed out by the State in its brief on appeal, this record begs the question of what more defense counsel could have possibly done to investigate an insanity defense. We thus find that the trial court did not err in denying defendant's *pro se* motions without appointing new counsel to investigate defendant's claims of ineffective assistance.

¶ 13 In reaching this conclusion, we find unpersuasive defendant's argument that counsel showed possible neglect of his case where, at the preliminary *Krankel* hearing, she did not explain any efforts on her part to obtain the pertinent medical records regarding his head injury. Defendant maintains this omission shows that she did not call the number provided to her by defendant to obtain the medical records. Defendant points out that counsel even admitted that her inquiries into his psychiatric condition had nothing to do with his allegation of a head injury, and stresses that a simple phone call could have confirmed or refuted his claim. However, as shown above, the record belies any notion that a "simple telephone call" would have resolved defendant's contention that the car accident that occurred in Iran resulted in his mental illness where he refused to have his sanity evaluated. Defendant seems to believe that if his counsel had obtained records from Iran which confirmed an earlier head injury, that would have sufficed to establish that he was insane at the time of the crime. The defendant is mistaken in this belief. Counsel's efforts to obtain an evaluation by a psychiatrist as part of her trial preparation was appropriate. Yet, defendant would not cooperate and now complains that counsel was ineffective, when it appears that he thwarted her efforts to pursue the insanity defense he now claims was necessary. Furthermore, defense counsel's decision to forgo further investigation concerning defendant's car accident records from Iran in favor of having his mental health

evaluated by a psychiatrist who would be available to testify in his trial was a matter of trial strategy, which cannot form the basis of an ineffective assistance of counsel claim. *Leeper*, 317 Ill. App. 3d at 482.

¶ 14 In the alternative, defendant contends that the State's participation in his efforts to have new counsel appointed, transformed the preliminary *Krankel* inquiry into an adversarial hearing and thus deprived him of his right to conflict-free counsel at a critical stage of the case. Defendant requests that we remand the cause for a new preliminary *Krankel* inquiry because the proceeding conducted by the trial court was legally deficient. The State responds that the assistant State's Attorney's brief participation did not convert the preliminary *Krankel* hearing into an adversarial proceeding, and, even if it did, that error should be held harmless.

¶ 15 After the briefs were filed in this case, we allowed defendant to cite as additional authority the recent supreme court case *People v. Jolly*, 2014 IL 117142. Relying on *Jolly*, defendant maintained that a harmless error analysis would be inappropriate where the State's participation in the proceedings was adversarial. See *Id*. at ¶ 40 (concluding that the circuit court's error in allowing the State to participate at the preliminary *Krankel* inquiry in an adversarial manner was not harmless beyond a reasonable doubt). The State, however, replied that harmless error could still be applied in this case because, unlike *Jolly*, the evidence considered by the trial court at the preliminary *Krankel* hearing was adduced in a largely non-adversarial manner. We see no need to resolve the parties' dispute regarding whether harmless error applies here because we conclude that no error occurred.

¶ 16 During a preliminary *Krankel* hearing, "some interchange between the trial court and trial counsel regarding the facts and circumstances surrounding the allegedly ineffective

representation is permissible and usually necessary in assessing what further action, if any, is warranted on a defendant's claim." *Jolly*, 2014 IL 117142, ¶ 30, quoting *Moore*, 207 Ill. 2d at 78. Thus, the trial court may inquire with trial counsel about the facts and circumstances surrounding the defendant's allegations, and may also briefly discuss the allegations with the defendant. *Jolly*, 2014 IL 117142, ¶ 30.

¶ 17 Here, during the preliminary *Krankel* hearing, after defense counsel and defendant presented their positions concerning defendant's ineffective assistance claim, the court asked the two assistant State's Attorneys if there was anything they "would like to say." One attorney then observed that defendant's motion conveniently indicated that the two witnesses who saw the accident were his mother, who lives out of the country, and his wife, who was murdered, and further pointed out that despite defendant's contentions to the contrary, he was not taking psychotropic medication. The State reiterated defense counsel's representation, which the record supported, that defendant frustrated every attempt to have a doctor evaluate his mental condition, and indicated that defendant could have testified in his own defense but refused. While it appears that the assistant State's Attorney was somewhat zealous in responding to the trial court's question, the response did not provide any new or particularly adversarial information which was otherwise unknown to the court.

¶ 18 Based on the hearing as a whole, we find that the State's participation was minimal, and thus no error occurred. See *Jolly*, 2014 IL 117142, ¶ 38 (stating that because a defendant is not appointed new counsel at a preliminary *Krankel* hearing, it is critical that the State's participation at the proceeding, if any, be *de minimis*, and should never be permitted to take an adversarial role against a *pro se* defendant).

¶ 19 In reaching this conclusion, we find *Jolly*, 2014 IL 117142, and *People v. Fields*, 2013 IL App (2d) 120945, relied on by defendant, distinguishable from the case at bar. In *Jolly*, 2014 IL 117142, ¶ 1, the parties agreed that the trial court improperly allowed the State's adversarial participation at a preliminary *Krankel* inquiry. Specifically, the trial court invited the State to rebut the defendant's claims, and permitted the State to call the defendant's trial attorney as a witness and question him at length on the defendant's claims of ineffective assistance. *Id*., ¶¶ 19-20. The trial court then questioned the defendant's attorney, after which the State and the defendant were permitted to present argument about whether a full evidentiary hearing should be held. *Id*. at ¶¶ 20-21. The supreme court found that the *Krankel* hearing in *Jolly* was improperly adversarial, and remanded the matter for a new preliminary *Krankel* inquiry without the State's adversarial participation. *Id.*, ¶¶ 40, 46. In *Fields*, the circuit court at the preliminary *Krankel* hearing permitted the State to argue against, or otherwise rebut, each of the defendant's claims of ineffective assistance of counsel. The State also made argument in support of defense counsel's explanations of his actions at the defendant's trial. *Fields*, 2013 IL App (2d) 120945, ¶¶ 22, 41. After finding that the trial court allowed the State to be an active participant in the preliminary *Krankel* hearing, the reviewing court remanded the matter to the circuit court for a new preliminary inquiry before a different judge without the State's adversarial participation. *Id*., ¶ 42. In contrast to *Jolly* and *Fields*, the State in this case made a few summary comments, never called any witnesses to testify against defendant, and did not question defendant or defense counsel.

¶ 20 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 21 Affirmed.