

No. 1-14-2600

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

| | | |
|--------------------------------------|---|---------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from the |
| |) | Circuit Court of |
| Plaintiff-Appellee, |) | Cook County. |
| |) | |
| v. |) | No. 10 CR 9643 (02) |
| |) | |
| MARCUS WESLEY, |) | Honorable |
| |) | Evelyn B. Clay, |
| Defendant-Appellant. |) | Judge, Presiding. |

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Lampkin and Rochford concurred in the judgment.

ORDER

¶ 1 *Held:* The judgment of the circuit court is affirmed where the defendant's *pro se* ineffective-assistance-of-counsel claims failed to show possible neglect by counsel, and where the circuit court's preliminary *Krankel* inquiry was nonadversarial.

¶ 2 The defendant, Marcus Wesley, appeals from an order of the circuit court denying his *pro se* post-trial motion, which alleged ineffective assistance of counsel. He argues that the court erred in (1) determining that his post-trial motion failed to demonstrate "possible neglect" of his case by his court-appointed trial attorney; and (2) conducting an adversarial or evidentiary hearing on the motion without first appointing new counsel to assist in the presentation of his

claims contrary to the holding in *People v. Krankel*, 102 Ill. 2d 181 (1984). For the reasons that follow, we affirm.

¶ 3 The defendant was arrested on April 30, 2010, and charged by indictment with one count of being an armed habitual criminal under section 24-1.7(a) of the Criminal Code of 1961 (Code) (720 ILCS 5/24-1.7(a) (West 2010)), two counts of aggravated unlawful use of a weapon under section 24-1.6(a)(1) of the Code (720 ILCS 5/24-1.6(a)(1) (West 2010)), and six counts of unlawful use of a weapon by a felon under section 24-1.1(a) of the Code (720 ILCS 5/24-1.1(a) (West 2010)).

¶ 4 Prior to trial, the defendant, through counsel, filed a motion to quash arrest and suppress evidence, as well as an answer to discovery. Thereafter, the defendant, again through counsel, filed an amended answer to discovery, which was substantially similar to the original answer except that it added several people who may be called as defense witnesses and stated that the "defense has photographs of the area of Kenneth and Lexington, Chicago, Illinois."

¶ 5 The circuit court conducted a hearing on the defendant's motion to quash arrest and suppress evidence. Chicago police officers Patrick Kelly and Joshua Zapata were called as witnesses, and gave their accounts of the events leading up to the defendant's arrest on April 30, 2010. After concluding that the officers' testimony was credible and that they had probable cause to arrest the defendant, the court denied the defendant's motion.

¶ 6 The defendant waived his right to trial by jury and he and his co-defendant, David Van, who is not a party to this appeal, were tried jointly in a bench trial.

¶ 7 The evidence at trial established that Chicago police officers Kelly, Zapata, and Jimmy Woods were patrolling in an unmarked patrol car in the early morning hours of April 30, 2010, when they received a radio call reporting that a black male wearing a green shirt over a red shirt

was in possession of a gun near Lexington and Kenneth. The officers responded to the call, and proceeded to drive westbound on Lexington towards Kenneth. When they arrived at the intersection of Lexington and Kenneth, Officer Kelly observed a man who matched the radio-call description, later identified as the codefendant, Van, standing on the northeast corner of Lexington and Kenneth. Officer Kelly testified that he noticed the defendant standing directly next to Van. He was able to identify the defendant because he had previous "run-ins" with him. Officer Zapata testified that there were not "more than ten" people gathered on the corner. According to Officer Zapata, the officers curbed their vehicle in order to interview Van. He stated that, as soon as he and Officer Woods began to exit the patrol car, Van reached into his waistband, dropped a pistol to the ground, and started running. All three of the officers testified that the defendant also began running. Officers Kelly and Zapata stated that, aside from the defendant and Van, no one else on the corner began running when they approached. Each of the officers testified that the defendant and Van ran eastbound on Lexington, and then northbound in an alley between Kenneth and Kostner. Officer Woods chased the defendant and Van while Officer Zapata recovered the gun that Van had dropped. Officer Zapata testified that, after he retrieved the gun and moved to the mouth of the alley, he saw the defendant, Van, and Officer Woods running north. He stated that he saw "a shiny metal object in [the defendant's] right hand."

¶ 8 Officer Woods continued to follow the defendant and Van as they turned into a vacant lot. Officer Woods noticed that, as the defendant turned into the lot, he had a silver pistol in his right hand. The defendant and Van "cut back west," and Officer Zapata lost sight of them after they came through the vacant lot. Officer Woods testified that the defendant still had the gun in

his hand when he jumped over a porch railing of a building on the north side of the vacant lot.

Officer Woods described what happened next:

"[Van] was not able to make it over the porch, so I placed him in custody and I put him against a fence which blocked off the vacant lot so he couldn't get out. As I'm placing him into custody I watched [the defendant] go northbound on Kenneth. I observed him drop the gun to the ground that he was carrying, and he continued northbound. At that point I kept my eye on the gun until another officer was able to recover it.

* * *

Q. You stated that you were able to watch Defendant Wesley while you had Defendant Van apprehended. How were you able to do that?

A. Well, I had him against the fence that goes along the sidewalk of Kenneth. So as I have him against the fence, I could look over the fence and I could see down Kenneth northbound.

Q. Can you describe the fence that you were looking through?

A. It was a chain link fence."

According to Officer Woods, the defendant was two or three houses away when he saw the defendant drop his gun from his right hand onto the sidewalk on Kenneth. As the defendant continued making his way northbound, Officer Woods lost sight of him. However, he observed Officer Kelly walk southbound on Kenneth and recover the gun which the defendant had dropped.

¶ 9 According to Officer Kelly, he was driving the police vehicle while Officers Woods and Zapata chased the defendant and Van. Consequently, he lost sight of them while they were in

the alley. However, as he drove northbound on Kenneth, parallel to the alley, he listened on his radio to Officers Woods and Zapata describing their locations. Officer Kelly testified that, eventually, he saw the defendant run onto Kenneth "at approximately 721 on the sidewalk." At approximately 709 South Kenneth, he saw a gun fall from the defendant's right side and onto the sidewalk.

¶ 10 After Officer Kelly observed the defendant drop the gun, he continued to follow the defendant in the police vehicle until "a garbage can was thrown in front of [his] car." The prosecutor asked Officer Kelly where the garbage can, which was thrown at his vehicle, came from. Officer Kelly responded that "[t]here's an alley north of Lexington alongside the expressway, the Eisenhower expressway. It's like a little alley right there and it was right there." Shortly after the vehicle he was driving was struck by the garbage can, Officer Kelly got out of the vehicle and recovered the gun which the defendant had dropped.

¶ 11 Officer Kelly testified that, while he was recovering the gun, Officer Perez, who was driving in another unmarked squad car, continued to pursue the defendant eastbound through another alley. According to Officer Zapata, the defendant was eventually apprehended at 733 South Kostner. Officer Zapata testified that, in total, the chase "took less than probably three or four minutes."

¶ 12 The officers transported the defendant to the police station, where Officer Kelly identified him as the man who was running and dropped a gun. Officer Andrew Camarillo testified that, at approximately 12:45 a.m., he gave the defendant his *Miranda* warnings at the station, and that the defendant agreed to speak with him and Officer Perez. During the interrogation, the defendant allegedly told Officer Camarillo that "ever since Little Tony got shot, the Meltons have been shooting at everybody, that's why we have our guns on us." On

cross-examination, Officer Camarillo admitted that the defendant never said that he had a gun and that he dropped it on Kenneth.

¶ 13 The State presented certified copies of the defendant's 2006 conviction for delivery of a controlled substance, his 2002 conviction for aggravated unlawful use of a weapon, and his 1998 conviction for aggravated discharge of a firearm. Thereafter, the State rested and the defendant moved for a directed finding which was denied.

¶ 14 The defendant called his niece, Marquesa Smith, and her boyfriend, Eric Ivy, to testify. Both stated that they were with the defendant on April 30, 2010, and did not see him in possession of a gun. Smith and Ivy also testified that there were at least 30 people present at Lexington and Kenneth, and that a number of those people, including Ivy, ran when Officers Woods and Zapata approached them. According to Ivy, "a good ten people ran," and he and approximately four to five other individuals ran north in the alley next to Kenneth. According to Ivy, the defendant was running in front of him for a time; then, the defendant continued north and veered west.

¶ 15 Following the testimony of Smith and Ivy, the defendant rested without testifying.

¶ 16 After entertaining argument, the circuit court found the defendant guilty of one count of being an armed habitual criminal, one count of aggravated unlawful use of a weapon, and one count of unlawful use of a weapon by a felon.

¶ 17 On February 17, 2012, the defendant filed a *pro se* post-trial motion for a new trial, alleging a number of instances of ineffective assistance of his trial counsel. On February 24, 2012, the defendant's privately-retained attorney also filed a post-trial motion on his behalf, raising other claims. The circuit court denied the motion prepared by counsel after a hearing, but did not address the merits of the defendant's *pro se* motion. Thereafter, the court found that the

defendant's convictions for aggravated unlawful use of a weapon and unlawful use of a weapon by a felon merged into his conviction for being an armed habitual criminal and sentenced the defendant to six years' imprisonment.

¶ 18 The defendant appealed, arguing, *inter alia*, that the circuit court erred by failing to inquire into his *pro se* claim of ineffective assistance of trial counsel. We agreed, holding that the court erred in not considering the *pro se* motion, and remanded the case "for the limited purpose of allowing the trial court to conduct an adequate inquiry" into the defendant's *pro se* post-trial motion as required under *Krankel*. *People v. Wesley*, 2013 IL App (1st) 122206-U, ¶ 16 (unpublished order under Supreme Court Rule 23).

¶ 19 On remand, the circuit court held a hearing on the defendant's *pro se* claims of ineffective assistance of trial counsel. The defendant's trial counsel was present during that hearing. During the course of that hearing the defendant asserted that his trial attorney was ineffective for, among other grounds, failing to: (1) provide adequate consultation by meeting with him only five or six times—with each meeting spanning between two to three minutes—over the course of 18 months; (2) investigate, interview, and subpoena additional witnesses who would have established that he did not possess a weapon; (3) offer into evidence an aerial photo of the neighborhood where the incident took place in order to provide a general view of the vicinity and to impeach the officers by showing that he pursued a different route when fleeing than they claimed; (4) investigate the crime scene; (5) offer into evidence photos depicting that garbage cans were not present in the alley where Officer Kelly alleged that he threw a garbage can at the vehicle; (6) present a query log and Office of Emergency Management and Communications (OEMC) records to show that he was in the hospital when he allegedly made incriminating statements to Officer Camarillo; (7) move to suppress the incriminating statement made to

Officer Camarillo because he had not been *Mirandized*; (8) file a pre-trial motion to dismiss his grand jury indictment as it was based upon the perjured testimony of the police officers; (9) act professionally and ethically by providing the State with "favorable defense photos," and then neglected to submit these photos into evidence;¹ (10) point out important discrepancies in police testimony, for example, Officers Woods and Kelly's testimony, which he claimed differed in regard to whether he held a gun in his hand while he was running through the vacant lot and onto Kenneth; and (11) obtain phone records to establish that the police conspired against him by calling his brother and telling him to bring three guns to the police station.

¶ 20 Throughout the course of his argument, the defendant presented, and the court viewed, the aerial photo, photos of the alley and fence, a letter from St. Anthony Hospital, his medical records, and portions of the trial transcript containing the testimony of Officers Kelly, Camarillo, and Woods.

¶ 21 The court heard each of the defendant's arguments, and then gave the defendant's trial counsel an opportunity to respond. Counsel claimed that the defendant's allegation that he failed to provide adequate consultation was "totally false." While he admitted that he did not visit the defendant in jail, he stated that he spent "probably" 20 minutes with the defendant each time that they met in court, and that they "talked in length about [the defendant's] strategy." Additionally, counsel explained that he visited the scene in question several times because he had other clients who lived in that neighborhood. He stated that, during one of his visits, he observed garbage cans with wheels in the alley. He also stated that some of the photos that he did not use as evidence depicted those garbage cans.

¹ According to the defendant, these photos would have portrayed that it was "impossible" for Officer Woods to look "over" the fence and see him drop his gun.

¶ 22 Counsel stated that he did not introduce photos of the fence because they corroborated the testimony of Officer Woods. Specifically, the fence was chain link and had a gap "where somebody could have slithered through." Counsel understood Woods' testimony to mean that Woods was "not *** looking over the top of the chain link fence;" rather, he was "looking through the opening while he [was] also holding Van." Counsel stated that he and the defendant discussed the photos exhibiting the gap in the fence "in length." According to counsel, the aerial photo did not corroborate the defendant's case and was not relevant because he "thought everybody understood there was [*sic*] vacant lots on that block through which [the defendant] ran, after which police followed him." He provided these photos to the State because, at some point, he was considering using them as exhibits.

¶ 23 Additionally, counsel explained that he did not believe that the defendant's statement regarding the Meltons was incriminating because the defendant did not explicitly admit to possessing a firearm; instead, "it was background information that could have been in reference to why guns could have been on the corner and why David Van might have had a gun." Because counsel did not believe that the statement was a confession, counsel "didn't see the need to look and see [whether the defendant] was at the hospital or *** the police station" when he made the statement. Counsel also said that he did not move to admit the query logs and OEMC records because they showed "the obvious;" namely, that the defendant injured his hand by jumping over a fence.

¶ 24 Lastly, regarding the allegation that he did not call necessary witnesses, counsel stated, "[t]he two witnesses [that the defendant] told me about were called and the Appellate Court opinion mentioned that. They both hit the witness stand. *** I don't know of any other witnesses that were available. I don't have the names of anybody else." Counsel explained that

he called a witness—presumably Ivy—to establish that the defendant was farther north than the police testified.

¶ 25 After hearing counsel's explanations, the court permitted the defendant to reply. The defendant asserted that trial counsel was habitually late for court and did not meet with him while in court. He reiterated his claims that the photos which were never offered into evidence show that there were no garbage cans in the alley as Officer Kelly alleged and that it was impossible for anyone to observe him drop a gun on Kenneth due to a bush obstructing the view to the north.

¶ 26 The court determined that the defendant's claims lacked merit, and that his trial counsel was not ineffective. As to the allegation that counsel failed to provide adequate consultation, the court stated, "[t]here is no set amount of time that a defense attorney has to spend [communicating with his client]." The court noted that, on the date that the State completed its discovery, counsel filed the motion to quash arrest and suppress evidence, and shortly after filed an amended motion. The court held that the filing of the amended motion conveyed that counsel and the defendant conversed between the time of the original motion and the amendment.

¶ 27 The court also found that the photos of the fence would not have supported the defendant case because the fence had an opening, and "[y]ou can see through a chain link fence." Additionally, the court held that the aerial photo "merely show[s] *** the grid. *** It doesn't prove any type of trial allegation, or it doesn't prove or corroborate testimony of anyone." The court explained that counsel's decision to exclude the photos "does not show dereliction of his duties. *** It just shows that he assessed that it wasn't helpful." Furthermore, the court said that counsel was correct in tendering the photos to the State because he was obligated to do so for the discovery process. Near the conclusion of the proceeding, the court stated:

"You apparently are not happy with the result here, Mr. Wesley, but the court does not find any dereliction of your case by [counsel]. It's a matter of his decisions in terms of motions and evidence. It's trial strategy.

* * *

He was looking out for your rights, whether or not it turned out in your favor, but he was looking out and protecting your rights. ***

* * *

Now that we have had the *Krankel* hearing, the court finds there is no need to go forward with a proof of the serious, there are no serious allegations that lack going forward to a hearing actually [*sic*]."

¶ 28 After concluding that the defendant had failed to demonstrate that his trial counsel was ineffective, the circuit court denied the defendant's *pro se* post-trial motion without appointing new counsel to assist the defendant in presenting his claims. This appeal followed.

¶ 29 The defendant first argues that the circuit court erred in concluding that he failed to establish counsel's possible neglect, so as to trigger his right to appointment of new counsel under *Krankel*. Specifically, he argues that counsel was neglectful in failing to properly "investigate and impeach the officers" through the introduction of various photographs of the scene, which, according to the defendant, would have contradicted the officers' testimony that he was in possession of a weapon, and that he threw a garbage can at the police vehicle. Additionally, the defendant maintains that his trial counsel failed to investigate and present evidence proving that his statement to Officer Camarillo was involuntary because, at the time he gave it, he was in the hospital for a hand-injury.

¶ 30 As a preliminary matter, we note the State's argument that, on appeal, the defendant has asserted only two of the several bases of ineffective assistance of counsel alleged in his post-trial motion as a basis for finding possible neglect on the part of trial counsel. Accordingly, the State contends that the defendant has forfeited any claim of error premised upon any ground which was not argued as a basis for reversal in his opening brief. We agree with the State.

¶ 31 Under Illinois Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013), an appellant's brief must include "the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on." Rule 341(h)(7) also states, "[p]oints not argued are waived and shall not be raised in the reply brief." Ill. S. Ct. 341(h)(7) (eff. Feb. 6, 2013). In his opening brief, the defendant does not make any reference to his prior allegations that counsel failed to provide adequate consultation; investigate, interview and subpoena additional witnesses; investigate the crime scene; file a pre-trial motion to dismiss his grand jury indictment; act professionally and ethically by providing the State with "favorable defense photos;" and point out important discrepancies in police testimony. Therefore, pursuant to Rule 341(h)(7), we find that defendant has forfeited any claim of error based upon these allegations. *Vancura v. Katris*, 238 Ill. 2d 352, 369 (2010); *In re G.W.*, 357 Ill. App. 3d 1058, 1061 (2005). As a consequence, we need only address whether the defendant's assertions that his trial counsel was ineffective by failing to "investigate and impeach the officers" through the introduction of various photographs of the scene, and by failing to investigate and present evidence proving that the defendant's statement to Officer Camarillo was involuntary demonstrate counsel's possible neglect sufficient to require the appointment of new counsel to assist him in the presentment of his claims.

¶ 32 Under *Krankel*, new counsel is not automatically appointed for a defendant who raises a *pro se* post-trial motion claiming ineffective assistance of counsel. *People v. Jolly*, 2014 IL 117142, ¶ 29. After the circuit court considers the factual basis of the defendant's claim and decides that it "lacks merit or pertains only to matters of trial strategy," the court may decline to appoint new counsel and deny the *pro se* motion. *Id.* (quoting *People v. Moore*, 207 Ill. 2d 68, 78 (2003)). Matters of trial strategy are generally reserved to counsel's discretion. *People v. Chapman*, 194 Ill. 2d 186, 231 (2000). The court, however, should appoint new counsel if the defendant's claim establishes counsel's "possible neglect of the case." *Jolly*, 2014 IL 117142, ¶ 29 (quoting *Moore*, 207 Ill. 2d at 78).

¶ 33 If the circuit court makes a determination on the merits of the defendant's ineffective assistance of counsel claim, a reviewing court's function is to determine whether the circuit court's decision was manifestly erroneous. *People v. McLaurin*, 2012 IL App (1st) 102943, ¶ 41; see also *People v. Walker*, 2011 IL App (1st) 072889-B, ¶ 33. Manifest error is error that is clearly plain, evident, and indisputable. *People v. Tolefree*, 2011 IL App (1st) 100689, ¶ 25. A determination is on the merits if the court considers the defendant's allegations, and conducts an adequate inquiry into them. *Walker*, 2011 IL App (1st) 072889-B, ¶ 33; see also *People v. Johnson*, 159 Ill. 2d 97, 124-25 (1994). However, we use a *de novo* standard of review to assess the legal question of whether a circuit court erred in the manner in which it conducted a preliminary inquiry pursuant under *Krankel*. *Jolly*, 2014 IL 117142, ¶ 28.

¶ 34 In this case, the circuit court's determination that the defendant was not entitled to the appointment of counsel to assist him in presenting his claims of ineffective assistance of trial counsel was on the merits, following an adequate inquiry into the basis for his claims. *Walker*, 2011 IL App (1st) 072889-B, ¶ 33; see also *Johnson*, 159 Ill. 2d at 125. Before making its

decision, the court heard the defendant's argument, counsel's response, and the defendant's reply. Therefore, our standard of review is whether the court's determination that the defendant failed to demonstrate counsel's possible neglect is manifestly erroneous. *McLaurin*, 2012 IL App (1st) 102943, ¶ 41; see also *Walker*, 2011 IL App (1st) 072889-B, ¶ 33.

¶ 35 The defendant's first contention, that counsel should have admitted photos of the scene into evidence for the purpose of impeaching the officers' testimony, lacks merit because it pertains to a matter of trial strategy, which is reserved to counsel's discretion. *Chapman*, 194 Ill. 2d at 231. During the hearing, defense counsel explained that he reviewed the photos, and decided not to use them because he believed that they corroborated the officer's testimony. It is clear that counsel used his discretion, and made a strategic decision. The circuit court also examined the photos, and did not think that they would have been helpful to the defendant. Therefore, we do not find that the court erred in holding that the defendant failed to establish counsel's possible neglect by his failure to use these photos as evidence.

¶ 36 We do not find that counsel possibly neglected the defendant's case by his alleged failure to investigate and present evidence that would have shown that the defendant was in the hospital at the time that he made his statement to Officer Camarillo. This, too, was a matter of trial strategy. The defendant fails to assert why his presence at the hospital would render his statement involuntary. Counsel stated that he did not look into whether the defendant was at the hospital at the time that he made the statement to Officer Camarillo because he did not believe that the statement was incriminating. We agree with the defendant that this explanation contradicts counsel's attempt to suppress the statement before trial. However, the circuit court denied the motion to quash the defendant's arrest and suppress the statement. In the face of this ruling, it appears that arguing, as trial counsel did, that the statement was not incriminating was a

reasonable trial strategy. Additionally, counsel explained that he did not submit the documents relating to the defendant's hospital visit because they were not helpful in that they showed that the defendant injured his hand by jumping over a fence as he attempted to evade the officers. Again, counsel used his discretion, and decided to exclude evidence that would not have benefited the defendant's case.

¶ 37 Because the defendant's claim did not establish counsel's possible neglect, the circuit court was justified in declining to appoint new counsel for the defendant. *Jolly*, 2014 IL 117142, ¶ 29.

¶ 38 Next, the defendant argues that the circuit court failed to comply with the holding in *Krankel* by conducting "what amounted to an evidentiary hearing." We review this issue *de novo* (*Id.* ¶ 28), and conclude that the proceeding addressing counsel's alleged ineffectiveness was an appropriate preliminary *Krankel* inquiry.

¶ 39 Preliminary *Krankel* inquiries "should operate as *** neutral and nonadversarial" proceedings. *Id.* ¶ 38. However, in *Moore*, 207 Ill. 2d at 78, our supreme court held that:

"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. Trial counsel may simply answer questions and explain the facts and circumstances surrounding the defendant's allegations."

Further, if, as in this case, the judge presiding over the *Krankel* hearing also presided at trial, she can use her knowledge of defense counsel's performance to decide whether the defendant's claim is sufficient to require the appointment of new counsel. *Id.* at 79.

¶ 40 The record reflects that the circuit court listened to the defendant's arguments on each of

his allegations, and engaged in some interchange with trial counsel regarding the facts and circumstances surrounding the defendant's claims. Counsel merely answered questions and explained the facts as he interpreted them at the time of the trial.

¶ 41 A preliminary *Krankel* proceeding may become adversarial if the State's participation "is anything more than *de minimis* *** with both the State and trial counsel opposing the defendant." *People v. Fields*, 2013 IL App (2d) 120945, ¶ 40. However, in this case, the State did not participate in the proceeding at any time. Nothing about this preliminary inquiry leads us to believe that it was adversarial in nature.

¶ 42 Accordingly, we affirm the judgment of the circuit court of Cook County.

¶ 43 Affirmed.