2015 IL App (3d) 130086-U

Order filed March 25, 2015

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2015

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 13th Judicial Circuit,
	)	La Salle County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal Nos. 3-13-0086 and 3-13-0578
v.	)	Circuit No. 11-CF-358
	)	
MORGAN SIMCOX,	)	Honorable
	)	H. Chris Ryan, Jr.,
Defendant-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE McDADE delivered the judgment of the court.
Justices Lytton and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Trial court's ruling that defendant had not received ineffective assistance of counsel was not manifestly erroneous. (2) Trial court did not conduct an improperly adversarial *Krankel* hearing. (3) Defendant's right to be free from double jeopardy was not violated.

¶ 2 Following a stipulated bench trial, defendant, Morgan Simcox, was convicted of unlawful possession of cannabis with intent to deliver (720 ILCS 550/5(g) (West 2010)). After sentencing, substitute defense counsel filed a motion for a new trial, alleging that defendant's original attorney had been ineffective. The trial court denied the motion. Defendant now

appeals, arguing that the court erred in finding that original counsel was not ineffective. Defendant also argues that he was subjected to double jeopardy. We affirm.

¶ 3 FACTS

¶ 4 Defendant was charged by indictment with unlawful possession of cannabis with intent to deliver. 720 ILCS 550/5(g) (West 2010). Defendant moved to suppress certain evidence and quash his arrest, arguing that Illinois State Police officers did not have probable cause to stop or to search his vehicle. Defendant also contended that the arresting officer engaged in behavior beyond the scope of the initial stop. After a hearing, the trial court denied the motion.

¶ 5 The matter proceeded to a stipulated bench trial. Both parties answered ready and waived opening statements. The State indicated that it would proceed by reading a stipulation into the record. As the State read the first stipulation, that of Illinois State Police trooper Brian Lewis, the court interrupted, calling the parties to the bench for a discussion held off the record. Following that discussion, and once again on the record, defense counsel, Louis Bertrand, asked the court if it stood adjourned "for a few minutes[.]" The court responded affirmatively.

¶ 6 When the court reconvened, the trial court explained the interruption:

> "Counsel, I had you approach the bench before because it came to my attention that this is potentially what we call a stipulated bench trial. And that's the way the parties wish to proceed, by stipulation of the evidence against the defendant in this particular matter.
>
> * * *
>
> *** In light of that, pursuant to Supreme Court Rule 402, I have to do some admonitions to [defendant]."

The court then admonished defendant, informing him of, *inter alia*, the charges against him, the

applicable sentencing range, and his trial rights. The court also explained that in proceeding by way of stipulated bench trial, defendant agreed to waive those rights. Defendant indicated that he understood the rights he was waiving and that he wished to proceed on the matter. The court advised the State that it could continue, and the State began reciting the stipulated testimony of Lewis from the beginning.

¶ 7 Following the recitation of a number of stipulations, the court found defendant guilty of unlawful possession of cannabis with intent to deliver. The matter proceeded to sentencing on a later date. Immediately prior to sentencing, the court asked defense counsel if he wished to present any motions. The following colloquy ensued:

> "MR. BERTRAND: Your honor, the only oral motion I have to present is a posttrial motion asking the court to reconsider its ruling on the motion to suppress.
>
> THE COURT: State, any response to that particular matter?
>
> [THE STATE]: Your honor, the court ruled on the motion to suppress. We already proceeded to bench trial. We would ask that all your prior rulings stand."

The court denied defendant's motion to reconsider. After hearing evidence and arguments in favor of mitigation and aggravation, the court sentenced defendant to a term of seven years' imprisonment.

¶ 8 On February 1, 2013, Elliot Price filed an appearance as additional counsel for defendant and filed a motion to reconsider defendant's sentence. On March 21, 2013, Price—on behalf of defendant—filed a motion for new trial *nunc pro tunc* on the grounds that Bertrand had rendered ineffective assistance of counsel. Specifically, defendant asserted that Bertrand had failed to file

a written motion for new trial, thereby waiving defendant's right to appeal the trial court's ruling on his motion to suppress. In a subsequent motion for a new trial, defendant added the argument that he had been subjected to double jeopardy when the trial court interrupted his stipulated bench trial to deliver admonishments. Defendant next filed a supplemental motion for new trial in which he argued that Bertrand had failed to convey to him a plea offer made by the State. In an affidavit attached to the supplemental motion, defendant averred that he never received a plea offer.

¶ 9 Hearings on defendant's various motions commenced on July 11, 2013. Following Price's opening statement, the court indicated that it would proceed first with defendant's claims of ineffective assistance of counsel. The court stated "Where he's going with this is it's called a *Krankle* [*sic*] hearing. I have to make a determination as to whether or not there's ineffective assistance and if there's none based upon the evidence presented." The State called Bertrand as its only witness. Bertrand testified that he received an offer from the State of seven years' imprisonment in exchange for a Class X felony plea. He conveyed this offer to defendant. Bertrand described defendant's response to the offer: "He was not really interested *** in any Department of Corrections resolution of his case on a Class X felony."

¶ 10 Following arguments, the court found that Bertrand had not rendered ineffective assistance. Specifically, the court found that Bertrand had, in fact, conveyed to defendant the State's plea offer. In addition, the court found that Bertrand's failure to file a motion for new trial did not result in a waiver of defendant's right to appeal the suppression ruling, reasoning that the trial court was still vested with jurisdiction as a result of Price's motion for reconsideration of the sentence. The court also rejected defendant's double jeopardy claim, pointing out that it had not left the bench during defendant's trial. Though the court agreed that it was an error for the trial to

commence before it had delivered admonishments, it found that the error "was found and caught by this Court in a reasonable amount of time." This appeal follows.

¶ 11 ANALYSIS

¶ 12 On appeal, defendant renews many of the arguments set forth in his various motions for new trial. He contends that Bertrand rendered ineffective assistance of counsel, owing to both his failure to preserve defendant's appeal rights via a motion for new trial and his failure to convey the State's plea offer. Defendant also again argues that he was subjected to double jeopardy when the trial court interrupted his stipulated bench trial to deliver admonishments. Additionally, defendant now contends that the trial court committed error by holding an improperly adversarial *Krankel* hearing. We find defendant's arguments to be without merit. Accordingly, we affirm defendant's conviction.

¶ 13 I. Ineffective Assistance of Counsel

¶ 14 Where the trial court has rendered a decision on the merits of a defendant's ineffective assistance of counsel claim, a reviewing court will reverse that decision only if it was manifestly erroneous. *People v. Tolefree*, 2011 IL App (1st) 100689, ¶ 25; see also *People v. Morgan*, 187 Ill. 2d 500, 528 (1999) ("Determinations made by the trial court subsequent to an evidentiary hearing will not be disturbed unless manifestly erroneous."). "Manifest error is ' "clearly evident, plain, and indisputable." ' [Citation.] Thus, a decision is manifestly erroneous when the opposite conclusion is clearly evident." *People v. Coleman*, 2013 IL 113307, ¶ 98 (quoting *People v. Morgan*, 212 Ill. 2d 148, 155 (2004), quoting *People v. Johnson*, 206 Ill. 2d 348, 360 (2002)). Because the trial court here ruled on the merits of defendant's ineffectiveness claims, we apply the manifest error standard.

¶ 15 To succeed upon a claim that counsel provided ineffective assistance, a defendant must

show that: (1) counsel's performance fell below an objective standard of reasonableness, and (2) but for counsel's deficient performance, there is a reasonable probability that the result of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984). To establish deficient performance, a defendant must overcome a strong presumption that counsel's actions were the product of sound trial strategy. *People v. Manning*, 241 Ill. 2d 319 (2011).

¶ 16 A. Counsel's Failure to File a Written Posttrial Motion

¶ 17 In order to preserve an issue for appeal, a defendant must object at trial and raise the issue in a posttrial motion.[1] *People v. Thompson*, 238 Ill. 2d 598, 611 (2010). While the rule generally requires that the posttrial motion be made in writing, our supreme court has explained that an oral motion may also be satisfactory. *People v. Pearson*, 88 Ill. 2d 210, 217 (1981). "[A] general oral motion to which the State does not object will preserve for review all errors which appear properly preserved in the record." *Id.* "The basis of the exception for oral motions lies in the concept of waiver; the State is found to have waived the requirement that the post-trial motion be in writing if it does not object to an oral request for a new trial." *People v. Todd*, 249 Ill. App. 3d 835, 840 (1993).

¶ 18 In the present case, Bertrand, prior to sentencing, moved for reconsideration of the court's decision to deny the earlier motion to suppress. Though this motion was made orally, the State did not object, instead merely urging the court to deny the motion. As the State waived the writing requirement by assenting to the motion, the motion served to preserve defendant's ability to challenge the suppression ruling on appeal.

¶ 19 The trial court denied defendant's ineffectiveness claims on the grounds that the court

[1] Defendant does not refute that the first of these requirements was satisfied by the motion to suppress.

retained jurisdiction, and no appealable issues had yet been forfeited. We find that Bertrand's oral motion preserved defendant's ability to challenge the court's suppression ruling on appeal. See *In re Detention of Stanbridge*, 2012 IL 112337, ¶ 74 (reviewing court may affirm the decision of the trial court on any grounds supported by the record). Accordingly, defendant's argument that Bertrand's performance was deficient for his failure to preserve that issue must fail.

¶ 20 B. Conveyance of State's Plea Offer

¶ 21 The failure of defense counsel to convey a plea offer made by the State to defendant may constitute ineffective assistance of counsel. See, *e.g*., *People v. Curry*, 178 Ill. 2d 509, 517 (1997). Defendant swore in his affidavit that Bertrand failed to communicate to him the State's offer of seven years' imprisonment. Bertrand, however, testified that he did convey the offer to defendant.

¶ 22 A trial court's findings of fact are entitled to great deference because that court has the opportunity to observe the demeanor and testimony of the witnesses firsthand and, thus, is in a better position than the reviewing court to judge the witnesses' credibility. *People v. Shepherd*, 2015 IL App (3d) 140192, ¶ 28. Such findings of fact will be reversed only where they are against the manifest weight of the evidence. *Id*. Where evidence is merely conflicting, it is not the position of a reviewing court to substitute its judgment for that of the trial court. See *People v. Brown*, 2013 IL 114196, ¶ 48.

¶ 23 Here, the trial court found Bertrand's testimony credible, finding that Bertrand did convey the State's offer to defendant. Nothing on the record—aside from defendant's own accusation that he did not receive the offer—would indicate that this factual finding was counter to the manifest weight of the evidence. As we defer to the trial court's finding of fact, it follows that

the court's ruling that Bertrand was not ineffective for failing to communicate the State's plea offer was not manifestly erroneous.

¶ 24 C. Ineffectiveness Hearing

¶ 25 In addition to challenging the trial court's ruling on his ineffectiveness claims, defendant also takes exception to the process by which the court reached its decision. Specifically, defendant contends that the hearing was improperly adversarial under *People v. Krankel*, 102 Ill. 2d 181 (1984). The manner in which a trial court conducts *Krankel* proceedings is subject to *de novo* review. See *People v. Moore*, 207 Ill. 2d 68, 77-79 (2003).

¶ 26 Under *Krankel*, 102 Ill. 2d at 189, a defendant raising *pro se* posttrial claims of ineffective assistance of counsel is entitled to have those claims heard by the trial court. The process due to defendant making such claims is broken down into two distinct steps. First, the trial court must examine the factual bases of the defendant's claims. *Moore*, 207 Ill. 2d at 78. If the allegations show "possible neglect of the case," new counsel is appointed to represent the defendant in a full hearing on his *pro se* claims. *Id*.

¶ 27 The first stage of analysis, under which the trial court examines the factual bases of the defendant's claims, is commonly known as a *Krankel* inquiry. *E.g.*, *People v. Taylor*, 237 Ill. 2d 68, 76 (2010). It is well-established that the first-stage inquiry is not an adversarial process. *E.g.*, *People v. Jolly*, 2013 IL App (4th) 120981. "[N]o case law suggests that the State should be an active participant during the preliminary inquiry. In fact, typically, virtually no opportunity for State participation is offered during the preliminary inquiry." *People v. Fields*, 2013 IL App (2d) 120945, ¶ 40 (listing cases). Anything beyond *de minimis* participation by the State at the inquiry stage creates a risk that it will become an adversarial proceeding. *Id.*; see also *Jolly*, 2013 IL App (4th) 120981 (finding error where State was allowed to question defense

counsel).

¶ 28 The hearing on defendant's claims of ineffective assistance of counsel in the present matter was clearly adversarial. Each party made arguments and questioned the lone witness. However, the bar on adversarial *Krankel* proceedings is irrelevant here, as the hearing was not such a proceeding. Defendant was represented by Price and, indeed, it was Price who filed the motions asserting ineffective assistance of counsel. A *Krankel* hearing—a proceeding crafted to determine whether a *pro se* defendant should be appointed counsel—in such a context would be redundant and unnecessary. The trial court's hearing here was akin to the full evidentiary hearing that may follow an initial *Krankel* inquiry. See, *e.g.*, *People v. Nitz*, 143 Ill. 2d 82, 135 (1991). Indeed, it appears that the court's only actual error was in referring to that hearing as a *Krankel* proceeding.

¶ 29 II. Double Jeopardy

¶ 30 Article I, section 10 of the Illinois Constitution holds that no person shall be twice put in jeopardy for the same offense. Ill. Const. art. I, § 10. Section 3-4(a)(3) of the Criminal Code of 2012 (Code) clarifies this rule, providing that

> "[a] prosecution is barred if the defendant was formerly prosecuted for the same offense, based upon the same facts, if that former prosecution:
>
> * * *
>
> (3) was terminated improperly after the jury was impaneled and sworn or, in a trial before a court without a jury, after the first witness was sworn but before findings were rendered by the trier of facts, or after a plea of guilty was accepted by the court." 720 ILCS 5/3-4(a)(3) (West 2012).

Determination of whether a defendant's right to be free from double jeopardy has been violated turns on two questions: "(1) whether the defendant was placed in jeopardy during the first proceeding; and (2) if so, whether the defendant can nevertheless be retried." *People v. Bellmyer*, 199 Ill. 2d 529, 537 (2002). Our review is *de novo*. *Id.*

¶ 31 Implicit in the two-step approach to double jeopardy analysis is that there is a "first proceeding" and some subsequent proceeding. In the present case, though defendant asserts that the trial court "terminat[ed] the proceedings" and then "began the trial as if one had never been commenced[,]" he offers no legal support for these conclusions. The record indicates that the court merely interrupted the trial so that it might admonish defendant,[2] then allowed the State to proceed. Although the State chose to read its first stipulation from the beginning upon recommencement of the trial, this fact alone is insufficient to show that defendant faced two separate trials.

¶ 32 The conclusion that defendant was not subjected to double jeopardy is further supported by our supreme court's jurisprudence regarding stipulated bench trials and guilty pleas. "A stipulated bench trial is not tantamount to a guilty plea if the defendant presented and preserved a defense. [Citations.] However, when a defendant in a stipulated bench trial stipulates not only to the evidence, but also to the sufficiency of the evidence to convict, the proceeding is tantamount to a guilty plea." *Bellmyer*, 199 Ill. 2d at 538-39.

¶ 33 In the present case, defendant's stipulated bench trial was ultimately akin to a guilty plea, as defendant offered no defense. Under the Code, jeopardy attaches only after a guilty plea has been accepted by the court. 720 ILCS 5/3-4(a)(3) (West 2012). Clearly this stage—or its equivalent in the context of a stipulated bench trial—had not been reached after the State's partial

[2] On appeal, defendant does not argue that he was improperly admonished.

recitation of its first stipulation.

¶ 34 CONCLUSION

¶ 35 The judgment of the circuit court of La Salle County is affirmed.

¶ 36 Affirmed.