2015 IL App (3d) 140148-U

Order filed February 10, 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 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-14-0148
v.	)	Circuit No. 10-CF-459
	)	
CHRISTIAN D. NOEL,	)	Honorable Edward Burmila, Jr.,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Justices Lytton and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in declining to appoint conflict counsel after holding a preliminary hearing on defendant's *pro se* posttrial claim of ineffective assistance of counsel.

¶ 2 Defendant, Christian D. Noel, was convicted of first degree murder (720 ILCS 5/9-1(a)(2) (West 2010)) and sentenced to 55 years' imprisonment. On direct appeal, we remanded the cause to the trial court for a preliminary inquiry into defendant's *pro se* claim of ineffective assistance of trial counsel. *People v. Noel*, 2013 IL App (3d) 110433-U. On remand, the trial

court held a *de novo* hearing on defendant's claim that he had received ineffective assistance. Defendant appeals from the denial of the claim, arguing that the court erred in refusing to appoint conflict counsel. We affirm.

¶ 3 FACTS

¶ 4 Defendant was charged by indictment with first degree murder. Prior to trial, the State filed a list of witnesses and memorandum summarizing the witnesses' oral statements. On June 9, 2010, defense counsel stated in court that he had reviewed all of the discovery with defendant except for a video recording referenced in the police reports. Defendant did not object to counsel's statement, and the trial court continued the case to allow counsel to review the recording with defendant. On November 4, 2010, defense counsel stated that he had reviewed the discovery with defendant and asked that the case be set for trial. Defendant did not object, and the case proceeded to a jury trial in March 2011.

¶ 5 During opening statements, the State said:

> "You are going to hear from a Detective [Carlos] Matlock from Joliet Police Department that the defendant was confident that no one would talk, that no one would give an account of what happened that day. So much so that he couldn't believe that anyone had told the police what happened when Detective Matlock talked to him.
>
> You will hear from Detective Matlock that after hearing that [Patrick Taylor] did make a statement to the police that the defendant said, oh, I knew that he was going to run his mouth. Well, it doesn't matter, this isn't going to stick."

¶ 6 Joliet police officer Phillip Martin and Joliet firefighter Chris Bourg testified that at approximately 10:45 a.m. on February 26, 2010, they responded to a shooting at Susana's

convenience store on Woodruff Street. Conley Ratcliffe was found bleeding inside a silver vehicle near the store and was transported to the hospital.

¶ 7 Two of Susana's patrons testified that they saw Ratcliffe inside the store on the morning of the incident and heard multiple gunshots after Ratcliffe left.

¶ 8 William Sitarz delivered items to Susana's on the day of the incident. At approximately 10:45 a.m., Sitarz heard four or five gunshots. A few seconds later, Sitarz heard another two or three gunshots and saw an injured person.

¶ 9 Jimmy Myers testified that he and Ratcliffe were friends. On the day of the incident, Myers drove Ratcliffe to Susana's. Myers stayed in the vehicle while Ratcliffe went into the store. After Ratcliffe exited the store, a tall "dark skinned black" man with dark clothes came behind Ratcliffe and fired a gun. Myers heard three to five gunshots and saw Ratcliffe fall to the ground. The tall man then fired an additional two to four shots at Ratcliffe. After the shooter left, Myers placed Ratcliffe inside of his car, and thereafter the police and fire department arrived.

¶ 10 Anthony Edwards testified that on the day of the incident, he was picked up by Taylor. Later, defendant asked Taylor for a ride, and defendant, Edwards, and Taylor drove to Susana's. As Edwards entered Susana's, he saw Ratcliffe leave the store and get into an argument with defendant. A few seconds later, defendant produced a gun, and everyone except defendant and Ratcliffe fled the area. Ratcliffe put his hands up and backed away from defendant. Defendant fired one gunshot in the air and then shot three or four times at Ratcliffe as he ran away. Ratcliffe was struck by one of the shots and began to limp. Edwards heard another three or four shots. Edwards, Myers, and another man lifted Ratcliffe into the rear seat of a vehicle. Edwards testified that he had identified defendant as the shooter from a photographic lineup.

¶ 11 Taylor testified that he was driving his cousin home when Edwards flagged him down and asked for a ride. Thereafter, defendant also asked for a ride. Taylor agreed and drove Edwards and defendant to Susana's. Taylor left the vehicle running and went into the store while defendant and Edwards stayed in the vehicle. Taylor saw Ratcliffe leave the store as he entered. Approximately one or two minutes later, Taylor heard gunshots fired nearby, but did not see the shooter. When Taylor exited the store, he saw Ratcliffe run toward Woodruff Street and fall near a neighboring church. As people fled the area, Taylor and defendant went to their vehicle and drove away before any emergency vehicles had responded. Taylor drove a few feet out of Susana's parking lot when he noticed that defendant had a gun. Taylor ordered defendant to get out of the car. Later that night, defendant asked Taylor not to tell the police that they were together that morning. Taylor also testified that he identified defendant from a photographic lineup as the person he picked up and drove to Susana's.

¶ 12 Raymond Morgan testified that he saw two black males get into an argument near the convenience store. One male was tall and slender, and he wore black clothing. The other male was shorter. The shorter man backed up toward the church, and the taller man walked toward him. The taller man pointed a gun at the shorter man and shot approximately four rounds. The shorter man, who had his hands in the air, fell to the ground. The taller man then fired another four rounds at the shorter man and walked out of Morgan's sight. Morgan was unable to identify the shooter from a photographic lineup, but told police that two of the men resembled the shooter, one of which was defendant.

¶ 13 Joseph Brown, a friend of defendant, testified that at 10:50 a.m. on the day of the shooting, he received a telephone call from defendant asking for a ride. Brown went to the area

near Woodruff Street, where he had to bypass emergency vehicles near Susana's before he picked up defendant. Defendant was wearing a black shirt and pants.

¶ 14 Dr. Scott Denton performed the autopsy on Ratcliffe. Denton stated that Ratcliffe died from internal and external bleeding caused by eight gunshot wounds to his pelvis and leg area. Approximately half of the gunshots were fired into the backside of Ratcliffe, consistent with someone who was running from the shooter. The wounds in the front of Ratcliffe's body were consistent with someone shooting Ratcliffe while standing near his feet. Ratcliffe was six feet, one inch tall and weighed 197 pounds. The parties stipulated that eight .40-caliber cartridge casings found at the scene were fired from the same firearm.

¶ 15 Matlock testified that he responded to the shooting at Susana's and was the lead detective on the investigation. Matlock arrested defendant on March 5, 2010. During the booking process, defendant asked Matlock whom the police had spoken with and if he had spoken with Taylor. When Matlock stated he had spoken with Taylor, defendant replied, "I knew that mother fucker was going to run his mouth but that's okay, this shit ain't going to stick[.]"

¶ 16 On cross-examination, Matlock stated that defendant's booking statement was not audio or videorecorded. Matlock also stated that he seized defendant's clothing and shoes prior to defendant's booking. However, on recross-examination, Matlock stated that he had not seized defendant's clothes and shoes, and the items were not logged into evidence.

¶ 17 During a break in the trial, the court advised defendant that he had an absolute constitutional right to remain silent. As a result, the decision on whether to testify was "completely up to [defendant]." The court explained that defendant was free to consult with counsel, but counsel could not force defendant to testify or prevent defendant from testifying. Defendant agreed that he understood his right to remain silent or testify, and the court directed

defendant to think about his decision overnight. The following day, the court reapprised defendant of his right to remain silent or testify. Defendant indicated that he had considered his decision and elected not to testify. The defense rested without putting on any evidence.

¶ 18 After closing arguments, the jury found defendant guilty of first degree murder.

¶ 19 On March 30, 2011, defense counsel filed a motion for new trial. On April 6, 2011, defendant filed a *pro se* motion for new trial, alleging, in part, that he had received ineffective assistance of trial counsel.

¶ 20 On June 17, 2011, the case was called for a sentencing hearing. Before conducting the sentencing hearing, the court denied defense counsel's motion for a new trial, but did not address defendant's *pro se* posttrial motion. The court sentenced defendant to 55 years' imprisonment, and defendant appealed.

¶ 21 On appeal, we held *inter alia* that the trial court erred by failing to conduct a preliminary inquiry into defendant's *pro se* posttrial claim of ineffective assistance of trial counsel and remanded the cause for further proceedings. *Noel*, 2013 IL App (3d) 110433-U.

¶ 22 On remand, the trial court conducted a *de novo* hearing on defendant's ineffective assistance claims. At the hearing, defendant appeared *pro se*, and trial counsel was not present. Defendant argued that trial counsel: (1) did not file a motion to suppress Matlock's statement or object to Matlock's testimony about defendant's statements; (2) persuaded defendant not to testify; and (3) withheld discovery.

¶ 23 The court ruled that it had "conducted the preliminary investigation into the defendant's allegations of ineffective assistance" and found that: (1) the court specifically admonished defendant that the decision to testify belonged to defendant regardless of counsel's advice; (2) counsel aggressively cross-examined the witnesses; and (3) the supreme court rules specifically

require that discovery stay in the exclusive possession of defense counsel. The court concluded that defendant had not met his burden, declined to appoint counsel, and denied defendant's motion. Defendant appeals.

¶ 24 ANALYSIS

¶ 25 Defendant argues that remand is necessary for the appointment of counsel to assist with his *pro se* claim of ineffective assistance because defendant made a preliminary showing that: (1) counsel failed to share the contents of discovery with defendant; (2) Matlock's testimony regarding defendant's booking statement took defendant by surprise; and (3) counsel persuaded defendant not to testify.

¶ 26 The issue of whether the trial court properly conducted a preliminary inquiry into defendant's *pro se* posttrial claims of ineffective assistance presents a question of law that we review *de novo*. *People v. Moore*, 207 Ill. 2d 68, 75 (2003).

¶ 27 When a defendant raises a *pro se* posttrial claim of ineffective assistance of trial counsel, new counsel is not automatically appointed. *Id*. at 77. Instead, the court must initially examine the factual basis of defendant's claim. *Id*. at 77-78. If the court determines that the claim lacks merit or pertains only to matters of trial strategy, it need not appoint new counsel and may deny the motion. *Id*. However, if the allegations show possible neglect, new counsel should be appointed. *Id*. The goal of these proceedings is to facilitate full consideration of a defendant's *pro se* claims of ineffective assistance of trial counsel and thereby potentially limit issues on appeal. *People v. Patrick*, 2011 IL 111666, ¶ 41.

¶ 28 On remand, defendant presented his contentions of ineffective assistance of counsel, and the court determined that defendant's contentions were meritless and did not require appointment of counsel. We agree with the trial court's conclusion. As the trial court noted, defendant did not

have a right to possess the discovery documents. See *People v. Savage*, 361 Ill. App. 3d 750, 757 (2005) (holding the discovery access limitations imposed by Illinois Supreme Court Rule 415(c) did not violate a defendant's constitutional rights). Illinois Supreme Court Rule 415(c) states:

> "[a]ny materials furnished to an attorney pursuant to these rules shall remain in his exclusive custody and be used only for the purposes of conducting his side of the case, and shall be subject to such other terms and conditions as the court may provide."

Rule 415(c) allows counsel to discuss or share discovery with defendant, but counsel is not "permitted to furnish [defendant] with copies or let [defendant] take it from his office." Ill. S. Ct. R. 415, Committee Comments (adopted Oct. 1, 1971).

¶ 29 Additionally, defendant's allegations that counsel withheld evidence were refuted by the record. The common law record included the State's witness disclosure and a memorandum summarizing the witnesses' testimony. On June 9 and November 4, 2010, counsel stated that he had reviewed all of the discovery items with defendant. Defendant did not object to counsel's representation at either hearing. As a result, defendant's argument that counsel withheld discovery is meritless.

¶ 30 Defendant also argues that Matlock's testimony regarding his booking statement took him by surprise. However, the record rebuts defendant's claim. The witness list filed by the State prior to trial named Matlock as a witness and cited to Matlock's police reports that were dated around the time of defendant's arrest. Further, during opening statements, the State said that Matlock's testimony would include an incriminating statement that defendant made at the time he was booked. As a result, defendant received notice prior to Matlock's testimony that Matlock

would testify to defendant's booking statement. Consequently, defendant's statement that he was taken by surprise by Matlock's testimony is also meritless.

¶ 31 Finally, defendant argues that counsel was ineffective for advising him not to testify. A defendant cannot prevail on such an argument unless he can show that he contemporaneously informed counsel that he wished to testify at trial. *People v. Whiting*, 365 Ill. App. 3d 402, 407 (2006). "Advice not to testify is a matter of trial strategy and does not constitute ineffective assistance of counsel unless evidence suggests counsel refused to allow the defendant to testify." *People v. McCleary*, 353 Ill. App. 3d 916, 923 (2004).

¶ 32 Here, defendant did not demonstrate that counsel refused to allow him to testify. Instead, the record shows that the trial court admonished defendant of his right to testify, defendant indicated that he understood the right, and, after considering the right overnight, elected not to testify. Moreover, although defendant did not directly refute Matlock's testimony, defense counsel cross-examined Matlock in an effort to discredit Matlock. Specifically, Matlock testified on cross-examination that defendant's statement was not recorded and made an inconsistent statement regarding the seizure of defendant's clothes and shoes. Therefore, defendant's posttrial claims of ineffective assistance were without merit and did not warrant appointment of conflict counsel.

¶ 33 CONCLUSION

¶ 34 The judgment of the circuit court of Will County is affirmed.

¶ 35 Affirmed.