2016 IL App (2d) 140195-U
No. 2-14-0195
Order filed March 31, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. TIMOTHY S. NEWBERRY, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Kane County. No. 13-CF-1204 Honorable M. Karen Simpson, Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Jorgensen and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court properly declined to appoint new counsel on defendant's *pro se* claim of ineffective assistance: even without having introduced phone records, counsel essentially established that the phone used in a drug deal was not registered to defendant, and in any event confirmation of that fact would not have defeated the officers' unequivocal identifications of defendant as the seller; (2) the trial court did not err in failing to inquire into a different alleged claim of ineffective assistance, as defendant's motion did not contain that claim; (3) defendant was entitled to full credit against various fines, to reflect the 224 days he spent in presentencing custody.

¶ 2 Following a jury trial, defendant, Timothy S. Newberry, was found guilty of unlawful delivery of a controlled substance (720 ILCS 570/401(g) (West 2012)) and sentenced to four

years in prison. Defendant timely appealed and raises the following issues: (1) whether the trial court erred in failing to appoint new counsel on, or to specifically inquire into, his *pro se* posttrial claims of ineffective assistance of counsel; and (2) whether defendant is entitled to monetary credit toward his fines for time spent in presentencing custody. For the reasons that follow, we affirm the judgment of the circuit court of Kane County as modified to reflect that defendant's fines totaling $675 are satisfied by a $1,120 credit for time spent in presentencing custody.

¶ 3 I. BACKGROUND

¶ 4 On September 9, 2013, defendant was indicted on one count of unlawful delivery of a controlled substance (720 ILCS 570/401(g) (West 2012)), arising out of the sale of four units of alprazolam, commonly known as Xanax, to an undercover officer on May 28, 2013. He was arrested on July 2, 2013.

¶ 5 The following relevant evidence was presented at defendant's jury trial. Kevin Stankowitz, a Carpentersville police officer, testified that, on May 28, 2013, while working undercover, he made a telephone call to a certain number for the purpose of purchasing Xanax. The person who answered the phone identified himself as "Tim." Stankowitz testified that he had had previous telephone and text conversations with "Tim" using that same phone number. In addition, prior to May 28, 2013, Stankowitz had seen "Tim," and he identified defendant as "Tim."

¶ 6 Stankowitz testified further that, on May 28, 2013, he contacted defendant by text and arranged to meet him at a liquor store in Carpentersville at 9 p.m. to buy Xanax. He also spoke with defendant on the phone that day to confirm the meeting location, and he recognized defendant's voice. Defendant told him that the price for four Xanax pills would be $45; $10 per

pill and $5 for gas. Defendant also told him that he would arrive in a red or maroon Buick and that his mother would be driving. Stankowitz had never met defendant's mother prior to that time.

¶ 7 Stankowitz testified that he arrived at the liquor store at 9:15 p.m. before defendant. He sent a text message to ask defendant if he was close. He received a text in response indicating yes. Stankowitz then saw a red, four-door vehicle enter the parking lot, and he saw defendant in the passenger seat. Stankowitz was shown a photograph of a woman, marked as People's exhibit No. 3, and he identified the woman as the driver of the vehicle. According to Stankowitz, defendant exited the vehicle and walked toward the liquor store, outside of Stankowitz's view. Stankowitz approached the vehicle and spoke with the driver through an open window. Defendant returned to the vehicle and approached Stankowitz. After a brief conversation, Stankowitz handed defendant $45. According to Stankowitz, defendant handed the money to the driver and said, " 'Here is the gas money, mom.' " The woman then handed defendant four green pills wrapped in cellophane, which defendant then handed to Stankowitz. Defendant told Stankowitz that he would be able to give him a better price next time, hugged Stankowitz, entered the vehicle, and left the scene. Defendant was not arrested at that time. Stankowitz returned to the police station.

¶ 8 On cross-examination, Stankowitz was asked whether he knew to whom the phone number he had used was registered. He responded: "I believe I did run it through a computer system, but I don't recall who it came back to." He stated that he could not testify that it was registered to defendant. He further testified that, while speaking with the driver of the car, the driver told him that the car was new, that it was not registered yet, and that it did not have license plates.

¶ 9 On redirect examination, Stankowitz explained that defendant was not arrested on the day of the transaction because defendant had mentioned setting up another transaction. Stankowitz also explained that the cellophane was not tested for fingerprints, because he and another officer had seen defendant hand over the bag.

¶ 10 Joe DeFranco, a Carpentersville police officer, testified that he was assigned to surveillance and rescue during the drug transaction and was present in the parking lot of the liquor store in an undercover car. Prior to the offense, he had seen defendant a "dozen or more" times and had seen defendant's mother a "handful, maybe more times." He identified the woman depicted in People's exhibit No. 3 as defendant's mother. While on surveillance, DeFranco observed a red, older model car with no license plates enter the parking lot. He saw the driver of the vehicle, whom he identified as "an elderly female"; he was unable to see her face clearly. He then saw defendant exit the passenger side of the vehicle and enter the store. He saw Stankowitz approach the car and speak with the driver. He next saw defendant approach Stankowitz. Stankowitz and defendant extended their hands toward each other, and then defendant extended his hand toward the driver's window. Defendant and Stankowitz extended their hands toward each other a second time. Defendant and Stankowitz had a conversation, and defendant hugged Stankowitz. Defendant entered the vehicle and drove away. DeFranco had no further involvement with the case.

¶ 11 Rhonda Earl, a drug chemist with the Illinois State Police Division of Forensic Services, testified that she tested four tablets contained in plastic cellophane and determined them to be alprazolam.

¶ 12 Defendant testified that he lived with his mother. He had been to the liquor store in the past, but he was not there on May 28, 2013. He had never had a telephone with the number that

Stankowitz used. He had previously been convicted, in April 2010, of unlawful possession of a controlled substance. He knew Stankowitz and DeFranco, and he had never sold drugs to either of them.

¶ 13 On cross-examination, defendant identified the woman pictured in People's exhibit No. 3 as his mother. He testified that she drove a maroon Buick. He testified that, at the time of his arrest, he lived with his mother at 640 Edwards Avenue in West Dundee. He had seen Stankowitz more than two times but no more than five. He had seen DeFranco about 12 times or maybe fewer. His mother did not go to the liquor store on May 28, 2013.

¶ 14 Stankowitz testified in rebuttal that on May 29, 2013, he went to 640 Edwards Avenue and saw a red Buick without registration parked outside.

¶ 15 The jury found defendant guilty.

¶ 16 On December 30, 2013, defendant filed a motion for judgment notwithstanding the verdict or for a new trial. Thereafter, on February 21, 2014, defendant filed a *pro se* four-page motion. Parts I and II of his motion alleged ineffective assistance of counsel. Defendant argued, *inter alia*, that counsel was ineffective for failing to subpoena the phone records for the number that Stankowitz used. Part III of the motion was titled "State Failed to Prove Beyond a Reasonable Doubt Defendant's Guilt." The final part of defendant's motion was titled "New Trial Issues" and dealt specifically with the State's closing argument. In that section, defendant argued that certain comments made by the State were "highly prejudicial," "not based upon competent evidence," and "not an *invited response*." (Emphasis in original.)

¶ 17 On February 21, 2014, prior to hearing the motion filed by counsel, the court inquired about defendant's *pro se* motion. The court noted that the first two pages of the motion addressed ineffective assistance of counsel. He then noted that the third and fourth pages

concerned the State's burden of proof and new-trial issues. The court stated that they did "not appear to address ineffective assistance issues." The court proceeded to discuss with defendant and with counsel each allegation of ineffective assistance of counsel.

¶ 18 With respect to counsel's failure to subpoena the phone records, defendant told the court that it would have shown that someone else owned the phone. According to defendant, counsel could have called the owner of the phone to testify that he did not allow defendant to use the phone, that he did not know who defendant was, and that the phone was never used to arrange a drug transaction. In response, counsel explained that she had her investigator check into the phone number. The investigator told her that "[i]t did not come back to [defendant]." Counsel stated that the investigator attempted to call it but "[s]he could never connect." Counsel explained:

> "The discovery I received, Judge, was that this was a hand to hand situation. There was going to be an identification by the police officers not connected to the phone. So I looked at it but I did not subpoena the records mainly because of the dead end we hit and because of what the discovery said."

Counsel explained that she did try to keep references to the phone number out and that "it was really a matter of trying to figure out in terms of trial how we could minimize the phone because we really—it wasn't the phone that we found was connected to [defendant]. I thought that was about as far as I could go. I think I argued it at trial."

¶ 19 The trial court dismissed defendant's *pro se* ineffectiveness claims, finding that defense counsel's decision not to subpoena the phone records was trial strategy and that the paragraphs of defendant's motion explaining how the phone records would have been beneficial to him were "very highly speculative." The court further stated: "I can say from my own observation of

counsel that counsel's performance at trial certainly met the standard that would be required and—over and above that standard I might add." The court continued: "She vigorously represented her client and I cannot find based upon my observation of her at trial that her performance in representing her client was deficient."

¶ 20 The court subsequently heard and denied the defendant's motion filed by counsel and sentenced defendant to four years in prison. The court assessed various fees and costs, including a $500 drug assessment, a $45 drug fine, a $100 trauma-center fine, and a $30 Children's-Advocacy-Center fine.

¶ 21 Defendant timely appealed.

¶ 22 II. ANALYSIS

¶ 23 Defendant first argues that the trial court erred in failing to appoint new counsel to represent him on his *pro se* posttrial claims of ineffective assistance of counsel. Under *People v. Krankel*, 102 Ill. 2d 181, 189 (1984), a *pro se* posttrial motion alleging ineffective assistance of counsel can trigger a trial court's obligation to appoint new counsel and set the claims for a hearing. However, when a defendant files such a *pro se* posttrial motion, he is not automatically entitled to the appointment of counsel to assist with the motion. *People v. Moore*, 207 Ill. 2d 68, 77 (2003). Rather, the trial court should first examine the bases of the defendant's claims; if the court determines that the claims lack merit or pertain only to trial strategy, the court may deny the *pro se* motion without appointing counsel. *Id.* at 77-78. If the court determines that the claims demonstrate that counsel possibly neglected the defendant's case, new counsel should be appointed to represent the defendant at the hearing on the *pro se* motion. *Id.* at 78.

¶ 24 In conducting the inquiry into the defendant's claims, the trial court will likely need to discuss the allegations with the defendant or with the defendant's trial counsel. "[S]ome 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." *Id.* Accordingly, to evaluate whether the claims indicate possible neglect, the trial court may consider any facial insufficiency of the defendant's allegations and may (1) ask the defendant's trial counsel questions; (2) briefly discuss the allegations with the defendant; or (3) rely upon its own knowledge of counsel's performance. *Id.* at 78-79. The defendant must raise a specific, discernible claim of ineffective assistance. *People v. Taylor*, 237 Ill. 2d 68, 76-77 (2010).

¶ 25 A reviewing court reviews *de novo* whether the trial court made an adequate inquiry into the defendant's *pro se* claims of ineffective assistance of counsel. *Id.* at 75. Where, as here, the trial court reaches a decision on the merits of the defendant's claim, we will reverse the decision only if it amounts to manifest error. *People v. Tolefree*, 2011 IL App (1st) 100689, ¶ 25. " 'Manifest error' is error that is clearly plain, evident, and indisputable." *Id.*

¶ 26 Defendant argues that the trial court manifestly erred in failing to appoint new counsel to him on his *pro se* claim that defense counsel was ineffective for failing to subpoena phone records that could have supported his testimony that he had not used a certain phone to arrange to sell drugs to Stankowitz. We find that the court's denial of the *pro se* motion without appointing counsel does not amount to manifest error.

¶ 27 First, as noted by the State, the jurors already had reason to know that the phone did not belong to defendant, based on Stankowitz's testimony. Stankowitz testified that he ran a computer check on the number but that he could not recall to whom it was registered. He testified that he could not say that it was registered to defendant. Indeed, defense counsel argued as much in her closing argument, specifically noting that the State failed to produce any phone records linking defendant to the phone. In any event, even if the phone records could have confirmed that the phone was not registered to defendant, they would not have established that

defendant did not have access to the phone. They also would not have defeated the officers' unequivocal identifications of defendant as the person who sold drugs to Stankowitz.

¶ 28 Moreover, defendant's claim that the phone records would have supported his theory of defense—misidentification—is speculative. Defendant argues that, had counsel subpoenaed the phone records and learned who owned the phone, counsel would have been able to locate the owner, who would have testified on defendant's behalf. Not only is this claim speculative, but it is also unlikely, given that the phone's owner, per defendant's theory, would have had to admit that he knew who the actual seller was.

¶ 29 In addition, defense counsel told the trial court that she had her investigator check the phone number. She explained that she "hit a dead end." The court inquired whether counsel believed that the records would have assisted in the defense. Counsel explained that, based on the discovery and the fact that there would be a police identification of defendant that was not connected to the phone, she wanted to "minimize" the phone. Nevertheless, as noted, she argued at trial that the phone was not connected to defendant. This was certainly a reasonable strategy.

¶ 30 Based on the foregoing, we cannot say that the court's conclusion that defendant's claim was speculative and that counsel's actions amounted to trial strategy was manifestly erroneous.

¶ 31 Defendant also argues that the trial court erred in failing to inquire into his *pro se* posttrial claim that defense counsel was ineffective for failing to object to certain comments made by the State during closing argument. This claim was not contained in defendant's motion. On the fourth and final page of his motion, which was titled "New Trial Issues" and dealt specifically with the State's closing argument, defendant argued that certain comments made by the State were "highly prejudicial," "not based upon competent evidence," and "not an *invited response*." (Emphasis in original.) According to defendant, "implicit" in this claim was an allegation that defense counsel was ineffective for failing to object to the alleged improper argument. We

disagree. Each page of defendant's motion contained a different heading; the first two pages dealt expressly with ineffective-assistance claims. Nothing in the language of the claims contained on pages three and four would have led the court to believe that they challenged anything other than the sufficiency of the evidence and the State's closing argument. Accordingly, we reject this claim.

¶ 32 In sum, we find that that the trial court properly inquired into defendant's *pro se* allegations of ineffective assistance of counsel by discussing the claims with defendant and with defense counsel, and we hold that the trial court's ruling, based upon those discussions and upon its own knowledge of counsel's performance, that new counsel need not be appointed to present defendant's claims was not manifestly erroneous.

¶ 33 Last, defendant argues that he is entitled to monetary credit against certain fines imposed. Under section 110-14(a) of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/110-14(a) (West 2012)), a defendant who is incarcerated on a bailable offense and does not supply bail, and against whom a fine is levied in connection with the offense, shall be allowed a credit of $5 for each day, upon his application. An application for monetary credit under section 110-14(a) of the Code may be raised for the first time on appeal. *People v. Woodard*, 175 Ill. 2d 435, 457 (1997). The State concedes that defendant is entitled to credit.

¶ 34 Here, at sentencing, defendant was ordered to pay $500 drug assessment (720 ILCS 570/411.2(a)(4) (West 2012)), a $45 drug fine (730 ILCS 5/5-9-1.1 (a) (West 2012)), a $100 trauma-center fine (730 ILCS 5/5-9-1.1(b) (West 2012)), and a $30 Children's-Advocacy-Center fine (55 ILCS 5/5-1101(f-5) (West 2012)). As defendant was incarcerated for 224 days before sentencing, he is entitled to a $1,120 credit against these fines. Therefore, under Illinois Supreme Court Rule 615(b)(1) (eff. Jan. 1, 1967), we modify the trial court's sentencing order to reflect that defendant's fines totaling $675 are satisfied by the $1,120 credit.

¶ 35 Defendant also points out that, in the judgment order, fines and costs were "sent to collections," and he asserts that any fee assessed for collection must be reassessed based on the reduction in the amount due. Under section 5-9-3(e) of the Unified Code of Corrections (730 ILCS 5/5-9-3(e) (West 2012)), the State's Attorney is authorized to retain attorneys and private collection agents to collect any defaults in payments of fines and costs. An additional fee of 30% of the delinquent amount is to be charged to the defendant to compensate the State's Attorney for costs incurred in collecting the delinquent amount. *Id.* Defendant asserts that any collection fee charged should be reassessed based on the delinquent amount remaining after the reduction of the $675. He asks that we remand with directions for any collection fee to be recalculated. The State does not oppose repose. However, although the matter was sent to collections, there is no indication that any fee was assessed. Thus, we have no reason to remand the matter. Nevertheless, we note that, should the State assess a collection fee, it should do so only after reducing the delinquent amount in accordance with this order.

¶ 36 III. CONCLUSION

¶ 37 For the reasons stated, we affirm the judgment of the circuit court of Kane County as modified to reflect that defendant's fines totaling $675 are satisfied by a $1,120 credit for time spent in presentencing custody.

¶ 38 Affirmed as modified.