2016 IL App (4th) 140854-U

NO. 4-14-0854

FILED
July 22, 2016
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Macon County
THELMA G. LAWSON,	)	No. 12DT224
Defendant-Appellant.	)	
	)	Honorable
	)	Katherine M. McCarthy,
	)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Justices Turner and Appleton concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err by refusing to appoint counsel after conducting a valid *Krankel* hearing.

¶ 2 In August 2012, the jury found defendant, Thelma G. Lawson, guilty of two counts of driving while under the influence of alcohol. Defendant *pro se* filed a posttrial motion alleging, among other things, ineffective assistance of trial counsel. The trial court did not address defendant's claims of ineffective assistance, instead hearing and denying the posttrial motion filed by trial counsel, which did not raise any claim of ineffective assistance. The court later sentenced defendant to 18 months' probation. On appeal, we vacated the trial court's judgment denying counsel's posttrial motion and remanded for a *Krankel* hearing on defendant's *pro se* allegations of ineffective assistance. *People v. Lawson*, 2014 IL App (4th) 120983-U.

¶ 3 On remand, the trial court conducted a *Krankel* hearing, after which it determined that defendant's claims of ineffective assistance did not warrant appointing new counsel. The

court then denied defendant's *pro se* posttrial motion.

¶ 4 Defendant appeals, arguing that the trial court erred by refusing to appoint counsel. According to defendant, she raised a meritorious claim that counsel was ineffective for failing to call witnesses who would have provided exculpatory testimony at trial. We disagree, concluding that the witnesses' testimony was cumulative of other trial testimony and that counsel's decision not to call the witnesses was trial strategy. We therefore affirm the trial court's judgment.

¶ 5 I. BACKGROUND

¶ 6 In May 2012, the State charged defendant with two counts of driving while under the influence of alcohol (DUI) (625 ILCS 5/11-501(a)(1), (2) (West 2012)). The trial court appointed counsel, and the cause proceeded to a jury trial.

¶ 7 A. The Jury Trial

¶ 8 Police officer Sean Bowsher testified that at approximately 11 p.m. on May 8, 2012, he responded to a call of disorderly conduct at a cul-de-sac in a residential neighborhood. At the scene, he encountered defendant, who was "loud and disorderly," appeared intoxicated, and was holding a 40-ounce beer in her hand. Bowsher left the scene after defendant agreed to stay in her home for the rest of the night.

¶ 9 Approximately 90 minutes later, defendant called the police, complaining that someone had damaged her car while she was driving in the neighborhood. Bowsher returned to the scene. Defendant told him that she was driving her car when somebody threw an object that damaged her car. As Bowsher spoke to defendant, defendant was holding her car keys and appeared "very intoxicated." The hood of defendant's car was very warm, as if it had recently been driven. Bowsher called in another officer to conduct DUI testing.

¶ 10 Officer Larry Brooks testified that he arrived at the scene to conduct field-sobriety testing of defendant. Defendant was holding her car keys in her hand and telling other officers that she had not been driving. However, defendant told Brooks that she drove into her driveway 20 or 30 minutes ago. Defendant failed the field-sobriety testing administered by Brooks, and a portable breath test indicated that defendant's blood-alcohol content was 0.236. A video-recording of defendant performing field-sobriety tests was shown to the jury.

¶ 11 Defendant testified that she drank only one 40-ounce beer on the night in question. She testified further that she drove her car to pick up her children around 5 or 6 p.m. and did not drive again that night. Instead, the father of her children, Cedric Gomiller, drove her car that evening. Gomiller had standing permission to use defendant's car. On the night in question, Gomiller did not ask for permission and took the car without defendant knowing. Defendant testified that although Gomiller usually asked for permission before using defendant's car, this time he did not. When Gomiller returned with defendant's car, he told defendant to call the police because someone had thrown a chair at the car. Defendant explained that she did not tell Brooks that she had driven 20 minutes earlier and, instead, was confused about Brooks' question.

¶ 12 Gomiller testified that he drove defendant's car to buy beer on the night of May 8, 2012, without first asking her permission. He returned to her home around midnight. As he was driving up to her home, someone threw a chair and hit the car. Gomiller told defendant to call the police. Gomiller did not speak to the police that night. He did not tell the police that he was driving because he did not want to be charged with driving without a license.

¶ 13 The jury found defendant guilty of both counts.

¶ 14 B. The Posttrial Motions

¶ 15 In September 2012, defendant *pro se* filed a posttrial motion alleging, *inter alia*, ineffective assistance of counsel. The motion alleged, in pertinent part, that trial counsel had refused defendant's suggestion to call additional witnesses to testify that defendant did not drive on the night in question. At a hearing later that month, the trial court refused to consider defendant's *pro se* motion, stating that counsel had sole authority to file motions on defendant's behalf.

¶ 16 In October 2012, defendant—through counsel—filed a posttrial motion alleging that the evidence was insufficient to prove her guilty. The motion did not raise any claim of ineffective assistance of counsel. The trial court denied that motion and sentenced defendant to 18 months of probation.

¶ 17 C. The Initial Appellate Proceedings

¶ 18 Defendant appealed, arguing that (1) the trial court erred by failing to conduct a hearing to consider her *pro se* claims of ineffective assistance of counsel as required by *People v. Krankel*, 102 Ill. 2d 181, 464 N.E.2d 1045 (1984), and (2) her convictions violated the one-act, one-crime rule. We vacated the trial court's dismissal of defendant's posttrial motion and remanded with directions that the trial court (1) comply with *Krankel* and (2) address defendant's one-act, one-crime claim. *Lawson*, 2014 IL App (4th) 120983-U.

¶ 19 D. The Proceedings on Remand

¶ 20 On remand, in July 2014, the trial court conducted a hearing, at which both defendant and trial counsel were present. During the hearing, the court granted the State's motion to dismiss one of defendant's two convictions to eliminate any one-act, one-crime issue.

¶ 21 The trial court then questioned defendant about her *pro se* claims that trial counsel provided ineffective assistance. As relevant to this appeal, the court questioned defendant about her claim that counsel refused defendant's suggestion to call certain witnesses. Defendant ex-

plained that she gave counsel the names of four witnesses who she claimed were present on the night in question, saw Gollimer driving the car, and would have testified that Gollimer, not defendant, was the person who drove the car that night. The court then asked trial counsel about those witnesses. He responded that although he did not have his file in front of him, he thought he had talked with "some" of the named witnesses and had determined that it "would not have been good strategy to put them on the stand." Trial counsel could not remember which of the potential witnesses he had spoken to.

¶ 22 The trial court declined to appoint new counsel to pursue defendant's *pro se* claims of ineffective assistance of counsel. The court determined that the decision whether to call a particular witness belonged to counsel and was a matter of trial strategy. The court therefore denied defendant's *pro se* posttrial motion.

¶ 23 This appeal followed.

¶ 24 II. ANALYSIS

¶ 25 Defendant argues that the trial court erred by failing to appoint new counsel to argue defendant's *pro se* posttrial claims of ineffective assistance of counsel. We disagree and affirm.

¶ 26 A. *Krankel* Procedure

¶ 27 Pursuant to *Krankel*, and its progeny, when a defendant raises a *pro se* posttrial claim of ineffective assistance of counsel, the following procedure should be followed to determine whether new counsel should be appointed:

> " '[W]hen a defendant presents a *pro se* posttrial claim of ineffective assistance of counsel, the trial court should first examine the factual basis of the defendant's claim. If the trial court determines

> that the claim lacks merit or pertains only to matters of trial strategy, then the court need not appoint new counsel and may deny the *pro se* motion. However, if the allegations show possible neglect of the case, new counsel should be appointed.' " *People v. Jolly*, 2014 IL 117142, ¶ 29, 25 N.E.3d 1127 (quoting *People v. Moore*, 207 Ill. 2d 68, 77-78, 797 N.E.2d 631, 637 (2003)).

To determine whether counsel should be appointed, "some interchange between the trial court and trial counsel regarding the facts and circumstances surrounding the allegedly ineffective representation is permissible and usually necessary." *Moore*, 207 Ill. 2d at 78, 797 N.E.2d at 638. As part of that interchange, the trial court may question defense counsel and the defendant about the facts and circumstances surrounding the defendant's allegations. *Id.*

¶ 28 B. Ineffective Assistance of Counsel for Failing To Call Witnesses

¶ 29 To establish a claim of ineffective assistance of counsel, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) defendant was prejudiced by counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668 (1984). Counsel has a duty to make reasonable investigations into the defendant's case unless those investigations are unnecessary. *Id.* at 691. Whether counsel's failure to investigate constituted ineffective assistance depends upon the value of the evidence that was not investigated and the closeness of the evidence that was presented at trial. *People v. Harmon*, 2013 IL App (2d) 120439, ¶ 26, 26 N.E.3d 344. "Failure to call or investigate a witness whose testimony is cumulative does not demonstrate ineffective assistance of counsel." *People v. Jarnagan*, 154 Ill. App. 3d 187, 194, 506 N.E.2d 715, 721 (1987).

¶ 30 C. Defendant's Claims in This Case

¶ 31 In this case, defendant argues that trial counsel neglected her case by failing to investigate and subpoena four witnesses who would have testified that Gomiller, not defendant, was the person who drove the vehicle on the night in question. The trial court denied that claim, determining it to be a matter of trial strategy. We agree with the trial court.

¶ 32 Trial counsel's decision not to investigate or call defendant's suggested witnesses was a matter of trial strategy because the witnesses' testimony would have been cumulative of Gomiller's testimony. Defendant claims that the additional witnesses would have testified that Gomiller, not defendant, drove defendant's car that night. However, Gomiller presented that same testimony to the jury. Trial counsel therefore had the authority to decide whether it was a desirable strategy to present additional testimony on that point. Counsel decided not to present that additional testimony. That decision was a matter of trial strategy that cannot be used to establish deficient performance.

¶ 33 Even if we were to assume, for argument's sake, that trial counsel was negligent for failing to fully investigate the potential witnesses, that failure was not prejudicial because of the overwhelming evidence against defendant. In her call to the police and her statements to officers on the scene, defendant admitted driving that night. In addition, both Bowsher and Brooks testified that defendant was holding her car keys in her hand when they arrived at the scene. In light of that evidence, the jury declined to accept defendant's theory that Gomiller, was the person driving the car that night. Additional testimony that defendant had not driven was not likely to affect the jury's decision.

¶ 34 III. CONCLUSION

¶ 35 For the foregoing reasons, we affirm the trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this ap-

peal. 55 ILCS 5/4-2002 (West 2014).

¶ 36 Affirmed.