2017 IL App (1st) 143580-U

No. 1-14-3580

Order filed October 27, 2017

Fifth Division

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. 13 CR 14652
	)	
ANTONIO GOODEN,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge, presiding.

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

ORDER

¶ 1 *Held*: Defendant's convictions for aggravated battery and home invasion are affirmed over his contentions that his jury waiver was not knowing and voluntary and that the trial court erred in rejecting his *pro se* posttrial claim of ineffective assistance of counsel after a preliminary *Krankel* inquiry (*People v. Krankel*, 102 Ill. 2d 181 (1984)).

¶ 2 Following a bench trial, defendant Antonio Gooden was convicted of aggravated battery and home invasion. He was sentenced to six years' imprisonment for aggravated battery and a concurrent term of eight years and six months' imprisonment for home invasion. On appeal,

defendant contends that his jury waiver was not knowing and voluntary. He also raises two challenges to the trial court's preliminary inquiry, conducted pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984), into his *pro se* posttrial claims of ineffective assistance of trial counsel. He argues that the trial court erred in rejecting his *pro se* claims after the initial *Krankel* inquiry because the record demonstrates counsel's possible neglect of the case. In the alternative, he argues that the State's participation in the preliminary *Krankel* inquiry transformed the proceeding into an adversarial hearing. We affirm.

¶ 3 Defendant was arrested after a physical altercation with Marcelo Cabrera, his landlord, that occurred inside Cabrera's apartment on July 6, 2013. He was subsequently charged with five counts of home invasion, two counts of residential burglary, and four counts of aggravated battery to a victim over the age of 60.

¶ 4 Prior to trial, defense counsel informed the court that defendant wanted a bench trial and the case was set for a bench trial on July 22, 2014. On the trial date, the court conducted a Rule 402 conference at defendant's request and offered defendant a ten-year sentence. At the next court status, defendant rejected the court's offer and his trial was reset for September 24, 2014. On that date, the case was transferred to another judge for trial. The following colloquy occurred, regarding defendant's jury waiver:

> "THE COURT: You have the right to have a jury trial where 12 people would be selected from the community. They would listen to the evidence. All 12 would have to unanimously agree you have been proven guilty beyond a reasonable doubt before you could be found guilty.

If you didn't have a jury trial, you could have a bench trial where I would hear the evidence myself, and I would decide myself if you were proven guilty beyond a reasonable doubt or not.

What kind of trial do you want to have, bench or jury?

THE DEFENDANT: Jury trial.

THE COURT: Jury trial.

THE DEFENDANT: But, your Honor, excuse me, like I told my counsel, I would need more time to talk to my witnesses because they present —

THE COURT: Your lawyer is ready. She said she's ready for trial. You want a jury trial, you want us to bring up 12 people?

THE DEFENDANT: Would it be possible to go pro se today because I still need time to read my discovery because I haven't had that.

THE COURT: What's this about?

¶ 5 The State explained the facts of the case and indicated that the complaining witnesses and medical doctor were present for trial. Defense counsel indicated that defendant had the opportunity to review all the discovery and stated, "I have investigated all the evidence that he has provided to me." Addressing defendant, the court stated:

"Okay. Okay. The case is set for trial. Witnesses are here. Both lawyers say they're ready. If you want a jury trial, that's going to cause a complication because I am not going to be here tomorrow.

* * *

If you want a jury trial, I can't do this myself. I can send it to another judge for a jury trial for instanter if that's what you want."

¶ 6 The State explained that this was the second time the case had been set for trial and that it had been ready with its witnesses. The Assistant State's Attorney indicated that she was also unavailable the following day and the trial court asked defense counsel to confer with defendant to determine how he wanted to proceed. The court explained, "he can have a jury trial if he wants, but it will be a different judge on a different date." When the court recalled the case, defense counsel confirmed that she had conferred with defendant and that he wished to proceed with a bench trial. The court asked defendant whether he understood that by signing the jury waiver, he was informing the court that he did not want a jury trial. Defendant responded in the affirmative and the trial court accepted his jury waiver.

¶ 7 Because defendant does not challenge the sufficiency of the evidence to sustain his convictions, we recount the facts to the extent necessary to resolve the issues raised in this appeal.

¶ 8 The evidence adduced at trial showed that in July 2013, Marcelo Cabrera, who was born on October 30, 1942, resided with his wife, Teresa Cabrera, and his granddaughter, Aimee Cabrera, in the basement apartment of a two-flat building he owned at 5125 West Deming Place. At the time, defendant was Marcelo's tenant and had resided in the first-floor apartment of the building for about a year. Prior to July 6, 2013, Marcelo had taken legal action against defendant for nonpayment of rent.

¶ 9 On that date, defendant, without permission, entered Marcelo's apartment by pushing open the door to the apartment. He then approached Marcelo, who was on the phone in the kitchen. Defendant grabbed the phone from Marcelo and threw it onto the ground. He then

punched Marcelo in the face and knocked him to the ground. Defendant continued to punch Marcelo about the face and chin, until Teresa entered the kitchen. Defendant hit Teresa on top of the head, causing her to fall. He then hit Marcelo again. Aimee pushed defendant before he was able to hit Marcelo with a chair. Aimee and Teresa eventually pushed a table between defendant and Marcelo. Defendant then left the apartment. Aimee called the police from a phone in the apartment because defendant had taken her cellular phone. Marcelo, Teresa and Aimee identified defendant in open court.

¶ 10 As a result of the attack, Marcelo had a laceration above his left eye that required stitches. He also had fractures to his face and, according to Doctor Jonathan Garlovsky, who treated Marcelo at Resurrection Hospital, a life-threatening subdural hematoma. Marcelo was in the hospital for four days as a result of his injuries.

¶ 11 Based on this evidence, the court found defendant not guilty of one count of aggravated battery based on great bodily harm and guilty on all remaining counts. Defendant filed a motion for a new trial, which the court denied.

¶ 12 At the sentencing hearing, defendant told the court that he believed he received ineffective assistance of counsel because he "had a host of witnesses" who were not subpoenaed to testify at trial. The court initiated *Krankel* proceedings and asked defendant to tell the court what his attorney did wrong. Defendant explained that he told his attorney about several alibi witnesses, who could place him at a party when the crime took place. The Assistant State's Attorney then asked whether the court would like to hear from the State. The court responded, "not yet[]" and then continued the inquiry. Defense counsel stated, "I pursued all investigative leads my client provided to me, however, as a matter of strategy I decided not to call the

witnesses." The court then asked defense counsel to elaborate because this was a *Krankel* inquiry. The following exchange occurred:

> "[DEFENSE COUNSEL]: I pursued these investigative leads and I had filed an answer with these witnesses' names. However, their statements made to the state's attorney and the state's attorney's investigator indicated to me that they were not going to be credible witnesses for us at trial.
>
> THE COURT: Not credible. Were they not sticking with the alibi or is it other baggage that they were brining into whatever they were saying?
>
> [DEFENSE COUNSEL]: There were profound inconsistencies between the witness statements, much — similar — the time of the arrival at a party was conflictual [*sic*] between the witnesses' statements, also who he arrived with. One potential witness is mentioned in a police report so the police would clearly testify that that one witness was somewhere at the time of the incident and after the time of the incident. And so what the witnesses were going to say about where that witness was and where [defendant] was was going to be problematic and not credible.
>
> [THE STATE]: Judge, I can clarify that since I did speak to these witnesses and that's what [defense counsel] is referring to.
>
> THE COURT: What else did your lawyer do wrong, if anything? Is that it?"

¶ 13 After defendant indicated that his attorney did not file a pretrial motion to suppress statements, the court responded, "there were no statements." The State then echoed the court's

declaration. The court continued to address defendant and explained that because no statements were elicited at trial, there were no statements to suppress.

¶ 14 Defendant next stated that his attorney did not file a motion alleging a speedy trial violation, and the court responded that it did not see a demand for trial. The State started to tell the court that there had not been a demand, but the court interrupted, "please. This is a *Krankel* hearing." The court noted that, according to the half sheet, there had been outstanding discovery, all the continuances were by agreement, and there were no demands for a trial. Defense counsel indicated that she discussed the matter with defendant and then reiterated, "I did investigate all the leads that he gave me and unfortunately as a matter of trial strategy, I did not believe that they could help us." The court found no evidence of incompetence of counsel and continued the case for sentencing.

¶ 15 The court subsequently sentenced defendant to eight years and six months' imprisonment for home invasion and a concurrent six-year term for aggravated battery based on great bodily harm to a victim over the age of 60. Defendant filed a motion to reconsider sentence, which the court denied.

¶ 16 On appeal defendant first contends that he is entitled to a new trial because he did not knowingly and understandingly waive his right to a jury trial. In setting forth this argument, defendant acknowledges that he did not preserve this issue for review because he failed to object in the trial court or raise the issue in a posttrial motion.

¶ 17 However, he argues, and we agree, that we may review this issue under the plain error doctrine. See *In re R.A.B.*, 197 Ill. 2d 358, 362-63 (a defendant's failure to question the validity of the jury waiver in the circuit court, either by objection or in a posttrial motion, does not mean that he has forfeited the alleged error on review); see also *People v. Bracey*, 213 Ill. 2d 265, 270

(2004) (whether a defendant's fundamental right to a jury trial has been violated is a matter that may be considered under the plain error rule). However, because without error, there can be no plain error, the first step in the plain-error analysis is to determine whether an error occurred. *People v. Bannister*, 232 Ill. 2d 52, 65 (2008); *People v. Reed*, 2016 IL App (1st) 140498, ¶ 6. Here, we find no error.

¶ 18 A criminal defendant has a constitutional right to a jury trial (U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, §§ 8, 13; *Bannister*, 232 Ill. 2d at 65), which he may knowingly and voluntarily waive in open court (725 ILCS 5/103-6 (West 2012)); *Bracey*, 213 Ill. 2d at 269). "When a defendant waives the right to a jury trial, the pivotal knowledge that the defendant must understand - with its attendant consequences - is that the facts of the case will be determined by a judge and not a jury." *Bannister*, 232 Ill. 2d at 69. Whether a jury waiver is valid depends on the totality of circumstances and not a precise formula. *Bracey*, 213 Ill. 2d at 269; *People v. Hollahan*, 2015 IL App (3d) 130525, ¶ 16. Although a written jury waiver is, by itself, insufficient to show knowing and understanding waiver, it does support the waiver's validity. *Reed*, 2016 IL App (1st) 140498, ¶ 7. Where, as here, the relevant facts are undisputed, we review the validity of defendant's jury waiver *de novo*. *Bannister*, 232 Ill. 2d at 66.

¶ 19 Based on the totality of the circumstances, we find that defendant knowingly and understandingly waived his right to a jury trial in open court. Here, defendant tendered a signed jury waiver to the trial court after the court distinguished a jury trial from a bench trial, described the jury selection process, and then passed the case to allow defendant to consult with counsel. In addition, defense counsel stated that defendant wanted a bench trial in open court on two prior occasions and defendant did not object. See *People v. Frey*, 103 Ill. 2d 327, 332 (1984) (collecting cases); *Reed*, 2016 IL App (1st) 140498, ¶ 7 (because a defendant typically speaks

through counsel, a defendant's presence in court and lack of objection when his attorney communicates the jury trial waiver supports the validity of the jury waiver). Accordingly, we find that the trial court did not err when it accepted defendant's jury trial waiver. Because there was no error, there can be no plain error and, thus, defendant has forfeited this argument on appeal.

¶ 20 Defendant next raises two challenges to the trial court's preliminary inquiry conducted pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984). Defendant first contends that the trial court erred in rejecting his *pro se* posttrial ineffective assistance of trial counsel claims after the initial *Krankel* inquiry because the record demonstrates counsel's possible neglect of the case. Specifically, defendant argues defense counsel relied on interviews of defendant's potential alibi witnesses conducted by the State and the State's investigator, but did not interview potential alibi witnesses herself. Thus, defendant requests that this court remand his case for appointment of new counsel and a *Krankel* hearing.

¶ 21 "The question of whether a defendant has sufficiently alleged ineffective assistance of counsel is one of law, and, therefore, subject to a *de novo* standard of review." *People v. Hunter*, 2016 IL App (1st) 141904, ¶ 24 (*citing People v. Taylor*, 237 Ill. 2d 68, 75 (2010)).

¶ 22 Under *Krankel* and its progeny, when a defendant makes a *pro se* posttrial allegation of ineffective assistance of counsel, the trial court must conduct some type of inquiry into the underlying factual basis of the defendant's claims. *People v. Moore*, 207 Ill. 2d 68, 79 (2003). If the allegations "show possible neglect of the case," the court should appoint new counsel to represent the defendant at an evidentiary hearing on his *pro se* claims. *Id.* at 77-78. However, if after the preliminary inquiry, the trial court determines that the claims lack merit or pertain only

to matters of trial strategy, the court may deny the *pro se* motion without appointing counsel. *Id.* at 78.

¶ 23 Here, we find that the trial court did not err in rejecting defendant's *pro se* claim of ineffective assistance of counsel based on counsel's decision not to call witnesses at trial because the claim pertained to matters of trial strategy. It is well-settled that decisions about whether to call witnesses are generally considered matters of trial strategy and reserved to the discretion of trial counsel. *People v. Chapman,* 194 Ill. 2d 186, 231 (2000). The record in this case shows, that defense counsel pursued all of the investigative leads defendant provided to her, filed an answer listing the potential alibi witnesses, but decided not to call them at trial because she determined that they would not be credible. At the preliminary *Krankel* inquiry, counsel explained that there were "profound inconsistencies between the witness statements[,]" such as conflicts regarding the time defendant arrived at the party and with whom he arrived. In addition, based on a police report that mentioned one potential witness, counsel determined that police testimony regarding that witness's location during and after the incident would further undermine the witness's credibility. Thus, the court's *Krankel* inquiry into the underlying factual basis for defendant's claim confirms that counsel's decision not to call the potential alibi witnesses was a matter of trial strategy. Accordingly, the court properly denied defendant's *pro se* posttrial claim of ineffective assistance of counsel based on counsel's alleged failure to investigate these witnesses.

¶ 24 Defendant nevertheless argues that defense counsel's investigation of the potential witnesses was defective because counsel relied solely on the statements the witnesses made to the State's investigator. We disagree. At the *Krankel* inquiry, defense counsel indicated, "I pursued these investigative leads and I had filed an answer with these witnesses' names. However, their statements made to the state's attorney and the state's attorney's investigator

indicated to me that they were not going to be credible witnesses for us at trial." As such, defendant's conclusion that counsel relied solely on the prosecution's investigation when she "pursued these investigative leads" is belied by the record.

¶ 25 Defendant next argues that the State's participation in the preliminary *Krankel* inquiry transformed it into an adversarial hearing and that we should remand this case for a new *Krankel* inquiry. The issue of whether the circuit court properly conducted a preliminary *Krankel* inquiry presents a legal question that we review *de novo. People v. Jolly*, 2014 IL 117142, ¶ 28.

¶ 26 In order to create a record and potentially limit issues on appeal, a trial court's goal in the preliminary *Krankel* inquiry is to "ascertain the underlying factual basis for the ineffective assistance claim and to afford a defendant an opportunity to explain and support his claim." *People v. Ayres*, 2017 IL 120071, ¶¶ 13, 24. The method by which the trial court conducts the initial inquiry is flexible (*People v. Fields*, 2013 IL App (2d) 120945, ¶ 40) and it may include a discussion with the defendant as well as some interchange with trial counsel (*Moore*, 207 Ill. 2d at 78). In evaluating the *pro se* ineffective assistance of counsel claims, the trial court may consider defense counsel's trial performance. *Jolly*, 2014 IL 117142, ¶ 30; *People v. Flemming*, 2015 IL App (1st) 111925-B, ¶ 85. Because a defendant acts *pro se* during the court's preliminary investigation, the initial *Krankel* "inquiry should operate as a neutral and nonadversarial proceeding." *Jolly*, 2014 IL 117142, ¶ 38. If the State participates in the initial proceeding in a manner that is more than *de minimis*, then the potential exists that the inquiry becomes adversarial and circumvents the creation of an objective record for review. *Id.*

¶ 27 Here, we find that the State's participation in the *Krankel* inquiry was *de minimis*. The record shows that the trial court repeatedly prevented the State from commenting during the proceeding and interrupted the Assistant State's Attorney, reminding her that a preliminary

Krankel inquiry was underway. The only other participation from the State occurred after defendant alleged that trial counsel failed to move to suppress statements. The court noted that there were no statements presented at trial and the State repeated the court's observation. Thus, the State's participation was limited to the repetition of a single fact contained in the record, which the court had already articulated. This participation by the State was *de minimis* and did not transform the proceeding into an adversarial hearing. Moreover, the State's *de minimis* participation lacked any potential to interfere with the creation of an objective record for review of defendant's claims. Accordingly, we find that the trial court properly conducted the preliminary *Krankel* inquiry.

¶ 28 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 29 Affirmed.