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Carla Bender
4th District Appellate
Court, IL

2017 IL App (4th) 150725-U

NO. 4-15-0725

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
ANTONIO D. SIBLEY,	)	No. 13CF553
Defendant-Appellant.	)	
	)	Honorable
	)	Timothy J. Steadman,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices DeArmond and Justice Holder White concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court (1) affirmed in part, concluding (a) the trial court did not err in denying defendant's *Batson* challenge (*Batson v. Kentucky*, 476 U.S. 79 (1986)); (b) defendant's claim of ineffective assistance of counsel was governed by the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and defendant failed to show counsel was ineffective for failing to file a motion to suppress; and (c) defendant was not entitled to a remand for a *Krankel* hearing (*People v. Krankel*, 102 Ill. 2d 181 (1984)); and (2) vacated certain assessments improperly imposed by the circuit clerk.

¶ 2 After a jury trial, defendant, Antonio D. Sibley, was convicted of aggravated discharge of a firearm and unlawful possession of a weapon by a felon. The trial court sentenced him to concurrent terms of 18 years and 5 years in prison, respectively. Defendant appeals, arguing (1) the trial court erred by denying defendant's *Batson* challenge (*Batson v. Kentucky*, 476 U.S. 79, 89 (1986)); (2) his trial counsel was ineffective for failing to file a motion to suppress; (3) the trial court erred in failing to conduct a *Krankel* inquiry (*People v. Krankel*, 102

Ill. 2d 181 (1984)); and (4) the circuit clerk improperly imposed fines and miscalculated fees. We affirm in part and vacate in part.

¶ 3 I. BACKGROUND

¶ 4 Although the charging instrument does not appear in the common-law record, we discern from docket entries and/or other references in the record that in May 2013, the State charged defendant by information with aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2012)) (referred to as count III), unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2012)) (referred to as count IV), and aggravated unlawful use of a weapon (720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2012)) (referred to as count VII). In January 2014, defendant's case went to trial.

¶ 5 A. *Voir Dire*

¶ 6 During *voir dire*, the following exchange occurred:

"[PROSECUTOR]: *** What is your general opinion of law enforcement? Positive, negative or neutral?

* * *

Q. And Ms. Krall?

[PROSPECTIVE JUROR KRALL]: Neutral.

Q. Is there any particular reason, any particular experience you or a close friend or family have had?

A. Do I need to go into specific detail?

Q. Not too specific, no.

A. Just the way a case was handled one time with one of my family members.

Q. Okay. Was that in Macon County?

A. Yes, ma'am.

Q. I'm—from your answer, did you believe that person was treated fairly during that incident?

A. No, ma'am. Not really.

Q. Okay. Is there anything about that situation that would make it difficult for you to be fair and impartial here today?

A. No, ma'am."

¶ 7 The prosecutor asked the same question of the remainder of the panel. Krall raised her hand again. Aside from the situation already discussed, she indicated another friend or family member had been arrested, but she believed that person had been treated fairly. At the conclusion of this questioning, the prosecutor indicated she would "excuse Ms. Krall with our thanks." Accordingly, the trial court excused Krall from the venire.

¶ 8 Outside the presence of the jury, the following exchange occurred:

"[DEFENSE COUNSEL]: Your Honor, I apologize. I haven't been all of the way through the list, but it's clear there's—I apologize, I don't know exactly how to go about this. There's a *Batson* challenge. This is clearly one of two African Americans we had in the pool. I'm not sure if [another prospective juror] is a black female as well. I'm not sure. I haven't been through the rest of it. But basically, with one peremptory challenge, the State has basically taken out an entire 50 percent, I believe, of the entire African American potential jurors. There is an answer in one that mentioned 'other,' but not specifically black. And so, I think I'm making a *Batson* challenge. *** At least one peremptory challenge

taking out a quarter of the potential African American potential jurors in this matter.

THE COURT: All right. And before we get to the State, first of all, you're referring to the entire venire that was throughout this week?

[DEFENSE COUNSEL]: That's correct. Clearly, she is the only one, I believe, in the pool this morning.

THE COURT: So to clarify the record, the court called in 24 prospective jurors. The only African American among the 24 was Ms. Krall. For the record, this defendant is an African American [male]. It's the court's first responsibility to decide whether there has been a *prima facie* showing under *Batson*. The racial identity between Ms. Krall and the defendant is the same. Is there a pattern striking against African Americans? The answer is no. There's only been one who has been excused. Is there a disproportionate use of peremptory challenges against African Americans on behalf of the State at this point? No. The court should consider the level of African American representation compared to the jury. We already made a record on that. The race of the victim—there was something about Mr. Rajiv Rice being shot at is an African American; is that correct?

[PROSECUTOR]: That's correct.

THE COURT: All right. Considering all these factors, the preeminent factor would be that Ms. Krall was the only African American brought over to this case. The court finds there has been a *prima facie* showing under the *Batson* case. The burden now shifts to the State to articulate a race neutral explanation.

[PROSECUTOR]: Your Honor, I wanted to ask questions—I asked Ms. Krall her general opinion of law enforcement. Ms. Krall was the only juror so far whose answer was not positive. When I asked her to explain, she expressed that there is an individual that she knew that had been treated unfairly, that the case was handled in Macon County and she did not believe that that person was treated fairly in this case.

THE COURT: Very well. Any further argument in behalf of the defendant?

[DEFENSE COUNSEL]: I'm not sure if the fact that they thought the issue of race and the fact that she thought this person was treated unfairly are separate and apart. They may actually be related. So I don't know that that's a neutral reason outside of race necessarily. I would add that's part of the record.

THE COURT: All right. Under the case law, among other things, the reasons on the record will be deemed race neutral in her testimony intent in the explanation. Ms. Krall did state that she had—I can't remember if it was a close friend or family member—who she felt was treated unfairly—again I'm paraphrasing—by the police. And I believe she might have been the only juror who said her opinion of law enforcement in general is neutral as opposed to favorable. So there clearly is a race neutral explanation here. The court finds that defendant has failed to meet his burden of establishing purposeful discrimination. So the *Batson* challenge is denied. Anything else for now, counsel?

[PROSECUTOR]: No, Your Honor.

[DEFENSE COUNSEL]: No."

¶ 9 B. Trial

¶ 10 After selecting the jury, the parties proceeded with the trial where the following evidence was presented. Two eyewitnesses testified to a shooting that occurred on April 29, 2013, at approximately 6:30 p.m. on Union Street in Decatur. Witness one was sitting in front of her neighbor's house on Union Street when a light-colored car pulled up. A man got out of the back seat, knelt down, and shot down the street. She saw only the shooter's profile and could not identify him any further. Witness two, who also lived on Union Street, said he heard gunfire. He looked out his window and saw "somebody hop[] out of a car right in front of [his] house and started shooting." He believed the car was white. He took a photograph of the man as he was getting back into the car. He said he could not identify the man, as he only saw the back of his head.

¶ 11 A third witness lived on Church Street. He said he looked out and saw a white sedan being followed by a police car. He heard officers yell for someone to get down. He looked out his window and saw a black male with braids, wearing a blue plaid shirt, pants down to his knees, and tennis shoes "creeping along a privacy fence that's two doors from [his] home." He said he did not get a "good look because of [the] fir tree" in the yard.

¶ 12 Detective Ben Massey testified he processed the crime scene. He found two separate groupings of shell casings in the road, 9 millimeter and .25 - caliber. Near the two 9-millimeter casings, there was also a live round in the road. Further down the road, he found seven .25-caliber casings.

¶ 13 Officer Timothy Wittmer testified he interviewed defendant on May 17, 2013, regarding the shooting incident. Defendant waived his *Miranda* rights (*Miranda v. Arizona*, 384 U.S. 436 (1966)) and agreed to speak with the officer. The officer testified:

> "A summation of that interview would be that [defendant] and some of his friends were caught in traffic driving northbound in the 1300 block of North Union. [Defendant] told me that a subject by the name of Devante Hill and some people that were in a minivan stopped their minivan in the middle of the roadway and would not let [defendant] and his friends pass. There was some kind of exchange verbally between [defendant], Mr. Rice, and Mr. Hill at which point [defendant] advised me that Mr. Rice fired several rounds from a handgun at him. Then [defendant] stated that he fired two handguns—or two rounds from a handgun back at Mr. Rice before fleeing the scene."

Defendant told the officer he was with Dana Bond and Kadaris Britt in the vehicle with him. The handgun defendant used "was just in the vehicle." Wittmer said defendant's statement was consistent with the evidence.

¶ 14 On cross-examination, Wittmer said he observed defendant in a vehicle and "conducted a traffic stop of him to arrest him" on May 17, 2013. Wittmer said defendant was initially evasive when explaining the shooting, but later gave a complete and seemingly accurate statement. He did not recall defendant telling him he was high or tired during this interview and, based on his own experience and expertise, he did not see any indication that defendant was under the influence of alcohol or drugs.

¶ 15 Ed Culp, an investigator with the Macon County State's Attorney's office, testified he met with defendant on July 30, 2013, at defendant's request to discuss the shooting incident. Defendant told Culp he was a passenger in a vehicle with Britt and Bond. While they were driving on North Union Street, they came upon a van that was blocking the road. Defendant recognized Rajiv Rice and Devante Hill. Defendant argued with Rice, while someone threw

money in the air. Defendant told Culp he said: " 'We're not about that bullshit.' " Defendant said Hill and Rice whispered amongst themselves and it seemed they were going to let them pass. As the van began to move, defendant saw Rice draw a gun. According to Culp, defendant "miraculously" saw a weapon on the floorboard of the vehicle and grabbed it in an effort to defend himself. As defendant was stumbling trying to get back into the vehicle, Britt accelerated. Defendant said he "cocked" the gun and fired two rounds toward Rice. Culp discovered that by "cocking" the gun, defendant meant he "jacked the slide of a semi-automatic pistol." Defendant said he got back in the vehicle. His first story was that he dropped the weapon at the scene. However, Culp told defendant that was not true because no weapon was found at the scene. Later, defendant said they had a good enough lead from the police, so he threw the gun out the window. Defendant later changed the story to say that he was actually carrying the weapon he fired because a week earlier he and Rice had a verbal altercation. From that altercation, defendant knew Rice carried a gun so from that point forward defendant began carrying one—a 9 mm gun he found lying in a vacant field. Defendant signed a written statement.

¶ 16 On September 17, 2013, Culp again met with defendant because Culp learned defendant had signed an affidavit claiming no involvement in the shooting and that no one had possessed or fired any weapon. Culp again read defendant his *Miranda* rights and defendant waived those rights and further spoke with Culp. Defendant said his previous statement was not truthful, as he was merely "taking the fall" for Britt and Bond. Culp explained to defendant that his prior statement was "exactly consistent" with the evidence found at the crime scene. Defendant had no explanation.

¶ 17 On the second day of the trial, outside the presence of the jury, defendant moved for a directed verdict, which the trial court denied. With the jury present, the parties presented a

stipulation that as of April 29, 2013, defendant had a prior conviction of a Class 2 or higher forcible felony from July 2011. The State rested.

¶ 18 Defendant testified on his own behalf. He said as Britt, Bond, and he drove in a vehicle on North Union Street, they saw a van blocking the street. Defendant recognized Hill as Hill exited the van and defendant went to speak with Rice. Defendant asked them to let their vehicle through and, after a couple of minutes, Rice told Hill to let them pass. As Hill started to leave, "gunshots were fired." When defendant heard gunshots, he was getting back into the car, which then sped off. He denied firing a gun or having access to a weapon. When the vehicle stopped, he jumped out and ran because he thought he had a warrant. He admitted he spoke with police after his traffic stop in May 2013, but he said he told Officer Wittmer he was high. He also told him he had fired a weapon at Rice, but only after he was pressured by Wittmer to say so. Defendant said he finally "just gave him the answer that he wanted."

¶ 19 Defendant said, because he was high on Xanax and "weed," he told Wittmer he had a gun and fired it at Rice. He also said he changed his story to Culp because he "felt like [he] shouldn't be taken down for something [he] didn't do." He had initially told Culp about having a 9-millimeter handgun because he "had already heard on the streets what had happened. [He] was just going off what [he] heard." The defense rested.

¶ 20 In rebuttal, the State recalled Wittmer, who testified that, based upon his training and experience, defendant did not appear to exhibit any signs of being under the influence of any intoxicating substances. He denied pressuring defendant in any way to make a statement during the interview.

¶ 21 After considering the evidence, arguments of counsel, and the jury instructions, the jury found defendant not guilty of aggravated unlawful use of a firearm, but guilty of aggravated discharge of a firearm and unlawful possession of weapon by a felon.

¶ 22 C. Posttrial Proceedings

¶ 23 On February 4, 2014, defendant submitted a handwritten letter to the trial court regarding "a few misunderstandings." He disputed his convictions based on the evidence presented. He also raised the *Batson* challenge earlier raised by his counsel. He requested a new trial.

¶ 24 On February 11, 2014, defendant, through counsel, filed a motion for judgment notwithstanding the verdict, or in the alternative, a new trial, raising, *inter alia*, the *Batson* challenge. At the March 5, 2014, sentencing hearing, the trial court first considered defendant's posttrial motion and denied the same. The court sentenced defendant to 18 years for aggravated discharge of a firearm and a concurrent term of 5 years for unlawful possession of a weapon by a felon.

¶ 25 On March 7, 2014, defendant submitted another handwritten letter to the trial court complaining that he, in fact, was not on parole at the time of the offense, which erroneously affected his bond, sentence, and plea offers. On March 13, 2014, defendant submitted a third handwritten letter indicating he had requested an appeal but, he could find "no appeal filed on [his] behalf showing up anywhere in the court computers or court websites." He filed a *pro se* notice of appeal.

¶ 26 Also on March 13, 2014, defendant filed a *pro se* "motion for sentence reduction," claiming (1) his sentence was excessive, (2) he was misled by his attorney about his

maximum sentence, (3) his attorney refused to file any motions to further his defense, and (4) his mother's health was poor.

¶ 27 On July 9, 2014, the public defender's office filed a notice of reassignment, assigning Monica J. Hawkins to represent defendant, taking over for Steven Jones. On October 29, 2014, Hawkins filed an "amended motion for a sentence reduction," alleging defendant's sentence was excessive given the nature of the crime "when considering all other factors stated at the hearing and hereinbefore." She also adopted and incorporated defendant's *pro se* March 13, 2014, motion.

¶ 28 On November 23, 2014, and February 12, 2015, defendant submitted handwritten letters inquiring of the status of his motion for sentence reduction. In the latter correspondence, defendant alleged Jones "failed to inform [him]" of how the facts supported the various allegations against him.

¶ 29 On June 25, 2015, defendant completed an affidavit, alleging Jones failed to inform him that his offense was "enhanced" or that he would be subjected to an "extended term." He alleged Jones rendered ineffective assistance of counsel.

¶ 30 On July 15, 2015, Hawkins filed a second amended motion for sentence reduction, attaching an affidavit from Rice which indicated defendant was not the individual shooting at him.

¶ 31 On August 19, 2015, the trial court conducted a hearing on defendant's postsentencing motion. Defendant testified he was the one supporting his mother prior to his incarceration. He stated he needed to be home with her to assist her financially and with her failing health. He denied committing the offenses. Rice, who was serving a 40-year sentence,

testified he "grew up" with defendant. He testified defendant was not the person who shot at him and he did not see defendant with a gun.

¶ 32 The State called officer Timothy Wittmer, who testified he interviewed Rice on May 18, 2013. He said Rice told him defendant and Bond displayed and fired handguns on the day of the incident.

¶ 33 The trial court initially took the matter under advisement, but later the same day entered a docket entry denying defendant's motion. This appeal followed.

¶ 34 II. ANALYSIS

¶ 35 A. *Batson* Challenge

¶ 36 Defendant appeals, arguing the trial court erred in denying defendant's *Batson* challenge. Specifically, defendant contends the State's race-neutral justification served as a pretext for racial discrimination. We affirm.

¶ 37 In *Batson*, the United States Supreme Court held "the Equal Protection Clause [of the United States Constitution (U.S. Const., amend. XIV, § 1)] forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Batson*, 476 U.S. at 89. Accordingly, the *Batson* Court established a three-step process to evaluate claims of alleged discrimination during jury selection.

¶ 38 During the first step of a *Batson* hearing, "the defendant must make a *prima facie* showing that the prosecutor has exercised peremptory challenges on the basis of race." *People v. Davis*, 231 Ill. 2d 349, 360 (2008). "[T]he threshold for making out a *prima facie* claim under *Batson* is not high: 'a defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has

occurred.' " *Davis*, 231 Ill. 2d at 360 (quoting *Johnson v. California*, 545 U.S. 162, 170 (2005)). In determining whether the person alleging discrimination has established a *prima facie* case, the trial court "must consider 'the totality of the relevant facts' and 'all relevant circumstances' surrounding the peremptory strike to see if they give rise to a discriminatory purpose." *Davis*, 231 Ill. 2d at 360 (quoting *Batson*, 476 U.S. at 94, 96-97). The relevant factors the court should consider include the following:

> " '(1) racial identity between the [party exercising the peremptory challenge] and the excluded venirepersons; (2) a pattern of strikes against African-American venirepersons; (3) a disproportionate use of peremptory challenges against African-American venirepersons; (4) the level of African-American representation in the venire as compared to the jury; (5) the prosecutor's questions and statements [of the challenging party] during *voir dire* examination and while exercising peremptory challenges; (6) whether the excluded African-American venirepersons were a heterogenous group sharing race as their only common characteristic; and (7) the race of the defendant, victim, and witnesses.' " *People v. Rivera*, 221 Ill. 2d 481, 501 (2006) (quoting *People v. Williams*, 173 Ill. 2d 48, 71 (1996)).

¶ 39 In addition, a "comparative juror analysis" is another factor for the court to take into consideration in determining the existence of a *prima facie* case. *Davis*, 231 Ill. 2d at 362. A comparative juror analysis examines " 'a prosecutor's questions to prospective jurors and the jurors' responses, to see whether the prosecutor treated otherwise similar jurors differently because of their membership in a particular group.' " *Davis*, 231 Ill. 2d at 361 (quoting *Boyd v. Newland*, 467 F.3d 1139, 1145 (9th Cir. 2006)). If the trial court—after considering "the totality

of all the relevant facts and circumstances to determine whether they give rise to an inference of discriminatory purpose"—concludes the defendant established a *prima facie* case of discrimination in the selection of the jury, the court proceeds to the next step. *Davis*, 231 Ill. 2d at 362.

¶ 40 During the second step of the *Batson* hearing, the focus shifts to the prosecutor, who must articulate a race-neutral reason for striking the juror. *Davis*, 231 Ill. 2d at 362-63. Once the prosecutor establishes a race-neutral reason for striking the juror, the defendant may rebut the proffered reason as pretextual. *Davis*, 231 Ill. 2d at 363.

¶ 41 Finally, during the third step of the *Batson* hearing, "the trial court must determine whether the defendant has shown purposeful discrimination in light of the parties' submissions." *Davis*, 231 Ill. 2d at 363. During this step, the court "must evaluate not only whether the prosecutor's demeanor belies discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor." *Davis*, 231 Ill. 2d at 364.

¶ 42 Initially, we address the State's contention that defendant forfeited his pretext argument by failing to raise it in the trial court. We find defendant properly preserved the *Batson* issue by raising it during *voir dire* and including it in his posttrial motion. Whether he specifically raised the pretext argument below will not preclude our consideration of the *Batson* issue on appeal. See *People v. Sanders*, 2015 IL App (4th) 130881, ¶ 25, *appeal denied*, 39 N.E.3d 1009 (Ill. 2015) (No. 119512), *cert. denied sub nom. Sanders v. Illinois*, __ U.S. __, 137 S. Ct. 86 (2016) (No. 15-9480) ("Thus, because a *Batson* claim involves a constitutional issue and defendant properly objected at trial, we will address the merits of his appeal.").

¶ 43 A trial court's ultimate conclusion on a *Batson* challenge will not be disturbed unless it is clearly erroneous. *People v. Davis*, 233 Ill. 2d 244, 261 (2009). Here, defendant raised his *Batson* objection immediately following the State's peremptory challenge of one African-American venire member, Krall. After finding defendant had established a *prima facie* case of purposeful discrimination by excluding the only African-American member, the court properly shifted the burden to the State to demonstrate a race-neutral reason for striking the juror. See *Davis*, 231 Ill. 2d at 362-63.

¶ 44 The State demonstrated that Krall was the only venire member who did not have a positive opinion of law enforcement. Because every other member had a positive opinion, the State asked that Krall be excused. Considering the State's explanation, the trial court found the State's basis for its peremptory challenge was not discriminatory but was race-neutral.

¶ 45 On appeal, defendant argues the trial court's decision was erroneous because the State's explanation for excusing Krall applied equally to a nonblack venire member. The State argued that, not only did Krall indicate she had a neutral opinion of law enforcement, but she also believed that a close friend or family member who had been arrested had not been treated fairly. Nonblack venire member Varvel had also said she knew of two close friends or family members who had been arrested. One had been treated fairly, where the other had not. Despite her opinion that one had not been treated fairly during his or her arrest, the State did not exercise a peremptory challenge for Varvel.

¶ 46 Additionally, defendant claims the trial court erred in denying his *Batson* challenge when considering the selection of the alternate juror Alderson, a nonblack member. Alderson indicated she, like Krall, had a neutral opinion of law enforcement yet the State accepted her as an alternate. Defendant contends because of Alderson's neutral opinion of law

enforcement, it cannot be said that Krall was excused for her nonpositive opinion. Defendant insists that because Varvel and Alderson were not excused for similar answers, Krall must have been excused on a discriminatory basis. We disagree.

¶ 47 Krall was the *only* venire member who believed that a family member had not been treated fairly during his or her arrest *and* had a nonpositive opinion of law enforcement. It was reasonable to assume that Krall had this neutral opinion of law enforcement based upon the treatment her family member during the arrest procedure. On the other hand, Varvel believed a close friend or family member had not been treated fairly *but*, despite that treatment, she had a positive opinion of law enforcement. Whereas, Alderson had a neutral opinion of law enforcement but, that opinion was not based upon any negative experience like Krall. Instead, Alderson's neutral opinion was based upon reportedly *no* experience with law enforcement. She said she had not "had a lot of interaction, so [she did not] really know too much about them personally." She was asked if there was a particular experience that she personally had with law enforcement or a close friend or family member personally had. She said no.

¶ 48 Given that these three venire members were not similarly situated, but had differences among them, we conclude the trial court did not err in denying defendant's *Batson* challenge. We conclude the State used a peremptory challenge to excuse Krall, an African-American, not because of Krall's race but, instead, for a legitimate race-neutral reason. She, unlike any other venire member, had a nonpositive opinion of law enforcement possibly based upon the police officer's unfair treatment of someone she knew during his or her arrest. Krall had unique characteristics based upon her own personal experiences that the others did not have. We find no error.

¶ 49 B. Ineffective Assistance of Counsel

¶ 50 Defendant next contends his trial counsel, Steven Jones, was ineffective for failing to file a motion to suppress his inculpatory statements obtained in violation of his constitutional rights. He claims Officer Wittmer arrested him without probable cause and then took his statement, which implicated him in the shooting. Then, defendant made a consistent statement to Culp from jail without his attorney present at a time when he was represented by counsel. Defendant claims Jones was ineffective when he failed to file a motion to quash the arrest and suppress the first statement and to exclude the second statement.

¶ 51 To prevail on a claim of ineffective assistance of counsel, "a defendant must show that counsel's performance was objectively unreasonable under prevailing professional norms and that there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *People v. Domagala*, 2013 IL 113688, ¶ 36 (quoting *Strickland v. Washington*, 466 U.S. 688 694 (1984)). The failure to establish either prong of the *Strickland* test defeats a claim of ineffectiveness. *People v. Henderson*, 2013 IL 114040, ¶ 11. "Where an ineffectiveness claim is based on counsel's failure to file a suppression motion, in order to establish prejudice under *Strickland*, the defendant must demonstrate that the unargued suppression motion is meritorious, and that a reasonable probability exists that the trial outcome would have been different had the evidence been suppressed." *Henderson*, 2013 IL 114040, ¶ 15. The decision of whether to file a pretrial motion to suppress is considered a matter of trial strategy and counsel's decision is accorded great deference. *People v. Martinez*, 348 Ill. App. 3d 521, 537 (2004). "Counsel is not required to make futile motions in order to provide effective assistance." *People v. Bowen*, 2015 IL App (1st) 132046, ¶ 28.

¶ 52 Our supreme court has noted that where a defendant's claim of ineffectiveness is based on counsel's failure to file a motion to suppress, "the record will frequently be incomplete

or inadequate to evaluate that claim because the record was not created for that purpose." *Henderson*, 2013 IL 114040, ¶ 22. However, in this case, the record before us is sufficient to decide the issue on the merits. The record indicates Officer Wittmer spoke with two eyewitnesses who were both present at the time of the shooting. According to Wittmer's sworn statement, the first of these two witnesses (referred to as witness two in our summary of the evidence presented at trial) saw a black male wearing a blue plaid shirt shooting a handgun while standing outside a white vehicle on the day of the incident. This witness took a photograph of the shooter on his cellular telephone and gave the image to the police. The second witness (one who did not testify at trial) viewed the photograph and identified the shooter as a person he knew only as "Sibley." This witness told Wittmer he observed this same black male leaning outside the rear passenger side window of the white vehicle prior to hearing gunshots. This witness picked out defendant in a photo lineup as the black male he saw in the white vehicle. Based on Wittmer's sworn statement, a circuit court judge found probable cause to arrest defendant.

¶ 53 We cannot say counsel's conduct was deficient by declining to file a motion to suppress based on a lack of probable cause. The judge found probable cause for a warrantless arrest of defendant based upon the officer's sworn statement. The officer recounted the eyewitnesses' statements for the judge and relayed the fact that defendant was on parole. It is unlikely counsel would have been successful in disputing probable cause in a motion to suppress under these circumstances. See *People v. Love*, 199 Ill. 2d 269, 279 (2002) ("Probable cause to arrest exists when the facts known to the officer at the time of the arrest are sufficient to lead a reasonably cautious person to believe that the arrestee has committed a crime."). "The probability of criminal activity, rather than proof beyond a reasonable doubt, is the standard for determining whether probable cause is present." *People v. Tisler*, 103 Ill. 2d 226, 236 (1984). If

there is probable cause, the arrest is lawful and evidence obtained as a result is admissible to prove defendant's guilt. *Tisler*, 103 Ill. 2d at 237. We cannot say the lack of a suppression motion rendered counsel's performance "objectively unreasonable under prevailing professional norms." *Domagala*, 2013 IL 113688, ¶ 36 (to show ineffectiveness, respondent must show "that counsel's performance was objectively unreasonable under prevailing professional norms"). Thus, we do not find persuasive respondent's ineffectiveness claim on this basis.

¶ 54 Defendant also claims his attorney should have filed a motion to suppress the second statement given to Culp when defendant was in jail, after arraignment, and while represented by counsel. See *People v. Thompkins*, 121 Ill. 2d 401, 432 (1988) (after a defendant has been formally charged, he has the right to have his attorney present during any later interrogation). Because we found defendant's first statement was not likely to be suppressed had a motion been filed, it would be of no benefit for counsel to have moved to suppress defendant's statements made to Culp. His first statement to Culp was inculpatory and similar to his statement made to Wittmer. His second statement to Culp was exculpatory. It would make little sense to suppress the exculpatory statement. Again, defendant has not met his burden of demonstrating that counsel's performance was objectively unreasonable.

¶ 55 C. *Krankel* Hearing

¶ 56 Defendant claims the trial court erred in failing to inquire pursuant to *Krankel* (*People v. Krankel*, 102 Ill. 2d 181, 189 (1984)), where he had made sufficient allegations in a posttrial motion and handwritten letters to the court that Jones was ineffective. We affirm.

¶ 57 Under *Krankel* and its progeny, if a defendant makes a *pro se* posttrial claim of ineffective assistance of counsel, the trial court must examine the factual basis underlying the claim. *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003). The court need not appoint new counsel for

the defendant merely because he or she has raised a claim of ineffective assistance. *Moore*, 207 Ill. 2d at 78. Instead, "the trial court must conduct an adequate inquiry ***, that is, [an] inquiry sufficient to determine the factual basis of the claim." (Internal quotation marks omitted.) *People v. Ayres*, 2017 IL 120071, ¶ 11. Having ascertained the factual basis of the claim, the court then should determine whether the claim has any potential merit. "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." (Internal quotation marks omitted.) *Ayres*, 2017 IL 120071, ¶ 11.

¶ 58 In March 2014, defendant first raised the issue in a handwritten letter to the trial court that Jones had rendered ineffective assistance of counsel. Defendant followed with additional *pro se* allegations in June 2015. The court never addressed any of defendant's allegations. This may be because in July 2014, defendant was appointed different counsel—not due to defendant's allegations, but rather, as an internal reassignment within the public defender's office. Defendant insists this reassignment "does not defeat his claim that the trial court should have conducted a *Krankel* hearing," because the new attorney never brought defendant's claim to the court's attention.

¶ 59 Defendant's claim is moot given new counsel, regardless of the reason, was appointed to represent him. Defendant fails to present this court with any authority to support his conclusion that the appointment of different counsel had no bearing on the trial court's duty to conduct a *Krankel* inquiry. To the contrary, we find the new appointment served the purpose of *Krankel* in that counsel was not required to argue his own ineffectiveness. See *People v. Phipps*, 238 Ill. 2d 54, 63 (2010) (the purpose of appointing counsel is to allow presentation of an

ineffective-assistance claim without the conflict of interest that would result from trial counsel having to argue his own incompetence). The newly appointed counsel adopted defendant's *pro se* motion for sentence reduction which included defendant's allegations of Jones's ineffectiveness. Thus, defendant would receive no further benefit by remanding for a *Krankel* hearing.

¶ 60 D. Circuit Clerk Imposed Fines

¶ 61 Finally, defendant complains the circuit clerk, not the trial court, imposed various fines upon sentencing and miscalculated certain fees. Defendant claims, and the State concedes, the following assessments constitute unauthorized fines and/or miscalculated fees and should be vacated: (1) $12 for "Clerk Op Add-Ons"; (2) $15 for "State Police Ops"; (3) $4.75 for "Drug Court"; (4) $.25 for "Clerk Op Deduction"; (5) $50 for "Court"; (6) $5 for "Youth Diversion"; (7) $28.50 for "Child Advocacy Fee"; (8) $9.50 for "Nonstandard"; (9) $10 for "Medical Costs"; (10) $20 for "Lump Sum Surcharge"; (11) $100 for "Violent Crime"; (12) $10 for "State Police Svcs"; and (13) $10 as an overcharge of the $70 for "State's Atty."

¶ 62 We accept the State's concession and vacate the above assessments improperly assessed by the circuit clerk.

¶ 63 III. CONCLUSION

¶ 64 For the reasons stated, we vacate the fines and other assessments mentioned herein above that were improperly imposed by the circuit clerk. We otherwise affirm the trial court's judgment. As part of our judgment, because the State successfully defended a portion of this appeal, we award the State its $75 statutory assessment against defendant as costs of this appeal.

¶ 65 Affirmed in part and vacated in part.