2018 IL App (5th) 160492-U

NO. 5-16-0492

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Jackson County.
	)	
v.	)	No. 13-CF-310
	)	
WILSON FRANKLIN,	)	Honorable
	)	William G. Schwartz,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Justices Welch and Goldenhersh concurred in the judgment.

ORDER

¶ 1 *Held*: Where the circuit court conducted a proper preliminary inquiry into the defendant's claim of ineffective assistance of trial counsel and reasonably determined that the claim pertained only to matters of trial strategy, and where any assertion of reversible error in this case would lack arguable merit, the defendant's appointed appellate counsel is granted leave to withdraw, and the judgment of the circuit court is affirmed.

¶ 2 This appeal is the second appeal by the defendant, Wilson Franklin, from the judgment of conviction that the circuit court entered in this case. In the first appeal, this court found that the circuit court had violated the holding in *People v. Krankel*, 102 Ill. 2d 181 (1984), by failing to conduct a preliminary inquiry into the defendant's posttrial claim that his trial attorney had provided him with ineffective assistance. This court

vacated the order denying the defendant's motion for a new trial and remanded the cause with directions that the court conduct a proper *Krankel* inquiry. See *People v. Franklin*, 2016 IL App (5th) 140068-U. On remand, the circuit court conducted the necessary inquiry, concluded that there was no indication of ineffective assistance by trial counsel, and again denied the defendant's motion for a new trial. The defendant then perfected the instant appeal.

¶ 3 The defendant's court-appointed attorney in this appeal, the Office of the State Appellate Defender (OSAD), has filed an *Anders* motion to withdraw on the ground that the appeal does not present any issue of arguable merit, along with a brief identifying and exploring five disparate issues that could potentially be raised in this appeal. See *Anders v. California*, 386 U.S. 738 (1967). OSAD served the defendant with a copy of its motion and brief. In response, the defendant has filed in this court a "petition for rehearing," wherein he briefly discusses the merits of four of OSAD's five potential issues. Specifically, the defendant addresses the first, second, fourth, and fifth of OSAD's five potential issues, apparently conceding that the third potential issue does indeed lack merit. (All five issues are discussed *infra*.) This court has examined OSAD's motion and brief, the defendant's response, as well as the entire record on appeal, and has concluded that this appeal does indeed lack merit. Accordingly, OSAD is granted leave to withdraw as counsel, and the judgment of the circuit court is affirmed.

¶ 4 BACKGROUND

¶ 5 The defendant was arrested in this case on July 12, 2013. On July 16, 2013, while the defendant remained in jail, the State filed a five-count information charging him with

being an armed habitual criminal (720 ILCS 5/24-1.7(a) (West 2012)), unlawful possession of a weapon by a felon (*id.* § 24-1.1(a)), and three counts that ultimately were not pursued. Also on July 16, 2013, the circuit court arraigned the defendant, appointed the public defender to represent him in the cause, and scheduled a preliminary hearing for August 6, 2013.

¶ 6 On August 1, 2013, the public defender moved to withdraw as the defendant's counsel due to a *per se* conflict of interest. According to the motion, the defendant had been a witness against another of the public defender's clients, a client who awaited sentencing. On August 6, 2013, which was the original date set for the preliminary hearing, the court granted the public defender's motion to withdraw, appointed substitute counsel for the defendant, and reset the preliminary hearing for August 20, 2013. The preliminary hearing was held on that date, and the court found probable cause and bound over the defendant for trial.

¶ 7 In pretrial orders, the court indicated that it alone would conduct the *voir dire* examination of potential jurors at the defendant's trial. Neither party filed any sort of objection to this approach. On October 22, 2013, the defendant, by counsel, filed a pretrial memorandum that included 60 "selected *voir dire* questions" concerning potential jurors' personal backgrounds, employment histories, prior knowledge of the case, and ability to be impartial, as well as the burden of proof at a criminal trial. (None of the proposed questions was remarkable for a criminal case.)

¶ 8 On October 29, 2013, the cause proceeded to trial by jury. Just before the venirepersons were brought into the courtroom, the defendant asked the judge about

subpoenas and stated that Cheryl James, his probation officer, could "verify the fact that [he] was on the job [at the Econo Lodge] at the time when [he] was arrested." During the *voir dire* examination, the court alone asked questions; neither party objected to this approach or sought permission to participate in the questioning.

¶ 9 During the court's examination of venireperson number 1, the court asked, "Would you believe the testimony of a police officer over any other witness simply because the witness was a police officer?" Venireperson number 1 responded, "One might tend to believe that." The court did not ask a follow-up question. In response to other questions from the court, venireperson number 1 indicated that he would be a fair and impartial juror, that he understood the principles that govern criminal trials (burden of proof, presumption of innocence, etc.), and that he would follow the court's instructions to the jury. Both parties accepted venireperson number 1; neither party moved to have him excused for cause, and neither exercised a peremptory strike against him.

¶ 10 During the evidentiary portion of the trial, the parties stipulated that the defendant, prior to the date of the alleged offenses for which he was being tried, had been convicted of two or more forcible felony offenses.

¶ 11 For the State, Carbondale police officer Blake Harsy testified that on July 11, 2013, sometime after 11 p.m., he responded to a dispatch concerning a possible attempt to break into a furniture store. On a parking lot not far from the store, Harsy stopped the defendant, who was walking eastward toward an Econo Lodge. The defendant was holding a baseball cap, upside down. Inside the cap were clear plastic baggies containing a substance that, to Harsy, looked like cannabis, plus some pills. Harsy arrested the

defendant for possession of cannabis. He patted the defendant's shirt pocket, felt something, and removed from the pocket a .22 caliber Astra Star semiautomatic pistol. At about that time, another Carbondale police officer, Charles Ellett, arrived on the scene. Inspecting the pistol, Harsy found a magazine inside it. Inside the magazine, Harsy found three .22 caliber bullets, all live rounds. Sometime later, Harsy asked the defendant about the gun, and he answered that he had found the gun in a room at the nearby Econo Lodge and that he had intended to turn the gun over to the police at a convenient time. As for the cannabis, the defendant told Harsy that he was distributing it to various people around town.

¶ 12 Defense counsel cross-examined Harsy, focusing on the defendant's good behavior during the arrest and the condition of the pistol, which showed wear and tear and some rust. The State conducted a very short redirect examination focused on the apparent functionality of the pistol. At the end of the redirect, the court told Harsy that he could step down. Defense counsel interjected that she had "one recross," but the court again told Harsy that he could step down. Defense counsel did not attempt to describe the question she wanted to ask or the testimony she hoped to elicit.

¶ 13 Also for the State, Carbondale police officer Charles Ellett testified that he assisted Harsy at the defendant's arrest and saw Harsy remove a .22 caliber pistol from the defendant's pocket. Three .22 caliber handgun rounds were found in the pistol's magazine; no bullets were in its chamber. Ellett heard the defendant tell Harsy that he worked at the nearby Econo Lodge and had found the pistol there. On cross-examination, defense counsel had only one question for Ellett: "You covered the—The answer I was

looking for from Mr. Harsy that I didn't ask the question on, but there was no round in the chamber, right?" Ellett answered, "Correct."

¶ 14 The sole witness for the defense was the defendant himself, who testified against the advice of counsel. According to the defendant, he was working at the Econo Lodge in Carbondale on July 11, 2013. At some point during the day, he inspected a guest room, in anticipation of the arrival of a family that had reserved that room. Behind a bed in that guest room, the defendant discovered cannabis, pills, and a gun. For safety's sake, he collected all of those items, put them in his cap, and took them to his own room in the hotel. (The hotel compensated the defendant with a room in which to reside.) With the items safely stored in his room, the defendant continued working throughout the hotel, all the while intending to contact the police about the items he had found in the guest room.

¶ 15 Late that evening, the defendant further testified he retrieved the cannabis, the pills, and the gun from his room. He had the items with him as he carried trash out of the hotel and deposited it in the dumpster. As he walked back from the dumpster to the hotel, his intention was to go to the hotel's office and contact the police about the cannabis, the pills, and the gun. Just then, a police officer stopped him. The gun was in his pocket at that time, and the cannabis and pills were in his hat. The defendant tried to explain the situation to the police officer, but the officer refused to listen, seemingly interested only in making an arrest.

¶ 16 The jury returned a verdict of guilty on each of the two counts submitted to it, *i.e.*, being an armed habitual criminal and unlawful possession of a weapon by a felon.

¶ 17 On November 15, 2013, the defendant filed, by trial counsel, a motion for a new trial, alleging (1) a failure of proof of guilt beyond a reasonable doubt as to the charge of being an armed habitual criminal, and (2) ineffective assistance of trial counsel for failing to call "the witnesses that [the defendant] wanted to [call] in his defense." Also on November 15, 2013, the defendant's trial attorney filed a motion to withdraw as counsel, based upon the defendant's belief that she had provided ineffective assistance.

¶ 18 On January 15, 2014, the court held a hearing on the defendant's motion for a new trial and trial counsel's motion to withdraw as counsel. After hearing cursory arguments from both parties, the court denied both motions. The defendant did not offer any specifics in regard to the allegation of ineffective assistance by trial counsel, and the court did not make any inquiry along those lines. The court immediately proceeded to sentencing. In a statement in allocution, the defendant apologized to the court for having a gun in his possession despite being a convicted felon, stating that he should have "turned the gun in sooner" but became intoxicated and thus irrational. The court sentenced the defendant to imprisonment for 10 years on the charge of being an armed habitual criminal. The court did not impose a sentence for unlawful possession of a weapon by a felon.

¶ 19 The defendant perfected an appeal from the judgment of conviction. In that appeal, the defendant argued, and the State conceded, that the circuit court had failed to conduct a proper preliminary *Krankel* inquiry into the factual basis for the defendant's posttrial claim of ineffective assistance of trial counsel. This court vacated the circuit court's order denying the defendant's motion for a new trial and remanded the cause with

directions that the circuit court conduct a *Krankel* inquiry. See *People v. Franklin*, 2016 IL App (5th) 140068-U.

¶ 20 On October 19, 2016, the circuit court complied with the mandate of this court and conducted a *Krankel* inquiry into the defendant's *pro se* posttrial claim of ineffective assistance of trial counsel. The defendant and trial counsel were present for the inquiry. The trial prosecutor also was present, but he did not actively participate.

¶ 21 The court began the *Krankel* inquiry by asking the defendant to explain the nature of his claim of ineffective assistance. In response to those queries, the defendant stated that trial counsel had failed to call two witnesses whom he considered crucial to his defense, and of whom he had informed counsel prior to trial. These two crucial but uncalled witnesses were Cheryl James, who was his probation officer at the time of his arrest in this case, and Anthony Williams, a Carbondale police detective.

¶ 22 The defendant represented to the court that if Cheryl James had been called as a witness at his trial, she would have testified about the content of two telephone conversations between herself and the defendant. During the first of those two telephone conversations, the defendant told James that he had found a gun, that he "was having problems with this individual," and that he "might want to do something with him with the gun." During that same conversation, the defendant told James that "[his] plan was to turn the gun in," but when James advised him to do exactly that, the defendant replied that due to his criminal record, "it wouldn't be good for [him] to turn it in." At that time, James told the defendant that she would contact the police. Sometime later, during the second of the two telephone conversations, James informed the defendant that she had

contacted Carbondale police detective Williams, who had assured her that he would arrange for two uniformed police officers to take possession of the gun from the defendant. Anticipating the arrival of the two uniformed officers, the defendant was carrying the gun on his person on the night he was arrested.

¶ 23 The defendant further represented to the court that he was carrying the gun on his person on the night he was arrested because he was anticipating the arrival of the two uniformed officers that Williams had promised to send. The defendant also stated the following: "The only reason I had that gun in my possession that long, the two days, because I feared for my life, and there's a police report stating that an individual had pulled a gun on me and threatened my life, but I felt that I had to turn the gun in." Finally, the defendant told the court that he had informed trial counsel of his two telephone conversations with James, as well as the other circumstances surrounding his possession of the gun, but counsel never listened to him, refused to call James or Williams as witnesses, and focused instead on persuading the defendant to plead guilty.

¶ 24 The court continued its *Krankel* inquiry by soliciting trial counsel's response to the defendant's allegations. Counsel told the court that according to her notes, the defendant wanted James and Williams called as witnesses at trial so that they could "verify that [the defendant] lived at the hotel and worked there at the hotel." Counsel further stated that her notes indicated that she had spoken with both James and Williams, and their statements to her were "not in line with" the defendant's prior statements to her. As for verifying that the defendant lived and worked at the Econo Lodge, counsel was confident that none of the State's witnesses would contradict the defendant's anticipated testimony

that he lived and worked there, and therefore she did not see any need for testimony corroborating his anticipated testimony on that point. According to counsel, her decision not to call James and Williams as witnesses was "a matter of trial strategy." Counsel concluded her remarks at the *Krankel* inquiry by saying that "[t]his stuff about someone else threatening him, that's why he had the gun or that he had even told [Cheryl] James about the gun" was "completely new news" to her.

¶ 25 At the close of its *Krankel* inquiry, the court announced that it found no indication of ineffective assistance by trial counsel. Days later, the circuit court entered a written order finding that trial counsel's decision not to call Cheryl James and Anthony Williams as trial witnesses was a matter of trial strategy and did not constitute ineffective assistance. Accordingly, the court denied the defendant's motion for a new trial. From this order, the defendant appeals.

¶ 26 ANALYSIS

¶ 27 This appeal is from a judgment of conviction in a criminal case. As noted above, the defendant's appointed appellate attorney, OSAD, has filed an *Anders* motion to withdraw on the ground that this appeal lacks merit. In the brief supporting its *Anders* motion, OSAD has conjured five potential issues for review, all of which are plainly meritless. This court will consider each issue.

¶ 28 OSAD's first potential issue is whether trial counsel provided ineffective assistance by failing to move for dismissal of the charges against the defendant based upon the circuit court's failure to hold a preliminary hearing within 30 days after the defendant's arrest.

¶ 29 Under section 109-3.1(b) of the Code of Criminal Procedure of 1963 (Code), anyone charged by information with a felony offense must receive a preliminary hearing within 30 days after he is taken into custody. See 725 ILCS 5/109-3.1(b) (West 2016). Section 109-3.1(c) of the Code provides that the 30-day period is suspended during any delay "occasioned by" the defendant. *Id.* § 109-3.1(c). Section 114-1(a)(11) of the Code states that if the preliminary hearing is not held within the 30-day period specified in section 109-3.1(b), the circuit court, upon the defendant's written motion, "may dismiss" the information on that basis. *Id.* § 114-1(a)(11). Section 114-1(e) of the Code makes clear that such a dismissal is without prejudice, for the State is explicitly allowed to file a new charge. *Id.* § 114-1(e). If the State contemplates filing a new charge after dismissal of the original charge, the court may order that the defendant be held in custody until such time as the new charge has been filed. *Id.*

¶ 30 Here, the defendant was arrested on July 12, 2013. The preliminary hearing was held on August 20, 2013, which was 39 calendar days after the arrest. However, the original date for the preliminary hearing was August 6, 2013, or only 25 calendar days after the arrest, and the continuance from August 6 to August 20 was due solely to the public defender's withdrawing from the case due to a *per se* conflict of interest and the necessity of appointing substitute counsel for the defendant. This 14-day delay could certainly qualify as a delay "occasioned by" the defendant under section 109-3.1(c), though no Illinois reviewing court ever has decided that issue in a published opinion. If the 14-day delay was indeed occasioned by the defendant, the 30-day statutory period was suspended for those 14 days, and the August 20 preliminary hearing was timely.

¶ 31 Even if the 14-day delay was not occasioned by the defendant, this court cannot imagine how the defendant might have been prejudiced by his attorney's failure to seek a dismissal of the charges on the ground that the preliminary hearing was not held within the 30-day period specified in section 109-3.1(b). See *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (to make a claim of ineffective assistance of counsel, a criminal defendant must establish that counsel's performance was both deficient and prejudicial to defendant). If counsel had sought a dismissal on that basis, and if the circuit court had granted the motion (which seems highly unlikely, given that the delay was short and for a perfectly legitimate reason), the State could simply have filed a new charge against the defendant pursuant to section 114-1(e). There is no reason to think that the defendant's trial would have turned out any differently in this scenario. See *People v. Washington*, 2012 IL App (2d) 101287, ¶ 24 (defendant, in order to establish that counsel provided ineffective assistance by failing to move for dismissal pursuant to section 109-3.1(b), "must show prejudice based on the outcome of the trial, and not just the failure to get a temporary dismissal"). After all, the State had an extremely strong case against the defendant, and the defendant admitted that he possessed the pistol.

¶ 32 OSAD's second potential issue is whether the circuit court deprived the defendant of a fair trial when it conducted the entirety of the *voir dire* examination, and when it failed to excuse *sua sponte* venireperson number 1 after he expressed a bias in favor of police officers.

¶ 33 The manner and scope of *voir dire* are within the discretion of the trial court. *People v. Williams*, 164 Ill. 2d 1, 16 (1994). An abuse of that discretion will be found

only where the judge's conduct of *voir dire* "thwarted the selection of an impartial jury." *Id.* Here, the defendant's trial attorney, in a pretrial memorandum, proposed 60 different questions to ask the potential jurors, and the court asked many of those questions. The defendant did not object to, or express any concerns or reservations about, the court's conducting the *voir dire* on its own. Therefore, the defendant forfeited this issue. Furthermore, this court, having examined the transcript of the *voir dire*, is confident that an impartial jury was impaneled. There was no abuse of discretion in the trial court's handling of *voir dire* in this rather simple and straightforward case, and no error.

¶ 34 As for the court's allowing venireperson number 1 to serve on the jury, there was no error. Where, as here, a defendant neither challenges a potential juror for cause nor exercises a peremptory challenge against the juror, the trial court does not have a duty to *sua sponte* excuse the juror for cause. See *People v. Metcalfe*, 202 Ill. 2d 544, 557 (2002). Furthermore, the record does not establish that venireperson number 1 was biased in favor of police officers. When the court asked venireperson number 1 whether he would tend to believe a police officer simply because of his status as a police officer, he did not answer in the affirmative, which certainly would have indicated a bias. Instead, he responded with a cryptic, "One might tend to believe that." This response warranted a follow-up question (which was not asked), but it does not establish bias. Meanwhile, venireperson number 1 was unequivocal in expressing that he understood the State's burden of proof beyond a reasonable doubt, the presumption of innocence, and the defendant's right not to testify, and that he understood that the defendant's choosing not to testify could not be held against him. He also stated unequivocally that he would follow

the law presented in the court's instructions at the end of the case. No error arose from venireperson number 1's serving on the jury.

¶ 35 OSAD's third potential issue is whether the circuit court deprived the defendant of a fair trial when it implicitly refused to allow his trial attorney to ask State's witness Blake Harsy a question on recross-examination. Regardless of what else could be said about counsel's unsuccessful attempt to recross-examine Harsy, it is clear that the court's refusal to permit recross-examination, if error at all, was definitely harmless error. At trial, counsel made clear that she had obtained from State's witness Charles Ellett's testimony the exact bit of information that she wanted to get from Harsy on recross-examination, namely, that there was no ammunition in the pistol's chamber.

¶ 36 OSAD's fourth potential issue is whether the State failed to prove the defendant guilty beyond a reasonable doubt when it failed to prove that the pistol the defendant possessed was operable, *i.e.*, actually capable of firing a bullet. Nothing in Illinois law requires the test-firing of a firearm in order to prove an accused guilty of being an armed habitual criminal (720 ILCS 5/24-1.7(a) (West 2012)) or unlawful possession of a weapon by a felon (*id.* § 24-1.1(a)), the two offenses of which the defendant was found guilty. The prohibited act in each of the two offenses, as charged here, is the possession of "any firearm," not the possession of any operable firearm. See *People v. White*, 253 Ill. App. 3d 1097, 1098 (1993) (rejecting defendant's contention that possession of an inoperable rifle could not support a conviction for unlawful use of weapons by a felon). Based on the State's evidence, detailed *supra*, a rational trier of fact easily could have found, beyond a reasonable doubt, that the defendant possessed a firearm. See *People v.*

Nitz, 143 Ill. 2d 82, 95-96 (1991) (where defendant argues on appeal that he was not proved guilty beyond a reasonable doubt, reviewing court considers whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt). There was no failure of proof in this case.

¶ 37 OSAD's fifth potential issue is a bit more serious than the others—whether the circuit court conducted an inadequate *Krankel* inquiry on remand or whether the court erred in finding no merit to the defendant's claim of ineffective assistance of trial counsel. As previously noted, the first appeal in this case ended with a remand with directions that the circuit court conduct a *Krankel* inquiry. See *People v. Franklin*, 2016 IL App (5th) 140068-U.

¶ 38 The circuit court conducted an adequate *Krankel* inquiry on remand. That is, the court inquired impartially into the factual basis of the defendant's posttrial ineffective-assistance-of-counsel claim, thus allowing for a full consideration of the claim. See *People v. Patrick*, 2011 IL 111666, ¶ 41 (goal of a *Krankel* inquiry). First, the court asked the defendant to explain the nature of his claim. Then, the court solicited trial counsel's comments on the facts and circumstances surrounding the defendant's allegations. Finally, the court gave the defendant an opportunity to respond to counsel's comments. This approach qualifies as an appropriate *Krankel* inquiry into a defendant's posttrial claim that trial counsel provided ineffective assistance. See *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003).

¶ 39 Both the defendant and defense counsel provided the court with detailed information on the ineffective-assistance allegations. Each described his or her version

of the facts and circumstances, and each provided his or her thoughts, viewpoints, or explanations. The defendant's allegations were inadequate on their face. The two witnesses the defendant claimed he wanted to have testify at trial, Cheryl James and Anthony Williams, would not have benefitted him at trial. They did not have any exculpatory testimony to offer. If anything, their testimonies, as described by the defendant, would have added to the already-abundant evidence that the defendant did in fact possess a gun, the gravamen of both of the counts for which he stood trial. Meanwhile, trial counsel represented to the court that she interviewed both James and Williams during her pretrial preparations, and their statements to her were "not in line with" anything the defendant had told her. Furthermore, counsel indicated to the court that defendant's remarks at the *Krankel* inquiry bore little or no resemblance to his statements during pretrial preparations.

¶ 40 This court also notes a discrepancy between the defendant's statements at the *Krankel* inquiry and a statement he made moments before his trial began. At the *Krankel* inquiry, the defendant stated that he wanted Cheryl James to testify about the content of two alleged telephone conversations between the two of them; moments before trial, he said he wanted to have James called as a witness so that she could "verify the fact that [he] was on the job [at the Econo Lodge] at the time when [he] was arrested." This discrepancy casts further doubt on the defendant's allegations.

¶ 41 Faced with the representations of the defendant and of trial counsel, the circuit court certainly did not commit manifest error (see *People v. McCarter*, 385 Ill. App. 3d 919, 941 (2008)) when it concluded that the defendant's claim pertained only to matters

of trial strategy, declined to appoint new counsel for the defendant, declined to conduct a full-scale hearing on the defendant's claim, and denied the defendant's motion for a new trial.

¶ 42 CONCLUSION

¶ 43 The circuit court conducted a proper *Krankel* inquiry into the defendant's posttrial claim that trial counsel had provided ineffective assistance, and it reasonably concluded that the claim pertained only to matters of trial strategy. No reversible error was committed in regard to the *Krankel* inquiry or in regard to any other aspect of this case. All of the potential issues discussed by OSAD in its *Anders* brief are issues that lack any arguable merit. Accordingly, OSAD is granted leave to withdraw as appellate counsel for the defendant, and the judgment of conviction is affirmed.

¶ 44 Motion granted; judgment affirmed.