2012 IL App (1st) 100867-U

FIFTH DIVISION
May 4, 2012

No. 1-10-0867

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 09 MC6 16387
	)	
BRIAN HILL,	)	Honorable
	)	Anna Helen Demacopoulos,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE EPSTEIN delivered the judgment of the court.
Justices McBride and Howse concurred in the judgment.

O R D E R

¶ 1 *Held*: Pursuant to *People v. Perkins*, 408 Ill. App. 3d 752 (2011), a *per se* conflict of interest was not created when counsel raised and argued her potential ineffectiveness in a posttrial motion. Remand pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984), is unnecessary when the trial court's preliminary inquiry did not indicate that counsel had neglected defendant's case.

¶ 2 After a bench trial, defendant Brian Hill was found guilty of resisting a peace officer and sentenced to 200 days in jail. On appeal, defendant contends that the trial court erred by failing to appoint new counsel to represent him when trial counsel had a *per se* conflict of interest at the

posttrial hearing. Alternatively, he contends that this cause must be remanded to the trial court for a hearing pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984). We affirm.

¶ 3 Defendant was arrested and charged with domestic battery and resisting a peace officer after a December 2009 incident during which the victim, his sister Tanika, was punched in the face. The State subsequently nol-prossed the domestic battery charges, and the matter proceeded to trial.

¶ 4 At trial, Officer Kaczanowski testified that after receiving a call regarding a domestic disturbance, he and two other officers responded to an address in Blue Island. Once there, the victim informed him that defendant had struck her in the face. Kaczanowski then went to speak with defendant who, at that time, was getting into a car. Defendant complied with instructions to exit the car and provide his identification. He denied hitting the victim.

¶ 5 At some point, Kaczanowski made the decision to arrest defendant. He and the other officers then attempted to take defendant into custody. Kaczanowski tried to grab defendant's hand in order to place the handcuffs on defendant's left hand, but defendant moved his hand away. The other two officers then grabbed defendant and placed him against a vehicle facing away so that Kaczanowski could handcuff defendant. However, defendant moved his hand again. Although one of the other officers had his hand on the back of defendant's neck, "in an attempt to stabilize him," defendant began to stiffen his body and Kaczanowski was unable to move defendant's hands together.

¶ 6 Ultimately, Kaczanowski was able to place one cuff on defendant's left wrist. He then forcibly moved defendant's left hand toward the center of defendant's body while another officer moved defendant's right hand closer so that both arms could be handcuffed. During this process, defendant denied doing anything and asked why he was being arrested. When he was informed it was for domestic battery, defendant uttered "obscenities and such." Kaczanowski testified that it

took all three officers to take defendant into custody. Ultimately, they had to drag and carry defendant to the squad car.

¶ 7 During cross-examination, Kaczanowski admitted to learning, after defendant was placed in the squad car, that defendant had asthma. However, Kaczanowski denied that defendant moved his hands toward his chest or in front of himself; rather, defendant moved his hands along his sides.

¶ 8 Defendant testified that he was backing up his car when a detective approached him, requested his identification and asked what had happened. Although the detective did not ask defendant to step out of the car, defendant exited his car. At some point, defendant told the detective that he had to go to the bathroom and began to walk away. When the detective grabbed defendant's right arm, defendant pulled away and said he was going to the bathroom.

¶ 9 After defendant pulled his arm away, the detective, Kaczanowski and another officer grabbed him. Kaczanowski grabbed defendant around the neck. Defendant pulled on Kaczanowski's arm while yelling not to choke him because he had asthma. He began to have shortness of breath and to wheeze. Defendant denied trying to prevent the officers from placing handcuffs on him or taking him into custody; rather, he stated that he went "willingly" to the car.

¶ 10 During cross-examination, defendant testified that when he was placed against a car, his right arm was behind him, but his left arm was cradled in front of him because it was broken.

¶ 11 During closing argument, the defense argued that the only reason the officers had difficulty placing handcuffs on defendant was because defendant was unable to breathe, and, consequently, did not intentionally refuse to be handcuffed. The State responded by characterizing defendant's recitation of events as incredible when defendant testified that he was wheezing, yet then indicated he was able to yell that he had asthma.

¶ 12 In finding defendant guilty of resisting a police officer, the court found Kaczanowski to be a credible witness, and, further, that defendant's testimony that he cradled his left arm in front of his body actually corroborated Kaczanowski's testimony. The court sentenced defendant to 200 days in jail.

¶ 13 Defendant then filed a motion to reconsider the "finding of guilty" arguing that the court did not hear evidence that defendant's arm was in a sling which rendered him incapable of complying with the officers' orders. At the hearing on the motion, counsel told the court that defendant's sister had told her, after the trial, that defendant's arm was in a sling at the time of the incident.[1] Counsel stated that although defendant had informed her prior to trial that he suffered from asthma, she did not understand him to have had his arm in a sling. Counsel further explained that she had misunderstood defendant and believed that his arm was injured after the incident. Accordingly, she did not bring the sling up at trial. However, counsel believed that this fact may have made a difference in the trial's outcome, and asked the court to consider this information. The State responded that regardless of the sling, Kaczanowski's testimony established that defendant did not enter custody "willingly."

¶ 14 In denying the motion, the trial court stated that defense counsel had done an "admirable" job. The court then reviewed its notes and the transcript which indicated that defendant had testified that his arm was broken and that it was cradled in a position in front of him. The court then stated that it "just" did not believe defendant.

¶ 15 On appeal, defendant contends that the trial court should have appointed new counsel to present the arguments raised in the motion to reconsider the finding of guilty. Specifically, defendant alleges that a *per se* conflict of interest was created when counsel was forced to argue

[1] It is unclear from the record whether the "sister" counsel spoke to was the victim.

her own ineffectiveness at the hearing. In the alternative defendant contends this cause must be remanded for a hearing pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984).

¶ 16 Our supreme court has found the existence of a *per se* conflict of interest when defense counsel (1) has a prior or contemporaneous relationship with the victim, the State, or an entity assisting the State; (2) contemporaneously represents a State witness; and (3) is a former assistant State's Attorney who was personally involved in prosecuting the defendant. *People v Taylor*, 237 Ill. 2d 356, 374 (2010).

¶ 17 Although the State highlights that none of the three scenarios outlined in *Taylor* occurred in the instant case, defendant argues that a *per se* conflict of interest arises whenever an attorney must argue his or her own ineffectiveness. See *People v. Lawton*, 212 Ill. 2d 285, 296 (2004) (counsel faced an inherent conflict of interest in representing the defendant on appeal when counsel's actions before the trial court were the basis of the defendant's claim of ineffective assistance of counsel and to advance defendant's claim on appeal would require counsel to argue his own incompetence); *People v. Moore*, 207 Ill. 2d 68, 79 (2003) (finding it "inappropriate" for trial counsel to argue a motion that contained allegations of his own incompetence).

¶ 18 However, this court has held there is no *per se* rule entitling a defendant to a new attorney when he files a *pro se* motion alleging his trial counsel was ineffective; rather, the circuit court should conduct a preliminary investigation in order to determine whether the defendant's claim is valid. *People v. Cabrales*, 325 Ill. App. 3d 1, 5 (2001). In other words, a conflict is not created by the mere filing of a defendant's *pro se* motion and a court is not required to appoint new counsel before conducting the preliminary investigation. *People v. Allen*, 391 Ill. App. 3d 412, 418 (2009).

¶ 19 This court's decision in *People v. Perkins*, 408 Ill. App. 3d 752 (2011), is instructive. In that case the defendant argued, relying on *Lawton*, that a *per se* conflict of interest arose when

trial counsel filed a motion for a new trial alleging, *inter alia,* that he was ineffective because he would have conducted a certain cross-examination differently had he known that the cause would proceed on certain charges.

¶ 20 This court first distinguished *Lawton,* as the issue in that case was whether a defendant forfeited a postconviction or postjudgment claim of ineffective assistance of counsel when represented by the same attorney at trial and on direct appeal. *Perkins*, 408 Ill. App. 3d at 762. This court then found that it was "far from clear" that the recognition of a conflict of interest in the context of either forfeiture or an attorney representing a defendant on appeal or in another postjudgment action "means that it is a constitutional *per se* conflict of the sort warranting automatic reversal outside those situations." *Perkins*, 408 Ill. App. 3d at 762. Finally, this court highlighted that it had previously declined to hold, especially in those cases where the defendant did not request new counsel, that a *per se* conflict of interest existed any time counsel raised his own ineffectiveness or that new counsel was automatically required. *Perkins*, 408 Ill. App. 3d at 762.

¶ 21 A review of the record in that case revealed that the defendant did not make a *pro se* complaint against his counsel; rather, his attorney "voluntarily and zealously" argued the claim on defendant's behalf. *Perkins*, 408 Ill. App. 3d at 762. The court also noted that the defendant was represented by new counsel on appeal and appellate counsel had no conflict in arguing trial counsel's ineffectiveness. *Perkins*, 408 Ill. App. 3d at 762. Accordingly, this court concluded that the concerns raised in *Lawton* were not present and did not find the existence of a *per se* conflict of interest. *Perkins*, 408 Ill. App. 3d at 762.

¶ 22 Similarly here, defendant did not allege that defense counsel was ineffective before the trial court. Rather, counsel brought to the court's attention in the motion to reconsider the finding of guilty that the trial court did not hear testimony regarding defendant's arm being in a sling

because she was not aware of that fact prior to trial and may have misunderstood defendant regarding the timing of his injury. Here, as in *Perkins*, counsel "voluntarily and zealously" asserted the claim before the trial court on behalf of her client who is represented by different counsel on appeal. Accordingly, no *per se* conflict of interest existed at the posttrial hearing. See *Perkins*, 408 Ill. App. 3d at 762.

¶ 23 Defendant alternatively contends that this cause must be remanded for a hearing pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984), so that the issue of trial counsel's alleged ineffectiveness may be further investigated.

¶ 24 When a defendant makes *pro se* posttrial claims of ineffective assistance of counsel, the trial court is required, pursuant to *People v. Krankel*, 102 Ill. 2d 181, 189 (1984), to conduct an adequate inquiry into the factual basis of his claims. *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003); see also *People v. Williams*, 224 Ill. App. 3d 517, 523-24 (1992) (applying *Krankel* and its progeny when defendant did not raise a *pro se* allegation of ineffective assistance of counsel but there was a "clear basis" for such a claim). If the court's inquiry reveals that a defendant's claims have no merit or relate only to trial strategy, the court may deny the motion. *Moore*, 207 Ill. 2d at 78; see also *People v. Nitz*, 143 Ill. 2d 82, 134 (1991) ("there is no *per se* rule that new counsel must be appointed every time a defendant presents a *pro se* motion for a new trial alleging ineffective assistance of counsel").

¶ 25 During the inquiry, the court may question trial counsel or the defendant regarding the circumstances surrounding the claim, or may base its determination on its own knowledge of counsel's actions at trial and the insufficiency of the defendant's allegations on their face. *Moore*, 207 Ill. 2d at 78-79. A discussion between the court and the defendant may also be sufficient. *Moore*, 207 Ill. 2d at 78.

¶ 26 A reviewing court must then determine whether the trial court conducted an adequate inquiry into the defendant's allegations. *Moore*, 207 Ill. 2d at 78. Because the question of the adequacy of the inquiry is a matter of law, this court reviews the issues *de novo*. *Moore*, 207 Ill. 2d at 75; *People v. Vargas*, 409 Ill. App. 3d 790, 801 (2011); but see *People v. McCarter*, 385 Ill. App. 3d 919, 941 (2008) (when the trial court declines to appoint new counsel based on its judgment regarding the merits of a defendant's allegations, that decision is reviewed for manifest error).

¶ 27 Here, the trial court read and considered defendant's motion to reconsider the finding of guilty and subsequently listened as counsel explained how she learned posttrial that defendant was wearing a sling at the time of the incident and had misunderstood when defendant's arm was injured. The court then reviewed its notes and the transcript of defendant's testimony, noting that defendant had in fact testified that his arm was broken and that it was cradled in front of his body.

¶ 28 We find that the trial court conducted an adequate inquiry into the allegation raised in the posttrial motion where it permitted counsel to explain the specifics of the allegation. The court then relied on its own knowledge of the case to determine that even though defendant did not testify that he was wearing a sling at the time of incident, he did explain that his arm was broken and was cradled in the front of his body at some point during the altercation with the police. See *Moore*, 207 Ill. 2d at 79. Ultimately, the court explained that it simply did not believe defendant; having made that determination, the court was free to deny the motion without appointing new counsel for defendant. See *Moore*, 207 Ill. 2d at 79 (the trial court's evaluation of a *pro se* ineffectiveness motion may be based upon the court's knowledge of counsel's performance and the insufficiency of the allegations on their face).

¶ 29 This court is unpersuaded by defendant's reliance on *People v. Williams*, 224 Ill. App. 3d 517 (1992). On appeal, that defendant claimed that the trial court erred when it failed to conduct a *sua sponte* examination of the "readily apparent" ineffectiveness of defense counsel's conduct when counsel, at the posttrial hearing, indicated that additional witnesses were not called at trial who could have supported the defendant's alibi. *Williams*, 224 Ill. App. 3d at 523. Although counsel stated that the witnesses were unavailable, the record was silent as to what efforts counsel had made to present the witnesses at trial.

¶ 30 The *Williams* court first noted that the defendant did not make a written *pro se* claim of ineffective assistance of counsel, but that the record indicated that the trial court was aware of counsel's possible neglect of the defendant's case. *Williams*, 224 Ill. App. 3d at 524. However, when there was a "clear basis" to raise an allegation of ineffectiveness of counsel, as there was in that case, a defendant's failure to raise such an allegation did not result in a waiver of a "*Krankel* problem." *Williams*, 224 Ill. App. 3d at 524. The court then remanded the cause to the trial court so that the court could conduct a preliminary investigation into counsel's performance. *Williams*, 224 Ill. App. 3d at 524.

¶ 31 Initially, this court questions whether the record in the case at bar contains a clear basis upon which to raise an allegation of ineffective assistance of counsel. However, even assuming that such a basis exists, unlike the trial court in *Williams*, the trial court in the instant case conducted a preliminary inquiry into counsel's alleged ineffectiveness at trial, and, after speaking with counsel and reviewing the transcript, determined that counsel had not neglected defendant's case. Ultimately, the court concluded that the information counsel presented in the motion to reconsider the guilty finding was essentially presented in defendant's testimony, albeit without the word "sling."

¶ 32 Accordingly, the judgment of the circuit court is affirmed.

¶ 33 Affirmed.