2012 IL App (1st) 101653-U

SECOND DIVISION
January 31, 2012

No. 1-10-1653

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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. 08 CR 8604
	)	
CHARLES BENTON,	)	Honorable
	)	Thomas J. Hennelly,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Quinn and Justice Cunningham concurred in the judgment.

O R D E R

¶ 1 *Held*: Judgment entered on defendant's conviction for unlawful possession of a weapon by a felon affirmed over his allegation that the court failed to conduct a *Krankel* inquiry into his post-trial claim, and that his conviction violated the constitutional right to bear arms.

¶ 2 Following a bench trial, defendant Charles Benton was found guilty of two counts of unlawful possession of a weapon by a felon (UPW). At sentencing, the trial court merged those convictions and sentenced defendant to five years' imprisonment. On appeal, defendant contends that the trial court erred by not conducting a "minimal inquiry" into his post-trial claim that

defense counsel was ineffective for not testing a handgun for fingerprints, and that his conviction should be vacated because the UPW statute violates the constitutional right to bear arms.

¶ 3 The record shows, in relevant part, that shortly after midnight on April 20, 2008, Chicago police officers were patrolling the area near Wilcox Street and Kildare Avenue, in Chicago, when they observed a tan Buick pull up just north of that intersection. Defendant exited the driver's side of that vehicle, then walked eastbound on Wilcox Street while drinking out of a plastic cup. He was accompanied by two other individuals who were also drinking from a plastic cup and a bottle in a brown paper bag, respectively. The officers suspected that the three individuals were drinking on a public way and began to follow them.

¶ 4 As the officers slowly drove their unmarked vehicle down Wilcox Street, defendant looked over his shoulder repeatedly in their direction and began walking at a brisk pace, eventually moving about six or seven feet ahead of his companions. Then, when the officers exited their vehicle to investigate, defendant turned, placed his left hand into his left front coat pocket, pulled out a "shiny" gun, and threw it over his head and a fence into a vacant lot at 4252 West Wilcox Street. At that point, the officers detained the three individuals and recovered the gun, a chrome .380 semi-automatic handgun with one bullet in the chamber and no magazine. The parties also stipulated that defendant had a 1997 armed robbery conviction (96 CR 4598).

¶ 5 The defense case focused primarily on the testimony of defendant and his companions Jerry Rayford and Paul Woodhouse, who each acknowledged that he was a convicted felon on the night in question. Woodhouse testified that the handgun recovered by police that night belonged to him, and that he had "flung it across the gate." Defendant denied possessing a "shiny" .380 caliber handgun on the night in question, or throwing one into a lot. In rebuttal, Chicago police officer Fabian testified that Woodhouse had initially informed him that the gun was his, but later denied it and told the officer that he was trying to protect defendant.

¶ 6 In announcing its findings, the trial court stated, *inter alia*, that it did "not believe [defendant] and his two convicted felon friends," and ultimately found defendant guilty of two counts of UPW. Then, as the court took care of housekeeping matters, the following exchange occurred:

> "THE DEFENDANT: I'm going to jail for nothing I didn't do.
>
> THE COURT: Mr. Benton, I disagree.
>
> THE DEFENDANT: Your Honor, I swear I didn't have –
>
> THE COURT: I listened to your testimony, and I decided –
>
> THE DEFENDANT: I asked him to print the gun. Nobody want to print it. Paul Woodhouse prints will be on there, your Honor. I swear. Mine won't. I promise you. He not lying. Paul Woodhouse prints.
>
> * * *
>
> THE DEFENDANT: I don't know why I'm going to jail for nothing I ain't –
>
> THE COURT: Mr. Benton, please. Only one of us can talk – only one of us can talk at a time. I still have to sentence you, you know.
>
> THE DEFENDANT: I'm sorry, your Honor.
>
> * * *
>
> THE COURT: You'll have an opportunity to address me on the next court date.
>
> THE DEFENDANT: Your Honor, I would rather die, your Honor. You don't know how it is to go to jail for something – if they printed the gun, Paul Woodhouse prints would have been on the gun, your Honor.

THE COURT: Well, I suggest you present that to [defense counsel] and maybe he can raise that issue in a posttrial motion.

MR. SHERMAN [defense counsel]: Thank you, Judge.

THE DEFENDANT: When do I come back to court?

MR. SHERMAN: April 7th.

THE DEFENDANT: I just had a son. I am –

THE COURT: Court is in recess."

¶ 7 Counsel subsequently filed a motion for a new trial asserting, *inter alia*, that "the defendant wanted it included that he requested his attorney consistently to have the weapon tested for fingerprints and the attorney never did." At the hearing on that motion, counsel also specifically noted, "Judge, my client wishes me to state there were no fingerprints that were taken of [*sic*] this gun, and he believes if fingerprints would have been taken of this gun they would have disclosed that his fingerprints were not on it and Mr. Woodhouse's fingerprints were on it." The court denied defendant's motion, and defendant raised the issue again at sentencing. During allocution, defendant stated there was "no way possible that I could prove that this gun wasn't mine. It could have been printed, your Honor." The trial court did not specifically address defendant's claim, then merged defendant's convictions and sentenced him to five years' imprisonment.

¶ 8 In this appeal from that judgment, defendant first contends that the trial court erred by not conducting a limited inquiry into his claim that trial counsel was ineffective for failing to test the gun in question for fingerprints. The State responds that the trial court's duty to conduct an inquiry under *People v. Krankel*, 102 Ill. 2d 181 (1984) was not triggered where defendant made only a "vague, oral statement" after being found guilty, and never requested a new attorney or a continuance so that he could obtain one. The State further responds that a *Krankel* inquiry was

not warranted where defendant was represented by private counsel, citing *People v. Pecoraro*, 144 Ill. 2d 1 (1991). Defendant's claim presents a question of law, which we review *de novo*. *People v. Taylor*, 237 Ill. 2d 68, 75 (2010).

¶ 9 The supreme court's decision in *Krankel* has led to the rule that where defendant raises a *pro se* post-trial claim of ineffective assistance of counsel, the trial court should examine the factual basis of his claim. *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003). If the court determines that the claim lacks merit or pertains solely to trial strategy, the court need not appoint new counsel and may deny defendant's motion. *Moore*, 207 Ill. 2d at 78. If the court finds possible neglect of the case, however, new counsel should be appointed. *Moore*, 207 Ill. 2d at 78.

¶ 10 In this case, the record shows that after defendant was found guilty of UPW, he orally protested to the trial court that his privately retained counsel had not tested the gun recovered by police for fingerprints despite his requests to do so. Defendant also stated that if counsel had conducted such testing, it would have revealed that Paul Woodhouse's fingerprints, and not his, were on the gun. The court suggested that defendant have counsel raise the issue in a post-trial motion. Counsel included it in the motion for a new trial and argued it at the hearing, but the court rejected his claim and denied the motion.

¶ 11 Defendant now contends that the trial court erred in failing to conduct a *Krankel* inquiry into his claim of ineffective assistance of counsel. We disagree. Although the pleading requirements for a *pro se* allegation of ineffective assistance of counsel are somewhat relaxed, defendant still must satisfy minimum requirements in order to trigger a *Krankel* inquiry by the trial court. *People v. Bobo*, 375 Ill. App. 3d 966, 985 (2007). Here, the record shows that defendant never expressly claimed that counsel was ineffective; nor did he seek to replace his private counsel who argued his motion for a new trial and continued to represent him through sentencing. Under similar circumstances, the supreme court has found that application of

Krankel was not warranted. *People v. Pecoraro*, 144 Ill. 2d 1, 15 (1991); accord *People v. Shaw*, 351 Ill. App. 3d 1087, 1092 (2004).

¶ 12 In *Taylor*, 237 Ill. 2d at 77, the supreme court found that defendant's statement at sentencing was insufficient to require a *Krankel* inquiry, and that it was therefore unnecessary to reach defendant's argument regarding the viability of *Pecoraro*. We reach the same conclusion here on the nature of defendant's statement to the court, which reflected his conflict with counsel regarding trial strategy, rather than an assertion of ineffective assistance.

¶ 13 The record shows that the State established defendant's possession of the gun in question with eyewitness testimony from a Chicago police officer who observed defendant pull the gun from his pocket and throw it over a fence into a vacant lot. Defense counsel chose to rebut this testimony through that of Paul Woodhouse who testified that the gun recovered by police that night belonged to him, and that it was he who "flung it across the gate." After trial, defendant claimed that counsel should also have tested the gun in question for fingerprint evidence. As such, defendant's claim addressed a matter of trial strategy. It is well settled that the decision as to what evidence to present is generally an unassailable matter of trial strategy which cannot support a claim of ineffective assistance of counsel; and where, as here, defendant makes such a claim, the trial court may dismiss it without further inquiry. *People v. Ward*, 371 Ill. App. 3d 382, 433 (2007).

¶ 14 In reaching that conclusion, we find *People v. Jackson*, 243 Ill. App. 3d 1026 (1993), cited by defendant, distinguishable from the case at bar. In that case, defendant filed a formal complaint against his attorney with the Attorney Registration and Disciplinary Commission (ARDC), and when counsel moved to withdraw due to a perceived conflict of interest, the court denied the motion without inquiring into the specific allegations made by defendant in his complaint. *Jackson*, 243 Ill. App. 3d at 1033-35. Here, on the other hand, defendant brought his

claim directly to the trial court, and the court did not need to conduct any additional inquiry because the claim, on its face, pertained to trial strategy. We therefore find defendant's reliance on *Jackson* misplaced.

¶ 15 Defendant next contends that his UPW conviction should be vacated because the statute creating the offense violates the constitutional right to bear arms. That statute makes it unlawful for a convicted felon to knowingly possess on or about his person a firearm or firearm ammunition. 720 ILCS 5/24-1.1(a) (West 2008). Although defendant did not raise and preserve this issue in the circuit court, a challenge to the constitutionality of a statute may be raised at any time (*People v. Bryant*, 128 Ill. 2d 448, 454 (1989)), and we review such a challenge *de novo* (*People v. Carpenter*, 228 Ill. 2d 250, 267 (2008)).

¶ 16 Defendant claims that the UPW statute is facially unconstitutional in light of the recent Supreme Court decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, __ U.S. __, 130 S. Ct. 3020 (2010). In *Heller*, 554 U.S. at 635, the United States Supreme Court held that the second amendment precluded the District of Columbia from banning the possession of handguns in the home and from prohibiting individuals from rendering those firearms operable for the purpose of self-defense. In *McDonald*, __ U.S. __, 130 S. Ct. at 3050, the Supreme Court held that the right to keep handguns inside the home for self-defense was incorporated in the due process clause of the fourteenth amendment.

¶ 17 The State responds that the UPW statute does not implicate or offend the second amendment right to bear arms, noting that in both *Heller* and *McDonald*, the Supreme Court noted that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons." *Heller*, 554 U.S. at 626; *McDonald*, __ U.S. __, 130 S. Ct. at 3047.

¶ 18 In *People v. Williams*, 2011 IL App (1st) 091667-B, ¶ 16, this court rejected the same challenge to the constitutionality of the UPW statute raised by defendant here. Citing the language in *Heller* and *McDonald* which defended traditional prohibitions on the possession of firearms by felons, this court found that the second amendment does not permit a convicted felon to possess a loaded firearm under any appropriate level of scrutiny. *Williams*, 2011 IL App (1st) 091667-B, ¶ 16. This court also noted that the limited holdings in *Heller* and *McDonald* recognizing the right to possess handguns in the home did not apply to defendant who was found in possession of a handgun while standing on a public street. *Williams*, 2011 IL App (1st) 091667-B, ¶ 16. Given the indistinguishable circumstances in this case, we see no reason to depart from our prior decision in *Williams*, and continue to find the UPW statute constitutional.

¶ 19 We also reject defendant's reliance on *De Jonge v. Oregon,* 299 U.S. 353 (1937). In that case, defendant had been criminally charged with participating in a Communist Party meeting in violation of the fundamental right to peaceable assembly. *De Jonge*, 299 U.S. at 362, 364-65. Here, as discussed above, the Supreme Court did not recognize that convicted felons have a fundamental right to carry firearms outside the home. We thus find *De Jonge* inapplicable to the case at bar.

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

¶ 21 Affirmed.