

2013 IL App (1st) 112091-U

SECOND DIVISION
May 14, 2013

No. 1-11-2091

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. 10 CR 17745
)	
ALEX COLEMAN,)	Honorable
)	Thomas V. Gainer, Jr.,
Defendant-Appellant.)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Harris and Justice Simon concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not violate defendant's right to counsel when it did not appoint new counsel to investigate trial counsel's post trial claim that trial counsel may have neglected defendant's case.

¶ 2 In a bench trial, defendant Alex Coleman was convicted of burglary of a railroad car and sentenced as a Class X offender to six years in prison. On appeal, defendant contends that the trial court erred in failing to appoint new counsel to investigate whether trial counsel failed to properly represent defendant.

¶ 3 Defendant does not challenge the sufficiency of the evidence to convict him. At trial, Union Pacific special agent Daniel Ewart testified that at 8:30 a.m. on September 15, 2010, he was conducting surveillance in the vicinity of 2500 West 19th Street in Chicago. Agent Ewart was parked on a hill about 25 yards from a stopped Union Pacific train when he heard what sounded like bolt cutters being used to cut the security bolt off a train car. He looked in the direction of the noise and saw defendant ripping open a box taken from one of the containers on the train. Defendant was dressed in a black t-shirt and black cargo pants and had on a two-tone baseball cap. Defendant then picked up some yellow-handled bolt cutters, walked to the next train car, and used the bolt cutters to cut the security seal from the door handle to that car. He entered the train car and Agent Ewart next saw that a number of boxes were being thrown to the ground from that train car. After this, defendant opened a third train car with the bolt cutters. At this time, Agent Ewart saw a second person pacing back and forth beside the train car. This man was wearing a black t-shirt over a white long-sleeve t-shirt, and black pants. A third man, wearing a black polo shirt and black pants, came out of the bushes and whistled loudly. All three men fled.

¶ 4 After notifying the Chicago police department that there was a burglary in progress, Agent Ewart attempted to catch the three men. Defendant dropped the bolt cutters and continued running until he was apprehended by the Chicago police. Agent Ewart identified defendant to the police officers and then returned to the train, discovering that the boxes contained puppy training pads. He also testified that defendant did not have permission to enter any of the Union Pacific box cars.

¶ 5 Defendant testified on his own behalf that he was in the vicinity of the train that day because he was "turning a date" in his car with a woman he had picked up. At the time, he was parked near the Union Pacific train. He and the woman smoked crack cocaine, to which he was

addicted, and the woman then left. Defendant testified that he decided to go for a walk next to the tracks, but he denied that he was carrying bolt cutters. He encountered another man on the tracks. When the man began running toward him, defendant also ran. Chicago police officers apprehended defendant and arrested him. Defendant denied that he possessed bolt cutters that day or that he approached the Union Pacific train cars. He also denied that he ever wore a hat that day, saying that a check of his police inventory slip would reveal "none of that." Defendant admitted that he had previously been convicted of possession of a controlled substance and two retail thefts.

¶ 6 The prosecution called Chicago police officer Edward Layton as a rebuttal witness. He testified that on the day in question he arrested defendant. At the time of the arrest, defendant was wearing a dark, two-tone baseball cap. Officer Layton initially did not recall what happened to that cap after defendant's arrest. However, after being shown a police inventory list, Officer Layton recalled that the hat was inventoried.

¶ 7 After hearing final arguments, the trial court convicted defendant of burglary and subsequently sentenced him to six years in prison. In his motion for a new trial, counsel made a reasonable doubt argument based upon the baseball cap which the two prosecution witnesses alleged defendant was wearing at the time he was apprehended. Trial counsel noted that defendant was adamant in his testimony that he had not been wearing a baseball cap and had suggested that the court could look at the inventory list to prove that he was not wearing a cap that day. As we have noted, the prosecution used an inventory list to refresh Officer Layton's memory about what happened to the cap, which he testified defendant had been wearing. The inventory list stated that one of the items was a "black Sox hat." After viewing this inventory slip, Officer Layton testified that the defendant's cap had been inventoried.

¶ 8 In his motion for a new trial, counsel also argued that he had overlooked the fact that the inventory list stated that the items listed on it were recovered from defendant's car. He argued that this notation contradicted the testimony of Agent Ewart and Officer Layton, who both testified that defendant had been wearing a baseball cap when he was apprehended. Based upon this contradiction of the two prosecution witnesses' testimony, trial counsel alleged that defendant's guilt was not proven beyond a reasonable doubt. The court denied trial counsel's motion for a new trial, and this appeal ensued.

¶ 9 Defendant contends that the trial court was made aware of possible neglect of defendant's case by trial counsel, and therefore should have appointed new counsel to independently investigate trial counsel's performance, under *People v. Krankel*, 102 Ill. 2d 181, 189 (1984). In *Krankel*, the defendant was convicted of burglary, but then alleged in a *pro se* motion for a new trial that his trial counsel was ineffective because he did not investigate or present defendant's alibi defense. *Id.*, 187. Our supreme court determined that when a defendant alleges in a post trial motion that his trial counsel was ineffective, the court should appoint new counsel to represent defendant in a hearing on the post trial motion. *Id.*, 189.

¶ 10 But as *Krankel* has subsequently been construed, new counsel need not be appointed in every instance when defendant alleges ineffective assistance of counsel. *People v. Moore*, 207 Ill. 2d 68, 77-80 (2003). The court should first examine the factual basis of the claim. *Id.*, 77-78. If the trial court determines that the claim lacks merit, or only pertains to trial strategy, the court need not appoint new counsel, and should deny defendant's claim. *Id.*, 78. But if the trial court finds possible neglect of defendant's case, then new counsel should be appointed to represent defendant at a hearing on defendant's claim. *Id.* If the trial court determines, after this hearing, that defendant was denied the effective assistance of counsel, then the court shall vacate defendant's conviction and order a new trial. *Krankel*, 102 Ill. 2d at 189. If the court determines

that defendant received effective assistance of counsel, then the court shall deny the motion for a new trial, and let defendant's conviction and sentence stand. *Id.* We also note that where a defendant fails to claim ineffective assistance of counsel, but the trial court is otherwise apprised of a clear basis for such a claim, the issue should still be examined by the court as a matter of fundamental fairness. *People v. Williams*, 224 Ill. App. 3d 517, 524.

¶ 11 The inventory list at issue was not introduced into evidence; it was only used by the prosecution to refresh Officer Layton's memory about what happened to defendant's baseball cap. An inventory list which is included in the record on appeal lists a "black Sox hat" as one of the items inventoried. It is not clear whether this hat is the two-tone baseball cap which Agent Ewart and Officer Layton testified they saw defendant wearing that day. Furthermore, it is not clear whether the black Sox hat was inventoried from items found on defendant's person or in his car. The inventory list has many items on it, including six pairs of pants, a pair of shoes, the hat, and a plastic "City Sports" bag with items in it. The last item on the list is the City Sports bag. Below this item, the inventory list states "items found in offenders vehicle." This statement is ambiguous; it is not clear whether it applies to all the items on the inventory list or just the last item, the City Sports bag. Given these ambiguities in the inventory list, we do not find that trial counsel would have been able to use it to impeach Agent Ewart and Officer Layton in any significant way concerning whether defendant was wearing a two-tone baseball cap that day. Nor do we find that such impeachment would have affected the trial court's finding that defendant was guilty of burglary.

¶ 12 Agent Ewart was unequivocal in his identification of defendant as the man wearing a two-tone baseball cap whom he saw breaking into the railroad cars. He and Officer Layton both testified that defendant was wearing a two-tone baseball cap that day. Trial counsel told the court that he "did not come up with" the notation on the inventory list that the items were from

defendant's car. But the fact that the inventory list included a black Sox hat, but did not include a two-tone baseball cap, may have indicated only that the baseball cap was not taken from defendant when he was arrested. Furthermore, had trial counsel emphasized the appearance of a hat on this inventory list, he would have been contradicting the implication in defendant's testimony that no hat would be listed on the inventory list because defendant did not have on a hat that day. When the trial court was faced with trial counsel's motion for a new trial, which implicitly argued that trial counsel had been ineffective, the court properly examined the factual basis of this claim. *Moore*, 207 Ill. 2d 68, 77-78. The court noted that the statement on the inventory list about items being found in a car was ambiguous. The court also found that trial counsel was not ineffective in his representation of defendant; in fact, the court found that trial counsel's representation was "excellent," and that the evidence of defendant's guilt was overwhelming. The court also stated that it believed Agent Ewart and Officer Layton, including their testimony that defendant was wearing a baseball cap on the day in question. Because the court found that trial counsel's claim that he offered ineffective assistance of counsel lacked merit, the court was justified in not appointing independent counsel to represent defendant. *Id.*, 78.

¶ 13 For the reasons set forth in this order, we affirm defendant's conviction and six-year prison term.

¶ 14 Affirmed.