FOURTH DIVISION
April 24, 2014

No. 1-12-1739

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. 06 CR 18840
	)	
DARNELL ALLEN,	)	Honorable
	)	Rosemary Grant-Higgins,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE EPSTEIN delivered the judgment of the court.
Presiding Justice Howse and Justice Fitzgerald Smith concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's felony convictions were affirmed where defendant failed to show that his appointed post-trial counsel was ineffective for failing to impeach his former trial counsel at a *Krankel* hearing on defendant's motion for a new trial.

¶ 2 Defendant Darnell Allen appeals from the trial court's denial of his motion for a new trial based on his claim of ineffectiveness of his trial counsel. Following a bench trial, defendant was convicted of first degree murder and two counts of aggravated discharge of a firearm and sentenced to 56 years in prison. Defendant appealed, and we remanded for the limited purpose of allowing the trial court to inquire into the factual basis of defendant's claims in his *pro se* post-

trial motion that his trial counsel was ineffective. Upon remand, the trial court appointed independent counsel for defendant, conducted a hearing, and denied defendant's post-trial motion. Defendant now appeals from that ruling, contending his appointed counsel at the hearing was ineffective in that she failed to impeach defendant's trial counsel. Defendant also requests correction of the mittimus to accurately reflect time served in presentence custody. We affirm the judgment of the trial court and order correction of the mittimus.

¶ 3 At defendant's July 2008 bench trial, the State presented evidence that in the early morning hours of June 25, 2006, defendant shot Julius Birdine in the head and the back. Julius had been sitting with his pit bull, Pepper, on the porch of his home on South Ada Street in Chicago which he shared with his wife, Brandi Birdine, their daughter Mahogany, and Brandi's mother, Ms. Annette Thomas. Defendant approached and conversed with Julius about Pepper. Defendant left, and about 15 or 20 minutes later another man, Orlando Ray, arrived and spoke to Julius. The men argued about dog-fighting, with Orlando asserting that his dog could out-fight Pepper. At one point, Orlando struck Pepper. Orlando left, and a short time later he returned with defendant. The men continued to talk about Pepper. Brandi's mother, Ms. Thomas, went outside and told Julius he needed to come inside. Meanwhile, Brandi called a friend, Phillip Kizer, to come to the house to help Julius. Phillip arrived in his car. He testified at trial that when he went to Julius's house, he was unarmed and made no indication he was in possession of a weapon. Phillip tried to persuade Julius to leave with him. Julius and Orlando continued to argue, and Julius punched Orlando in the face. Phillip got back into his car. As Ms. Thomas pulled Julius away from defendant and Orlando and tried to get him into Phillip's car, defendant fired several gunshots at the car. Phillip drove away. Julius ran toward the street but was shot in the back. Both Brandi and Ms. Thomas saw defendant walk over to where Julius was lying and

shoot him in the head. Brandi yelled at defendant, who turned and fired a shot at her.

¶ 4 As the State's case in chief was drawing to a close with both sides about to stipulate to additional testimony, defendant's trial counsel addressed the court:

> "MR. PRUSAK: Can I approach? We got our stipulations, but is it possible I don't put [defendant] on today? I'd like to visit him and talk to him and go over. We have a videotape and transcript, stuff like that.
>
> If we have to, I will put him on today. I'd like to do it tomorrow, if possible."

¶ 5 The court stated it would finish the case that day. The parties entered into stipulations, after which Prusak asked for and was allowed a brief recess. After the case was recalled, Prusak announced: "We are ready, Judge. Judge, we are going to call Darnell Allen."

¶ 6 Defendant testified and presented a theory of self-defense. He admitted carrying a gun and shooting Julius but testified he did not intend to shoot anyone that day. Defendant fired his handgun only after Julius told Phillip to "air [defendant's] ass out," which defendant took to mean to kill him, and that Phillip aimed a pistol at him. Defendant reacted by firing his revolver at the back of Phillip's car "as a warning shot." Defendant continued to shoot at Phillip while running from the scene, and Phillip shot at him three or four times. Defendant denied approaching Julius on the ground, standing over him, and firing at his head. On cross-examination, defendant testified that after he was arrested, he had a conversation with Detectives Sandoval and Carlassare. He did not recall telling them that Julius had sent his dog after defendant on the date of the shooting and that he was upset about that.

¶ 7 Detective Lorenzo Sandoval testified that after he arrested defendant on July 18, 2006, he took defendant to the police station and had a videotaped conversation with him.[1] Defendant stated he was upset when Julius's dog came at him. Defendant never told the detectives that Julius told Phillip Kizer to "air his ass out."

¶ 8 At the conclusion of the bench trial, the court found defendant guilty as charged and denied defense counsel's motion for a new trial. Defendant filed and presented to the court a *pro se* hand-written motion for a new trial. The court noted that the *pro se* motion included claims of ineffective trial counsel and advised defendant that if he wished to pursue his motion, the court would dismiss his counsel and allow defendant to argue his own motion. Defendant elected to withdraw his *pro se* motion. The court sentenced defendant to a 25-year prison term for first degree murder and a mandatory consecutive 25-year term for personally discharging a firearm that proximately caused the victim's death. The court also imposed two concurrent 6-year sentences for aggravated discharge of a firearm, consecutive to the 50-year sentence.

¶ 9 Defendant appealed. In an unpublished order, we rejected defendant's claim that he was denied a fair trial because of prosecutorial misconduct in closing argument. We also addressed defendant's claim of error based on his *pro* se post-trial motion and held that the trial court failed to examine the factual basis of all of defendant's *pro se* claims of ineffectiveness of counsel to determine whether they warranted the appointment of new counsel for defendant. We remanded for the limited purpose of allowing the trial court to inquire into the factual basis of defendant's claims. We directed that if defendant's claims were found to be meritless, the trial court could deny defendant's motion, and defendant's convictions and sentence would remain standing.

[1] Defendant's videotaped statement was not introduced at trial.

People v. Allen, No. 1-08-2603 (2011) (unpublished order under Supreme Court Rule 23).

¶ 10 On remand, based on the claims in defendant's *pro se* post-trial motion and pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984), the trial court appointed an assistant Public Defender to independently evaluate defendant's claims of ineffective assistance of counsel and present any additional claims in a motion for a new trial. Appointed counsel conferred with defendant and filed a written motion for a new trial on which the court held a hearing. Relative to the instant appeal, the claims of ineffective counsel in the motion included the allegations that defendant's trial counsel did not visit him in jail or prepare him to testify at his trial or allow him to view the videotape of the statement defendant gave to police. Testimony at the *Krankel* hearing relevant to the instant appeal included the following.

¶ 11 Defendant testified that his trial counsel, Raymond Prusak, never visited him in jail, never discussed his case with him by telephone, and all of their conversations were brief and took place in the courtroom lockup before or after court. Prusak did not show defendant any discovery materials or the videotape of the statement he gave to police or any other written material, did not advise him of what witnesses would be called, and did not discuss with him what his trial testimony would be.

¶ 12 Defendant's appointed counsel presented Prusak as a witness. He testified that he was surprised there was no documentation showing he had visited defendant in the jail, but that prior to trial he spoke with defendant numerous times in the courtroom lockup. The shortest conversations were 3 to 5 minutes in length, the longest lasted 20 to 30 minutes. Prusak discussed with defendant the witnesses who would be called at trial. Prusak did not play for defendant the recorded statement defendant gave to police, but he read the transcript of the

statement to defendant "many times." "I did go over the statement with him, I did make a point that he needed to be aware of what he had said on a previous occasion, and I did advise him to tell the truth." "I do remember having very clear conversations with my client regarding his statement and telling him that he has to be aware of everything that's on that transcript." Prusak testified that he was prepared for defendant's trial. Asked whether he would have requested a continuance if he had not been prepared, Prusak responded, "I would have got on my knees and begged for a date, yes."

¶ 13 The State presented the testimony of Michael Clark, the assistant State's Attorney who prosecuted defendant. Clark testified that Prusak presented a self-defense theory at defendant's trial and cross-examined the State's witnesses in a manner that was relevant to the self-defense theory. Defendant's trial testimony was substantially consistent with the recorded statement he had given previously to the police, and Clark had been able to impeach him only on a couple of points. Each time Prusak appeared in court, Clark would observe him go back to the lockup before and after the court call to speak with his clients.

¶ 14 At the conclusion of the hearing, the court rejected defendant's claims of ineffective assistance of trial counsel based on Prusak's alleged deficiencies in failing to communicate with defendant at the jail and found that Prusak spoke with defendant on a number of occasions in the courtroom lockup and prepared him to testify at trial. The court found: "Mr. Prusak gave an opening statement where he introduced his theory of self-defense and stated what he expected the evidence to show, he made timely objections, had effective cross-examinations of the State's witnesses, and argued [ ] effectively for the defendant in closing argument." The court denied defendant's motion for a new trial.

¶ 15 On appeal, defendant contends his conviction should be reversed and remanded for a new trial on the basis of ineffective assistance of post-trial counsel, citing *Strickland v. Washington*, 466 U.S. 668 (1984). He asserts that his "trial attorney, Raymond Prusak, was ineffective for a number of reasons, including failing to prepare him to testify and failing to review his statement to the police with him prior to trial." However, that is not the basis for defendant's assignment of error based on *Strickland* in this appeal. Rather, he claims he was deprived of effective assistance of counsel by his court-appointed attorney at the *Krankel* hearing because she failed to demonstrate through impeachment of Prusak that he lied when he claimed he was prepared for trial and had prepared defendant to testify.

¶ 16 Argument of a post-trial motion has been held to be a critical stage of a criminal proceeding in which an accused has a right to legal representation. *People v. Finley*, 63 Ill. App. 3d 95, 103 (1978). Upon remand after defendant's initial appeal in the case *sub judice*, the preliminary *Krankel* inquiry led both to the appointment of counsel who filed a new motion for a new trial and to an adversarial hearing, at which the State was permitted to cross-examine defendant and defendant's trial counsel was examined by defense counsel and cross-examined by the State. We conclude that the *Krankel* hearing was a critical stage of the criminal proceeding, and defendant's claim of ineffective assistance of his court-appointed counsel is guided by the two-prong test set forth in *Strickland*, 466 U.S. at 687. Under that test, a defendant must prove that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced defendant. The failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *People v. Clendenin*, 238 Ill. 2d 302, 317-18 (2010). For the reasons that follow, we conclude that defendant has failed to satisfy either prong of *Strickland*.

¶ 17 Defendant contends that his appointed counsel, Lisa Brean, was ineffective for failing to demonstrate at the *Krankel* hearing through the impeachment of his trial attorney, Raymond Prusak, that, contrary to Prusak's *Krankel* hearing testimony, he neither prepared defendant to testify nor reviewed the transcript of defendant's police statement with him before defendant testified. Defendant asserts that Brean was ineffective for failing to impeach Prusak's *Krankel* hearing testimony with a prior statement Prusak made at trial near the end of the State's case in chief when Prusak asked the trial court: "[I]s it possible I don't put [defendant] on today? I'd like to visit him and talk to him and go over. We have a videotape and transcript, stuff like that." Prusak stated that, if he had to, he would put defendant on the witness stand that day but added, "I would like to do it tomorrow, if possible." Defendant interprets Prusak's request for additional time as an admission on the record by Prusak that he previously had not reviewed defendant's statement to the police with him, and that this contradicted Prusak's later testimony at the *Krankel* hearing that he was prepared for trial and had prepared defendant to testify. Defendant contends it was essential that Brean impeach Prusak's *Krankel* hearing testimony of readiness for trial with his mid-trial request for a continuance to review defendant's statement with him.

¶ 18 Generally, the decision whether or not to impeach a witness is a matter of trial strategy which will not support a claim of ineffective assistance of counsel. *People v. Pecoraro*, 175 Ill. 2d 294, 326 (1997). Counsel renders ineffective assistance in cross-examining witnesses only if his approach is unreasonable. *People v. Ford*, 368 Ill. App. 3d 562, 575 (2006), citing *Pecoraro*, 175 Ill. 2d at 327. Here, the fact Brean did not cross-examine Prusak with his request during trial for a one-day continuance to speak with defendant was not objectively unreasonable because Prusak's continuance request did not impeach his *Krankel* hearing testimony. The

record shows that after the court denied Prusak's request to hold defendant's testimony over to the next day, the court afforded Prusak a brief recess to allow him to speak with defendant, after which Prusak announced: "We are ready, Judge. Judge, we are going to call Darnell Allen." Hence, both during trial and at the *Krankel* hearing, Prusak represented that he was prepared to present defendant's testimony. During his direct examination of defendant, Prusak elicited testimony detailing defendant's theory of self-defense which was consistent with defendant's exculpatory videotaped statement that he gave to police after his arrest. The assistant State's Attorney who prosecuted the case testified at the hearing that defendant's trial testimony was consistent with his videotaped statement. Our examination of the record has not found that the direct examination of defendant by his trial counsel was deficient or that defendant's trial testimony gave any indication that he had not been prepared to testify. Consequently, defendant has not established that Prusak failed to prepare defendant to testify. See *People v. Giles*, 209 Ill. App. 3d 265, 272 (1991).

¶ 19 We agree with the State that Prusak's request to present the defense's case until the next day to allow him to "go over" things with defendant did not exclude the possibility that Prusak had done so previously. Prusak testified at the *Krankel* hearing that he felt ready for trial after the State completed discovery and that he had gone over the transcript of defendant's statement with him before trial, but Prusak never represented whether or not he believed defendant was ready to testify at that stage. Nor would Prusak's determination of defendant's readiness to testify have matured until the State had rested. It would have been irresponsible for Prusak to proceed with the presentation of defendant's testimony without confirming at that critical time that defendant was prepared to testify. We conclude that Prusak's request for a brief trial delay to "go over" matters with defendant before letting defendant take the witness stand was appropriate

and not inconsistent with his testimony at the *Krankel* hearing that he had reviewed the statement transcript with defendant several times before trial. Consequently, there was no basis to impeach Prusak. That being the case, defendant has failed to establish under the first prong of *Strickland* that appointed counsel Brean was ineffective for failing to impeach Prusak.

¶ 20 Defendant has also failed to satisfy the second prong of *Strickland*, requiring that he show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. In the case *sub judice*, the record shows there was sufficient pretrial communication between Prusak and defendant. The motion for a new trial filed by Brean did not allege that defendant felt unprepared to testify and needed additional time with Prusak before testifying. Critically, defendant did not allege in the motion nor has he explained on appeal how additional pretrial communication with Prusak would have altered the outcome of the trial. See *People v. Valladares*, 2013 IL App (1st) 112010, ¶ 64, citing *People v. Penrod*, 316 Ill. App. 3d 713, 723 (2000). Attempted impeachment of Prusak would not have been enough to create a reasonable probability that the outcome of the proceeding would have been different or undermine confidence in the outcome. See *People v. Brown*, 371 Ill. App. 3d 972, 977-78 (2007). Consequently, defendant has failed to establish how he was prejudiced by appointed counsel Brean's alleged failure to impeach Prusak at the *Krankel* hearing.

¶ 21 Finally, the record reflects and the parties agree that the mittimus, which currently credits defendant with 777 days of presentence custody credit, must be corrected to reflect that defendant is entitled to two additional days of credit. Pursuant to our authority under Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), we order the clerk of the circuit court to correct the

mittimus to reflect 779 days of presentence custody credit.

¶ 22 For the aforementioned reasons, we order correction of the mittimus to reflect the correct amount of time served in presentence custody, and we affirm the judgment of the circuit court in all other respects.

¶ 23 Affirmed; mittimus corrected.