2014 IL App (1st) 130153-U

FIRST DIVISION
December 1, 2014

No. 1-13-0153

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. 12 CR 10843
	)	
WYATT JACKSON,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Delort and Justice Connors concurred in the judgment.

O R D E R

¶ 1 *Held*: The trial court did not err in declining to appoint new counsel to represent defendant with respect to his posttrial claim of ineffective assistance of counsel when the trial court conducted an extensive inquiry into the factual basis of defendant's *pro se* allegation of ineffective assistance of counsel and found it to be meritless.

¶ 2 Following a bench trial, defendant Wyatt Jackson was convicted of burglary and sentenced, based upon his criminal background, to a Class X sentence of seven years in prison.

On appeal, defendant contends that although the trial court made an inquiry into his posttrial claim of ineffective assistance of counsel in accordance with *People v. Krankel*, 102 Ill. 2d 181 (1984), the court erred when it failed to appoint new conflict-free counsel to investigate his claim and instead instructed defendant's allegedly ineffective trial counsel to investigate the issue. Defendant further contends that he was denied due process by the trial court's faulty recollection of the evidence presented at trial. We affirm.

¶ 3 Defendant's arrest and prosecution arose out of a May 2012 incident where he was observed exiting a window at 5607 South Throop Street in Chicago.

¶ 4 The matter proceeded to a bench trial. Prior to the commencement of trial, the court accepted defendant's jury waiver, and instructed him to have a seat. Defendant then asked whether the case was set for trial that day and stated that the defense was not ready. The court responded that trial counsel had just "answered ready" and instructed defendant to sit down.

¶ 5 Officer Jennifer Bryk testified that when she arrived at 5607 South Throop Street, she observed defendant exit the building through a basement window. Bryk approached defendant and detained him based upon "a call" that had been received regarding that address. She observed a shopping cart filled with scrap metal outside the window and that a wooden board had been removed from the window. When Bryk looked inside the basement window she saw a stack of metal pipes. After advising defendant of his *Miranda* rights, Bryk engaged him in conversation. During this conversation, defendant stated that he was scrapping and that he did not know who owned the building. Bryk did not observe defendant remove the board from the window, take anything out of the building, or put anything into his cart.

¶ 6 John Prekezes testified that he and his wife owned the building at 5607 South Throop and that defendant did not have his consent to be inside the building.

¶ 7 Defendant denied that he was at 5607 South Throop; rather, he testified that was at "the next building" over looking for scrap. He was coming out of the back of that building when the police arrived and inquired where he was coming from. He responded that someone was chasing him. During cross-examination, defendant stated that he was on a vacant lot next to 5607 South Throop.

¶ 8 In finding defendant guilty of burglary, the trial court found Bryk's testimony to be credible and compelling beyond a reasonable doubt. At a posttrial hearing, the court stated that it had "received some notes" from defendant regarding trial counsel.[1] The court then stated that it would "consider this a *Krankel* hearing," and asked defendant to explain his complaints about counsel. Defendant responded that counsel did not contact a witness who would have stated that defendant was outside the building.

¶ 9 Counsel responded that defendant wanted to go to trial immediately and had no witnesses. Counsel further stated that defendant did not mention a witness or request an investigation until after the trial. Defendant indicated that counsel's statement was not true and that from "day one" he told counsel there was a witness, *i.e.*, the person who called 911. Defendant asserted that counsel stated that he could not help defendant and that counsel never returned calls from defendant's "old lady."

¶ 10 The trial court ordered the State to obtain the log of the 911 call, and continued the "*Krankel* hearing." The State responded that the 911 call was from a neighbor who heard loud noises coming from the building next door. Defendant then stated that he told counsel that he was ready to go to trial but that he did not want to do so without witnesses against a police

[1] The record does not contain these notes.

officer because everyone would believe the officer. Defendant indicated that he had a witness, "the guy that was standing there."

¶ 11 At a subsequent hearing, trial counsel told the court that his investigator had attempted to locate and interview Leopold Kennedy and that a resident of 5601 South Throop indicated that Kennedy had moved without leaving a forwarding address. Upon questioning by the court, defendant indicated that if defense counsel had located the 911 caller earlier, the case "might be over" because the caller would have told the court that defendant was not in the building. Ultimately, the trial court concluded that "this is something that was talked about at trial," and that "efforts" were made to see if the "evidence might have been different." However, the situation had become "an empty unworkable" one and the court did not believe that the person at issue was available. Based upon the evidence at trial, the court concluded that defendant was inside the building scrapping. The court further stated that it had heard defendant's *Krankel* complaints and that the court found no fault in counsel's diligence or competence such that defendant was entitled to relief. The court then sentenced defendant, based upon his criminal background, to a Class X sentence of seven years in prison.

¶ 12 On appeal, defendant contends that the trial court erred by failing to to appoint new counsel to investigate his *pro se* posttrial claim of ineffective assistance of trial counsel when the court concluded that further investigation into defendant's clams was warranted, but erroneously left that investigation in trial counsel's hands.

¶ 13 In *People v. Krankel,* 102 Ill. 2d 181, 187-89 (1984), our supreme court concluded that the failure to appoint new counsel to argue a defendant's *pro se* posttrial motion alleging ineffective assistance of trial counsel was an error and remanded the cause for a new hearing on the claim. However, new counsel is not automatically required every time a defendant presents a

pro se posttrial claim that his counsel was ineffective; rather, the trial court must examine the factual basis of the defendant's claim in order to determine whether new counsel should be appointed. *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003).

¶ 14 A trial court may conduct such a preliminary examination by questioning trial counsel about the facts and circumstances surrounding the defendant's allegations, engaging in a discussion with the defendant, or relying on its own knowledge of counsel's performance and the insufficiency of the defendant's allegations on their face. *Moore*, 207 Ill. 2d at 78-79. If the court determines that the claim lacks merit or pertains only to matters of trial strategy, then it need not appoint new counsel and may deny the *pro se* motion. *Id*. at 78. If, however, the court finds that the allegations show possible neglect, the matter then proceeds to the second step of a *Krankel* proceeding, and new counsel must be appointed to represent the defendant at a hearing on his *pro se* claims of ineffective assistance of counsel. *Id.* at 78. This new counsel independently evaluates a defendant's ineffectiveness claim and avoids any conflict of interest that might be created were trial counsel forced to justify her actions. *Id.*

¶ 15 When considering a trial court's initial inquiry, a reviewing court must determine "whether the trial court conducted an adequate inquiry into the defendant's *pro se* allegations of ineffective assistance of counsel." *Moore*, 207 Ill. 2d at 78. This court reviews the manner in which the trial court conducted a *Krankel* hearing *de novo*. *People v. Fields*, 2013 IL App (2d) 120945, ¶ 39.

¶ 16 Initially, this court notes those decisions regarding which witnesses to call and what evidence to present at trial generally constitute matters of trial strategy that cannot form the basis of an ineffective assistance of counsel claim. *People v. Leeper*, 317 Ill. App. 3d 475, 482 (2000). However, counsel's failure to present available evidence to support a defense constitutes

ineffective assistance of counsel. *People v. York*, 312 Ill. App. 3d 434, 437 (2000). Here, defendant makes no substantive claims on appeal regarding trial counsel's alleged ineffectiveness. Rather, defendant's contentions are procedural in that he contends he was not given conflict-free new counsel and a full hearing on his *pro se* claims regarding trial counsel before the trial court.

¶ 17 In the case at bar, when defendant indicated that he was dissatisfied with trial counsel's representation, the court questioned defendant and trial counsel in order to determine the basis of defendant's complaint, that is, the failure of counsel to present the testimony of the 911 caller at trial. The court's questioning was clearly a preliminary inquiry, intended to provide the court with information regarding the factual matters underlying defendant's claim in order to determine whether the claim had merit and should be examined further. See *Moore*, 207 Ill. 2d at 77-78 (when a defendant makes a *pro se* posttrial claim of ineffective assistance, the court should first examine the claim's factual basis). In fact, here, the trial court conducted an extensive inquiry into the factual basis of defendant's claim. In other words, not only did the trial court question both defendant and trial counsel regarding defendant's claim, the trial court also attempted to obtain the 911 call log in order to determine the basis of defendant's claim. See *Moore*, 207 Ill. 2d at 78 (the main concern for a reviewing court is "whether the trial court conducted an adequate inquiry into the defendant's *pro se* allegations of ineffective assistance of counsel").

¶ 18 We note that defendant essentially argues that because the trial court conducted too much of an inquiry, the proceeding was transformed into a full *Krankel* hearing. We disagree. Although the trial court's inquiry was extensive and the court itself investigated the factual basis of defendant's claims, the record reveals that the court never required trial counsel to argue his own incompetence. See *People v. Willis*, 2013 IL App (1st) 110233, ¶ 71, quoting *People v.*

Lawton, 212 Ill. 2d 285, 296 (2004). Rather, the trial court questioned counsel regarding defendant's claim. We are unpersuaded by defendant's contention that the investigation conducted by trial counsel's investigator establishes that trial counsel was asked to investigate himself. The results of the investigation were merely an explanation of steps taken to determine the factual basis of defendant's claim. We similarly reject defendant's contention that the trial court improperly delegated the investigation of defendant's claim to trial counsel, in effect tasking counsel with investigating his own alleged incompetence. Here, the court requested that the State try to obtain the 911 log, and it was an investigator who attempted to locate the alleged caller. Although defendant is correct that the investigator reported the results of the inquiry to trial counsel, we disagree with defendant's characterization that this essentially caused counsel to argue his own ineffectiveness. Here, the investigator merely attempted to answer the factual question of whether this witness was available.

¶ 19 With regard to the maps attached to defendant's brief, we first note that these documents were not before the trial court, and, consequently, are not properly before this court. See, *e.g.*, *People v. Benson*, 256 Ill. App. 3d 560, 563 (1994) (explaining that items attached to briefs that are not included in the record on appeal cannot be used to supplement the record and cannot be considered). To the extent defendant asks this court to take judicial notice of the fact there is no building on the lot where the investigator allegedly conducted the interview, even were this court to take judicial notice of that fact, that fact was not before the trial court and we decline to assume anything more than a simple mistake in reporting the address on the investigator's part.

¶ 20 Ultimately, here, after conducting an extensive preliminary inquiry into defendant's claim in order to determine additional facts, the trial court found no fault in counsel's representation. See *Moore*, 207 Ill. 2d at 78-79 (the trial court need not appoint new counsel and may deny the

motion when the court determines that the claim lacks merit or pertains only to matters of trial strategy).

¶ 21 Defendant next contends that this cause must be remanded for a "proper *Krankel* hearing" because he was denied due process by the trial court's faulty recollection of the evidence presented at trial. Defendant argues that because there was no mention of an exculpatory witness at trial, the trial court's recollection that "this" issue was discussed at trial was incorrect.

¶ 22 A defendant is denied due process by "the failure of the trial court to recall and consider evidence that is crucial" to his defense. *People v. Williams,* 2013 IL App (1st) 111116, ¶ 75. When the record affirmatively shows that the trial court did not remember or consider the crux of the defense when entering judgment, the defendant did not receive a fair trial. See *People v. Simon,* 2011 IL App (1st) 091197, ¶ 91.

¶ 23 Here, we cannot find that the record affirmatively demonstrates that the trial court incorrectly recalled the evidence presented at trial. Although defendant argues that "this," taken in context refers the issue of the witness, the State contends that "this" refers to the central issue at trial, that is, whether defendant was inside the building. In the case at bar, the trial court's ambiguous statement does not rise to the level of misstating evidence, and consequently, fails to establish that the court affirmatively misremembered the evidence presented at trial. See *Simon,* 2011 IL App (1st) 091197, ¶ 91. Accordingly, defendant's contention must fail.

¶ 24 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 25 Affirmed.