FOURTH DIVISION
June 30, 2015

No. 1-13-0951

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 CR 20561
	)	
QUINTUS LEE,	)	Honorable
	)	Neil J. Linehan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ELLIS delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Cobbs concurred in the judgment.

O R D E R

¶ 1 ***Held:*** Evidence sufficient to sustain defendant's convictions for unlawful possession of a weapon by a felon. Defendant not entitled to new *Krankel* hearing where defendant was granted independent counsel to evaluate and litigate ineffectiveness claim. Mittimus corrected. Judgment affirmed in all other respects.

¶ 2 Following a bench trial, defendant Quintus Lee was convicted of two counts of unlawful possession of a weapon by a felon. Defendant challenges the sufficiency of the evidence to

sustain his convictions. He also requests a remand for a new preliminary *Krankel* inquiry and correction of the mittimus to reflect the correct number of days he spent in presentence custody.

¶ 3 At trial, Chicago police officer Michael Durkin testified that, at 10:47 p.m. on October 12, 2009, he and some 20 to 40 other officers executed a search warrant at an apartment located at 6648 South Spaulding Avenue in Chicago. The warrant specified that defendant was the target of the search. Officer Durkin testified that the Special Weapons and Tactics (SWAT) team made the initial entry into the apartment and detained defendant and his wife, Cherise Flenoy-Lee. Officer Durkin then entered the apartment and found a recycling bin in the hallway closet containing clothing and a box of 18 rounds of .45-caliber ammunition.

¶ 4 Officer Donna Walsh testified that the SWAT team detained Flenoy-Lee in the dining room while defendant was moved to the stairwell of the apartment building. Walsh testified that, once in the stairwell, defendant said that "his gun and weed were in the dresser." Walsh's arrest report said that defendant had said, "[M]y gun and weed are in the second drawer." Walsh testified that she searched the living room and found a utility bill addressed to defendant at the Spaulding Avenue address.[1]

¶ 5 Flenoy-Lee provided Walsh with documentation for the gun, but she did not recall if it included a bill of sale and a valid firearm owner's identification card (FOID).

¶ 6 Officer William Bokowski testified that he searched the bedroom dresser and found a.45-caliber pistol loaded with five rounds. The officer noted that there was clothing in the drawer, but

[1] Officer Walsh's name was not consistently labeled in the record, such that at times the officer's first name was listed as "Donald" and other times as "Donna." The trial court, in referencing the officer's testimony, referred to the officer in the feminine. We will follow the trial court's lead.

he could not recall whether it was men's or women's clothing. When shown a picture of the clothing in the drawer, Bokowski could not tell whether a woman's brassieres were depicted. The picture of the drawer does seem to show the straps of a woman's brassiere.

¶ 7 Officer Andy Mui testified that he also searched the bedroom dresser and found a .45-caliber magazine containing two live rounds in the right drawer—a different drawer than the one containing the handgun—but he did not recall whether there was clothing inside that drawer. When shown a picture of the drawer with the items recovered from it, Mui conceded that there "probably" were "panties" in the drawer.

¶ 8 Flenoy-Lee testified that she is defendant's wife, and while they were in bed at 10:30 pm on the night in question, she heard police yelling, "search warrant." She and defendant jumped out of bed, looked out the window, and saw a helicopter with a light shining down at their bedroom. The SWAT team was hitting the door, trying to get in, so Flenoy-Lee opened it for them. The SWAT team detained her and defendant in the dining room, and they remained side-by-side and within earshot of each other at all times during the search. The police recovered a gun from the bedroom and, while they were still in the dining room, the officers asked them who owned the gun. Flenoy-Lee said that it was her gun.

¶ 9 Flenoy-Lee identified a receipt for the gun showing that she purchased it on June 8, 2005, at Chuck's Gun Shop. She testified that she purchased the gun because she had planned to get a security-guard job—although she never actually did get one—and that she did not know defendant when she bought it.

¶ 10 Flenoy-Lee also identified her prior FOID card, which had her maiden name and her

previous address on it, as well as another FOID card which showed her married name and present address, with an expiration date of October 1, 2012. She testified that defendant never told police that the gun belonged to him and was in their bedroom dresser, and that the content of the pictures of the drawers from which the gun and rounds were recovered showed her undergarments and no men's clothing. She said that everything in the dresser belonged to her and, although she and defendant shared the bedroom, defendant did not have any belongings in the bedroom dresser. According to Flenoy-Lee, defendant kept his belongings in one of the two hallway closets. The other closet held linens, where she kept a box of bullets. Flenoy-Lee testified that she never allowed defendant to use or carry the gun.

¶ 11 The court found defendant guilty of two counts of unlawful possession of a firearm and ammunition by a felon and one count of possession of a controlled substance. The court noted that the apartment was very small, that there was no question that defendant rented the apartment with his wife, that both were in control of the apartment and its contents, and that defendant had constructive possession of the items in the apartment. The court also credited Walsh's testimony that defendant admitted that the gun was his, which, according to the court, proved his possession of the gun.[2]

¶ 12 At the initial hearing date for defendant's posttrial motion, defendant's private counsel informed the court that defendant had sent her a letter requesting that she raise her own ineffectiveness in the posttrial motion. Based on defendant's request, counsel requested leave to

[2] The trial court also found defendant guilty of one count of possession of a controlled substance based on cocaine residue left on a kitchen knife, but that conviction is not challenged on appeal.

withdraw as the attorney of record. The court inquired as to the contents of the letter, and counsel provided the court a copy to review.

¶ 13 In the letter, defendant claimed that counsel failed to file any pre-trial motions to suppress the statement or to quash his arrest. Defendant further alleged that the seizure of his wife's gun went beyond the scope of the search warrant. He asserted that, had the motion been denied, he would have been able to consciously choose a jury trial. After reviewing the letter, the court stated that it would conduct a hearing on this matter pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984).

¶ 14 The court asked defendant why he felt his counsel provided ineffective assistance. Defendant stated that he paid counsel to "fight this case," but that she only discussed his background. He also asserted that counsel failed to file pretrial motions, although he admitted that he never asked her to do so. When the court asked defendant if he was upset because his attorney lost the case, defendant said, "Yes, because it is my life." The court then explained to defendant that there are a lot of good attorneys who lose cases, but that does not mean they provided ineffective assistance. The court asked the State if it had any questions for defendant, and the State said that it did not.

¶ 15 The court then invited counsel to respond to defendant's allegations. Counsel explained that she filed a pretrial motion to dismiss the armed habitual criminal offense, which she won. She did not file a motion to quash arrest and suppress evidence because there was probable cause for the arrest, a search warrant was executed, defendant was the target of the warrant, and defendant was present when contraband was found. She said that she considered defendant's

statement a credibility issue for trial, not a proper subject for a motion to suppress. Counsel also noted that defendant made no allegations that his statement was coerced or taken in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). Counsel said that she submitted exhibits, prepared for trial, and prepared for Flenoy-Lee's testimony; she did not believe there was anything else she could have done prior to trial. Counsel also explained to defendant the difference between a jury and bench trial and that his criminal background could be used as an enhancement at sentencing.

¶ 16 The court then asked the State if it had any questions for counsel. The State inquired into counsel's background and license to practice law in the State of Illinois. The State also inquired into her prior experience in cases involving guns or drugs, whether she had filed motions in such cases, and whether her decision not to file a motion to suppress was a strategic one. The State asked counsel if she had filed a motion to dismiss, if she explained to defendant the difference between a jury and bench trial, if defendant executed a jury waiver, if she had an investigator investigate this case, and if she called a witness to testify.

¶ 17 The court found that counsel's explanation for not filing a motion to suppress "ma[de] sense" in light of the evidence at trial. The court also found that, based upon his observation of counsel's performance, she provided defendant with effective assistance both before and during trial.

¶ 18 Despite the court's finding that counsel was not ineffective, the court permitted counsel to withdraw. The court gave defendant a month to find another lawyer. At the next court date, the court appointed a public defender for defendant and gave the public defender additional time to file a posttrial motion. The public defender ultimately filed a motion for a new trial, which

included an allegation of ineffective assistance of counsel, although the written motion did not specify how trial counsel was ineffective. At the hearing on the motion for a new trial, the public defender said, "Now as far as [the claim that] Defendant received ineffective assistance of counsel, I'm not going to speak on that. I will rest on that. [Defendant] just wanted to make sure he didn't waive his right on that one, so I added that to the actual motion but I won't speak on that." The trial court denied the motion, finding that trial counsel effectively represented defendant throughout the proceedings. This appeal followed.

¶ 19 On appeal, defendant first contends that he was not proved guilty of possessing the ammunition and the gun beyond a reasonable doubt where his convictions were based on a theory of joint constructive possession, and his wife, with whom he lived, had a Second Amendment right to possess a firearm in her home for self-defense.

¶ 20 As an initial matter, defendant asserts that our standard of review is *de novo* because the issue is purely a legal one. We disagree. Defendant is challenging the sufficiency of the State's evidence. The standard of review for such an issue is whether, after reviewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Williams*, 193 Ill. 2d 306, 338 (2000). A criminal conviction will be reversed only if the evidence is so unsatisfactory as to raise a reasonable doubt of his guilt. *People v. Campbell*, 146 Ill. 2d 363, 375 (1992).

¶ 21 To sustain defendant's convictions for unlawful possession of a weapon by a felon, the State was required to prove that defendant possessed a firearm or ammunition after being convicted of a felony. 720 ILCS 5/24-1.1 (West 2012). Possession can be actual or constructive

(*People v. Frieberg*, 147 Ill. 2d 326, 360-61 (1992)), and where, as here, defendant was not found in actual possession of the firearm and ammunition, we consider whether the evidence shows his constructive possession of them. Constructive possession exists where defendant has the intent and capability to maintain dominion and control over the contraband, but not immediate personal control over it. *Id.* at 361. Proof that defendant knew the firearm and ammunition were present and exercised control over them establishes constructive possession (*People v. Moore*, 365 Ill. App. 3d 53, 60 (2006)), and living in a residence where the contraband is discovered is relevant to establishing control (*People v. Cunningham*, 309 Ill. App. 3d 824, 828 (1999)). In fact, where contraband is found on premises under the defendant's control, it may be inferred that the defendant had the requisite possession, absent other facts and circumstances which might leave a reasonable doubt as to guilt in the minds of the fact finder. *Frieberg*, 147 Ill. 2d at 361. This remains true even if other individuals besides the defendant had access to the controlled substances, because possession may be joint; "if two or more persons share immediate and exclusive control or share the intention and power to exercise control, then each has possession." *People v. Schmalz*, 194 Ill. 2d 75, 82 (2000).

¶ 22 The evidence showed that defendant and his wife lived together in a small, one-bedroom apartment. Inside the apartment, police found ammunition in the linen closet, along with a gun and additional ammunition in the bedroom. According to Officer Walsh, defendant admitted that the gun in the dresser belonged to him. The trial court expressly found Walsh's testimony regarding the statement to be credible and the record does not prove that finding to be unreasonable. See *People v. Ross*, 229 Ill. 2d 255, 272 (2008) (trier of fact is responsible for

making credibility determinations and will not be reversed unless unreasonable or improbable). Although no other officer testified to defendant's statement, the testimony of a single officer, standing alone, is sufficient to convict. *People v. Loferski*, 235 Ill. App. 3d 675, 682 (1992).

¶ 23 Moreover, the conclusion that defendant was in constructive possession of the gun is not refuted by the fact that defendant's wife also lived in the apartment, as possession may be joint. *Schmalz,* 194 Ill. 2d at 82; *People v. Embry,* 20 Ill. 2d 331, 335-36 (1960). The fact that other residents of a dwelling had access to the weapons is insufficient to defeat constructive possession. *People v. Bui*, 381 Ill. App. 3d 397, 424 (2008).

¶ 24 Defendant contends that this case is unlike other joint constructive possession cases because his wife had lawful possession of the firearm and ammunition, and had a Second Amendment right to possess them. Regardless of his wife's right to lawfully possess a firearm, Walsh testified that defendant admitted that the gun was his. The trial court found this testimony to be credible. Based on the evidence of the location of the gun and ammunition, it was not unreasonable for the trial court to conclude that defendant knew of those items and had the power to exercise control over them, even if his wife lawfully purchased them and could also control them. While defendant presented some evidence tending to show that his wife owned the gun and ammunition and that he had no right to control them, the trial court was better-positioned to resolve the conflict between that evidence and the evidence showing that defendant possessed the gun and ammunition. As the trial court's findings are not unreasonable, it is not our place to second-guess them.

¶ 25 Defendant further contends that where an act may be attributed to a criminal or an innocent cause, it will be attributed to the innocent cause rather than the criminal one, citing *People v. Benson*, 19 Ill. 2d 50, 61 (1960). This argument evokes the "reasonable hypotheses of innocence" standard rejected by the supreme court in *People v. Pintos*, 133 Ill. 2d 286, 291 (1989). To the contrary, in weighing the evidence, the trial court was not required to search out all possible explanations consistent with innocence and raise them to the level of a reasonable doubt. *People v. Jackson*, 232 Ill. 2d 246, 281 (2009). Nor was it required to accept the testimony of defendant's wife over Officer Walsh's testimony that defendant admitted that the gun was his. *People v. Young*, 269 Ill. App. 3d 120, 123-24 (1994). A rational trier of fact could have found defendant guilty of felony unlawful possession of the firearm and ammunition beyond a reasonable doubt.

¶ 26 Defendant next contends that the State's adversarial participation during the preliminary *Krankel* inquiry deprived him of his right to conflict-free counsel at a critical stage in his case. He asserts that because of the adversarial manner in which the *Krankel* hearing was conducted, this court should remand for a new preliminary *Krankel* inquiry.

¶ 27 A *Krankel* inquiry "serves the narrow purpose of allowing the trial court to decide whether to appoint independent counsel to argue a defendant's *pro se* posttrial ineffective assistance claims." *People v. Jolly*, 2014 IL 117142, ¶ 39 (quoting *People v. Patrick*, 2011 IL 111666, ¶ 39). The purpose of *Krankel* is best served by having a neutral trier of fact initially evaluate the claims at the preliminary inquiry without the State's adversarial participation, creating an objective record for review, so that a reviewing court can properly determine

"whether the circuit court properly decided that a defendant is not entitled to new counsel." *Jolly*, 2014 IL 117142, ¶ 46. The trial court may conduct a preliminary examination by questioning counsel about the facts and circumstances surrounding defendant's allegations, requesting more specific information from defendant or relying on its own knowledge of counsel's performance at trial and the insufficiency of defendant's allegations on their face. *People v. Boose*, 2014 IL App (2d) 130810, ¶ 27. Because defendant is not appointed new counsel at the preliminary *Krankel* inquiry, it is critical that the State's participation at that proceeding, if any, be *de minimis*. *Jolly*, 2014 IL 117142, ¶ 38. We review *de novo* whether the trial court properly conducted a preliminary *Krankel* inquiry in this case. *Id.* ¶ 28.

¶ 28 The trial court's initial inquiry into defendant's allegations was correct. The court asked defendant to state his complaints, then asked for counsel's response. But when the court allowed the State to extensively question counsel regarding her assistance, thereby eliciting corroborative testimony of counsel's explanations, the court went beyond the limits of an initial inquiry.

¶ 29 In this respect, this case appears similar to *Jolly*, 2014 IL 117142, ¶ 31, which held that the trial court erred in permitting the State to participate in an initial *Krankel* hearing in an adversarial way. The court further held that permitting the State to participate in an initial *Krankel* hearing was not harmless error and required remand for a new preliminary hearing. *Id.* ¶ 38.

¶ 30 But this case differs from *Jolly* in one critical respect. The trial court in *Jolly* allowed the State to participate in the initial *Krankel* inquiry, then denied the defendant's *pro se* claim of ineffective assistance of counsel at the preliminary stage—that is, without ever appointing new

counsel to argue the ineffectiveness of trial counsel. *Id.* ¶¶ 19-22. Here, even though the trial court found that trial counsel was not ineffective, the court still granted counsel's request to withdraw and appointed a new attorney to prepare defendant's posttrial motion and to evaluate defendant's ineffectiveness claims. In essence, the trial court granted defendant the same relief that defendant would have received had the trial court found some merit to defendant's claim of ineffective assistance of counsel. See *id.* ¶ 29 (if, at initial *Krankel* hearing, "the allegations show possible neglect of the case, new counsel should be appointed" (quoting *People v. Moore*, 207 Ill. 2d 68, 78 (2000)). In fact, the very point of a *Krankel* inquiry is to determine whether new counsel should be appointed to "independently evaluate the defendant's claim and avoid the conflict of interest that trial counsel would experience if counsel had to justify his or her actions contrary to the client's position." *People v. Chapman*, 194 Ill. 2d 186, 230 (2000). Simply put, even if the *Krankel* hearing was not conducted properly, defendant got the only remedy he was seeking, anyway—a new lawyer to represent him at a posttrial hearing on the ineffectiveness claims against his trial counsel. A remand would provide defendant nothing he did not already receive.

¶ 31 We recognize that, in defendant's written motion for a new trial, his newly-appointed public defender offered no explanation for why defendant's counsel was ineffective. And at the hearing on the motion, the public defender offered no argument in support of that claim. But an attorney appointed to represent a defendant on a posttrial claim of ineffective assistance of trial counsel is under no obligation to ultimately assert such a claim if it lacks merit. See *id.* (appointed counsel must "evaluate" defendant's claims, not necessarily assert them).

¶ 32 Moreover, the reluctance of the new lawyer to spend much time on the ineffectiveness claim in this case is understandable. The record strongly suggests that defendant's trial counsel had no basis for filing a motion to suppress either defendant's statement or the evidence recovered from his apartment. Defendant's apartment was the target of a search warrant that was executed while defendant was in the apartment. Nothing in the record suggests that the warrant was unsupported by probable cause or that the police exceeded the scope of the warrant in conducting the search. With respect to defendant's statement, defendant made no claim that his statement was coerced or taken in violation of *Miranda*. To the contrary, defendant's theory at trial was that he did not make the statement at all. Thus, the fact that his new attorney did not support his ineffectiveness claim does not persuade us that a new, initial *Krankel* hearing would amount anything more than an empty gesture. The trial court's error in permitting the State to participate as an adversarial party at the initial *Krankel* inquiry was harmless beyond a reasonable doubt.

¶ 33 Finally, defendant contends, the State concedes, and we agree that defendant is entitled to 261 days of presentence custody credit, rather than 255 days as stated in the mittimus. Accordingly, we correct the mittimus to reflect 261 days of presentence custody credit. *People v. McCray*, 273 Ill. App. 3d 396, 403 (1995).

¶ 34 For the reasons stated above, we correct the mittimus as indicated but affirm the judgment in all other respects. The evidence was sufficient to support defendant's convictions for unlawful possession of a firearm and ammunition, and a new *Krankel* inquiry was unnecessary where defendant obtained appointed counsel to review his claim of ineffective assistance of trial

counsel.

¶ 35 Affirmed; mittimus corrected.