2016 IL App (1st) 140238-U

FOURTH DIVISION
May 26, 2016

No. 1-14-0238

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. 13 CR 10886
	)	
MACK KEARNEY,	)	The Honorable
	)	Mary Colleen Roberts,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Howse and Cobbs concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant was not denied the effective assistance of counsel where defendant could not establish prejudice because there was no viable defense to the charge of delivery of a controlled substance. The trial court did not fail to adequately inquire into defendant's posttrial claims of ineffective assistance where the claims involved only matters of trial strategy.

¶ 2 Following a bench trial, defendant Mack Kearney was found guilty of delivery of a controlled substance and sentenced, based on his criminal background, as a Class X offender to six years' incarceration. Defendant appeals contending (1) that his trial counsel was ineffective

because he failed to properly present entrapment as a defense; and (2) the trial court failed to conduct a preliminary inquiry into defendant's posttrial claims of ineffective assistance of counsel as required by *People v. Krankel*, 102 Ill. 2d 181 (1984). We affirm.

¶ 3 Defendant was charged, through a four-count indictment, with delivery of a controlled substance within 1,000 feet of a school, possession of a controlled substance with intent to deliver within 1,000 feet of a school, delivery of a controlled substance and possession of a controlled substance with intent to deliver. The State alleged that defendant was approached by an undercover police officer who asked to buy "rocks" or crack cocaine. After leading the officer to another location defendant took $20 in prerecorded currency known as 1505 funds and gave the officer a small plastic bag containing cocaine. A custodial search revealed a second bag of cocaine on defendant's person.

¶ 4 At trial, the State repeated its allegations during opening statements. Defense counsel responded stating:

> "Judge, I want you to keep one word in mind when you think about Mr. Kearney's case, that's 'temptation.' Temptation is a terrible thing, and it's a very hard thing to resist, and when we look at the flow of this case, I want you to just stay in the flow and I want you to follow what happens is that Mr. Kearney is just minding his own business. ***
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> * * *
>
> While minding his own business, he is approached and a conversation does happen, and he is not one that initiated this conversation and there's a couple of key factors I want you to pay attention to. That's $20. That's enough to buy two little baggies of crack cocaine. *** What happened was, and I do believe the evidence will bare [*sic*] witness to this, is that the officer said to Mr. Kearney, if you help me get some crack cocaine, I will give you a bag."

Defense counsel continued contending that the evidence would show that defendant was tempted into committing a crime by the officer. Defense counsel, however, did not use the word "entrapment."

¶ 5 Officer Darryl Smith testified that on May 16, 2013, he was working undercover in the area of a gas station near Homan and Harrison where he observed defendant. At approximately 2 p.m., he approached defendant and asked to purchase some "rocks." Defendant said that he did not keep rocks on him and that they would have to walk across a bridge to go get them. Smith followed defendant north on Homan across the bridge on Congress to the mouth of an alley on Van Buren. Defendant told Smith to give him the money and wait. Smith gave defendant a $20 bill of 1505 funds. Prior to starting his assignment Smith had recorded the serial number of the bill. After Smith gave him the money, defendant walked out of sight toward the east. Approximately one minute later, defendant returned and handed Smith a plastic bag containing a white powdery substance suspected to be cocaine.

¶ 6 After defendant handed Smith the suspect cocaine, Smith signaled the other officers on his team that there had been a "positive narcotics purchase." Smith and defendant continued walking east and then southbound until they were at approximately 425 South Homan. There, the enforcement officers detained defendant and Smith. After defendant was placed in custody, another officer recovered a plastic bag containing suspected cocaine from defendant's person. Both the bag given to Smith and the bag recovered from defendant had spade logos on them.

¶ 7 On cross-examination, Smith denied that he had an agreement with defendant to allow him to keep one bag of cocaine for himself. Smith also denied that during his conversation with defendant, defendant told Smith that he didn't have anything to sell. Smith testified that he and defendant walked approximately one-half mile. In response to a question by the court, Smith testified that it was normal to walk that far for a drug purchase. Smith admitted that neither he

nor any other police officer searched the alley for the source of the drugs, and that he did not ask for the name of defendant's drug supplier.

¶ 8 Officer Durand Lee testified that on May 16, 2013, he was assigned as an enforcement officer on the controlled narcotics purchase. In response to a radio call, Lee went to a location on South Homan in Chicago. There he saw defendant and Smith and took defendant into custody. Lee searched defendant and recovered a small rock like object suspected to be cocaine from his right front pants pocket. Lee inventoried the item.

¶ 9 On cross-examination, Lee denied that defendant told him that Smith gave him one bag of narcotics. Lee also denied that defendant told him that defendant and Smith had an arrangement where defendant would buy one bag for the officer and keep one for himself. Lee testified that the 1505 funds were not recovered from defendant. Before the transaction, Smith had $20 of 1505 funds, and bags of drugs normally sold on the street for $10.

¶ 10 The State presented a written stipulation between the parties that the chain of custody was proper and that each of the bags was tested by a forensic chemist who would testify that each bag contained 0.1 gram of cocaine. The State also nol-prossed counts 1 and 2 of the indictment, the counts alleging offenses within 1,000 feet of a school. The State rested and defendant moved for a directed finding which the trial court denied. Defendant rested without presenting evidence and the trial court heard the State's closing argument. Defense counsel waived closing argument when given the opportunity.

¶ 11 The trial court found defendant not guilty of possession of a controlled substance with intent to deliver, but guilty of delivery of a controlled substance. In making its finding the trial court observed:

> "With respect to delivery of a controlled substance, I understand the defense's argument as presented through their opening statement that the – that there was an

arrangement between the defendant and the undercover officer that if the defendant provided rocks to the undercover officer that he could in turn get a bag of rocks. I understand that's the defense's argument, their theory of the case. But the reality is is [*sic*] that the testimony and evidence I have before me is that even if that is what happened, it still constitutes delivery of a controlled substance."

¶ 12 Defendant filed a motion for a new trial[1], which the trial court denied.

¶ 13 At the sentencing hearing, the State argued that defendant was subject to mandatory Class X sentencing and noted that his prior conviction included "criminal sex assault," "PCS" and two convictions for "manufacture/delivery." Defense counsel argued that a minimum sentence was appropriate. When offered a chance to speak on his own behalf, defendant indicated that he had prepared a letter which he read to the court. Defendant stated that all he was trying to do was get high at someone else's expense, and that he wanted his attorney to present an entrapment defense. Defendant continued stating:

"So when the officer approached pretending to be an addict hoping to share drugs with another addict, provide that one share the other were to buy drugs, you inclined to show him just to get high. Before I presented the entrapment argument to my attorney, I asked him to file a motion, request that I be tried as a drug addict. He ignored that totally.

I had witnessed [*sic*] that he didn't subpoena her to [c]ourt. Her testimony alone [*sic*] with the surveillance officer testimony would have helped to support my entrapment argument. I feel that the issues I'm asserting establish the fact that I was denied my [sixth] amendment right to effective assistance of counsel, which I feel should entitle me to a new trial. That's for your honor to decide."

[1] Although the report of proceedings suggests that a written motion was filed, the motion is not contained in the common law record.

¶ 14 The trial court indicated that it had considered defendant's claim of ineffective assistance and emphasized that defense counsel was trained in the law and was in a better position to determine what defenses were legally available. The court concluded:

> "Attorneys can't throw up any defense against the wall like a plate of spaghetti and see if it sticks. They are required under the law to not represent their client in a frivolous manner but only do what is required under the law, so I want you to know that I hear you say that you have had valid defenses in mind that you believe should have been raised.
>
> You have to trust you attorney and the experience and education that he has in being able to rightfully assert the defenses that he believes would have been proper in your case. That's what I wanted to address with you and I wanted to say thank you for putting that letter together."

The trial court subsequently sentenced defendant, as a Class X offender, to the minimum term of six years' incarceration. Defendant appealed.

¶ 15 Defendant first contends that he was deprived of the effective assistance of counsel. The State responds that defendant cannot establish ineffective assistance of counsel because ultimately defendant had no viable defense to the charges brought against him.

¶ 16 Claims of ineffective assistance of counsel are judged against the familiar two-prong *Strickland* test. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984); see also *People v. Albanese*, 104 Ill. 2d 504, 526 (1984) (adopting the *Strickland* standard). A defendant must show both that his attorney's performance fell below an objective standard of reasonableness, and a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v. Henderson*, 2013 IL 114040, ¶ 11. However, a court may dispose of a *Strickland* claim by proceeding directly to the prejudice prong without

addressing counsel's performance. *People v. Hale*, 2013 IL 113140, ¶ 17, citing *Strickland*, 466 U.S. at 697.

¶ 17 Defendant, however, urges us to forgo the *Strickland* analysis and its prejudice requirement in favor of the standard used in *United States v. Cronic*, 466 U.S. 648 (1984) and *People v. Hattery*¸ 109 Ill. 2d 449 (1985). Defendant argues that counsel's decision to concede the elements of the offense during opening statements, combined with his failure to make a closing argument, was such a deviation from a reasonable trial strategy that the State's case was subjected to no adversarial testing at all. We disagree.

¶ 18 In *Cronic* the Supreme Court observed:

> "[I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *United States v. Cronic*, 466 U.S. 648, 659 (1984).

In *Hattery*, our supreme court applied that standard where trial counsel conceded the murder defendant's guilt in opening statements arguing, "At the end of you deliberations you will find him guilty of murder." *Hattery*, 109 Ill 2d at 458. During the guilt-innocence phase of the trial, counsel presented no evidence, chose not to make a closing statement and instead attempted to develop a theory of compulsion on cross-examination even though compulsion was not available to a defendant charged with an offense punishable by death. *Id.* at 459. Our supreme court ultimately concluded that trial counsel had presented a defense inconsistent with the defendant's not guilty plea. *Id.* at 465.

¶ 19 Although *Hattery* reversed a conviction where defense counsel conceded defendant's guilt, our supreme court subsequently cautioned that *Hattery* should be read narrowly and that it did not create a *per se* rule that conceding guilt constituted ineffective assistance without the

necessity of showing prejudice. *People v. Johnson*, 128 Ill. 2d 253, 269-270 ("Thus, if a concession of guilt is made, ineffectiveness may be established, however, the defendant faces a high burden before he can forsake the two-part *Strickland* test.")

¶ 20 Here, we do not find that *Hattery* applies to defendant's case. Although trial counsel admitted that the evidence would show that defendant delivered a bag of cocaine to an undercover police officer, he stopped short of conceding guilt and far short of the sort of strategy pursued in *Hattery*. Instead counsel, gave an opening statement and developed a theory of defense, *i.e.*, that defendant was merely a drug addict looking to get high at someone else's expense. Trial counsel developed this theory through cross-examination of the State's witnesses. Admittedly, the defense counsel presented was more strongly rooted in a plea for sympathy than in existing law. However, we are not required to find that counsel developed a wise or effective strategy. Instead we are merely called upon to determine that counsel did not abandon his role as the State's adversary completely. *Cf. Hattery*, 109 Ill. 2d at 465. Under the facts of this case, we cannot conclude that counsel did so, and, accordingly, we will require defendant to establish ineffective assistance through the two-part *Strickland* standard.

¶ 21 Applying the *Strickland* standard we cannot find that defendant was denied the effective assistance of counsel because he cannot demonstrate prejudice in light of the overwhelming evidence against him. Defendant was arrested at the scene of the drug transaction minutes after it occurred, so identity was not at issue. The undercover officer clearly and unequivocally testified that defendant gave him cocaine in exchange for cash, and the parties stipulated to the chain of custody and composition of the drugs. Therefore, we conclude that regardless of the strategy chosen by defense counsel there is no reasonable probability that defendant would have been acquitted of delivery of a controlled substance. See *Henderson*, 2013 IL 114040, ¶ 11.

¶ 22 Although we have not inquired into counsel's performance, we find it worth noting that counsel was under no duty to make specious arguments or " 'create a defense where none existed.' " See *People v. Montanez*, 281 Ill. App. 3d 558, 564 (1996), quoting *People v. Stone*, 274 Ill. App. 3d 94, 99 (1995).

¶ 23 Defendant, nevertheless, argues that an entrapment defense would likely have changed the outcome of the trial. Section 7-12 of the Criminal Code of 2012 (720 ILCS 5/7-12 (West 2012)) defines entrapment as follows:

> "A person is not guilty of an offense if his or her conduct is incited or induced by a public officer or employee, or agent of either, for the purpose of obtaining evidence for the prosecution of that person. However, this Section is inapplicable if the person was predisposed to commit the offense and the public officer or employee, or agent of either, merely affords to that person the opportunity or facility for committing an offense."

¶ 24 First, we note, that there was no credible evidence to support defendant's claim. Smith repeatedly denied defendant's claim that the transaction involved an agreement to let defendant keep one bag of cocaine for himself. More importantly, the State presented ample evidence that would have rebutted an entrapment defense.

¶ 25 Predisposition defeats a claim of entrapment and can be established through evidence " 'that the defendant was willing and able to commit the offense without persuasion before his initial exposure to government agents.' " *People v. Anderson*¸ 2013 IL App (2d) 111183, ¶ 61, quoting *People v. Sanchez*, 388 Ill. App. 3d 467 474 (2009). In a drug offense the following factors have been identified as relevant (1) the defendant's initial reluctance or willingness to commit the crime,; (2) the defendant's familiarity with drugs; (3) the defendant's willingness to accommodate the needs of drug users; (4) the defendant's willingness to profit from the offense,; (5) the defendant's current or prior drug use; (6) the defendant's participation in cutting or testing

the drugs; and (7) the defendant's ready access to a supply of drugs. *Anderson*, 2013 IL App (2d) 111183, ¶ 61.

¶ 26 Here, six of the seven factors favor a finding of predisposition. Although no evidence was presented regarding cutting or testing of the drugs, the other factors all support the conclusion that defendant was predisposed to committing the offense. The state presented, or could have easily presented (*i.e.* through proof of prior convictions) evidence of predisposition. Defendant showed no reluctance in committing the offense. His prior convictions demonstrated familiarity with drugs. Defendant was willing to accommodate Smith's request for drugs and his own theory of the case demonstrated a willingness to profit from the transaction in the form of drugs for his own use. Defendant's alleged reason for participating in the offense was his own current use of cocaine. Finally, although defendant and Smith walked some distance to obtain the drugs, defendant was able to procure the cocaine he delivered to Smith with minimal delay. Therefore, we conclude that even if defense counsel had explicitly raised the defense, the outcome of defendant's trial would not have been different. Accordingly, defendant's ineffective assistance of counsel claim fails.

¶ 27 Defendant alternatively contends that his case must be remanded for further proceedings on the issue of ineffective assistance of trial counsel because the trial court failed to conduct the inquiry required by *Krankel* when defendant alleged after trial that his attorney was ineffective. The State responds that the trial court conducted an adequate inquiry because defendant's claims involved only matters of trial strategy and could be dismissed without the appointment of new counsel to investigate the claims.

¶ 28 In *Krankel,* our supreme court held that the defendant in that case was entitled to a hearing with newly appointed counsel after he made a claim that his attorney had failed to present an alibi defense and had failed to investigate the defendant's whereabouts at the time of

the offense. *Krankel*, 102 Ill. 2d at 187. Interpreting *Krankel*, Illinois courts developed the following rule:

> "New counsel is not automatically required in every case in which a defendant presents a *pro se* posttrial motion alleging ineffective assistance of counsel. Rather, when a defendant presents a *pro se* posttrial claim of ineffective assistance of counsel, the trial court should first examine the factual basis of the defendant's claim. If the trial court determines that the claim lacks merit or pertains only to matters of trial strategy, then the court need not appoint new counsel and may deny the *pro se* motion. However, if the allegations show possible neglect of the case, new counsel should be appointed." *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003).

¶ 29 Defendant argues that pursuant to *Moore*, we should apply *de novo* review to his claim because the trial court failed to conduct any inquiry into his claims. See *id.* at 75. The State argues that we should review this claim against the more deferential "manifest error" standard. See *People v. McCarter*, 385 Ill. App. 3d 919, 941-42 (2008). We agree with the State. *Moore* is inapposite. In that case, it was clear that the trial court had applied the wrong legal standard—a matter for *de novo* review. See *Moore*, 207 Ill. 2d at 75. Here, in contrast, there is no indication in the record that the trial court misunderstood the legal standard. Rather the only question is whether the trial court appropriately determined, under the facts of this case, that defendant's claims did not warrant further inquiry or the appointment of new counsel. Accordingly, we may only reverse if we find that the trial court's determination was manifestly erroneous. *See McCarter*, 385 Ill. App. 3d at 941.

¶ 30 Here, we cannot conclude that the trial court's implicit determination that defendant's claims warranted no further inquiry was manifestly erroneous. On appeal, defendant highlights two interrelated claims of attorney error (1) his trial counsel failed to present an entrapment

defense; and (2) his trial counsel failed to call a witness to support that defense. The first claim clearly involves a matter of trial strategy. See *People v. Cunningham*, 376 Ill. App. 3d 298, 301-02 (2007). The second claim is likewise a matter of trial strategy. We find it significant that defendant did not allege that counsel failed to investigate the unidentified witness. Rather defendant merely alleged that counsel failed to call her in support of an entrapment defense. Decisions regarding which witnesses to call at trial and what evidence to present in the support of a defense are, like the choice of the defense in the first instance, matters of trial strategy, and are generally immune from claims of ineffective assistance. See *People v. Hotwagner*, 2015 IL App (5th) 130525, ¶ 48. Defendant argues that we cannot determine the merits of his claim regarding the witness because we do not know the contents of her testimony. However, we find the allegations defendant raised regarding a witness that could have supported an entrapment defense were so vague that they didn't trigger the duty of further inquiry by the trial court. Therefore, we conclude that the letter defendant read to the court, although it alleged ineffective assistance of counsel, raised only matters of trial strategy, and the trial court's decision to reject those claims without additional inquiry was not manifestly erroneous.

¶ 31 For the reasons above, the judgment of the circuit court of Cook County is affirmed.

¶ 32 Affirmed.