2018 IL App (1st) 152703-U

THIRD DIVISION
March 28, 2018

No. 1-15-2703

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	Appeal from the Circuit Court
Plaintiff-Appellee,	)	of Cook County, Illinois,
	)	Criminal Division.
v.	)	
	)	No. 12 CR 501
OMARI ROBINSON,	)	
	)	The Honorable
Defendant-Appellant.	)	Lawrence E. Flood,
	)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Cobbs and Justice Howse concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant was not denied a proper *Krankel* hearing, because he never filed a *pro se* motion alleging ineffective assistance of trial counsel, but rather raised and litigated that claim through the entirety of the posttrial proceedings while represented by appointed posttrial counsel. The trial court properly denied the defendant's motion for a new trial based on trial counsel's ineffectiveness, where the evidence at the posttrial hearing rebutted the defendant's claims. The defendant's appointed posttrial counsel's decision not to question trial counsel or present any other witnesses at the posttrial hearing does not constitute ineffective representation, where that decision was strategic and ultimately did not prejudice the defendant. Additionally, the 25-years-to-natural life sentencing enhancement (730 ILCS 5/5-8-1(a)(1)(d) (iii) (West 2012)) under which the defendant was sentenced to an additional 30 years, is not unconstitutionally vague.

¶ 2 Following a bench trial in the circuit court of Cook County, the defendant, Omari Robinson, was convicted of two counts of attempt first-degree murder with intent to kill (720 ILCS 5/8-4(a); 5/9-1(9)(1) (West 2012)) while personally discharging a firearm at the victim (720 ILCS 5/8-4(a) (West 2012)) and one count of aggravated battery (720 ILCS 5/12-3.05(e)(1) (West 2012)). After the lesser offenses were merged, the defendant was sentenced to 45 years' imprisonment; 15 years' for attempt murder and 30 years' as a result of the mandatory firearm enhancement (730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2012)). On appeal, the defendant contends that he was denied a proper *Krankel* hearing, and that his *Krankel* appointed counsel was ineffective. The defendant also contends that the mandatory firearm enhancement, under which he was sentenced to an additional 30 years' imprisonment, is unconstitutionally vague. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 The defendant was arrested on December 10, 2011, after being involved in the shooting of the victim, Contrell Lester, near the intersection of Homan Avenue and Adams Street. The defendant was charged in a 25-count indictment with, *inter alia*, attempt first degree murder (720 ILCS5/8-4(a), 9-1(a)(1) (West 2012)) (Count I), attempt first degree murder while personally discharging a firearm (720 ILCS5/8-4(a), 9-1(a)(1) (West 2012)) (Count IV), and aggravated battery (720 ILCS 5/12-3.05(e)(1) (West 2012)) (Count VII).

¶ 5 The defendant proceeded to a bench trial at which the following relevant evidence was adduced.

¶ 6 Contrell Lester (Contrell) testified that on December 10, 2011, at approximately 12:00 to 12:30 a.m. he and his two brothers, Kenneth Lester (Kenneth) and Trevell Howard (Trevell), were walking to their grandmother's house after a party they had attended. As they walked on

Fifth Avenue towards Homan Avenue, they noticed a parked green van, and inside it Contrell's friend, Lizzele Williams (Lizzele). Following a conversation with Lizzele, Contrell and his brothers proceeded to Homan Avenue and then northbound towards Monroe Street. On Homan Avenue, Contrell noticed a girl across the street, and walked over to her.

¶ 7 Once on the other side of the street, Contrell saw a black mini-van approaching southbound. As the van approached him, it pulled up to the side of the street where Contrell was standing, so that the passenger side was closest to him. The front passenger window was down and Contrell saw the individual in that seat point a gun at him and shoot.

¶ 8 At trial, Contrell identified the defendant as the individual who was seated in the front passenger seat of the mini-van and who shot at him. Although Contrell admitted that when he first saw the defendant, the defendant had his dread-locks covering his face so that Contrell had difficulty making out his face, he stated that that when the defendant subsequently moved his dread-locks, he could make out his face "clear as daylight." Contrell was positive in his identification because the street lights were on and the defendant was only a couple feet away.

¶ 9 Contrell testified that the defendant shot him twice, hitting him in the chest. Contrell, who was unarmed, ran towards a nearby alley and the mini-van followed while the defendant continued to fire in Contrell's direction. The defendant shot Contrell again in the right leg and Contrell fell to the ground. Contrell saw the mini-van head south towards Jackson Boulevard with the defendant still in the front passenger seat.

¶ 10 Contrell testified that after the mini-van drove off, his brother Trevell came to his aid. The green van Contrell saw earlier with Lizzele, approached and he was taken to Stroger Hospital. While at the hospital, Contrell was visited by Chicago Police Detectives Moreso and

DeCicco. Contrell was shown a photo array from which he identified the defendant as the individual who shot him.[1]

¶ 11 Contrell's brother, Trevell, next testified consistently with Contrell about the events that transpired on the night of December 10, 2011. He stated that after midnight, together with Contrell, and their other brother, Kenneth, he was returning to their grandmother's house after a party. The boys walked along Fifth Avenue, to Homan Avenue, where Contrell saw Lizzele and then north towards Monroe Street, where their grandmother lived. While on Homan Avenue, Contrell spotted a girl across the street, and walked over to talk to her. Trevell and Kenneth remained on the other side of Homan Avenue. Trevell testified that he saw a black mini-van headed southbound on Homan Avenue stop on the other side of the street near Contrell. Trevell could see the front of the van but was unable to view anyone inside. Trevell stated that he saw someone point a gun at Contrell from the front passenger window of the mini-van, and heard seven or eight gunshots. Trevell described the gun as "all black, a .45 or something." Trevell stated that after the shots were fired, the van drove-off southbound on Homan Avenue. Trevell never saw anyone get out of the van or change seats in the van. Trevell identified the photograph of the black mini-van as the van from which he saw Contrell get shot.

¶ 12 Lizzele next corroborated Trevell and Contrell's testimony. He averred that just after midnight on December 10, 2011, he was with three other friends inside a green van parked on Fifth Avenue, near the intersection with Homan Avenue. Shortly thereafter, Lizzele saw Contrell and his brothers, who stopped and chatted with him for a bit before proceeding to Homan Avenue. Lizzele stated that after Contrell left, he heard a gunshot from the direction of Homan Avenue. Lizzele looked over and saw a black van with someone's hand coming from the

[1] Contrell's Aunt, LaShawn Howard, was with him during the photo array because he was a minor.

passenger's side. Lizzele could see that Contrell was facing the van's passenger door and that he was about four or five feet away. Lizzele observed Contrell trying to run after the first two shots were fired. He also identified the photograph of the black mini-van as the van from which he saw gunfire.

¶ 13 Antoin Jones (Antoin) next testified that he witnessed the shooting by chance as he was driving southbound on Homan Avenue at around 12:30 a.m. on December 10, 2011. Antoin stated that he was heading towards Harrison Street where he was going to exit onto Interstate 290 (I-290), when somewhere between Adams Street and Jackson Boulevard, he witnessed a black Chrysler mini-van merge over to the right, heard three to five gunshots, and saw gunfire coming from the van. Antoin stated that he was "not even a full car length" behind the black mini-van when he saw the gunshots, which were coming from the front right passenger side of the van.

¶ 14 Antoin testified that as the mini-van pulled to the side of the street with the passenger's side along the curb, he observed a young man standing in the vacant lot next to the curb. Antoin said that after he heard the gunshots he saw the young man take a few steps and then fall to the ground.

¶ 15 According to Antoin, after the shooting occurred, the black mini-van sped off southbound on Homan Avenue and Antoin followed it towards I-290, where they both exited onto the interstate, heading east. During his pursuit of the mini-van, Antoin called 911 numerous times and gave them the license plate number, which was N421870, but he kept being transferred or disconnected. Antoin continued to follow the mini-van as it exited the interstate at Columbus Drive, and made its way to Lake Shore Drive heading north. Antoin stated that during the pursuit, he never observed the mini-van stop, or anyone exit or enter the vehicle. He averred, however, that once on Lake Shore Drive, he noticed the mini-van merge to the right without

getting off at an exit and then merge back over to the left lane, continuing northbound. The mini-van then exited onto Belmont Avenue, where Antoin saw both a marked and an unmarked police car draw up behind it with activated lights. Believing that the mini-van had been stopped by police, Antoin continued driving and lost sight of the mini-van at that point.

¶ 16 Antoin testified that when he got back on southbound Lake Shore Drive to head home, he recognized the black mini-van again, which was now stopped on Lake Shore Drive by police. Antoin got out and talked with one of the police officers and explained to him what had happened. Antoin told the officer he had previously observed the mini-van merge right on Lake Shore Drive, probably allowing something to be tossed out of it, and led police to the area where this happened.

¶ 17 Chicago Police Officer Thomas O'Shaughnessy (Officer O'Shaughnessy) next testified that after midnight on December 10, 2011, he received a message on his radio that a vehicle, wanted for a shooting, was driving northbound on Lake Shore Drive from Congress Parkway. The vehicle was described as a black newer Chrysler Town and Country mini-van and the license plate was provided. Officer O'Shaughnessy who was parked on Division Street between Dearborn and State Streets proceeded eastbound onto inner Lake Shore Drive. Heading north on inner Lake Shore Drive, Officer O'Shaughnessy saw a vehicle heading north on outer Lake Shore Drive that matched the description of the vehicle involved in the shooting. When Officer O'Shaughnessy reached the North Avenue on-ramp he got onto outer Lake Shore Drive and caught up with the vehicle. The vehicle got off at Belmont Avenue and was stopped by a light. Officer O'Shaughnessy was directly behind it and ran the license plate number, N421870, which confirmed this was the wanted vehicle. The vehicle proceeded west on Belmont Avenue and went south onto inner Lake Shore Drive. When another police vehicle arrived on the scene,

Officer O'Shaughnessy initiated a traffic stop by activating his squad car's lights and the two police cars curbed the mini-van just north of Briar Place. The mini-van stopped and Officer O'Shaughnessy exited his vehicle to approach the driver. When he reached the van's back taillight, however, the vehicle sped off and headed westbound on Briar Place. Officer O'Shaughnessy returned to his vehicle and began pursuing the mini-van together with the other squad car. After a pursuit throughout several side streets and erratic driving by the mini-van, the vehicle eventually returned onto Lake Shore Drive heading south. As the mini-van attempted to make a u-turn from the left lane to exit at the Fullerton Avenue on-ramp, it collided with Officer O'Shaughnessy's vehicle and then another police vehicle and spun around before coming to rest facing northbound in the southbound lane. After Officer O'Shaughnessy's vehicle came to a stop, he exited his squad car and approached the mini-van. There were other officers attempting to enter the vehicle and remove the non-compliant front passenger from the van. Officer O'Shaughnessy identified the defendant in court as that front passenger. According to Officer O'Shaughnessy, the defendant would not follow police orders to unlock the door and exit the vehicle, and an officer had to break the window and open the door to remove him. Officer O'Shaughnessy testified there were three other individuals inside the vehicle with the defendant: the driver, Asif Memon (Memon), and two backseat passengers, Rafael Hammond (Hammond) and Donter Essex (Essex). He also identified two photographs of the black mini-van as the vehicle involved in the pursuit and crash he described.

¶ 18 On cross-examination the officer admitted that when he entered from inner Lake Shore Drive to outer Lake Shore Drive, he lost sight of the mini-van for a minute to a minute and a half before catching up to it again. He also admitted that no handgun was recovered from the vehicle.

¶ 19 Chicago Police Detective James DeCicco (Detective DeCiccio) next testified that he was assigned to investigate the shooting of Contrell on December 10, 2011. Together with his partner, Detective Marasco, he went to see Contrell at Stroger Hospital. Despite Contrell's serious medical condition, Detective DeCicco testified Contrell was coherent, alert, and responsive. Contrell described the individual who had shot him to the detectives as an African American, age 19 to 22, with a thin face and dreadlocks.

¶ 20 Following his initial visit with Contrell, Detective DeCicco returned to Area 4 police station where Essex, Hammond, Memon, and the defendant were being detained. Detective DeCicco requested an evidence technician perform a gunshot residue test on all four individuals and at about 4:36 a.m. a technician arrived to perform the collection tests. The four suspects were placed in separate interrogation rooms all aligned next to each other in the police station. According to Detective DeCicco, while in one interview room, it was possible to hear what was happening in the room next door. The forensic technician began collecting the tests with Memon first at 4:45 a.m., followed by Essex at 4:55 a.m. Ten minutes later as she and Detective DeCicco entered the room where the defendant was being held, they saw the defendant leaning over to his right and spitting on his right hand. The defendant was handcuffed to a pole attached to a bench, in a way that prevented him from raising his hand to his mouth. The defendant stopped spitting when ordered to by Detective DeCicco and the gunshot residue collection test was performed.

¶ 21 Thereafter, Detective DeCicco went to see Contrell in the hospital again. Detective DeCicco showed Contrell a photo array with a photograph of the defendant. None of the other three individuals from the mini-van were in the photo array since none of them met the description given by Contrell, namely none had dreadlocks like the defendant. Contrell

identified the photograph of the defendant as the individual that had shot him and Detective DeCicco made an in-court identification of the defendant.

¶ 22 Illinois State Police forensic scientist, Mary Wong, next testified that on December 12, 2011, she performed the gunshot residue test on the defendant. The defendant's right hand tested positive for one of the three component particles used to test for gunshot residue, and his left hand tested positive for all three. Based on these tests, Wong concluded that the defendant discharged a firearm, came in contact with a primer gunshot residue related item or had his left hand in the environment of a discharged firearm. She further explained that detection of gunshot residue particles can be affected when an individual discharges a weapon and then spits on this hands.

¶ 23 Wong performed the same gunshot residue tests on Essex, Hammond and Memon. Wong determined Essex discharged a firearm, was in the vicinity of a discharged firearm or came in contact with a primer gunshot residue related item for both hands. She determined Hammond discharged a firearm, had come in contact with a primer gunshot residue related item or had his right hand in the environment of a discharged firearm. She determined that Memon may not have discharged a firearm with either hand, and if he had, the particles were removed by activity or not deposited or detected by the procedure.

¶ 24 The parties stipulated that on December 10, 2011, the black Chrysler mini-van bearing the Illinois license plate number N421870 was registered to Enterprise Leasing Company of Chicago and was rented by Memon on December 2, 2011. The parties further stipulated that a Chicago Police Department forensic investigator processed the crime scene at 216 South Homan Avenue on December 10, 2011, and recovered three “Win 9mm luger” expended shells, and one

"FC9 mm luger" expended shell case. The three shells and shell case were all tested and a forensic firearms expert would testify each of them was fired from the same firearm.

¶ 25 Following the bench trial, the defendant was convicted of two counts of attempt first degree murder (count I and count IV), and one count of aggravated battery (count VII). He was acquitted of all remaining charges.

¶ 26 On February 20, 2014, the defendant's trial counsel filed a motion for a new trial. Subsequently after seven months, on October 6, 2014, trial counsel filed a motion to withdraw as counsel for the defendant. In that motion, trial counsel stated that he had, "discussed the matter extensively with his client and based on allegations made by his client, [the] [d]efendant [], it [wa]s his belief that it [wa]s his obligation to withdraw on the above matter so that [the] [d]efendant [could] assert ineffective assistance of counsel on posttrial motions and appeal." (C 158). At the presentment hearing, trial counsel reiterated to the court that, "[b]ased on some of the discussions I've had with [the defendant], I believe it's in his best interest frankly for me to withdraw." (PP-2). The trial court asked the defendant if he wanted his trial counsel to withdraw, and the defendant replied that he did. Based on these findings, the trial court granted trial counsel's motion to withdraw and then immediately appointed the Office of the Public Defender to represent the defendant.

¶ 27 Following that appointment, at the next hearing on November 5, 2014, the defendant's appointed counsel appeared and asked for time to meet with the defendant to discuss the posttrial motions with regards to any possible claim of trial counsel's ineffectiveness.

¶ 28 On January 16, 2015, appointed counsel filed an amended motion to vacate the conviction or alternatively for a new trial, arguing, *inter alia*, that the defendant's trial counsel was ineffective for failing to: (1) investigate, interview, and question potential witnesses for trial,

specifically Essex and Hammond; (2) maintain adequate communication with him; and (3) inform him of a plea offer tendered by the State prior to trial.

¶ 29 On April 28, 2015, the trial court held a hearing on the defendant's motions. At that hearing, the trial court first addressed the defendant's ineffective assistance of counsel claim. Appointed counsel began by arguing that trial counsel was ineffective because he failed to investigate, interview and question Essex and Hammond. Trial counsel was then called to the stand, and testified that while he could not remember the names of the witnesses he spoke to, he did talk to at least one individual who was inside the mini-van. Trial counsel further stated that "[a]fter reviewing all of the discovery extensively for a long period of time and after having these discussions, it was [his] determination via trial strategy that [these witnesses] would not be supportive or effective witnesses."

¶ 30 The court asked trial counsel if he had "talked about that with [his] client" and trial counsel responded that he had. Based on counsel's representation, the trial court then asked the defendant why he believed that counsel had not interviewed the witnesses in the mini-van, to which the defendant replied, "I don't know, sir."

¶ 31 Appointed counsel next argued that trial counsel was ineffective because he failed to properly communicate with the defendant. The trial court then engaged trial counsel on this issue and the following colloquy took place:

> "MR. FAGAN [(TRIAL COUNSEL)]: There is a couple times I know we had discussions about the case much. One stands out. Approximately six or nine months in [] which we had a two-hour discussion about the case and everything related to the case. Not at the Cook County Jail, but at the police station at Belmont and Western. There was some unrelated investigations that the Chicago police detectives contacted me about and they

brought [defendant] there. While he was there, I know we had a long extensive discussion regarding the case.

THE COURT: What about the preparation for trial?

MR. FAGAN: That's what it was in terms of preparation for trial. I obviously discussed with him all factors of the case, including the facts of the case. That was at least one discussion. I believe there was other visits. Obviously every time I came here, talking to him in the back.

THE COURT: Approximately how many times is what I am trying to get. How many times was the case up before it went to trial where you had interviews with your client?

MR. FAGAN: Dozen.

THE COURT: As far as visits to the jail to interview him?

MR. FAGAN: I can't recall how many specifically, Judge. Obviously the one at Belmont and Western. I believe there was at least one other, two others. At this point it is more than a year old.

MR NOLAN [(APPOINTED POSTTRIAL COUNSEL)]: Judge, my client's response to that is Mr. Fagan never visited my client while he was in the Cook County Department of Corrections, and he states that he has his visiting logs to prove that.

THE COURT: He did interview you, as he said, when you were in the back?

DEFENDANT: He --

THE COURT: Just listen to my questions. Just answer my questions.

DEFENDANT: All right.

THE COURT: When the case was called and Mr. Fagan was here in court, you spoke with him in the back. Is that correct?

DEFENDANT: Yes, sir.

THE COURT: And you gave him the names of possible witnesses and discussed the strategy in the case?

DEFENDANT: We didn't never discuss the strategy.

THE COURT: You at least talked to him about whether you wanted a jury or bench trial. Is that right?

DEFENDANT: Yes, sir.

THE COURT: You wanted a bench trial, so you talked to him about that?

DEFENDANT: Yes, sir.

THE COURT: And you discussed with him the facts in the case. Is that correct?

DEFENDANT: Yes, sir.

THE COURT: And the fact you wanted witnesses interviewed. Is that correct?

DEFENDANT: Yes, sir."

¶ 32 After this colloquy, appointed counsel proceeded to argue that trial counsel had failed to inform the defendant of the State's plea offer until after trial. Trial counsel was then questioned about having such a conversation with the defendant, and responded in the following manner, "If you are asking me do I remember the specific conversation that we had, the answer is no. I remember discussions I had with him about pleas and his – what he wanted and his desires. I obviously remember the offer. I would like to think I told him that. It would be my practice to do that. If you are asking me do I specifically remember the date and time we had this discussion, my answer is I don't specifically remember that, no."

¶ 33 The following discussion ensued:

"THE COURT: Was there a specific offer made?

MS. STEVENS [(STATE'S ATTORNEY)]: Judge, I have [a] note on my blue [book] from March 11, 2013, where it says that an offer of 16 years IDOC was made. I wrote down that the defendant – I was told that the defendant wanted 10, and I indicated to [trial counsel] State is firm at 16.

THE COURT: Is that correct? Did you discuss with your attorney about ten years on a plea?

DEFENDANT: I asked him can he give me ten years, yes.

MS. STEVENS: Judge, I believe in this case, because there was a firearm enhancement, the minimum was 31, and I believe that [c]ounsel had informed the defendant of that as well."

¶ 34 After trial counsel's testimony and appointed counsel's arguments, the trial court asked the defendant if there were any other allegations he wanted to raise against trial counsel for ineffective assistance, and the defendant responded in the negative. The court then ruled that a new trial was not warranted based "upon issues raised in the *Krankel* hearing."

¶ 35 The trial judge then heard arguments regarding the remaining issues in the defendant's posttrial motions, after which he denied the motions in their entirety.

The defendant was subsequently sentenced to 45 years' imprisonment, 30 years' of which was imposed under the mandatory 25-year-to-life firearm enhancement (730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2012)). The defendant now appeals.

¶ 36 II. ANALYSIS

¶ 37 On appeal, the defendant first contends that he was denied a proper *Krankel* hearing on his posttrial ineffective assistance of trial counsel claim. The State asserts *Krankel* is not implicated by the circumstances of this case, and that despite the trial court's characterization to the contrary, the posttrial hearing below was not a *Krankel* hearing. In the alternative, the State asserts that even if the hearing can be characterized as a *Krankel* hearing, the hearing was proper, and the defendant was afforded every relief that such a hearing confers, namely representation by appointed counsel. For the reasons that follow, we agree.

¶ 38 It is well-settled that *Krankel* is only triggered "when a defendant raises a *pro se* posttrial claim of ineffective assistance of trial counsel," and the court must determine whether to appoint new counsel. *People v. Jolly*, 2014 IL 117142, ¶ 29, 25 N.E.3d 1127, 1133, *as modified on denial of reh'g* (Jan. 28, 2015); see also *People v. Ayres*, 2017 IL 120071, ¶ 11 (*Krankel* " '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.' ") (quoting *People v. Patrick*, 2011 IL 111666, ¶ 29); see also *People v. Taylor*, 237 Ill. 2d 68, 75 (2010) (citing *People v. Krankel*, 102 Ill. 2d 181 (1984)).

¶ 39 Under *Krankel*, appointment of new counsel is not automatically required every time a defendant makes a *pro se* claim of ineffective assistance of counsel. *Ayres*, 2017 IL 120071, ¶ 11; see also *Taylor*, 237 Ill. 2d at 75. Rather, upon the raising of such a claim, the trial court must employ a two-step procedure. *Taylor*, 237 Ill. 2d at 75.

¶ 40 First, the court must conduct a preliminary examination of the factual basis underlying the defendant's claim—the so-called *Krankel* inquiry. *Taylor*, 237 Ill. 2d at 75; see also *People v. Moore*, 207 Ill. 2d 68, 77–78 (2003); see also *People v. McLaurin*, 2012 IL App (1st) 102943, ¶¶ 39–40. During this preliminary evaluation, "some interchange between the trial court and trial

counsel regarding the facts and circumstances surrounding the allegedly ineffective representation is permissible and usually necessary in assessing what further action, if any, is warranted on a defendant's claim." (Internal quotation marks omitted). *Ayres*, 2017 IL 120071, ¶ 12. Accordingly, at this stage, the trial court is permitted to question trial counsel about the facts and circumstances surrounding the defendant's allegations, engage in a discussion with the defendant, or rely on its own knowledge of counsel's performance at trial and the insufficiency of the defendant's allegations. *Ayres*, 2017 IL 120071, ¶ 12 (citing *Jolly*, 2014 IL 117142, ¶ 30; *Moore*, 207 Ill. 2d at 78–79).

¶ 41 If, after the preliminary inquiry, the court determines that the defendant's 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. *Ayres*, 2017 IL 120071, ¶ 11; *Jolly*, 2014 IL 117142, ¶ 29; see also *Moore*, 207 Ill. 2d at 77–78. If, however, the court finds that the allegations show "possible neglect of the case," new counsel must be appointed to represent the defendant at the next stage of the proceeding—*i.e.*, the hearing on the defendant's *pro se* claims of ineffective assistance of counsel. *Ayres*, 2017 IL 120071, ¶ 11. This new counsel can independently evaluate the defendant's ineffectiveness claim and avoid any conflict of interest that might be created were trial counsel forced to justify his or her actions contrary to the defendant's position. See *Moore*, 207 Ill. 2d at 78.

¶ 42 In the present case, we find that *Krankel* does not apply. First, the record is uncontroverted that the defendant himself never made a *pro se* claim of ineffective assistance of trial counsel, nor brought to the trial court's attention trial counsel's ineffectiveness in any way. Rather, after initially filing a motion for a new trial, trial counsel sought to withdraw his representation of the defendant, stating that his withdrawal would permit the defendant to

proceed with a claim of ineffective assistance. After granting counsel's request to withdraw, the trial court immediately appointed new counsel to represent the defendant through the remainder of the posttrial proceedings. Newly appointed counsel then filed an amended motion for a new trial, for the first time arguing, *inter alia*, trial counsel's ineffectiveness. As such, the defendant was appointed new counsel before any claim of ineffective assistance of trial counsel was ever raised before the trial court, and was represented by that appointed counsel all through the posttrial proceedings, including the litigation of the ineffective assistance of trial counsel claim. Accordingly, *Krankel* does not apply to the proceedings below. See *People v. McGath*, 2017 IL App (4th) 150608, ¶ 52 ("Because [the] defendant [never] raise[d] a *pro se* posttrial claim of ineffective assistance of counsel, there was no reason for the trial court to conduct a *Krankel* hearing.").

¶ 43 Since *Krankel* does not apply, the only question that remains on review is whether the trial court erred in denying the defendant's motion for a new trial on the basis of trial counsel's ineffectiveness. For the reasons that follow, we find that it did not.

¶ 44 It is well-settled that claims of ineffective assistance of counsel are resolved under the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Under *Strickland* to prevail on a claim of ineffective assistance of counsel the defendant bears the burden of establishing that: (1) counsel's performance fell below an objective standard of reasonableness and (2) the deficient performance resulted in prejudice to the defendant. *People v. Domagala*, 2013 IL 113688, ¶ 36. More specifically, a defendant must show that counsel's performance was objectively unreasonable under prevailing professional norms and that a reasonable probability exists that, but for counsel's deficient performance, the result of the proceedings would have been different. *Domagala*, 2013 IL 113688, ¶ 36. Failure to satisfy either prong of

the *Strickland* test precludes a finding of ineffectiveness. *People v. Simpson*, 2015 IL 116512, ¶ 35; see also *McGath*, 2017 IL App (4th) 150608, ¶ 37.

¶ 45 In his posttrial motion, the defendant asserted that trial counsel was ineffective for failing to: (1) interview three witnesses; (2) visit the defendant in prison; and (3) inform the defendant of a plea offer. We will address each of these contentions in turn.

¶ 46 With respect to counsel's alleged failure to interview two of the occupants of the mini-van, we find that the record rebuts the defendant's contentions. Trial counsel testified at the hearing on the motion for a new trial that he interviewed at least one of the individuals in the minivan and that "after reviewing all of the discovery extensively for a long period of time and after having these discussions," he strategically chose not to call Essex and Hammond at trial, because their testimony would not be "supportive," and they would not be "effective witnesses." See *People v. Wilborn*, 2011 IL App (1st) 092802 ¶ 79 ("decisions concerning which witnesses to call at trial and what evidence to present on defendant's behalf" are considered trial strategy and "ultimately rest with trial counsel.") (citing *People v. Munson*, 206 Ill. 2d 104, 139–40 (2002)). The defendant presented no evidence to rebut this testimony, but rather admitted at the posttrial hearing that "he did not know" why he believed that trial counsel had failed to interview these witnesses. Nor did the defendant provide any explanation as to how absent counsel's failure to interview these witnesses the result of his trial would have been different.

¶ 47 The defendant's second contention, that counsel failed to adequately communicate with him to discuss trial strategy, fails for similar reasons. Contrary to the defendant's assertion, trial counsel testified, and the defendant himself admitted, at the posttrial hearing, that they met at least a dozen time, prior to every status hearing, and discussed "the facts of the case." In addition, trial counsel specifically recalled at least one occasion "about six or nine months in,"

where he met with the defendant in the police station and discussed "the case and everything related to the case," for two hours. As such, the record shows there was sufficient communication between the defendant and his trial counsel. See *People v. Valladares*, 2013 IL App (1st) 112010, ¶ 64 (holding that defense team did not fail to sufficiently communicate with the defendant where they met with the defendant twice in jail and went over the transcript of his statement and the police reports prior to trial). Moreover, the defendant does not explain how additional pretrial communication with counsel would have altered the outcome of his case. See *People v. Penrod*, 316 Ill. App. 3d 713, 723 (2000) (despite trial counsel's admission that he never called or visited the defendant in jail, representation was deemed effective where the defendant did not show how further communication with counsel would have altered the outcome of trial).

¶ 48 Turning to the defendant's final contention that trial counsel failed to apprise him of the State's plea offer prior to trial, we again find that the record belies the defendant's contention. At the hearing on the motion for a new trial, the State acknowledged that a plea offer of 16 years was made to the defendant on March 11, 2013, and that the plea was rejected, because counsel countered with an offer of 10 years. Although trial counsel could not recall the specific conversation he had with the defendant about this offer, he testified that it is his practice to always communicate to his clients, any plea offers made by the State. In addition, trial counsel recalled several discussions he had with the defendant about what the defendant wanted with respect to a plea offer, namely to spend not more than 10 years in prison. The defendant himself admitted at the posttrial hearing that he had communicated to his defense counsel that he would not accept a plea of more than 10 years. Under this record, the defendant has failed to establish

both that counsel failed to communicate the State's offer to him, or that but for counsel's failure to do so, the result of the plea bargain would have been different.

¶ 49 Accordingly, we find no error in the trial court's decision to deny the defendant's motion for a new trial on the basis of trial counsel's ineffectiveness.

¶ 50 On appeal, the defendant nonetheless contends that if we find that *Krankel* does not apply here, we should hold that posttrial counsel was ineffective in his litigation of trial counsel's ineffectiveness. Specifically, the defendant complains that posttiral counsel failed to question trial counsel and call any witnesses, including the defendant. We disagree.

¶ 51 The decision of which witness to present (*Wilborn*, 2011 IL App (1st) 092802 ¶ 79), and whether or not to impeach a witness (*People v. Pecoraro*, 175 Ill. 2d 294, 326 (1997)) are both matters of trial strategy, which will not support a claim of ineffective assistance of counsel. Counsel renders ineffective assistance in cross-examining witnesses only if his approach is unreasonable. *People v. Ford*, 368 Ill. App. 3d 562, 575 (2006).

¶ 52 In the present case, the defendant fails to establish that posttrial counsel's actions were not the product of sound trial strategy. In that respect, the record reveals that posttrial counsel contacted and procured trial counsel's presence at the hearing, as well as directed trial counsel's attention to specific allegations brought against him at that hearing, which trial counsel needed to explain. Posttrial counsel also interjected, when appropriate, to ensure that the specific nature of the defendant's allegations were known and being addressed. Specifically, he noted that trial counsel never visited the defendant while in jail and that prison records showed as much. Moreover, contrary to the defendant's contention, after the defendant responded to the trial court's questions by admitting that certain portions of his allegations against trial counsel were untrue, it is not unreasonable to conclude that trial counsel's decision not to call the defendant to

the stand, or further question trial counsel were products of sound trial strategy, intended to prevent the defendant from impeaching himself, or worse, committing perjury. See *People v. Manning*, 241 Ill. 2d 319, 334 (2011) ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."); see also *People v. Albanese*, 104 Ill. 2d 504, 525-26 (1984) ("It is all too tempting for a defendant to second-guess counsel's assistance after *** [an] adverse [ruling], and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." (Internal quotation marks omitted.)). For these same reasons, the defendant has failed to explain, how, had counsel called him to the stand or chose to cross-examine trial counsel, the outcome of his proceedings would have been different. Accordingly, we find the defendant's contention to be without merit.

¶ 53 The defendant next asserts that the additional 30-years imposed on his sentence pursuant to the mandatory firearm sentencing enhancement (730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2012)) should be vacated because the statute is unconstitutionally vague. The defendant contends that the statute provides no objective criteria upon which the trial court could rely when imposing a sentence and instead encourages an arbitrary and discriminatory enforcement of the law. We disagree.

¶ 54 Our courts have repeatedly reviewed these very same arguments and determined that the 25-years-to-natural-life sentence enhancement (730 ILCS 5/5-8-1(a)(1)(d) (iii) (West 2012)) is

not unconstitutionally vague. See e.g., *People v. Sharp*, 2015 IL App (1st) 130438; *People v. Butler*, 2013 IL App (1st) 120923; *People v. Brown*, 2017 IL App (1st) 142197, ¶ 80, *reh'g denied* (July 28, 2017), *appeal denied*, No. 122647, 2017 WL 5641299 (Ill. Nov. 22, 2017). In doing so, our courts have explained that although the enhancement allows for a wide range of sentences, there is a clear and definite scope of the sentencing range—25–to–life—and the trial court has no discretion concerning whether to apply the enhancement. See *Sharp*, 2015 IL App (1st) 130438, ¶ 141; *Butler*, 2013 IL App (1st) 120923, ¶ 41. In addition, we explained that the standards for imposing the enhancement are clearly defined, specifically, that the enhancement must be applied when a defendant commits first degree murder and discharges a firearm that proximately causes great bodily harm, permanent disability, permanent disfigurement, or death. *Sharp*, 2015 IL App (1st) 130438, ¶ 141; *Butler*, 2013 IL App (1st) 120923, ¶ 41; see also *People v. Thompson*, 2013 IL App (1st) 113105.

¶ 55 We continue to find the reasoning of these decisions persuasive, and therefore hold that the 25–to–life firearm enhancement is not unconstitutionally vague.

¶ 56 III. CONCLUSION

¶ 57 For all of the aforementioned reasons, we affirm the judgment of the circuit court.

¶ 58 Affirmed.