2012 IL App (2d) 110335-U
No. 2-11-0335
Order filed February 16, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. EDWARD L. TENNEY, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 96-CF-467 Honorable Robert J. Anderson and Daniel P. Guerin, Judges, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Hutchinson and Schostok concurred in the judgment.

ORDER

Held: (1) Defendant's fourth amendment rights were not violated by the search of containers in a storage locker where the police objectively had reason to believe that the person renting the locker had authority to consent to the search; (2) defendant's right to present a defense was not curtailed by the trial court's ruling *in limine* that he could not argue that an unknown third party committed the murder; and (3) the trial court conducted an adequate *Krankel* hearing.

¶ 1 Defendant, Edward L. Tenney, appeals from his convictions of first-degree murder (Ill. Rev. Stat., Ch. 38, § 9-1(a)(3) (West 1992)) and armed robbery (Ill. Rev. Stat., Ch. 38 §18-2(a) (West 1992)) following a jury trial in the circuit court of Du Page County. The victim was Jerry Weber, age 24, who suffered four gunshot wounds. Three gunshot wounds to the head caused his death,

and the fourth in his neck was a contributing cause of death. The victim was found shot to death in a field in rural Aurora, Illinois, on April 16, 1992. His "biker's" wallet and chain were discovered missing. Defendant was sentenced to death on the first degree murder conviction and to 60 years' imprisonment in the Department of Corrections on the armed robbery conviction. On March 9, 2011, the Governor of the state of Illinois commuted defendant's death sentence to a period of natural life imprisonment. We affirm.

¶ 2 BACKGROUND

¶ 3 The Motion to Suppress Evidence Seized From a Storage Locker

¶ 4 On May 2, 1995, Donald Lippert spoke with Captain Robert Cannon of the Kane County sheriff's police and implicated himself and defendant in three murders. Two of the murders occurred in Kane County, and the third occurred in Du Page County. The Du Page County murder was the killing of Jerry Weber in rural Aurora on April 16, 1992. Defendant was arrested on a warrant for the Du Page and Kane homicides on May 3, 1995, and was housed in the Kane County jail.

¶ 5 Donald Lippert's brothers, Bobby and Michael, told the Kane County sheriff's police that their father, Les Lippert, who was defendant's uncle, might have information about cases the police were investigating. Acting on Bobby's and Michael's information, the police contacted Les Lippert, who came to the Kane County sheriff's office on the evening of May 8, 1995. Cannon and Sergeant Michael Anderson spoke with Les. They played a tape of Donald's confession for Les. Les then indicated that he had knowledge of a weapon and the proceeds of some burglaries. Les was reluctant to be more forthcoming until he spoke with an assistant state's attorney.

¶ 6 The next morning, May 9, 1995, Les, Cannon, and Anderson met with Kane County assistant state's attorney, John A. Barsanti, in the state's attorney's office. Les told Barsanti that he was

concerned he would be prosecuted because of his possession of certain property in a storage facility. Les further "held out the possibility" that he had information that would help the authorities solve the murder cases they were investigating, but Les wanted "assurances" that he would not be prosecuted for burglary or theft if he led the police to the property. Barsanti prepared a limited immunity agreement that provided that neither the Kane County state's attorney nor the Du Page County state's attorney would charge Les with the offenses of obstruction of justice and theft based on Les's possession "or hiding" of a handgun or items found in a storage shed. In return, Les agreed to give the authorities a handgun that was used in either the Weber homicide or one of the Kane County homicides, and Les agreed to consent to a search of certain storage lockers. In addition, Les agreed to provide truthful testimony about conversations he had with defendant or others concerning the Du Page and Kane homicides.

¶ 7 Les, Cannon, and Anderson left the state's attorney's office and went to Les's residence in West Chicago, Illinois, where Les gave Cannon and Anderson a .22 Ruger pistol that was located in a dirt crawlspace.[1] From there, the trio went to a U-Stor-It facility on North Avenue in St. Charles, Illinois. The facility was a series of "garage door type storage buildings" with a fence around the perimeter. The grounds were gated and had an office. When they arrived, Les went into the office and paid back-due rent. Les returned to the police vehicle and signed a consent for the police to search storage units 500 and 63. By that time, additional police officers had arrived to assist in the search and the collection of evidence.

[1]Les testified at the hearing on the motion to suppress that he turned over two guns to the police. At trial, he testified that he turned over one gun.

¶ 8 Someone from the storage facility's office opened the electronic gate, and the police, along with Les, entered the area where the storage lockers were located. They searched locker 500 first. Locker 500 was secured by a padlock. Cannon testified that Les "removed the keys from his pocket, went over and unlocked the padlock" on unit 500. Then the police officers opened the door. The locker was "crammed full" of boxes. The police recovered items of evidentiary value in unknown burglary cases, but locker 500 did not yield anything of evidentiary value in the three murders the police were investigating. The police then searched locker 63 after Les unlocked the padlock on it with a key he had in his possession.

¶ 9 Locker 63 was full of boxes, suit cases, "loose stuff," and bags. Cannon testified, "You name it, it was in there." Les identified whose property was in which box. If the police found something relevant to their investigations, they inventoried the items. The police searched boxes containing Les's, Michael's, Donald's, and defendant's belongings. Police then located one particular box in locker 63, identified at the scene by Les as containing defendant's items and referred to at the hearing on the motion to suppress, as the "Ed box." The cardboard box had remnants of masking tape on it and four flaps on the top of the box, but the box was not sealed when the police found it. The name "Ed" was written on two sides of the box. The police seized maps and costume jewelry, which were relevant to the Kane County murders, from the Ed box. The police knew that Du Page County victim Jerry Weber's biker's wallet and chain were missing. They seized a biker's wallet from the Ed box. Sitting on top of the contents of another cardboard box in locker 63 was a blue Royal Dansk cookie tin. The police seized a second biker's wallet and .22 ammunition from inside the cookie tin.

¶ 10 At the conclusion of the search of locker 63, Les locked the unit. He retained the key. In evidence were two U-Stor-It rental agreements. One showed that Les rented locker 500 on

December 18, 1993. The U-Stor-It account ledger pertaining to locker 500 indicated that the December 1993 rental of locker 500 was a transfer from another storage locker. A second rental agreement in evidence showed that Les rented locker 63 on April 30, 1994. Testifying at the motion to suppress, Cannon recalled that Les identified certain property in locker 500 as proceeds from burglaries in Warrenville, Illinois, that Les, or Les and his sons, had put in the locker. Cannon also recalled that in May 1995, Les told him that Les and his sons moved the contents of their former home on Austin Boulevard in Aurora to the storage facility in August or September 1993. On redirect examination, Cannon testified that he was not certain whether Les told him Les and his sons moved the items into the storage facility in August or September 1993 or whether they moved the items out of the Austin Boulevard house at that time. Cannon testified that Les was not specific about which storage locker they put the items into, only that they placed items into the storage facility. Cannon did not believe that defendant lived with Les and his family at the Austin Boulevard address. Anderson testified that Les said that he (Les) himself had put the items into the storage lockers.

¶ 11 Defendant testified at the motion to suppress as follows. In the summer of 1993, defendant lived at 759 Austin Boulevard in Aurora with Les and two of Les's sons, Michael and Donald. Occasionally, another of Les's sons, Bobby, also lived there. In the late summer or early fall of 1993, everyone moved out of the Austin Boulevard house. Defendant packed his belongings in boxes marked with his name, sealed the boxes with duct tape, and put them in a storage locker he said "we" rented. Defendant testified that he was with either Les or Mark Lippert (another of Les's sons) when defendant put the boxes in the storage locker, which was on North Avenue in St. Charles. Defendant agreed that Les had rented the storage place, but defendant stated that he had an

agreement with Les to supply the padlocks and occasionally to assist with the rent. According to defendant, there were two padlocks, and defendant kept the only set of keys. Defendant visited the storage lockers before he was incarcerated in October 1993. When defendant went to the penitentiary in 1993, the keys were left at the apartment he shared with his girlfriend and her family in Aurora.

¶ 12 Defendant was released from the penitentiary in January 1995. He moved back in with his girlfriend in Aurora. The keys to the padlocks on the storage lockers were gone. Defendant got in touch with Les about getting into the storage locker to get some of his things, but he was arrested in May 1995 before he got into the lockers. Defendant did not consent to the police officers' search of the lockers or of the boxes that contained his possessions.

¶ 13 Les testified at the hearing on the motion to suppress as follows. Les, defendant, and Michael lived at the Austin Boulevard house. Donald, who was living with his mother, came for weekend visits. After they moved out of the Austin Boulevard house, Les and Michael, and occasionally Donald, lived in a house in Warrenville. Defendant did not live with them in Warrenville. From Warrenville, Les moved into the Geneva Motel, where defendant stayed with him occasionally. From the Geneva Motel, Les moved to West Chicago and then to Tennessee.

¶ 14 At the time Les moved into the Austin Boulevard house, he was renting a storage locker. He needed more space, so on December 18, 1993, he transferred from his existing locker to locker 500. Although defendant contributed money toward the bills, Les rented the storage locker and paid for the padlock. Les kept the key to the storage locker hanging on a pegboard in the kitchen. When Les, defendant, and Michael moved out of the Austin Boulevard house, they each packed their own belongings in boxes. Les, Michael, and defendant moved some of the boxes into locker 500. Les

put other boxes from the Austin Boulevard house into the basement at the Warrenville house. At that time, defendant was living in Aurora with a girlfriend. When Les moved out of the Warrenville house, locker 500 was full, so he rented locker 63. Les placed the remaining boxes from the Austin Boulevard house, which were in the basement of the Warrenville house and then in the garage on the Warrenville property, into locker 63. The Ed box was among those Les took from the basement of the Warrenville house and put into locker 63. At the time Les and defendant were living at the Geneva Motel, Les kept the keys to the storage lockers on a ring in his pocket. The next time Les saw the boxes in locker 63 was when the police searched the locker in May 1995. Because the storage lockers were under Les's "jurisdiction," he felt he had the right to give the police permission to search them.

¶ 15 The trial court denied the motion to suppress. The court found that the Ed box, "if [it] ever had been sealed," was not sealed at the time the police searched it. The court also found that Les leased locker 63 and had the key for the lock. The court further found that Les put the boxes into locker 63. The trial court concluded that it was objectively reasonable for the police to have believed that Les had both actual and apparent authority to consent to the search.

¶ 16 The Trial

¶ 17 The following pertinent testimony was introduced at defendant's jury trial. At 10:30 p.m. on April 16, 1992, the victim, Jerry Weber, left his Aurora home to go to a barn to pick up flagstones for planters he was constructing in his yard. His wife was at home with their son and new baby. She intermittently dozed off, but at 2:30 a.m. she became very concerned that her husband had not yet returned home. At 4:30 a.m. on April 17, 1992, she went looking for him in the area of Vaughn Road and Sheffer Road, where she knew he had gone to find the flagstones. She

encountered his white van parked off of Sheffer Road. She approached the van and discovered her husband lying face-up in mud. His face was covered in blood. She went to a nearby gas station and called the police. By the time she returned to the scene, the police and emergency personnel were already there. A police officer informed her that her husband was deceased. Mrs. Weber advised the police that Jerry carried a black leather biker's wallet with a silver chain because he was a carpet installer, so when he bent down to do his work no one would be able to remove his wallet from his back pocket. Inside the wallet was an NFL helmet sticker. The wallet and chain were not on the body.

¶ 18 The police recovered four discharged cartridge cases and two live bullets in the vicinity of the body. Close inspection of the body revealed that the victim had been shot in the head. A cigarette butt was found underneath the body. The adjacent roadway was littered with cigarette butts. Nothing of evidentiary value was recovered from the victim's van. The case went unsolved until May 1995.

¶ 19 In April 1995, Sergeant Michael Anderson of the Kane County sheriff's department was investigating the Weber homicide. In pursuing leads in the case file, he had Michael Lippert brought in for questioning on May 2, 1995. Sergeant Anderson was aware that Michael was questioned in 1994 and denied any knowledge of the Weber murder at that time. However, on May 2, 1995, Michael implicated his brother Donald and defendant, who was his cousin, in the Weber homicide. The police then brought Donald Lippert in for questioning. Donald initially denied having anything to do with Weber's murder. The police confronted Donald with Michael's taped statement, and Donald then told the police that defendant shot Weber with one gun. The police told Donald that they knew two guns had been used in the homicide. Donald then agreed that two guns were used.

Upon further questioning, Donald admitted that he had possession of one of the guns at the time defendant shot the victim. Donald stated that the gun defendant used jammed, so Donald supplied defendant with the gun he was carrying, and defendant shot the victim with that gun also.

¶ 20 Defendant was arrested for the Weber homicide on May 3, 1995. Prior to that date, on October 14, 1993, defendant was arrested in his home on an unrelated charge. The police seized a bag that was next to defendant in his bedroom at the time of the 1993 arrest. Inside the bag was a loaded .22 semi-automatic pistol. At trial, this gun was referred to as a High Standard. It had a short barrel.

¶ 21 On May 8, 1995, the police contacted Les, who negotiated a limited immunity agreement for himself on May 9, 1995. On May 9, 1995, Les turned over a .22 Ruger long-barrel pistol to the police. The Ruger was in a case inside a Napa Auto Parts box and was stowed in a crawl space under the house Les occupied in West Chicago. The Ruger had been cleaned and oiled. In the case with the gun was ammunition and a Florida driver's license in the name of Christopher Nelson. The license bore defendant's photo.

¶ 22 As part of their investigation, the police submitted the .22 High Standard and the .22 Ruger to the police laboratory for examination, as well as the live bullets and the shell casings found at the scene of the Weber murder. The bullets and casings at the scene were fired from the .22 High Standard and the .22 Ruger.

¶ 23 On May 9, 1995, after Les gave the .22 Ruger to the police, he led them to two storage lockers he rented in St. Charles. Les signed a consent to search locker 500 and locker 63. The police recovered a cookie tin from locker 63, and inside the tin was a black biker's wallet. Inside the Ed box, also found in locker 63, was another biker's wallet, this one brown, with a silver chain attached.

Mrs. Weber, the victim's wife, identified the black wallet as her husband's, and she told police that she was 99% sure that the chain on the brown wallet was the same chain her husband had on the black wallet. At trial, she identified the black wallet and the chain as her husband's property.

¶ 24 On direct examination at trial, Michael Lippert testified that in 1992 he was living at 759 Austin Boulevard in Aurora with Les, Donald, and defendant. Les and defendant slept on separate couches in the living room. Michael testified that he had seen defendant target shooting with a black .22 in the backyard of the home four or five times. Michael further testified that on the morning of April 17, 1992, he spoke with defendant in the living room of the Austin Boulevard house. According to Michael, defendant said that he "shot this guy that was stuck in the mud trying to get lime stone for his house." The shooting occurred off of Sheffer Road near an old wooden bridge. Michael said that defendant told him that defendant and "Donny" were walking and saw a guy stuck in the mud. According to Michael, defendant and Donald "offered to help [the victim], but [defendant] shot him and took his wallet." Michael testified that defendant showed him a black leather wallet with a chain attached that had pictures of the victim's wife and children in it. According to Michael, defendant stated that there was $6 in the wallet. Defendant told Michael that Donald, who was 16 years old at the time, was there, but defendant did not say what "Donny did." According to Michael, defendant threatened to kill him if he told anyone about defendant's revelations. Michael testified that he confronted Donald that same afternoon. Michael asked Donald "why," and then Michael "kicked [Donald's] ass." After April 17, 1992, Michael saw that defendant kept the wallet with his other possessions, including a cookie tin and a dictionary, in a box next to the couch where defendant slept. Michael testified that when he was questioned by police in August 1994, he told them he "didn't know nothing" because defendant had threatened his life.

¶ 25 On cross-examination, defense counsel first established where everyone in the Austin Boulevard house slept. Counsel then established that the box next to the couch where defendant slept was not the Ed box but was similar to it and that defendant kept his possessions in the cookie tin, which he kept in the box. Michael reaffirmed that he had seen defendant target shooting with a gun he got from inside the house. Under questioning by defense counsel, Michael brought up another incident in which defendant had shot the gun inside the house.[2] Under further questioning, Michael testified that the gun he saw defendant shooting was the .22 High Standard. Counsel asked Michael to describe the leather wallet, and Michael testified that it had a silver chain attached to it. Michael testified that he was aware of his father's (Les's) various moves after they moved out of the Austin Boulevard house, and Michael was aware that Les had put items into a storage locker. Michael testified that in 1992 he smoked Marlboro cigarettes. Michael testified to the statement he gave police in May 1995. He also testified that he never went to court on a traffic warrant that was outstanding in May 1995. On redirect, Michael testified that he had no conversation with the police about the warrant.

¶ 26 Donald Lippert testified that he was serving a 60-year sentence in the Department of Corrections upon his plea of guilty to the Weber murder. He was also serving a concurrent 80-year sentence for other cases in Kane County. During the time that Donald, Les, and defendant lived in the Austin Boulevard house, Donald had a friend in Warrenville named Kurt Kopec. Donald

[2]The defense presented evidence in its case that the police looked for a bullet in the kitchen ceiling in order to verify Michael's story but did not find anything other than a hole the size of a pencil in a ceiling tile, which might have been cause by a bullet.

testified that he stole a .22 Ruger and a .22 High Standard from the Kopec residence.[3] When Donald brought the guns into the Austin Boulevard house, he showed them to defendant. Donald kept the guns under his mattress until Les took them away from him and stored them under Les's couch in the living room. Donald testified that he partied most of the day and evening on April 16, 1992. He explained that he drank "a lot of beer, did some shots, smoked some weed." Toward the end of the day, Donald was "pretty wasted." Late that evening, defendant asked Donald if he wanted to go out and collect cans. Defendant and Donald walked on Sheffer Road, when they saw a van at Sheffer Road and Vaughn Road. According to Donald, defendant handed him a gun and said they would "see what's going on up there, to rob somebody." Donald testified that defendant had both the .22 High Standard and the .22 Ruger in his waistband. Defendant handed the Ruger to Donald. Donald said that he and defendant walked closer to the van, and Donald saw a man by the van putting something under a front tire. According to Donald, he kept walking because he wanted to urinate, but he heard defendant talking to the man. Donald said that he looked back toward the van. He saw defendant behind the man. Defendant was bringing the gun up from his side and held a finger to his mouth, indicating for Donald to be quiet. Then Donald turned around and heard one or two gunshots. At that point, Donald looked back toward the van. According to Donald, defendant was pulling the slide back on the gun and telling Donald to give him the Ruger. Donald handed defendant the Ruger, and defendant shot the man two more times with the Ruger while the man was on the ground. Then defendant took the man's wallet. Defendant checked the inside of the van, and then he and Donald walked home. Donald testified that he went to bed. Donald testified that Michael confronted him the next day about the killing, and when Donald asked defendant why he

[3]Kurt Kopec testified to the theft of the guns.

told Michael, defendant made a facial expression that indicated that he had threatened Michael to stay quiet. Donald testified that eventually the guns were put into Les's storage locker, but defendant retrieved them. After defendant was arrested in 1993, Donald went to the house where defendant was staying and took the Ruger, which he then gave to Les.

¶ 27 The trial court denied defendant's motion for a directed verdict. Pertinent to this appeal, defendant presented a stipulation that DNA analysis of the cigarette butt found under the victim's body at the scene did not match the victim, defendant, or Donald Lippert. The State filed a motion to preclude defendant from arguing that a third, unknown party committed the murder. The trial court ruled that the defense could argue that a piece of physical evidence found at the scene was not linked in any way to defendant, the victim, or Donald Lippert, but could not argue that an unknown third person had participated in the crime. Defense counsel argued in his closing argument that Michael Lippert participated with Donald in the shooting, and then defense counsel pointed out to the jury that the DNA on the cigarette butt found underneath the victim's body did not match defendant, the victim, or Donald.

¶ 28 On February 24, 2010, the jury found defendant guilty of first degree murder and armed robbery. The same jury, after a hearing following the guilty verdict, sentenced defendant to death for the murder of Jerry Weber.

¶ 29 Posttrial Proceedings

¶ 30 On March 30, 2010, defendant filed a lengthy, handwritten *pro se* supplemental posttrial motion in which he alleged numerous instances of ineffective assistance of counsel. Pertinent to this appeal, defendant alleged that his counsel were ineffective for failing to impeach Michael Lippert with his gang affiliation, drug history, and "revenge motive" consisting of fights between defendant

and Michael. On April 8, 2010, defendant's counsel filed a motion for a "*Krankel*" hearing to determine whether other counsel should be appointed for defendant. On April 8, 2010, the trial court conducted a hearing pursuant to defendant's *Krankel* motion. Because defendant did not have his glasses, the court read aloud each allegation in the *pro se* supplemental posttrial motion and gave defendant an opportunity to expand upon his written allegations. The court then requested a verbal response from counsel. Defendant did not add anything to his written allegation that his counsel should have impeached Michael with his drug history and gang affiliation. The trial court commented that neither was "particularly relevant." Defense counsel Houlihan interjected that he and his partner had deposed Michael and had "fully questioned him on those issues." Houlihan continued:

> "[I]t was the decision of [defense counsel], for trial strategy, that we didn't think that would be very helpful to the defendant, as far as impeachment was concerned. We believed that the manner in which we questioned him was the more appropriate strategy, and that's the strategy we pursued through our questioning."

The trial court found that "if certain matters" were not brought out on the cross-examination of Michael, it was due to trial strategy and not neglect. With respect to evidence that Michael and defendant fought, the trial court found that if it had been brought out, it would not have changed the outcome. The court commented that "it may be a point that could have been raised," but not raising it did not constitute ineffective assistance of counsel. At the conclusion of the lengthy hearing, the trial court found that there was no basis to appoint other counsel for defendant.

¶ 31 On May 3, 2010, the trial court denied defendant's motion for a new trial. In accordance with the jury's verdict, the court sentenced defendant to death on the first degree murder conviction and

to sixty years' imprisonment on the armed robbery conviction to run concurrent with the death sentence. Defendant appealed. After the Governor of the State of Illinois commuted the death sentence to life imprisonment on March 9, 2011, our supreme court transmitted the record in the instant case to this court.

¶ 32 ANALYSIS

¶ 33 Defendant raises three issues on appeal: (1) the warrantless search of the Ed box violated the fourth amendment because the police unreasonably relied on Les's apparent authority to consent to the search; (2) the trial court erred in precluding defendant from arguing to the jury that an unknown person committed the crime; and (3) the trial court failed to conduct an adequate hearing on defendant's *pro se* allegation that defense counsel were ineffective for failing to impeach Michael Lippert with his history of fights with defendant and his drug use.

¶ 33 The Motion to Suppress

¶ 34 Defendant contends that the search of the Ed box and the cookie container located inside storage locker 63 violated his fourth amendment rights because the police failed to ascertain whether Les Lippert had mutual use of, or joint access to, defendant's containers. In *United States v. Matlock*, 415 U.S. 164 (1974), the Supreme Court held that the prosecution may justify a warrantless search by showing that consent was obtained from a third party "who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." *Matlock*, 415 U.S. at 171. The Court explained that a determination of common authority does not rest upon the law of property but rests on "mutual use of the property by persons generally having joint access or control for most purposes." *Matlock*, 415 U.S. at 171, n.7. This "mutual use" by persons generally having joint access or control makes it reasonable "to recognize that any of the co-inhabitants has

the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched." *Matlock*, 415 U.S. at 171, n.7. Determination of consent to enter is judged against the objective standard of whether the facts available to the police at the moment would warrant a person of reasonable caution in the belief that the consenting party had authority over the premises. *Illinois v. Rodriguez*, 497 U.S. 177, 188 (1990). In *People v. Stacey*, 58 Ill. 2d 83, 89 (1974), our supreme court held that a defendant's subjective expectation of privacy is irrelevant, and the validity of a warrantless search consented to by a third party is to be judged by *Matlock*'s common authority test. Here, the trial court heard conflicting testimony as to who placed the items into locker 63 and when and whether the Ed box was sealed with tape. The trial court found that Les placed the items in the storage locker and that the Ed box, if it ever was sealed, was not sealed when the police searched locker 63 on May 9, 1995. Findings of historical fact made by the trial court in ruling on a motion to suppress will be upheld on review unless such findings are against the manifest weight of the evidence. *People v. Pitman*, 211 Ill. 2d 502, 512 (2004). However, the reviewing court reviews *de novo* whether the evidence should be suppressed. *Pitman*, 211 Ill. 2d at 512.

¶ 35 Here, the evidence showed that Les rented locker 63 in his name on April 30, 1994. The evidence also showed that Les paid the rent and had a key in his possession for the padlock on locker 63. At the time Les rented locker 63, defendant admittedly was in the penitentiary. Therefore, defendant's claim that he personally placed his items into the locker could not be true. On appeal, defendant does not challenge Les's authority to consent to a search of the locker itself but contests the officers' right to search the containers within the locker without making further inquiry as to

Les's mutual use and control over the containers. Defendant relies on two federal cases and one Illinois supreme court case.

¶ 36 In *United States v. Whitfield*, 939 F. 2d 1071 (D.C. Cir. 1991), special agents of the FBI went to the defendant's home without a search warrant, suspecting the defendant of having stolen Federal Reserve money from a Brinks storage facility. *Whitfield*, 939 F. 2d at 1072. The defendant was not at home, but his mother gave the agents consent to search her adult son's bedroom. *Whitfield*, 939 F. 2d at 1072-73. The defendant's bedroom door was unlocked, and the bedroom contained items of furniture apparently belonging to the defendant. *Whitfield*, 939 F. 2d at 1073. The agents went into the closet and searched the pockets of four of the defendant's coats, seizing $16,000 of the stolen Federal Reserve money. *Whitfield*, 939 F. 2d at 1073. In reversing the district court's order denying the defendant's motion to suppress, the court of appeals held that the agents could not reasonably have believed that the defendant's mother had authority to consent to the search because they did not have enough information. *Whitfield*, 939 F. 2d at 1074. The agents had asked the mother whether the house was hers, whether she lived there with the defendant and another son and a daughter, and whether the defendant paid rent. *Whitfield*, 939 F. 2d at 1072. The court of appeals held that the agents' questioning, sparse as it was, established a basis for their belief that the mother generally had joint access to her son's room in the sense that she and the defendant could both enter his bedroom. *Whitfield*, 939 F. 2d at 1074. However, what the agents ascertained from the mother did not furnish them with a belief that she had "mutual use" of the bedroom or the closet containing the defendant's clothing. *Whitfield*, 939 F. 2d at 1074.

¶ 37 In *United States v. Rodriguez*, 888 F. 2d 519 (7th Cir. 1989), the defendant and his wife lived in an apartment in a union hall, although the couple was separated and the defendant stayed in the

janitors' quarters. *Rodriguez*, 888 F. 2d at 522. Mrs. Rodriguez unlocked the janitors' room for federal agents and consented to their search of the room. *Rodriguez*, 888 F. 2d at 522. The agents opened a briefcase on which the defendant's name was written, and they opened other closed containers located within the room. *Rodriguez*, 888 F. 2d at 522. The court of appeals held that Mrs. Rodriguez's possession of the key to the janitors' room gave her actual or apparent authority to consent to a search of the room. *Rodriguez*, 888 F. 2d at 522-23. However, the court said that was not enough for the agents to have concluded that she consented to a search of the items the room contained. *Rodriguez*, 888 F. 2d at 523. Because the parties did not address the question of consent to search the containers in the room, the court of appeals remanded to the district court for a further evidentiary hearing. *Rodriguez*, 888 F. 2d at 524. The court of appeals held that, unless the evidence on remand showed that Mrs. Rodriguez had apparent authority to consent to the opening of the containers, and actually did consent, the evidence found in them had to be suppressed. *Rodriguez*, 888 F. 2d at 524-25.

¶ 38 In *People v. Bull*, 185 Ill. 2d 179 (1998), the police searched a closed box belonging to the defendant, which was found in the bedroom the defendant and his lady friend shared. *Bull*, 185 Ill. 2d at 195-96. The police asked the lady friend if she had access to the box, to which she replied that she did. *Bull*, 185 Ill. 2d at 196. Our supreme court held that the police could reasonably have believed that the lady friend had common authority over the box. *Bull*, 185 Ill. 2d at 198.

¶ 39 Defendant relies on the above cases for his argument that the police in the instant case had to inquire of Les whether he had access to the cookie tin and the Ed box. In the absence of such an inquiry, defendant maintains that the State did not establish that the police could have reasonably believed that Les and defendant had mutual use of the containers.

¶ 40 Our case is distinguishable from *Whitfield*, *Rodriguez*, and *Bull*. In those cases, the containers were under the present direct control of the defendants, although the defendants happened to be momentarily absent at the time the officials searched. In contrast, defendant in the present case relinquished exclusive control over the items when he departed the Austin Boulevard house to live with his girlfriend in Aurora in 1993 and Les took the items to the Warrenville house, where defendant never stayed. There the items remained until Les put them into locker 63. From the time Les placed the items into locker 63 until the police searched in May 1995, defendant had not accessed his property. Although the Ed box had remnants of masking tape on it in May 1995, it was not sealed.

¶ 41 At oral argument, defendant relied primarily on *People v. James*, 163 Ill. 2d 302 (1994). In *James*, the police, who obtained consent from the driver of an automobile to search the car, searched the defendant's closed purse, which was on the front passenger seat. *James*, 163 Ill. 2d at 306. Our supreme court held that the search violated the fourth amendment because the police were not entitled to rely upon the driver's apparent authority to consent to the search of the passenger's purse. *James*, 163 Ill. 2d at 315. The court reasoned that the driver did not own the purse, nor was there any suggestion in the record that the driver had common possession or control of the purse. *James*, 163 Ill. 2d at 315. The supreme court also noted that the defendant did not abandon her possessory interest in or control over her purse during the traffic stop. *James*, 163 Ill. 2d at 321. Our case is not like *James* for two reasons. First, Les Lippert exerted at least common, if not exclusive, control over the Ed box and the cookie tin from the time he removed those items from the Austin Boulevard house, through the time he stored them at the Warrenville address, placed them in locker 63, and finally allowed the police to search. Second, while the State did not argue before the trial court that

defendant abandoned the Ed box and the cookie tin, the evidence showed that defendant, at a minimum, relinquished his possessory interest in those items.

¶ 42 At oral argument, defendant argued that he and Les had an agreement that Les would store the Ed box and the cookie tin for defendant. This "agreement" allegedly had its genesis way back when Les and defendant were living in the Austin Boulevard house. Defendant testified at the motion to suppress that he contributed to the household bills, one of which was for a storage locker. However, the storage locker in question at the time they lived on Austin Boulevard had to be storage locker 19. At oral argument, defense counsel conceded that the Ed box and the cookie tin were never placed in locker 19. Defense counsel further conceded that defendant never had any property interest in or actual control over locker 63, where Les eventually put the Ed box and the cookie tin along with numerous other boxes of the Lipperts' belongings. Consequently, the record does not support defendant's contention that he and Les had an "agreement" regarding a bailment of defendant's property for defendant's benefit.

¶ 43 We focus on the particular language in *Matlock* in resolving this issue. Defendant emphasizes the "common authority" language, which depends upon "mutual use." *Matlock*, 415 U.S. at 171, n.7. However, *Matlock*'s language was not so narrow:

> "[W]hen the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over *or sufficient relationship to the premises or effects sought to be inspected*." (Emphasis added.) *Matlock*, 415 U.S. at 171.

Here, defendant placed his effects into Les's possession when he moved out of the Austin Boulevard home and moved in with his girlfriend. Some time elapsed between then and when defendant went to the penitentiary, and defendant did not make other arrangements for the safekeeping of his property. The evidence showed that over time Les rented three storage lockers. Before Les, Michael, Donald, and defendant moved into the Austin Boulevard home, Les had rented a single locker. He continued to rent this locker while they lived at the Austin Boulevard address. Defendant contributed to the household bills, which might have included some of the rent on the locker. After they moved out of the Austin Boulevard house, Les needed more storage room, so he transferred his existing locker (number 19) to locker 500 in December 1993. Later, Les needed still more storage room because he vacated the Warrenville house, so he rented locker 63 in April 1994. The storage rental documents in evidence showed that Les rented lockers 500 and 63 while defendant was incarcerated, so defendant likely would not have contributed to the rent on those units. The evidence also showed that Les put defendant's property, which had been stored at the Warrenville house, into locker 63 and left it there for a little more than a year, until the police seized it in May 1995, at which time Les had stopped paying rent on the locker. When the police first encountered locker 63 in May 1995, it was filled floor to ceiling with cardboard boxes and loose items that belonged to various Lipperts as well as defendant (the video of the search of locker 63 corroborates this). Only Les had the key to the locker. This evidence established Les's significant relationship, not only to the locker, but to the effects inside the locker.

¶ 44 It is significant that in the *Whitfield, Rodriguez, and Bull* cases cited above, upon which defendant relies, the evidence showed that the police were aware that the defendants were joint occupants of the premises with the consenting parties. This was also true in *Matlock*, where the

defendant's wife shared a bedroom in their rented house with the defendant (*Matlock*, 415 U.S. at 166), and in *Illinois v. Rogriguez*, where the premises searched had been jointly occupied by the defendant and his former girlfriend (*Rodriguez*, 497 U.S. at 179-80). The issue then became one of "common authority," which prompted the need to inquire further.

¶ 45 Further inquiry on the part of the police is necessary where the situation is "ambiguous." *Whitfield*, 939 F. 2d at 1075. Here, the sheriff's detectives did not encounter an ambiguous situation, because it was unlike the situation where an apartment or a bedroom was obviously jointly occupied. One of Les's sons had told the detectives that Les may have information. Les indicated to the detectives and to assistant state's attorney Barsanti that he may have worthwhile evidence in cases they were investigating packed away in certain storage lockers. While the detectives waited at the storage facility's gate, Les paid the back rent on the storage lockers before the storage company allowed them onto the premises. In the detectives' presence, Les opened the lockers with a key in his possession and then re-locked the units at the conclusion of the search. In the detectives' presence, Les went through every box and container and identified whose property it was. Defendant's property was not in any way segregated from the Lipperts' property. The Ed box, although it had defendant's name written on it, was not sealed and was commingled with property belonging to almost, if not all, of the Lipperts. The cookie container was on top of some other boxes. In sum, nothing known to the detectives at the time of the search indicated that defendant shared either joint occupancy of the storage lockers (which he did not) or that Les did not have access to the Ed box and the cookie container.

¶ 46 At oral argument, defendant emphasized that he had an "expectation of privacy" in the Ed box and the cookie tin. However, this claim of an expectation of privacy is at odds with his claim

that this issue is governed by *Matlock*'s common authority doctrine under which we examine whether it was objectively reasonable for the police to believe the consenting party had authority over the premises. *Illinois v. Rodriguez*, 497 U.S. at 188. As our supreme court stated in *Stacey*, the defendant's expectation of privacy is irrelevant in a third-party consent case, which defendant contends this is. *Stacey*, 58 Ill. 2d at 89. Accordingly, we hold that the search of locker 63 did not violate defendant's right against unreasonable searches and seizures.

¶ 47 Defendant's Right to Present a Defense

¶ 48 Defendant's second contention is that the trial court denied him the right to present a defense when it ruled that defendant could not argue to the jury that an unknown person committed the murder based upon a cigarette butt that was found underneath the victim's body and did not contain the victim's, defendant's, or Donald Lippert's DNA. Defendant argues that, since the field in which the victim was killed had recently been plowed, and no other cigarette butts were in the vicinity, it is reasonable to conclude that the killer dropped the cigarette butt. Defendant relies on *Holmes v. South Carolina*, 547 U.S. 319 (2000), for the proposition that the trial court cannot constitutionally exclude evidence of another's guilt. Defendant's reliance on *Holmes* is misplaced, because the trial court in the instant case did not exclude the cigarette butt or the evidence that it did not contain defendant's, Donald's, or the victim's DNA. The trial court ruled that defendant could present that evidence but that he could not argue to the jury that an unknown third party committed the murder. The trial court held that it was too speculative to argue that the cigarette butt pointed to an unknown third party who was the actual killer. While the cigarette butt was discovered beneath the victim's body in the field, there was evidence that the adjacent roadway was littered with cigarette butts.

Defendant's real argument on appeal appears to be that the trial court erred in limiting his right to argue the evidence to the jury.

¶ 49 Closing argument for the defense is a basic element of the adversarial fact-finding process in a criminal trial. *Herring v. New York*, 422 U.S. 853, 858 (1975). The right to make a closing argument for the defense is grounded in an accused's sixth amendment right to counsel. *Herring*, 422 U.S. at 858. The trial court does not have the discretion to deny a defendant the right to make a proper closing argument. *People v. Crawford*, 343 Ill. App. 3d 1050, 1056 (2003). Here, defense counsel communicated their theory that someone other than defendant committed the murder with Donald Lippert to the jury first during cross-examination. Defense counsel asked Donald, after a lengthy cross-examination, who he was really with when the victim was shot, intimating that it was someone in the household other than defendant. Defense counsel established that Michael Lippert smoked cigarettes at the time of the murder. In closing argument, defense counsel argued that Michael was the one who was with Donald at the murder scene. Counsel then brought to the jury's attention that the cigarette butt, which was not linked to defendant, Donald, or the victim, was underneath the victim's body at the scene. The logical inference from the evidence established by the defense and the closing argument was that the cigarette butt had been dropped at the scene by Michael. Thus, defense counsel argued the theory of the defense, and there was no improper curtailment of closing argument.

¶ 50 Sufficiency of the *Krankel* Hearing

¶ 51 Defendant's final contention is that the trial court failed to conduct a sufficient hearing in accordance with *People v. Krankel*, 102 Ill. 2d 181 (1984), to determine whether to appoint other counsel to represent him at the posttrial hearing with respect to his allegations of ineffective

assistance of counsel. Defendant argues that his theory that the Lipperts falsely incriminated him in order to support Donald's testimony could have been strengthened if defense counsel had attacked Michael Lippert's credibility with his history of drug use and fights with defendant.

¶ 52 In *Krankel*, the defendant filed a *pro se* posttrial motion alleging ineffective assistance of counsel based upon his counsel's alleged refusal to investigate and present an alibi defense. *Krankel*, 102 Ill. 2d at 187. The defendant's counsel requested a continuance of the hearing on the posttrial motion that counsel filed as well as a continuance of the hearing on the defendant's *pro se* posttrial motion so that other counsel could represent the defendant. *Krankel*, 102 Ill. 2d at 188. The trial court denied the continuance and denied both posttrial motions. *Krankel*, 102 Ill. 2d at 189. Before our supreme court, both the State and the defendant agreed that the defendant should have been appointed counsel other than his originally appointed attorney to represent him at the posttrial hearing with regard to his allegation of ineffective assistance of the originally-appointed counsel. *Krankel*, 102 Ill. 2d at 189. The supreme court remanded the case to the trial court for a hearing to determine whether the defendant received ineffective assistance of counsel. *Krankel*, 102 Ill. 2d at 189.

¶ 53 In *People v. Moore*, 207 Ill. 2d 68 (2003), the court expanded on its *Krankel* decision. The court explained that, in interpreting *Krankel*, the following rule developed:

> "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." *Moore*, 207 Ill. 2d at 77-78.

The court went on to say that the "operative concern" for the reviewing court is 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. The court prescribed an evaluation involving "some interchange" between the court and counsel regarding the "facts and circumstances" surrounding the alleged ineffective representation, and said that a "brief discussion" between the court and the defendant may be sufficient. *Moore*, 207 Ill. 2d at 78. Alternatively, the trial court can base its evaluation on its knowledge of defense counsel's performance at trial and the sufficiency of the defendant's allegations on their face. *Moore*, 207 Ill. 2d at 79.

¶ 54 Defendant in our case claims that the hearing the trial court conducted was inadequate because when defense counsel represented that they knew of Michael's prior drug use and fights with defendant and stated that it was their trial strategy not to cross-examine Michael on those matters, the trial court accepted their statement without further inquiry. Defendant asserts that his counsel's cross-examination of Michael left Michael's testimony "nearly unchallenged," and argues that there was no strategic reason to justify his counsel's inadequate performance. Defendant urges that the question of whether defense counsel's performance was based on a reasonable strategy is a factual question upon which a defendant should have the opportunity to present evidence. In particular, defendant relies on two federal cases, *Fisher v. Gibson*, 282 F. 3d 1283 (10th Cir. 2002), and *Brecheen v. Reynolds*, 41 F. 3d 1343 (10th Cir. 1994). Both of those cases were before the federal courts on the defendants' *habeas corpus* petitions, and both cases involved an analysis on the merits of claims of ineffective assistance of counsel. Defendant in our case quotes *Brecheen*'s

admonishment that the mere incantation of strategy does not insulate an attorney's performance from review. *Brecheen*, 41 F. 3d at 1369. Defendant is, in effect, faulting the trial court in the instant case for not following procedures employed by federal courts hearing federal *habeas corpus* petitions.

¶ 55 The record establishes that the trial court followed the procedure set forth by our supreme court in *Moore* for evaluating defendant's *pro se* allegations of ineffective assistance of counsel. The trial court allowed defendant orally to expound on his detailed 10-page handwritten supplemental posttrial motion, and then the court requested responses from counsel. When the court asked defendant if he wished to elaborate on his allegation with respect to the cross-examination of Michael Lippert, defendant stood on his motion. The trial court thus afforded defendant the opportunity to make whatever argument he wished and to tell the court whatever factual information he possessed to support his allegation. Defense counsel stated that they were aware of Michael's prior drug use, his gang affiliation, and his acrimonious history with defendant but decided, as a matter of trial strategy, not to pursue those matters on cross-examination. *Moore* does not require that the trial court delve into the reasons for the strategy or second-guess counsel's strategic decisions. Rather, our supreme court has made it clear that where the claim of ineffective assistance of counsel pertains to trial strategy, no new counsel need be appointed. *People v. Nitz*, 143 Ill. 2d 82, 134 (1991). In *People v. Ramey*, 152 Ill. 2d 41, 54 (1992), our supreme court held that a defendant has the right, in consultation with his attorney, to decide what plea to enter, whether to waive a jury trial, whether to testify in his own behalf, and whether to file an appeal. In *People v. Brocksmith*, 162 Ill. 2d 224, 229-30 (1994), the court added the right to decide whether to tender a lesser included offense instruction to the list of those matters a defendant must decide. Trial counsel

has the right to make the ultimate decision with respect to matters of tactics and strategy. *Ramey*, 152 Ill. 2d at 54. Matters of tactics and trial strategy include whether and how to conduct cross-examination. *Ramey*, 152 Ill. 2d at 54. The trial court in the instant case ascertained that defense counsel did not neglect the case when defense counsel represented that they took Michael's deposition prior to trial and went into the issues of his drug use, his gang affiliation, and the animosity between Michael and defendant. How counsel conducted the cross-examination at trial was a matter of strategy, and the court was not required to inquire further.

¶ 56 Michael's prior testimony in one of the Kane County cases is in the record in connection with defendant's motion for leave to take Michael's deposition. Defendant points to that transcript, where Michael was cross-examined about his drug use and his fights with defendant, as a model his counsel in the present case should have used. However, the cross-examination elicited that the fights were over defendant's involving Donald in three murders and resulted in defendant chopping Michael's finger with a machete. To cross-examine Michael on these matters would have risked bringing out defendant's involvement in two other murders and his propensity for extreme violence. Further, the Kane County cross-examination established that Michael was using drugs at the time of the Kane County murder. It did not establish Michael's drug use at the time of the instant murder. Accordingly, we hold that the trial court afforded defendant an adequate *Krankel* hearing.

¶ 57 CONCLUSION

¶ 58 For the foregoing reasons, the judgment of the circuit court of Du Page County is affirmed.

¶ 59 Affirmed.