2013 IL App (2d) 120580-U
No. 2-12-0580
Order filed August 20, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellee,	)	
v.	)	No. 08-CF-2395
SHERRIANNE REMSIK-MILLER,	)	Honorable Thomas E. Mueller,
Defendant-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE BURKE delivered the judgment of the court.
Justices Hutchinson and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly denied defendant new counsel to represent her on her posttrial claims of ineffective assistance of counsel, as defendant did not show possible neglect: counsel's alleged omissions were strategic and harmless.

¶ 2 Defendant, Sherrianne Remsik-Miller, was charged with solicitation of murder for hire (720 ILCS 5/8-1.2(a) (West 2008)) and solicitation of murder (720 ILCS 5/8-1.1(a) (West 2008)). Following a bench trial, the trial court found defendant guilty of solicitation of murder for hire and sentenced her to 22 years in prison. On appeal, defendant argues that she was entitled to new counsel to represent her on her posttrial claims of ineffective assistance of counsel. We affirm.

¶ 3 I. BACKGROUND

¶ 4 At trial, Timothy Youngberg testified that he had previously pleaded guilty to the offense of delivery of a controlled substance and been sentenced to five years in prison. He was released after 18 months and began staying at "PADS," a homeless shelter in Elgin. He met defendant, a PADS volunteer, at the shelter. In early July 2008, Youngberg stayed at defendant's home in Algonquin for about four days, because PADS was closed for the Independence Day holiday. While there, Youngberg performed various home repair projects for defendant. According to Youngberg, shortly after meeting defendant, she told him that she was going through a divorce with her abusive spouse, Gerald Miller, and that she was having a problem paying the mortgage on her house. She told Youngberg that he could help her solve her financial problems by killing Gerald, because she would receive about $1.5 to 2 million in life insurance if Gerald were to be killed while they were married. At first, Youngberg did not take defendant seriously. He agreed to kill Gerald, but he did so "in a friendly way, like, whatever, you know."

¶ 5 Youngberg further testified that, at some point in July 2008, he was sitting with friends outside of a bowling alley, when defendant came by and picked him up in her car. While in the car, defendant showed him some cans of an adhesive that is used to glue down carpeting. The cans were marked flammable. Defendant asked Youngberg to tie the cans to the engine block of Gerald's car, so that the car would explode while Gerald was driving. Youngberg told defendant that the plan would not work, and defendant dropped him off where she had picked him up. In middle or late July 2008, Youngberg contacted the police about defendant, because she had threatened to hurt Youngberg for ignoring her requests to kill her husband. Ultimately, he met with state police

investigator Brion Hanley. The police obtained an overhear authorization, and Youngberg was fitted with a recording device, so that he could record his conversations with defendant.

¶ 6 On August 21, 2008, Youngberg met with defendant in the Elgin Community College (ECC) cafeteria, while Hanley watched. Youngberg's and defendant's conversation was recorded. (The audiotape and a transcript of the conversation were admitted into evidence.) Youngberg told defendant that he had a friend who wanted to come and help defendant out, but that the friend wanted to make sure that she was serious about doing this to her husband. Youngberg needed a photograph of Gerald, as well as Gerald's address and the name of the golf course where he regularly golfed. Defendant said that Gerald played golf on Tuesdays at Crystal Woods. Referring to Youngberg's friend, she said, "If it's this week it's thirty." She clarified that "[t]his week means before next Thursday." She further stated, "After this next next [*sic*] Friday, it's twenty." She added, "Does that tell you how serious I am?" At a later point in the conversation, Youngberg told defendant, "Well, it'll probably be, he'll come up." He added, "[H]e'll be here sometime in the week, during the week." Defendant replied, "I don't wanna know when. I'm just tellin' you if it's before next Thursday it's three [*sic*]." She added, "If that doesn't have express [*sic*] how serious I am, I don't know what does." Near the end of the conversation, defendant asked Youngberg, "How well do you know this guy[?]" When Youngberg responded, "Real well," defendant said, "This isn't gonna turn out to where we both end up goin' to jail because of this." Youngberg assured her that it would not turn out that way. Defendant said, "Well, if you tell this guy thirty, thirty before net [*sic*] Thursday, what are the odds he's gonna go for ten more." Youngberg assured her that his friend was "ready to do it" and that he "just wants to pop in and pop out. Get the fuck out of here."

Defendant said that it would take 21 days for the insurance to go through and that she would "even drive [downstate] with cash," because she would not want to "Western Union that amount."

¶ 7 The next day, August 22, 2008, Youngberg recorded a second conversation with defendant. (The audiotape and a transcript of the conversation were admitted into evidence.) Youngberg told defendant that he had "talked to dude this morning" and that he would be "comin' up this weekend." Youngberg needed "a pic, picture from [*sic*] of him. And a map of how to get to his house." When defendant suggested that the best way would be to go to ECC and use mapquest.com on the computer, Youngberg said that he did not have time to do that. He suggested meeting defendant that evening for directions. He reemphasized that he needed a recent picture of Gerald because the one that defendant had previously given him got thrown away. They arranged to meet at 7:30 p.m. by an Elgin bowling alley. Defendant said that she would go to ECC first and print out the directions. She said that the only picture she had was of Gerald with a beard and that he did not have a beard anymore.

¶ 8 Youngberg testified that, on the evening of August 22, 2008, he met defendant outside of an Elgin bowling alley. (The meeting was recorded and the audiotape admitted into evidence; however, no transcript of the conversation was prepared.) Youngberg arrived at the bowling alley on foot; defendant arrived in her vehicle. According to Youngberg, defendant told him how she wanted Gerald killed. She told Youngberg not to shoot him in the face, as that would be the sign of a hate crime and would lead back to her. She said that, instead, Gerald should be shot in the back of his head to make it look like a robbery. She gave Youngberg a picture of Gerald and the directions to his house. The picture and directions where admitted into evidence.

¶ 9 On cross-examination, Youngberg confirmed that defendant brought up wanting to have her husband killed, either by Youngberg or by someone he knew, soon after Youngberg first met her, before he stayed at her house. In the previous 10 years, Youngberg had been convicted of driving under the influence and drug crimes. He was about to enter a drug rehabilitation program for a possession charge when he was arrested and charged with delivery of a controlled substance, to which he ultimately pleaded guilty. He was arrested in 2005 for writing a bad check. (The State began to object to testimony about any arrests, and the court interrupted stating: "Correct. This is about convictions.") He was on supervised release when he first approached the police. He agreed that he had no car, no money, and no assets. Although defendant had mentioned something about access to a " 'throw-away' " gun, she never showed him a gun. He was given money by the police for "helping out." The total amount given to him was $566.

¶ 10 Gerald testified that he and defendant had been married for nine years and that, at the time of the trial, they had been divorced for several months. Divorce papers had not been filed in the summer of 2008, but he filed for divorce shortly after defendant's arrest. He did not remove defendant as the beneficiary of his life insurance policy until after the divorce. On cross-examination, Gerald stated that he had two life insurance polices: one had a face value of $50,000 and the other had a face value of $500,000. He believed that he could have changed the beneficiary of either policy at any time. He never had a policy worth $1.5 to 2 million.

¶ 11 Joanie Bellas testified that, at the time of trial, she was serving mandatory supervised release. Within the past 10 years, she had been arrested several times for theft, retail theft, and forgery. After being accepted to "Treatment Alternative Court," she committed an offense and was ultimately sentenced to three years in prison. She had also been arrested in Du Page and Kendall counties, but

nothing was currently pending. She and defendant had become friends in January 2009, while they were both incarcerated in the Kane County jail. Defendant helped Bellas cope with withdrawal symptoms from various drugs. Bellas and defendant were in the same jail pod for several months. When they were not on lockdown, Bellas and defendant would often sit alone at a private table "and talk quietly to each other for hours on end." Defendant told her that she was in jail because she had tried to have a homeless man murder her husband. At some point, upon the advice of her attorney, Bellas began to keep a daily log of her conversations with defendant. According to her notes, on March 6, 2009, defendant asked whether Bellas's husband would murder Youngberg. Defendant suggested to Bellas that Bellas's husband could find Youngberg at a picnic table where he often hung out and that he could spray lighter fluid on Youngberg and set Youngberg on fire. Bellas identified People's Exhibit No. 10 as a map that defendant drew of the various locations where Youngberg could be found.

¶ 12 Russell Norris, a sergeant with the corrections division of the Kane County sheriff's department, testified that defendant and Bellas were housed in the same pod at the jail "for quite awhile." They were both allowed to socialize with others. There were never any problems between the two women.

¶ 13 In closing argument, defense counsel stated: "I'm not going to stand up here and tell you that that's not my client's voice on the tape. I'm not going to say that to you, Judge. I'm not going to insult you. The point is, sometimes we say things and do things and we don't really mean it." He argued that the "hired gun" was not someone who could carry out the murder. He argued that Youngberg and Bellas were both incredible.

¶ 14 In finding defendant guilty of solicitation of murder for hire, the court relied heavily on the transcripts of defendant's conversations with Youngberg. It stated:

> "I believe there are three if not four occasions during the 29-paged [*sic*] transcript that accompanied the first overhear, wherein [defendant] says to Mr. Youngberg that, 'You understand that I'm serious, you understand how serious I am', is usually is proceeded [*sic*] by a reminder that, 'It's $30,000 if it's done before next Thursday, then it drops to $20,000,' but she keeps coming back to, 'You understand how serious I am?' I think that that's the most damning evidence that there is because it comes straight from her mouth into the courtroom in the form of an overhear. It's not subject to anyone else's interpretation, it's not subject to any credibility assessment based upon who gets what from whom; this is the Defendant talking to a person that she thinks that she can trust[.]"

¶ 15 Defense counsel and defendant each filed a motion for a new trial. At the sentencing hearing, the court addressed defendant's *pro se* motion, in which she alleged that there were witnesses who could have testified that she was angry at her husband but that she never would have "gone through with anything." The court told defendant that the proposed witnesses could not have testified to inadmissible hearsay. The court noted that it was familiar with defendant's position that she did not intend for her husband to be killed. The court denied both motions.

¶ 16 The court sentenced defendant to 22 years in prison. Defendant filed a *pro se* motion to reduce her sentence. At the hearing on her motion, defendant told the court: "I want to make sure that [defense counsel] is no longer listed as my attorney. I don't believe he did represent me to his fullest ability during my trial." The court told defendant that the appellate court could address her concerns about defense counsel and denied her *pro se* motion. Defendant appealed.

¶ 17 On appeal, defendant argued that the trial court erred in failing to inquire into her *pro se* claim of ineffectiveness. *People v. Remsik-Miller*, 2012 IL App (2d) 100921. We found that defendant's statement during the hearing on her motion to reduce her sentence made clear that she was raising a claim of ineffectiveness and that the court should have inquired further. Thus, we remanded for the limited purpose of allowing the court to conduct the necessary preliminary examination into the factual basis of defendant's allegations. We noted, however, that if the court were to find that defendant's ineffectiveness claim related back to the argument that she raised at the hearing on the posttrial motions (concerning whether certain witnesses should have been presented at trial) then the court need not inquire further and may deny the claim, because the court's original inquiry was sufficient.

¶ 18 On remand, defendant argued, *inter alia*, that defense counsel failed to sufficiently investigate the criminal backgrounds of Youngberg and Bellas. According to defendant, Bellas had cases pending in other counties at the time of trial. In addition, Youngberg was on parole and had been arrested for buying cocaine a few days before being approached by the police concerning defendant. Defendant claimed that defense counsel did not investigate their criminal backgrounds "until the day of the trial when he got their actual records." Defendant also claimed that defense counsel failed to introduce medical records that would have shown that she was unable to drive when she allegedly showed Youngberg the cans of adhesive. Defendant claimed that defense counsel failed to introduce phone records that would have established that she and Youngberg did not call each other as often as Youngberg suggested and that she did not leave the messages that Youngberg said she did. Defendant claimed that defense counsel failed to introduce into evidence the transcript of the third overhear. Although the State claimed that defendant said "head shot," the transcript would show

otherwise. Defendant claimed that defense counsel should have established that she and Bellas were housed together for only two weeks and that the set-up of the pod did not allow for private conversations. Defendant claimed that there were corroborating witnesses who would testify that Youngberg "enhanced" defendant's requests of him so that he could "sell it to the State" to get out of his parole violation. According to defendant, counsel failed to contact these witnesses.

¶ 19 The trial court allowed defense counsel to respond to defendant's allegations. Counsel stated that "the facts and the recordings made it rather difficult as a strategy to try to convince [the court] that it didn't happen." Counsel stated that his strategy was to show not that defendant did not say the words, but that defendant did not mean what she said. The court asked counsel whether he discussed other potential witnesses with defendant. Counsel responded: "Yes, Judge. And unfortunately, she would say things like, well, you can call A because I told A that this—that I wasn't going to really kill him, but those are all hearsay things. Witnesses that could not testify even if I called them because they had no direct knowledge." Counsel also explained that he had tried to locate Youngberg on several occasions but was unable to.

¶ 20 The court allowed defendant to argue further, but ultimately agreed that defendant's claims of ineffectiveness pertained to matters of trial strategy. The court stated: "I found that the testimony of Mr. Youngberg and Ms. Bellis [*sic*] once corroborated by these other professionals, both Mr. Handily [*sic*] of the state police and Sergeant Norris of the sheriff's department together formed the State's case and met their burden. One without the other would have been a different story. But together, I believe that the State met its burden and I now understand further, of course, why some of these witnesses were not called." Defendant timely appealed.

¶ 21 II. ANALYSIS

¶ 22 Defendant argues that the court erred in failing to appoint new counsel to represent her on her claims of ineffective assistance of counsel. In *People v. Krankel*, 102 Ill. 2d 181, 189 (1984), our supreme court held that, where a defendant has set forth a colorable claim of ineffective assistance of counsel, new counsel should be appointed before a hearing on that claim. In *People v. Moore*, 207 Ill. 2d 68, 77 (2003), the court clarified that new counsel is not automatically required merely because the defendant presents a *pro se* posttrial claim that his counsel was ineffective. The trial court must first examine the factual basis of the claim. *Id*. at 77-78. If the defendant's allegations show possible neglect of the case, the court should appoint new counsel to argue the claim. *Id*. at 78. However, if the court concludes that the claim lacks merit or pertains only to matters of trial strategy, the court may deny the claim. *Id*. In *Moore*, the supreme court listed three ways in which a trial court may conduct its evaluation: (1) the court may ask defense counsel about the defendant's claim and allow counsel to "answer questions and explain the facts and circumstances surrounding" the claim; (2) the court may have a "brief discussion" with the defendant about his claim; or (3) the court may base its evaluation "on its knowledge of defense counsel's performance at trial and the insufficiency of the defendant's allegations on their face." *Id*. at 78-79. "A trial court's decision not to appoint separate counsel on an ineffective-assistance-of-counsel claim will not be erroneous if the underlying claim is deemed to be without merit or related to a matter of trial tactics." *People v. Crane*, 145 Ill. 2d 520, 533 (1991). "Only if the defendant's allegations indicate that trial counsel neglected the defendant's case, should the court appoint new counsel to represent the defendant." *People v. Ramey*, 152 Ill. 2d 41, 52 (1992).

¶ 23 As an initial matter, we note that the parties disagree on the appropriate standard of review. Defendant argues that the standard of review is *de novo*, whereas the State argues that a reviewing

court should not disturb a trial court's decision to decline the appointment of new counsel unless the decision was manifestly erroneous.

¶ 24 In support of *de novo* review, defendant first relies on *People v. Munson*, 171 Ill. 2d 158, 199-203 (1996). In *Munson*, the defendant claimed posttrial that his counsel had been ineffective but he failed to provide any supporting facts. The trial court denied the appointment of counsel, noting that the defendant had not given any basis in support. The court noted that the law does not support appointment of new counsel based on a mere allegation of ineffectiveness. The supreme court affirmed, finding that the defendant "provided neither a basis nor facts from which the court could infer a basis in support of such claim." *Id*. at 201. Although defendant claims that this supports *de novo* review of the court's denial of new counsel, we do not agree. Indeed, the supreme court made no mention of its standard of review but instead merely acknowledged the defendant's failure to provide *any* support for his claim. Here, defendant provided support, but the court found that appointment of new counsel was not warranted.

¶ 25 Defendant also argues that, because she needed to demonstrate only the attorney's "possible neglect" in order to obtain new counsel, we should review the court's denial under the same standard employed when we review a trial court's summary dismissal of a *pro se* postconviction petition alleging ineffective assistance of counsel, which requires the defendant to state only the "gist" of an ineffectiveness claim. See *People v. Wright*, 2013 IL App (4th) 110822, ¶ 23 ("We decide *de novo* whether the petition deserves to be summarily dismissed as legally and factually inarguable."). In response, the State notes that, unlike *pro se* posttrial ineffectiveness claims, in first-stage postconviction proceedings well-pleaded claims are taken as true. *People v. Wilborn*, 2011 IL App (1st) 092802, ¶ 48. That is because, unlike *Krankel* claims, a postconviction petition is a sworn

allegation. See *People v. Niezgoda*, 337 Ill. App. 3d 593, 597 (2003). In any event, the cases cited by the State support its position that we review the court's decision to determine if it was manifestly erroneous. See *People v. McCarter*, 385 Ill. App. 3d 919, 941 (2008) ("The trial court's decision to decline to appoint new counsel for a defendant based on a judgment that the ineffective assistance claim is spurious shall not be overturned on appeal unless the decision is manifestly erroneous."); *People v. Woodson*, 220 Ill. App. 3d 865, 877 (1991) (same); *People v. Brandon*, 157 Ill. App. 3d 835, 847 (1987) (same); *People v. Jackson*, 131 Ill. App. 3d 128, 140 (1985) (same); see also *People v. Moore*, 389 Ill. App. 3d 1031, 1044-45 (2009) (applying manifestly-erroneous standard to consider whether the trial court properly limited the scope of ineffectiveness claim to be raised by counsel appointed under *Krankel*). Accordingly, we consider whether the trial court's decision was manifestly erroneous.

¶ 26 Defendant argues that she established possible neglect of her case. More specifically, she argues that she raised meritorious claims that her attorney failed to effectively impeach the credibility of the State's key witnesses: Youngberg and Bellas.[1] She contends that counsel: (1) failed to investigate Youngberg's and Bellas's criminal backgrounds and failed to effectively use their backgrounds and pending cases to impeach their credibility; (2) failed to introduce defendant's medical and pharmacy records to show that Youngberg was lying when he said that defendant picked him up in her car and showed him cans of adhesive; (3) failed to introduce phone records to show

[1]Although the State addresses defendant's allegations that counsel was ineffective for discussing attempted solicitation in closing, for failing to introduce the transcript of the third overhear into evidence, and for advising defendant not to testify, defendant does not raise these issues on appeal.

that Youngberg was lying about how often he and defendant spoke on the phone; (4) failed to introduce evidence that the configuration of the jail pod made it unlikely that defendant and Bellas privately discussed the matters as described by Bellas in her testimony; and (5) failed to speak with witnesses before trial (Youngberg and Gerald) or investigate witnesses ("Mrs. Wenk") who could have provided evidence that defendant's plan with Youngberg was never a murder plan.

¶ 27 Given counsel's strategy (to convince the court that defendant did not mean what she said), defendant's arguments concerning counsel's failure to effectively impeach Youngberg and Bellas are without merit. Although defendant concedes that an attorney's method of cross-examining a witness is normally a matter of trial strategy, she argues that a failure to impeach a witness when significant impeachment is available cannot be considered strategic. For instance, in *People v. Salgado*, 263 Ill. App. 3d 238, 246-47 (1994), the court held that "the complete failure to impeach the sole eyewitness when significant impeachment is available is not trial strategy and, thus, may support an ineffective assistance claim." Here, however, none of the alleged impeachment evidence was significant, as no impeachment would have negated "the most damning evidence" in this case, the recorded conversations. In any event, the evidence would have had virtually no impeachment value. As the State notes, while the phone records may have shown that defendant and Youngberg did not speak as often as he claimed, the records also would have definitively established that defendant and Youngberg did speak on the phone. Similarly, testimony concerning the layout of the jail pod would not have negated the fact that Bellas and defendant spoke but would have instead confirmed that they did. Indeed, the fact that defendant and Bellas socialized with each other was corroborated by Norris. In addition, the fact that defendant may have been prescribed certain medication when Youngberg claimed to have been with her in her car would not have established

that she actually took the medication or, moreover, that she did not drive. Finally, any additional evidence concerning Youngberg's and Bellas's criminal backgrounds would have had little weight, as they both provided testimony concerning recent criminal histories.

¶ 28 Last, concerning defendant's general claim that counsel was ineffective for failing to interview Youngberg and Gerald before trial, counsel explained, at least as to Youngberg, that he tried to locate him before trial but could not. Given that Youngberg was homeless, it is understandable that he may have been difficult to find. Nevertheless, both witnesses did testify, which distinguishes this case from the cases relied on by defendant. See *People v. Davis*, 203 Ill. App. 3d 129, 140-41 (1990) (trial counsel's failure to secure the testimony of an eyewitness who was named on the police report and who had been unable to pick the defendant out of a lineup was unreasonable); *People v. Barry*, 202 Ill. App. 3d 212, 216 (1990) (trial counsel's failure to interview and present at trial witnesses whose testimony would corroborate his theory of defense resulted in a failure on counsel's part to meet the objective standard of reasonable competence). Defendant does not explain how counsel's failure to interview either person impacted counsel's cross-examination. Concerning counsel's failure to interview and present testimony from "Mrs. Wenk," defendant argues that Wenk would have testified that she was with Youngberg when he was "caught buying crack" a few days before he went to the police about defendant and that this information would establish that he received a benefit for testifying. However, Youngberg testified that he had received $566 from the police; thus the court was already aware that Youngberg was benefitting in some way. None of these omissions showed possible neglect.

¶ 29 III. CONCLUSION

¶ 30 The trial court adequately inquired into defendant's *pro se* claims of ineffective assistance of counsel by thoroughly discussing the matter with both defendant and defense counsel. Its conclusion, following that inquiry, that the appointment of new counsel was not warranted was not manifestly erroneous. Thus, we affirm.

¶ 31 Affirmed.