2012 IL App (3d) 100825-U

Order filed April 3, 2012

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit Will County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-10-0825
v.	)	Circuit No. 07-CF-2120
	)	
GREGG A. DAVIS,	)	Honorable Richard C. Schoenstedt
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justice Holdridge concurred in the judgment.
Justice McDade concurred in part and dissented in part.

ORDER

¶ 1 *Held:* The trial court did not err in refusing to appoint counsel to assist defendant in presenting his claims of ineffective assistance of counsel. The trial court's finding that defendant's allegations were insufficient to warrant the appointment of new counsel was not manifestly erroneous.

¶ 2 Defendant Gregg A. Davis was convicted of driving while license suspended (625 ILCS 5/6-303(d-3) (West 2006)) and domestic battery (720 ILCS 5/12-3.2(a)(2) (West

2006)). The trial court sentenced him to six years in prison. Defense counsel filed a motion to reconsider sentence and a motion for new trial. Defendant filed a *pro se* posttrial motion, alleging that his trial counsel was ineffective. At a hearing, the trial court denied defense counsel's motions but did not rule on defendant's *pro se* motion. We remanded the matter for the limited purpose of allowing the trial court to conduct the required preliminary investigation into defendant's claims of ineffective assistance. *People v. Davis*, No. 3-08-1029 (2010) (unpublished order under Supreme Court Rule 23). Following the required hearing, the court denied defendant's *pro se* posttrial motion. We affirm.

¶ 3 In October 2007, the State filed a two-count information against defendant. Count I alleged that defendant committed aggravated driving while license suspended when he drove a 1997 Chevrolet Cavalier on 91st Street in Romeoville while his driver's license was suspended. Count II alleged that defendant committed domestic battery when he "mashed a pillow in Joy Davis' face while holding her down." Both events allegedly occurred on September 6, 2007.

¶ 4 At trial, Davis testified that defendant was her ex-husband and that they lived together in September 2007. On September 5, 2007, she and defendant went to dinner at Lost Acres, a local tavern. She testified that she drove defendant home at approximately 1:00 a.m. on September 6, 2007. After they arrived home, defendant asked her for her car keys, but she refused and put them in her bra. Defendant struggled with her. Defendant put a pillow over the back of her head and pushed her face in the carpet. Defendant took the keys from Davis and left in her car. She called the police and gave them a description of her car.

¶ 5 Officer James Luckett testified that he observed Davis' car on Joliet Road traveling in the opposite direction he was traveling. Luckett turned around, caught up to the car, and activated his lights to attempt to make a traffic stop. However, the driver did not stop. Luckett followed the car onto Interstate 355 and then Interstate 55. The vehicle turned onto 91st Street, but Luckett could not safely make the turn. After Luckett turned his car around, he saw Davis' vehicle stopped in the middle of 91st Street and a man running eastbound into a yard. Luckett attempted to chase the man on foot but lost sight of him. Luckett took note of the man's physical appearance; however, he never observed the man's face because the man was running away from him. Luckett described the suspect as approximately six feet tall, heavy set, with light-colored blonde hair, wearing a white t-shirt and blue jeans.

¶ 6 Approximately one hour later, Officer Luckett saw defendant at White Hen approximately three-fourths of a mile from where Davis' vehicle had stopped. According to Luckett, defendant had the same physical appearance as the man he saw running from the car. Luckett also noticed that defendant's clothes were dirty and there were leaves on his shoes and pants. Luckett arrested defendant.

¶ 7 Defendant testified that he went to Lost Acres with Davis on September 5, 2007, but she left without him. He left with a friend named John, whose last name he did not know, and another friend, Paul Fallis. John drove them to another bar, and defendant left the second bar alone on foot. He walked a mile-and-a-half to White Hen, where he called his step-brother, David Stark, using a phone provided by a White Hen employee. Stark's wife, Cindy Andros, answered the phone when defendant called because Stark was sleeping at the time. Defendant also called a taxi company. When defendant exited the White Hen, he was

arrested. Defendant admitted that he did not have a driver's license but said he did not drive. Defendant testified that he can walk but he is unable to run. He also testified that he did not strike Davis or shove her face into the ground.

¶ 8 The jury found defendant guilty of both charges. The trial court sentenced defendant to an extended term of six years' imprisonment for aggravated driving while license revoked and entered a judgment of conviction on the domestic battery count.

¶ 9 Defense counsel filed a motion to reconsider sentence and a motion for new trial. On the same day, defendant filed a *pro se* motion to appeal his conviction. In that motion, defendant alleged that he was denied effective assistance of counsel because his counsel (1) refused to file motions that he requested to be filed on his behalf; (2) failed to interview or call to testify witnesses whose names defendant provided; (3) failed to obtain and admit videotaped footage from Luckett's squad car; (4) requested continuances that were not necessary; (5) failed to obtain and introduce into evidence videotaped security camera footage from Lost Acres; and (6) did not enter into evidence defendant's medical records showing his physical condition.

¶ 10 At a posttrial status hearing, the trial court stated that it had received communications from defendant "that relate to assistance of counsel and appeal and some other issues." The trial court set a date for a hearing on defense counsel's motion to reconsider sentence and for "status on defendant's communications." That date was December 11, 2008.

¶ 11 On December 11, 2008, defendant and his counsel were present in court. Defense counsel stated that the motion to reconsider and motion for a new trial were before the court. The trial court denied the motions. No one mentioned or discussed defendant's *pro se*

motion alleging ineffective assistance of counsel.

¶ 12 Defendant appealed, requesting that we remand the matter to the trial court to conduct a proper inquiry regarding his claims of ineffective assistance of counsel. Upon review, we held that the trial court erred in failing to conduct the necessary preliminary examination as to the factual basis of defendant's allegations. Thus, we remanded the cause for the limited purpose of allowing the trial court to conduct the required preliminary inquiry into defendant's claims of ineffective assistance. *People v. Davis*, No. 3-08-1029 (2010) (unpublished order under Supreme Court Rule 23).

¶ 13 On remand, defendant filed a written *pro se* motion outlining his various claims of ineffective assistance. The only claims argued on appeal are defendant's second and sixteenth claims. Defendant's second claim states:

> "The defendant submitted a list of witnesses to his attorney, these people were supposed to be interviewed before the [sic] by a trial court investigator and nobody ever contacted them. [Citation.] WHERE TRIAL COUNSEL'S FAILURE TO INTERVIEW WITTNESSES [sic] WHO COULD CORROBORATE DEFENDANT'S DEFENSE WAS ACTUAL IMCOMPENTENCY [sic]."

Defendant's sixteenth claim states:

> "Trial counsel failed to interview the witnesses that Mr. Davis told him could provide him his alibi defense. The phone records were never subpoenaed for the call that defendant made to their residence in the middle of the night in question to the phone number,s [sic] of his step-brother David Stark and Cindy Andros ***. The error was also made when his appointed counsel failed to contact the clerks that

worked at the White Hen ***. [Citation.]"

¶ 14 The trial court conducted a *Krankel* inquiry into defendant's allegations. At the hearing, defendant argued that there were four witnesses who would corroborate his testimony that he remained at the bar after his wife left. Defendant also said that he spoke to his step-brother on the telephone from the bar at the time the police were chasing the man in his wife's car.

¶ 15 Defense counsel stated, with respect to defendant's second claim, that he would have investigated any witnesses placing defendant at a bar when the car was being chased and that he did not believe defendant's allegations were accurate statements. He also testified that he did not call the particular witnesses suggested because they would have testified to how drunk defendant was the night he was arrested. Counsel explained that he felt the best strategy was to focus on Luckett's lack of identification and not call any witness that might say defendant was intoxicated. He added that he did not feel the jury would believe that defendant walked intoxicated one or two miles to the White Hen, where he was arrested.

¶ 16 As to defendant's sixteenth claim, defense counsel recalled that defendant told him that he called his brother from the White Hen. Defendant interjected that he only called a taxi from the White Hen. When the prosecutor, in turn, indicated that defendant had testified at trial that he also called his brother from the White Hen, defendant denied so testifying. Defense counsel further testified that he did not know the identify of Cindy Andros. Defendant stated that Andros was his brother's wife. Defendant said he spoke to her at approximately 2:30 a.m. from the bar and asked for a ride home. Defendant then walked to the White Hen, where he called a taxi. Counsel explained that the phone calls from the

White Hen did not aid the defense because the calls fit in the time line of the charged offenses and gave defendant the opportunity to have committed the crime.

¶ 17 Upon taking the matter under advisement, the trial court denied defendant's motion, determining that there was no possible neglect necessitating the appointment of new counsel. As to allegations two and sixteen, the court found that defense counsel had exercised trial strategy.

¶ 18 ANALYSIS

¶ 19 The sole issue before us is whether the trial court erred in failing to appoint counsel other than defendant's originally appointed counsel to argue his *pro se* motion alleging ineffective assistance.

¶ 20 In the seminal case of *People v. Krankel*, 102 Ill. 2d 181 (1984), the defendant's trial counsel failed to present an alibi defense, or to contact an alibi witness suggested by the defendant. The supreme court found that the failure to appoint new counsel to argue the defendant's *pro se* posttrial motion alleging ineffective assistance of counsel was error and remanded the cause for a new hearing on the ineffective assistance of counsel issue. *Krankel*, 102 Ill. 2d at 189.

¶ 21 Recently, in *People v. Taylor*, 237 Ill. 2d 68 (2010), our supreme court stated that there is no *per se* rule that all *pro se* motions for a new trial alleging ineffective assistance of counsel must result in the appointment of new counsel. *Taylor*, 237 Ill. 2d at 75. Instead, when a defendant presents a *pro se* posttrial claim of ineffective assistance of counsel, the trial court must examine the factual basis of a defendant's claim. *Id.* Specifically, the court explained:

"If the court determines the claim lacks merit or pertains only to matters of trial strategy, new counsel need not be appointed and the *pro se* motion may be denied. However, if the defendant's allegations show possible neglect of the case, new counsel should be appointed to argue the defendant's claim of ineffective assistance." *Taylor*, 237 Ill. 2d at 75.

¶ 22 Decisions to call certain witnesses to testify are matters of trial strategy reserved to the trial counsel's discretion. *People v. West*, 187 Ill. 2d 418 (1999). Such decisions are given a strong presumption that they reflect sound trial strategy rather than incompetence. *People v. Enis*, 194 Ill. 2d 361 (2000). However, counsel may be ineffective for failing to present exculpatory witnesses. *People v. Cabrera*, 326 Ill. App. 3d 555 (2001).

¶ 23 "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." *People v. Moore*, 207 Ill. 2d 68, 78 (2003). If the trial court makes no determination of the merits of defendant's claim, then the standard of review is *de novo*. *Moore*, 207 Ill. 2d at 75. If the trial court makes a determination on the merits, then the conduct of the trial court is reviewed under a manifestly erroneous standard of review. *People v. McCarter*, 385 Ill. App. 3d 919 (2008). Because the trial court in the instant case made a determination on the merits, its decision is subject to review under the manifest weight of the evidence standard. See *McCarter*, 385 Ill. App. 3d at 941-42.

¶ 24 Here, on the second claim, trial counsel stated that defendant did *not* tell him that the witnesses would have placed him at the bar while the car was being chased. Counsel explained that he did not call defendant's friends because they would have stated that

defendant had consumed several drinks and was intoxicated. Counsel's trial strategy was to attack the lack of identification of defendant both in the vehicle and as the suspect was running away. Counsel elicited testimony from Officer Luckett that he did not get a good look at defendant in Davis' car and did not see his face as he ran away. At trial, counsel also emphasized the time line of events and noted that defendant was arrested at the White Hen approximately one hour after Officer Luckett witnessed a person fleeing from Davis' car. As counsel testified, he chose to pursue this strategy because he felt the jury would not believe that, in an intoxicated state, defendant walked one or two miles from the bar to the convenience store. Trial counsel explained his decision as one of trial strategy, not neglect of defendant's case. The trial court's denial of defendant's motion to appoint new counsel on this claim was not against the manifest weight of the evidence.

¶ 25 We further find no error in the trial court's decision regarding defendant's sixteenth claim. The first sentence of defendant's sixteenth claim is encompassed within his second claim, which we have already addressed. The remainder of the claim alleges that counsel should have subpoenaed the phone records of his step-brother and the White Hen.

¶ 26 At the *Krankel* hearing, counsel explained that the phone calls from the White Hen did not aid the defense because such calls would fit within the time line of the charged offenses. Stated another way, defendant had plenty of time to commit the charged offenses prior to the calls from the White Hen. Thus, we cannot say that counsel's failure to subpoena the phone records of defendant's step-brother and the White Hen was the result of neglect. Finally, while defendant alleged, at the *Krankel* hearing, that he called his step-brother from the bar, the record at trial rebuts this claim. Consequently, we find defendant's sixteenth

claim of ineffective assistance is not well founded.

¶ 27 CONCLUSION

¶ 28 The judgment of the circuit court of Will County is affirmed.

¶ 29 Affirmed.

¶ 30 JUSTICE McDADE, concurred in part, dissented in part:

¶ 31 I agree with the majority that the evidence does not support defendant's sixteenth claim of ineffective assistance of counsel and I, therefore, concur in that portion of the judgment.

¶ 32 However, I do not agree with respect to the second claim. I would find that defense counsel's asserted trial strategy was neither sound nor sufficiently reasonable to excuse the apparent failure of diligent, effective representation required of every attorney, hired or appointed, by the Code of Professional Conduct.

¶ 33 *Second Claim*

¶ 34 In this case, the record clearly establishes that new counsel should have been appointed to question defendant's friend named John, whose last name he did not know,[1] and Paul Fallis. If John's and Paul's testimony is as defendant claims it will be, and trial counsel had actually talked with them and knew about this possible testimony and still failed to call the witnesses, defendant might have a valid claim for ineffective assistance. The testimony, as characterized by

[1] The fact that defendant did not know John's last name would not excuse counsel's lack of investigation into the matter. Perhaps Paul, or someone at the bar, knew John's last name. Or perhaps, John paid his bill at the bar with a credit card. Had counsel investigated the matter we believe he could have discovered John's last name.

the defendant, is exculpatory in that it directly refutes Joy's testimony and places defendant inside the bar at the time Luckett was pursuing Joy's car. Yet, the trial court found counsel's decision, not to call any witnesses who could place defendant at the bar at the time the police were pursuing Joy's car, was trial strategy. I would hold this finding was against the manifest weight of the evidence.

¶ 35 Counsel indicated he felt that the best strategy was to focus on Luckett's lack of identification and not call any witness to show how drunk defendant was. As counsel testified, he chose to pursue this strategy because he felt the jury would not believe that, in an intoxicated state, defendant walked one or two miles from the bar to the convenience store. Trial counsel explained his decision as one of trial strategy, not neglect of defendant's case. We note the testimony of the defendant's four putative witnesses, if found credible, would conclusively establish defendant's continued presence at Lost Acres and exonerate defendant of the charged offenses regardless of how drunk he may or may not have been. Moreover, counsel's statement, during the *Krankel* hearing, that he *would have* interviewed any witness placing defendant at the bar when the car was being chased does not support the trial court's trial strategy finding.

¶ 36 Because of counsel's ambiguous "would have" statement, it is unclear whether counsel did or did not interview John and Paul. Counsel does not affirmatively identify or even claim that he interviewed any witnesses at the bar. Instead, counsel only claims he *would have* interviewed any witnesses who could place defendant at the bar. This statement is subject to two possible interpretations. Counsel may have been implying that defendant did not inform him of any potential witnesses who could place defendant at the bar at the time in question. If this is what counsel was in fact implying the record rebuts counsel's claim because counsel was aware, at the time of trial, of John and Paul's claimed existence. Again, defendant testified at trial that he stayed

at the bar with John and Paul after Joy left, an assertion that loses credibility in the glaring absence of corroboration by John or Paul.

¶ 37 On the other hand, counsel may be implying that he did in fact interview John and Paul, or any other possible witness, and none of them could place defendant in the bar at the time in question. Had this been the case, I believe counsel would have so stated at the *Krankel* hearing. Moreover, the mere fact that counsel used the term "would" as oppose to "did" leads to a reasonable inference that he never actually interviewed John and Paul. Absent an affirmative statement to the contrary, there is nothing in the record supporting the trial court's trial strategy finding. More importantly, one cannot even formulate a meaningful trial strategy without knowing and taking into consideration all of the relevant facts. Thus, I would hold that defendant's second claim of ineffective assistance shows possible neglect and new counsel should have been appointed to argue this claim.

¶ 38 In coming to this conclusion, I acknowledge that defendant's *pro se* pleadings did not expressly identify John and Paul. Instead, defendant's pleadings only generally referred to "witnesses" that could place him in the bar at the time Joy's car was being pursued. Initially, I note the relaxed pleading requirements for *pro se* allegations of ineffective assistance of counsel. See *Moore*, 207 Ill. 2d at 79 (to trigger an inquiry under *Krankel*, "a *pro se* defendant is not required to do any more than bring his or her claim to the trial court's attention"). Furthermore, I note that a review of the record at trial and at the *Krankel* hearing clearly establishes that two of the four witnesses defendant was referring to were John and Paul. Thus, I do not deem defendant's failure to specifically identify John and Paul within his pleading to be fatal to his *pro se* claim of ineffective assistance.

¶ 39 For the foregoing reasons, I believe defendant's second claim sufficiently asserted the ineffective assistance of his counsel to have required appointment of new counsel to question his witnesses. Because I do not believe the trial court had enough information to adequately assess defense counsel's invocation of trial strategy, I believe that finding must be reversed and the matter remanded for a proper *Krankel* hearing. Because I would so find, I dissent from the majority's contrary finding.