2019 IL App (4th) 170325-U

NO. 4-17-0325

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
April 22, 2019
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Adams County
ISIAH D. THOMAS,	)	No. 14CF325
Defendant-Appellant.	)	
	)	Honorable
	)	Debra L. Wellborn,
	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices DeArmond and Turner concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Defendant's counsel did not labor under either a *per se* or actual conflict of interest while representing defendant during postplea proceedings.

(2) A *Krankel* inquiry was unwarranted where defendant did not raise a *pro se* ineffective-assistance-of-counsel claim before the trial court.

¶ 2 Defendant, Isiah D. Thomas, pleaded guilty to aggravated battery with a firearm (720 ILCS 5/12-3.05(e)(1) (West 2012)), and the trial court sentenced him to 15 years in prison. Defendant appeals, arguing (1) his defense counsel labored under a conflict of interest during postplea proceedings and failed to argue her own ineffectiveness and (2) the court failed to conduct a *Krankel* inquiry (*People v. Krankel*, 102 Ill. 2d 181, 464 N.E.2d 1045 (1984)) into his postplea, ineffective-assistance-of-counsel claim. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In June 2014, the State charged defendant by amended information with aggravated battery with a firearm (720 ILCS 5/12-3.05(e)(1) (West 2012)) (count I) and unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2012)) (count II). It alleged that defendant, a convicted felon, possessed and discharged a firearm, causing injury to the victim, Randy Summers.

¶ 5 In December 2014, defendant pleaded guilty to aggravated battery with a firearm, a Class X felony, in exchange for the dismissal of count II and a sentencing cap of 20 years' imprisonment. At the guilty plea hearing, defendant asserted he understood the penalties he faced in connection with count I and the terms of the plea agreement. When asked by the trial court whether he pleaded guilty or not guilty, defendant responded "I'm guilty." Defendant also asserted that he understood the rights he was giving up by pleading guilty and he denied that any threats or promises had been made to him.

¶ 6 The State then presented the following factual basis:

> "Judge, if the case had gone to trial, we would present evidence that Randy Summers, while he was at the area of 15th and VanBuren here in Quincy, Illinois on the evening of May 31st, 2014[,] was struck by a .38 caliber round that entered his upper chest area. He was treated for that injury.
>
> Eventually the course of the investigation led to [defendant], who was *** on parole at the time the event occurred. [Defendant] was interviewed, admitted to the police that he had fired a .38 caliber revolver at several subjects who he'd had a verbal altercation with in that area of 15th and VanBuren on the evening of May 31st, 2014.

> We would also have presented statements made by the defendant while in the Adams County Jail on the phone with regard to a firearm, and that the firearm had been taken care of and things of that nature. That would be the evidence we would have presented at trial in part."

Defendant agreed that the State's factual basis was "substantially correct."

¶ 7 In February 2015, the trial court conducted defendant's sentencing hearing. The record reflects the court considered defendant's presentence investigation report, which included defendant's written version of the offense. Specifically, defendant reported that he had been drinking and was driving around with friends when he observed the victim in the middle of the street. The victim slammed his hand on the hood of the vehicle defendant was driving. Defendant asserted he stopped the car, thinking that the victim knew him or his friends. He then stated that the victim and five other Caucasian males approached the vehicle. According to defendant, one of his friends claimed to have heard the men yelling racial remarks. Defendant stated he "started shooting out of the car to get them off of the car." Defendant and his friends then left the scene.

¶ 8 Police reports from the investigation of the shooting incident were also attached to the presentence investigation report and showed that defendant confessed to the shooting when interviewed by the police. Defendant reported the shooting occurred while he was driving around with two friends, Lindsey Raleigh and Byron Nunley. Finally, attached to the presentence investigation report was a statement in which defendant apologized to the victim and his family, asserting the shooting was accidental and he "just tried to scare [the victim] away from [the] car."

¶ 9 At sentencing, neither party presented any additional evidence. Defendant offered a statement on his own behalf, apologizing to the victim. Ultimately, the trial court sentenced

defendant to 15 years in prison.

¶ 10 Shortly after sentencing, defendant moved to withdraw his guilty plea. In May 2015, defendant filed an amended motion to withdraw, arguing his guilty plea was not knowingly and intelligently entered because he "made a false confession to protect a friend, which he later regretted." Defendant further asserted as follows:

> "[Defendant] did not believe that any other witness would confirm that said confession was false and felt that because of his false confession, the evidence against him was overwhelming. Since that time[,] Defendant has learned that Lindsay Raleigh, who was present at the time of the incident, was lodged in the Adams County Jail and told [two individuals] that she was present during the shooting and that [defendant] was not the shooter."

¶ 11 In February 2016, the trial court conducted a hearing on defendant's amended motion to withdraw his guilty plea. Defendant testified on his own behalf that he gave a false confession to the police. He asserted he learned about the shooting and the details of the incident from the police detective who interviewed him, Doug McQuern. Defendant stated he first reported that he did not know about a shooting and that on the night it happened, he was playing a game with a friend all night. Defendant also testified as follows:

> "Then [McQuern] left, and he came back, and was like, well, we got a team about go [*sic*] inside Byron's house right now, and the reason why I said I did it is because I lived upstairs from Byron, and the landlord said he's putting everybody out next time—next commotion, next thing that happened[.]"

Defendant asserted he confessed to the shooting in an effort to protect Byron.

¶ 12 When asked by his attorney, Babette Brennan, whether he was "promised anything about the charges" against him, defendant responded that McQuern told him he could "say that the bullet ricochetted [*sic*] off *** of a tree," which amounted to "nothing but a Class 2 felony." Defendant testified he then asked McQuern how much time he would be facing and McQuern told him 10 years. Brennan then questioned defendant as follows:

> "Q. Did I as your attorney do anything or say anything that caused you to feel forced to take this plea?
>
> A. No. The only thing you said is that [the trial judge] would sentence me lighter than what my sentencing [would be] with me going to trial—the judge that would have heard me at trial would have did.
>
> Q. Did I fail to do anything in preparation that caused you to feel forced to plead?
>
> A. No. I just really wanted you to put in a motion to withdraw the confession earlier, because now they probably think the reason why I'm doing it now is because I got all this time.
>
> Q. So, just so we're all clear, the reason you are asking to withdraw your guilty plea at this time is because you made a false confession, and at the time you felt like you couldn't prevail and you had no other choice?
>
> A. At the time, I was feeling that I was going to get a lighter sentence—I mean I was going to get a lighter sentence, and I thought it was a Class 2 felony when I came to court, but the second day I came to court they upped it to a Class X. That's why I was like—That's why I never knew what was going on."

¶ 13 On cross-examination, defendant agreed that he was originally charged in connection with the shooting in June 2014. He testified he first appeared in court that same month. Defendant acknowledged that, at that time, he was charged with aggravated battery with a firearm, a Class X felony. Defendant also stated that he received an explanation that the applicable sentencing range for that offense was 6 to 30 years.

¶ 14 Defendant further agreed that his counsel explained his charges to him and that he knew that he was charged with a Class X felony. He testified that the plea negotiations included his agreement to plead guilty to a Class X felony and a sentencing cap of 20 years' imprisonment. Defendant stated he understood that he could receive a sentence anywhere within the 6- to 20-year sentencing range. The State then questioned defendant as follows:

> "Q. Did you ever ask [defense counsel] to file a motion about a false confession?
>
> A. Yes.
>
> * * *
>
> Q. And why did you not file that?
>
> A. Because she said, uhm—she said—she said it might not—it might not win it [*sic*], win the motion, so she just never put it in. I actually asked her to put in more than one motion. I asked her to put in a motion to withdraw—withdraw evidence—
>
> Q. Okay.
>
> A. —dismiss evidence."

On further cross-examination, defendant acknowledged providing a statement in connection with

his presentence investigation report in which he admitted that he "shot out of the car." He testified that no one threatened him regarding that statement.

¶ 15 In arguing defendant's motion to withdraw to the trial court, Brennan asserted as follows:

> "Leave to withdraw a guilty plea should be granted to correct a manifest injustice, and that would be if there was a misapprehension of the facts or the law, or there is doubt of the guilt of the accused, or if the accused has a defense, or if the ends of justice would be better served to submit the case to a jury.
>
> This is a case where the evidence was primarily based on the confession of [defendant]. He is indicating to the Court that that was a false confession and that he was induced to make that because he believed he would get a lesser charge and lesser sentence.
>
> Certainly under those grounds, the confession should have been suppressed, so I would say at this point in time it would seem to me that justice would be best served by letting him—allowing him withdraw his plea and have a jury trial."

In presenting its argument, the State asserted that defendant had presented "nothing *** that would allow him to withdraw his plea." It further argued that defendant would not have been entitled to have his confession suppressed on grounds that a police officer stated or implied that he would obtain a better outcome in his case by confessing.

¶ 16 Ultimately, the trial court denied defendant's motion. It noted that defendant had admitted to the shooting on three separate occasions and found that there had been no misappre-

hension of fact or law.

¶ 17 Defendant appealed the trial court's decision. In January 2017, we remanded the matter to the trial court for the filing of a certificate pursuant to Illinois Supreme Court Rule 604(d) (eff. Mar. 8, 2016), the opportunity for defendant to file a new postplea motion, and a new postplea hearing and ruling. On remand, defendant and his counsel elected to stand on his previous motion and the evidence and arguments presented at the previous postplea hearing. In April 2017, after reviewing defendant's amended motion to withdraw his guilty plea and the transcript of the hearing on that motion, the court again denied defendant's motion.

¶ 18 This appeal followed.

¶ 19 II. ANALYSIS

¶ 20 A. Conflict of Interest

¶ 21 On appeal, defendant first argues that Brennan labored under a conflict of interest during postplea proceedings. Specifically, he contends that an ineffective-assistance-of-counsel claim was raised during the hearing on his motion to withdraw his guilty plea and that Brennan failed to properly argue that claim.

¶ 22 "A criminal defendant's sixth amendment right to the effective assistance of counsel includes the right to conflict-free representation." *People v. Peterson*, 2017 IL 120331, ¶ 102, 106 N.E.3d 944. "Such representation means 'assistance by an attorney whose allegiance to his client is not diluted by conflicting interests or inconsistent obligations.' " *Id.* (quoting *People v. Spreitzer*, 123 Ill. 2d 1, 13-14, 525 N.E.2d 30, 34 (1988)). "Two categories of conflict of interest exist: *per se* and actual." *Id.*

¶ 23 "A *per se* conflict of interest exists where facts about a defense attorney's status

*** engender, *by themselves*, a disabling conflict." (Emphasis in original and internal quotation marks omitted.) *Id.* ¶ 103. The supreme court has found the existence of a *per se* conflict of interest in the following circumstances:

> "(1) where defense counsel has a prior or contemporaneous association with the victim, the prosecution, or an entity assisting the prosecution; (2) where defense counsel contemporaneously represents a prosecution witness; and (3) where defense counsel was a former prosecutor who had been personally involved with the prosecution of defendant." (Internal quotation marks omitted.) *Id.*

"The justification for treating these conflicts as *per se* conflicts is that, in each situation, the defense counsel's association or tie to the victim, the prosecution, or a prosecution witness may have subtle or subliminal effects on counsel's performance that are difficult to detect and demonstrate." *Id.* "Unless a defendant waives his right to conflict-free representation, the existence of a *per se* conflict of interest is grounds for automatic reversal." *Id.* ¶ 104.

¶ 24 When the defendant cannot establish the existence of a *per se* conflict of interest, he or she must show the existence of an actual conflict to obtain a reversal of his or her conviction. *Id.* ¶ 105. "To succeed on an actual conflict-of-interest claim, the defendant must establish that the conflict adversely affected counsel's performance." *Id.*

¶ 25 Initially, defendant argues that Brennan labored under a *per se* conflict of interest in having to argue her own ineffectiveness. He contends that the three *per se* conflict of interest categories identified by the supreme court have never been held to be exclusive. Further, he cites decisions from the Second District for the proposition that a *per se* conflict of interest exists when defense counsel is forced to argue his or her own incompetence. See *People v. Keener*, 275

Ill. App. 3d 1, 5, 655 N.E.2d 294, 297 (1995) (holding that the defendant did not forfeit an ineffective-assistance-of-counsel claim by failing to raise it with the trial court in a posttrial motion and noting that "[a] *per se* conflict of interest arises when attorneys argue motions in which they allege their own ineffectiveness"); *People v. Willis*, 134 Ill. App. 3d 123, 132, 479 N.E.2d 1184, 1190 (1985) (finding a *per se* conflict of interest existed when defense counsel's own performance was at issue during postplea proceedings). Defendant asks this court to adopt the view held in those cases.

¶ 26 Although appellate court authority exists for the proposition of law advocated by defendant, we note that in *People v. Jones*, 219 Ill. App. 3d 301, 304, 579 N.E.2d 1192, 1194 (1991), this court expressly rejected the very argument raised by defendant. In so holding, we stated there was "no *per se* rule requiring appointment of new counsel to represent a defendant on his claim of ineffective assistance of trial counsel, particularly when the defendant does not request a new attorney." *Id.* We further noted as follows regarding the facts at issue:

> "While the motion to withdraw the plea here was prepared and filed by counsel, it is apparent the motion was filed at the behest of [the] defendant, who had apparently complained to his counsel of confusion and inadequate representation. We do not believe this poses a *per se* conflict. Defendant was permitted to testify on his contention and his counsel did not make any arguments to refute the contention." *Id.*

The other appellate court districts have similarly declined to find the existence of a *per se* conflict of interest when counsel is required to argue his or her own ineffectiveness. See *People v. Perkins*, 408 Ill. App. 3d 752, 762, 945 N.E.2d 1228, 1237 (2011) (refusing to hold that a *per se*

conflict of interest exists any time an attorney raises his own ineffectiveness); *People v. Sullivan*, 2014 IL App (3d) 120312, ¶¶ 44-46, 6 N.E.3d 888 (finding no *per se* conflict of interest where counsel argues his own ineffectiveness); *People v. Zareski*, 2017 IL App (1st) 150836, ¶¶ 36-38, 84 N.E.3d 527 (rejecting the defendant's argument that a fourth category of *per se* conflicts of interest existed for when defense counsel must argue his or her own ineffectiveness); *People v. Garcia*, 2018 IL App (5th) 150363, ¶ 30, 116 N.E.3d 1082 ("We are persuaded by the majority of cases that have declined to expand upon the supreme court's definition of a *per se* conflict to include situations in which defense has to argue his or her own ineffectiveness in posttrial proceedings.").

¶ 27 In his reply brief, defendant points out that in *People v. Parker*, 288 Ill. App. 3d 417, 421, 680 N.E.2d 505, 507 (1997), this court favorably cited the Second District's decision in *Keener*. Specifically, we noted that in *Keener*, "the [S]econd [D]istrict held there was a *per se* conflict of interest in requiring trial counsel filing a post-trial motion to assert his or her own ineffectiveness and, therefore, failure to do so does not result in waiver of the issue on appeal." *Id.* at 421 (citing *Keener*, 275 Ill. App. 3d at 5). We then relied on *Keener* to find that the defendant's ineffective-assistance-of-counsel claim was not forfeited even though it had not been raised with the trial court. *Id.*

¶ 28 We note that *Parker* only addressed the issue of a *per se* conflict of interest in the context of forfeiture. We agree with the court in *Perkins*, 408 Ill. App. 3d at 762, that "[i]t is far from clear that the recognition of a conflict of interest in the context of forfeiture *** means that it is a constitutional *per se* conflict of the sort warranting automatic reversal outside [forfeiture] situations." Additionally, *Parker* did not repudiate this court's earlier holding in *Jones*.

¶ 29 Accordingly, we find *Parker* is limited to the specific circumstances of that case and does not require a finding of a *per se* conflict of interest here. Further, we continue to adhere to our holding in *Jones*, and the holding of a majority of the appellate districts, and find that no *per se* conflict of interest is presented when an attorney argues his or her own ineffectiveness.

¶ 30 On appeal, defendant also contends that an actual conflict of interest existed in this case and that it adversely affected Brennan's performance at the hearing on his motion to withdraw his guilty plea. We disagree.

¶ 31 Here, the record fails to reflect any conflict of interest in that it does not show that a claim of ineffective assistance of counsel was ever raised by defendant during postplea proceedings. Notably, defendant did not argue ineffective assistance of counsel in his amended motion to withdraw his guilty plea. Additionally, the record does not otherwise reflect any explicit challenge to his counsel's performance. Defendant suggests that, while testifying on cross-examination at the hearing on his motion to withdraw, he raised a claim of ineffective assistance based on Brennan's failure to file a motion to suppress his confession. However, the testimony he cites in his brief showed only that he asked Brennan to file a motion to suppress and she advised against it. His testimony does not reflect any specific complaint about Brenna's performance. Instead, defendant was responding to questions by the State regarding the facts as they occurred. Moreover, on direct examination, defendant clearly denied that Brennan had done anything or failed to do anything that forced him to plead guilty.

¶ 32 We note that the record shows defendant also testified that he "wanted [Brennan] to put in a motion to withdraw the confession earlier, because now they probably think the reason why I'm doing it now is because I got all this time." This testimony also does not reflect a

complaint regarding Brennan's performance in refusing to file a motion to suppress. Rather, it appears that defendant simply regretted the timing of the filing of his motion to withdraw relative to the imposition of his sentence.

¶ 33 Finally, although defendant essentially claims that Brennan failed to properly present and argue an ineffective-assistance claim at the hearing on his motion to withdraw, he also suggests that Brennan's argument to the court was sufficient to present an issue regarding her ineffectiveness and create a conflict of interest. Again, we disagree. In her argument, Brennan noted that defendant asserted his confession was false and that he was "induced to make that [confession] because he believed he would get a lesser charge and lesser sentence." She then concluded that "[c]ertainly under those grounds, the confession should have been suppressed." As stated no claim of ineffective assistance was raised in defendant's motion or otherwise. This single statement by Brennan was not sufficient by itself to raise an ineffective-assistance claim nor was it sufficient to create an actual conflict of interest.

¶ 34 Accordingly, the record does not support a finding that defendant raised an ineffective-assistance-of-counsel claim during postplea proceedings. Defendant is not entitled to the appointment of new counsel or remand for further proceedings to address a nonexistent claim of error.

¶ 35 B. *Krankel* Inquiry

¶ 36 On appeal, defendant also argues that the trial court erred in failing to inquire into his *pro se* claim that Brennan was ineffective for failing to move to suppress his false confession.

¶ 37 "Under *Krankel* and its progeny, when a defendant raises a *pro se* posttrial claim of ineffective assistance, the trial court must conduct an inquiry into the factual basis of the de-

fendant's claim to determine whether new counsel should be appointed to assist the defendant." *People v. Bell*, 2018 IL App (4th) 151016, ¶ 35, 100 N.E.3d 177 (citing *Krankel*, 102 Ill. 2d at 189). Here, defendant argues an ineffective-assistance claim was presented to the trial court as he was testifying as a witness at the hearing on his motion to withdraw and when his counsel acknowledged that his false confession should have been suppressed. However, as discussed, defendant's testimony did not challenge his counsel's performance and the record otherwise reflects no complaint regarding Brennan's assistance. Further, any assertions or representations made by Brennan, defendant's counsel, in her representation of defendant, would not amount to a *pro se* claim of ineffectiveness by defendant. Accordingly, under the circumstances presented the trial court was not required to conduct a *Krankel* inquiry.

¶ 38 III. CONCLUSION

¶ 39 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we grant the State its statutory assessment of $50 against defendant as costs of this appeal.

¶ 40 Affirmed.