FIRST DIVISION
August 4, 2014

No. 1-12-1620

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 11 CR 6874
	)	
LARRY BANKS,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Connors and Justice Cunningham concurred in the judgment.

ORDER

¶ 1 ***Held:*** Defendant's post-trial claims of counsel's ineffective assistance did not warrant additional inquiry under *Krankel*, where the court drew on its knowledge of counsel's performance and trial strategy, and defendant's claims were otherwise belied by the record. Defendant's sentence is upheld against the claim it was excessive.

¶ 2 After a bench trial, Larry Banks was convicted of burglary and sentenced to 14 years' imprisonment. On appeal, defendant contends the trial court failed to conduct an adequate inquiry into his pro se post-trial claims of the ineffectiveness of his trial counsel pursuant to

People v. Krankel, 102 Ill. 2d 181 (1984). Specifically, he argues the court did not investigate his assertions that his trial counsel provided deficient representation when counsel failed to suppress his statement to police, did not challenge the prosecution's DNA evidence and did not pursue a discovery violation by the State. Defendant also challenges the length of his prison sentence. For the reasons stated below, we affirm.

¶ 3 Defendant was charged with the burglary of a beauty supply store in Chicago. At trial, Robert Sztochmal testified that on August 20, 2010, he closed his business at 6 p.m., locking the front and back doors. At 9 a.m. the next day, Sztochmal received a phone call and went to the store, which had been burglarized and was being inspected by police. The glass front door had been broken, and the interior of the store was in disarray.

¶ 4 Photos of the store's interior were entered into evidence, including a photo of the broken glass around the front door and a photo of the cash register that depicted blood spots. Sztochmal testified about $800 was missing from the register. Sztochmal denied he gave defendant permission to enter the store.

¶ 5 On cross-examination, Sztochmal testified the cash register contained $200 and an unlocked cabinet contained additional cash. He confirmed that blood was on the cash register but did not know who broke into the store or if more than one burglar participated. Sztochmal said a store surveillance video showed one person was inside the store and that a copy of the video had been given to the State. However, the video was never offered into evidence.

¶ 6 About eight months after the burglary, on April 18, 2011, Chicago police detective John Campbell interviewed defendant. Campbell testified at trial that he advised defendant of his *Miranda* rights and told defendant that his DNA had been found at the scene of the burglary. According to Campbell, defendant responded that "it was on glass and then pointed to the back

of his ear to a cut." Defendant also told Campbell, "prove it, m—f—" and pointed to a healed cut on his neck. Photos of defendant's healed cut were entered into evidence.

¶ 7 Marla Mendoza, a Chicago police department evidence technician, testified she processed the crime scene and recovered suspected blood from the cash register and also recovered blood from coins on the floor. Mendoza swabbed those areas and packaged the swabs for testing. She took the photographs of the scene that were entered into evidence. Mendoza did not retrieve fingerprints from the scene.

¶ 8 Cindy Lee, a forensic scientist with the Illinois State Police, testified that she tested the swabs and determined they contained blood. Andrea Paulsen, also a state police forensic scientist, testified as an expert in forensic DNA analysis. Paulsen obtained a DNA profile from the blood samples taken at the scene, and her search of the Combined DNA Index System (CODIS) database indicated defendant was associated with that DNA profile.

¶ 9 Megan Neff, a state police forensic scientist, tested the human male DNA profile identified from the swabs taken from the crime scene and concluded that profile matched the DNA profile of defendant that was obtained from buccal swabs. Neff stated that profile would be expected to occur in approximately 1 in 3.7 quadrillion African-Americans, 1 in 130 quadrillion Caucasians, or 1 in 75 quadrillion Hispanic "unrelated individuals." Neff stated she found no signs of contamination in the DNA samples.

¶ 10 The defense presented no evidence. The trial court found defendant guilty, stating that while defendant "didn't exactly admit, confess outright to the crime, [he] indicated some knowledge about it." The court noted defendant "acknowledged some knowledge about where the blood might be, and he was right about that."

¶ 11 At sentencing, the State asserted defendant was subject to mandatory Class X sentencing due to previous convictions. Defendant presented a *pro se* motion for a new trial in which he raised several claims of his trial counsel's ineffectiveness. In the motion, defendant argued the police lacked probable cause to arrest him and his attorney should have moved to suppress his statement to police. Defendant also asserted his counsel should have "investigated" the DNA evidence.

¶ 12 After defendant presented his *pro se* post-trial motion, the court responded defendant's assertions were "enough for a *Frankel* [*sic*] hearing." The following colloquy then took place:

> "THE COURT: So tell me [] how is this your lawyer's fault as opposed to your fault?
>
> DEFENDANT: Okay. This is what I'm saying. I asked him to put the motions in. This was an illegal arrest. They didn't have no probable, you say you arrested me off of a video tape. There was no videotape. Then you said I made a statement, you said that I admitted to it. [] I never seen anything that I admitted to. I never admitted to no burglary. You found me guilty. You said I admitted to the burglary. I've been –
>
> THE COURT: Well, you made a, not a total admission, the police officer testified he was talking to you and you showed him where you got a cut.
>
> DEFENDANT: Your Honor, I never even talked to this officer. He's not in my grand jury indictment. I don't know this officer. I ain't say anything to this officer [*sic*]. I ain't made no

> statement to nobody. Now, I don't know where they get this from. Now for you to really say that I made a statement, I did not make no statement to no officer. Just want to see it. That's all. He don't even talk to me. ***."

¶ 13 In response, defendant's public defender stated that he advised defendant "at the beginning that the reason he was arrested on this case is because they had a DNA CODIS [match]." The court then summarized the history of the case, defendant's earlier demands for an immediate jury trial, and concluded: "Ultimately, we agreed to have a bench trial. We had a bench trial. I don't believe that what happened was the fault of his lawyer. It was the evidence. There was his DNA, which corroborated the burglary, and it was not quite a confession, but the conversation, the colloquy had with the detective was corroborative as well. I don't find that he got convicted because of anything that his lawyer did do or didn't do. He got convicted based on the evidence so we've got our *Frankel* [*sic*] hearing, and I do not find any fault with counsel."

¶ 14 Noting that defendant was eligible to be sentenced as a Class X offender due to his previous felony convictions, the court sentenced defendant to 14 years' imprisonment.

¶ 15 On appeal, defendant contends the trial judge failed to adequately inquire into three claims of the ineffectiveness of defense counsel that he raised in his *pro se* post-trial motion. He concludes that this court should remand for the trial court to conduct further questioning on his claims pursuant to *Krankel*.

¶ 16 When a defendant raises a *pro se* claim of ineffective assistance of counsel, the trial court should examine the factual basis of the defendant's claim; if the court determines that the claim lacks merit or pertains only to trial strategy, the court may deny the *pro se* motion without

appointing counsel. *Krankel*, 102 Ill. 2d at 77-78. However, if the allegations show possible neglect of the defendant's case, new counsel should be appointed. *Id*.

¶ 17 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. *Id*. "During this evaluation, some interchange between the trial court and trial counsel regarding the facts and circumstances surrounding the allegedly ineffective representation is permissible and usually necessary in assessing what further action, if any, is warranted on a defendant's claim." *Id*. at 78. A trial court can conduct a *Krankel* evaluation using any or all of the following three means: (1) the court may ask defendant's counsel about the facts and circumstances related to the defendant's allegations; (2) the court may ask the defendant for more specific information, or (3) the court may rely 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.

¶ 18 Here, defendant argues the court conducted a "very brief inquiry" under *Krankel* but that the court erred in failing to inquire as to three specific points. First, defendant contends the court did not investigate his assertion in his post-trial motion that he "requested the presence of counsel which was denied by law enforcement authorities." He argues that if he was interrogated after making such a request, his statement would have been suppressed, thus affecting his trial's outcome.

¶ 19 After defendant presented his written post-trial motion to the court, the court asked defendant to orally explain his claims. Defendant told the court he did not admit to any burglary or make any statement to anyone. Defendant did not expand on his written contention that he was denied the right to counsel before he made a statement; rather, defendant asserted to the trial court that he did not make a statement to any officer. The court was not required to ask

defendant about his written claim that he requested counsel before making a statement, given that when the court inquired about defendant's motion, defendant proceeded to deny that he offered any statement at all.

¶ 20 The court noted that defendant's remarks to Detective Campbell, during which defendant pointed to the cuts on his ear and neck, did not constitute a statement *per se* but instead corroborated that his blood or DNA was at the crime scene. But, in the end, the cuts were a very minor issue. Even if defendant's remarks to police about his blood being found at the scene had been suppressed, defendant would not have been exonerated, given the strong and uncontroverted DNA evidence presented. See *People v. Sims*, 2014 IL App (4th) 130568, ¶ 93 (a defendant suffers prejudice only where the suppression of evidence ultimately would have resulted in a better outcome).

¶ 21 Defendant's second *Krankel* claim is that the trial court should have explored whether defense counsel adequately investigated the DNA evidence. He argues that the court should have inquired about the steps taken by defense counsel to probe that evidence. The record, however, contains numerous exchanges between defense counsel and the court regarding the DNA testing. In September 2011, prior to trial, the court explained to defendant that his attorneys sought time to consult with a DNA expert:

> "THE COURT: Your lawyer wants to look at this DNA. He wants to talk to somebody that knows a little bit more about DNA than he does.
>
> DEFENDANT: An expert?
>
> THE COURT: Yes, that's what he's trying to do, but he needs a little bit of time to do that. If you start demanding trial,

> there's not going to be any expert. They are just going to come in. They're going to say they have DNA. Your lawyer won't even have a chance to check it out. He's trying to help you. If there's a way to help you, he'll find it, but he has to have a little bit of time to do that.
>
> He's on your side. I'm not on any side. I'm in the middle. She [the prosecutor] is absolutely against you. She said she's got some DNA. He wants to look at it. Can he have that time to check it out? Is that all right? Is that okay with you, Mr. Banks?
>
> DEFENDANT: All right."

¶ 22 Several months later, in December 2011, defense counsel addressed the court's question about delays in proceeding to trial:

> "MR. WOELKERS: Judge, one of the snags on our end – it is not really a snag. We just haven't finished reviewing the DNA forensic tendered to us, which is the crux of this case. We have reviewed one of the sets of tests. We are still reviewing the other set."

¶ 23 Shortly thereafter, the court asked defense counsel if he agreed with defendant that "this is something that should be checked out." Counsel then responded:

> "Absolutely, Judge. It [DNA] is the case. Without DNA they have no way of tying him to this crime. If we are going to beat the case, it's got to be DNA. That's it."

¶ 24 Defendant asked the court if he could see the DNA testing report. Defense counsel said he would review it with defendant. At the next court date, defense counsel thanked the court for the opportunity to review the DNA information with defendant.

¶ 25 The requirement of a *Krankel* inquiry can be satisfied by the court's accrued knowledge of defense counsel's performance at trial. *Moore*, 207 Ill. 2d at 79. The colloquy quoted above and similar discussions in the record reveal that the court was aware of defense counsel's likely trial strategy regarding the DNA evidence. The court explained to defendant that counsel would attempt to find flaws in the DNA methodology to challenge the fact that defendant's DNA matched the DNA recovered from the crime scene. Defense counsel cross-examined the forensic scientists about the DNA testing methodology. In closing argument, defense counsel contended a reasonable doubt existed that the DNA evidence could have been contaminated. On this record, the court was able to determine that defendant's post-trial claim pertained to his counsel's trial strategy. Such a contention does not warrant further inquiry under *Krankel*.

¶ 26 Defendant's third *Krankel*-related claim is that the trial court should have inquired about defense counsel's failure to pursue a potential discovery violation by the State. That claim of counsel's alleged ineffectiveness is not included in defendant's written post-trial motion and is rooted solely in defendant's following remark to the court during the discussion of the post-trial motion: "This was an illegal arrest. They didn't have no probable, you say you arrested me off of a video tape. There was no videotape."

¶ 27 Defendant now contends the trial court should have inquired as to whether defense counsel saw the videotape and if not, why counsel chose not to obtain the videotape or seek discovery sanctions if the State refused to tender it. Defendant argues that at trial, the store's owner said a surveillance videotape of the burglary was provided to the State.

¶ 28 The record reflects that during a pre-trial court appearance, defense counsel mentioned a videotape of the offense existed and that he had not received it. The court set a date for the State to complete discovery and tender the video, and on that date, the prosecutor indicated the video was not recovered by police and told the court that it would find out if any other video was available. Defendant addressed the court and demanded that a trial date be set, and defense counsel stated that he was not prepared to proceed to trial because the videotape was the only evidence that would potentially connect defendant to the crime.

¶ 29 However, in closing argument, the prosecutor indicated a video had "been tendered." The court noted, and defense counsel also stated in closing, that no videotape was presented as evidence. Defense counsel did not contend the videotape had not been provided during discovery. Therefore, when defendant raised his post-trial claims, the trial court lacked any basis to inquire into a potential discovery violation. In summary, defendant's three claims of counsel's deficient performance did not warrant further inquiry by the court under *Krankel*.

¶ 30 Defendant's remaining contention on appeal relates to his 14-year prison sentence. He contends his prison term is excessive because burglarizing a business is a nonviolent crime, and he argues his criminal history did not include any violent offenses but only involved property and drug crimes.

¶ 31 Defendant was convicted of burglary, which is a Class 2 felony (720 ILCS 5/19-1(a) (West 2008)). The pre-sentence investigation (PSI) report presented to the court indicates that defendant had prior felony convictions for burglary, theft and delivery of a controlled substance, among numerous other offenses. To sentence defendant as a Class X offender, the State was required to establish that defendant was previously convicted of two Class 1 or Class 2 offenses. 730 ILCS 5/5-4.5-95(b) (West 2010). The court found that requirement was met by two of

defendant's prior convictions. As a Class X offender, defendant was subject to a sentencing range of between 6 and 30 years in prison (730 ILCS 5/5-8-1(a)(3) (West 2010)). Defendant's 14-year sentence therefore was in the lower portion of the applicable statutory range.

¶ 32 A trial court has broad discretion in sentencing, and a reviewing court should not disturb a sentence that is within the applicable statutory range unless the trial court is found to have abused its discretion. *People v. Stacey*, 193 Ill. 2d 203, 209-10 (2000). When the trial court imposes a sentence within the applicable range, the court has not abused its discretion unless the sentence is manifestly disproportionate to the nature of the offense. *People v. Hauschild*, 226 Ill. 2d 63, 90 (2007). The record reflects that the court reviewed defendant's full criminal history. As to defendant's argument that he should have received a shorter sentence because the offense here was nonviolent and his previous convictions were for non-violent crimes, the record indicates the trial court expressly acknowledged that fact at sentencing, remarking that defendant was "not a violent person" but was a "person that's constantly in trouble stealing and not being respectful of people's property and causing trouble."

¶ 33 Defendant also asserts he suffered from drug addiction at the time of the offense, pointing out that the court recommended at his arraignment that he undergo drug treatment. Defendant concedes, however, that he did not report in his PSI interview that he suffered from any drug or alcohol addiction. Therefore, the trial court did not err by not expressly noting that factor in imposing defendant's sentence.

¶ 34 In sum, the court correctly relied on its knowledge of defense counsel's performance at trial to reject defendant's post-trial claims of counsel's ineffective assistance. Additionally, the court did not abuse its discretion in sentencing defendant to a term in the lower portion of the applicable statutory range.

¶ 35 Accordingly, the judgment of the circuit court is affirmed.

¶ 36 Affirmed.