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2016 IL App (3d) 150061-U

Order filed September 8, 2016

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2016

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois,
Plaintiff-Appellee,)	
v.)	Appeal No. 3-15-0061
ADRIAN L. WATKINS,)	Circuit No. 14-CF-8
Defendant-Appellant.)	Honorable Kevin Lyons, Judge, Presiding.

JUSTICE CARTER delivered the judgment of the court.
Justices Holdridge and Schmidt concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court did not err when it denied defendant's posttrial claim of ineffective assistance of counsel.
- ¶ 2 Defendant, Adrian L. Watkins, appeals from the denial of his posttrial motions that alleged that he received ineffective assistance of counsel. Defendant argues the cause should be remanded for the appointment of conflict-free counsel and further ineffective assistance proceedings. We affirm.

¶ 3

FACTS

¶ 4

Defendant was charged by information with unlawful use of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2014)). The court appointed counsel for defendant, and defendant entered a plea of guilty. The factual basis for the plea indicated that on January 8, 2014, the police executed a search warrant on the home of Shaka Jones. The warrant commanded officers to search the person of Jones and the home for evidence of possession of cannabis¹. Jones was arrested outside the home, and defendant was located inside. The search uncovered 23.5 grams of cannabis and a loaded .380-caliber handgun. Defendant agreed to speak with the police and said that he was Jones' cousin, and he came to the house a few hours before the police arrived because he had gotten into an argument with his girlfriend. Defendant said he knew nothing about the cannabis, but that the handgun was his. Defendant had previously taken the handgun from his nephew. Defendant did not know what to do with the handgun so he took it to Jones' house. The handgun was located inside a shoebox that was in a tote in the basement. The tote also contained defendant's mail and personal effects. The State said that its evidence would also show that defendant was previously convicted of unlawful possession with intent to deliver a controlled substance. The court accepted defendant's plea and sentenced him to 10 years' imprisonment.

¹The search warrant was not part of the record on appeal, but defendant included it in the appendix of his brief. Therefore, we take judicial notice of the search warrant. See *People v. Davis*, 65 Ill. 2d 157, 165 (1976) (a reviewing court may take judicial notice of records of proceedings in its own or other courts which contain easily verifiable, though not generally known, facts that "aid in the efficient disposition of litigation").

¶ 5 Counsel filed a motion to reconsider sentence. The court denied the motion, and defendant filed a notice of appeal. On appeal, we remanded the cause to the trial court for compliance Illinois Supreme Court Rule 604(d) (eff. Dec. 11, 2014). *People v. Watkins*, No. 3-14-0379 (2014) (unpublished order under Supreme Court Rule 23).

¶ 6 On remand, counsel filed motions to withdraw defendant's guilty plea, reconsider sentence, and a Rule 604(d) certificate. Thereafter, counsel filed a *Krankel* motion, on defendant's behalf, that alleged defendant received ineffective assistance of counsel. See *People v. Krankel*, 102 Ill. 2d 181 (1984). In that motion, defendant argued that counsel did not file a motion to suppress the search or advise defendant that he had a meritorious defense. Defendant also filed a *pro se* motion to withdraw his guilty plea that alleged that counsel had provided ineffective assistance. In an affidavit filed with defendant's motion, defendant averred that, before pleading guilty, he insisted that counsel file a motion to suppress evidence. Defendant averred that the police could not legally search him because he was not named in the search warrant, had no connection to the address listed in the warrant, and had not been at the residence for more than an hour when the search was executed. Defendant also stated that the police reports indicated that the officers knew the tote belonged to him before they conducted the search because they saw legal and personal documents with his name and address. Defendant believed that he had an expectation of privacy in regard to the tote and closed shoebox that contained the handgun. Based on these facts, defendant contended that he would have prevailed on a motion to suppress, if counsel had filed one.

¶ 7 Defendant's posttrial motions were called for a combined hearing. The court first conducted an inquiry into defendant's claim of ineffective assistance of counsel. Defendant told the court that he urged counsel to file a motion to suppress evidence because the search warrant

had nothing to do with him, but counsel refused to file a motion. Defendant explained that he arrived at the house one hour before the warrant was executed. At the time, defendant carried a tote, which he described as a cylindrical container with a lid used for storage. The tote contained defendant's clothes and other items. Defendant had gone to Jones' house to wash his clothes, shave, and take a shower. When the police executed the search warrant, an officer searched the tote and found defendant's mail near the top of the tote. Defendant contended that the officers should have stopped the search at this point because the mail indicated that the tote did not belong to Jones. However, the officer continued the search and found a gun inside a shoebox which was in a grocery bag and wrapped in clothes at the bottom of the tote.

¶ 8 Counsel told the court that he had a lengthy discussion with defendant regarding defendant's standing to challenge the search. Counsel thought that the search was legal because the container was located in the basement of the property named in the warrant and defendant was not exercising dominion over it. Counsel's professional opinion was that a motion to suppress evidence was meritless, and counsel advised defendant to plead guilty.

¶ 9 The court found that counsel's decision not to file a motion to suppress evidence was strategic and denied defendant's ineffective assistance claim.

¶ 10 Next, the court asked if defendant wanted to argue the remaining postplea motions *pro se* or allow counsel to argue the motions. Defendant elected to have counsel argue the motions. Regarding the motion to withdraw the plea, counsel argued:

"at the time that there was not a—in my professional judgment—enough there to give me a reasonable probability of prevailing on a motion to suppress or the motion to suppress this search.

There are some quirks, and I think the judge fully understands the factual basis now. You have a gun that's wrapped in layer upon layers of things in a blue tote, and then in the tote is some identification of the defendant. This is in the basement.

A motion in such a case would not have—would not have been frivolous, and [defendant] is simply asking for his day in court."

The court denied defendant's motions to withdraw his guilty plea and reconsider sentence.

Defendant appeals.

¶ 11

ANALYSIS

¶ 12

Defendant argues that the cause should be remanded for the appointment of conflict-free counsel and further postplea proceedings because defendant demonstrated possible neglect of his case. Specifically, defendant argues that counsel neglected his case by failing to file a motion to suppress. Because defendant's underlying suppression claim was meritless, we find the court did not err in denying defendant's motions that alleged ineffective assistance of counsel.

¶ 13

A defendant who makes a posttrial claim that he received ineffective assistance of counsel is not automatically entitled to new counsel. *People v. Jolly*, 2014 IL 117142, ¶ 29. Instead, the court must examine the factual basis of defendant's claim. *Id.* New counsel is warranted if a defendant's claim has potential merit and does not pertain to matters of strategy. *Id.* This preliminary inquiry may include some interchange between the court and counsel regarding the facts and circumstances surrounding the allegedly ineffective representation, a brief discussion between the court and defendant, or consideration of the court's own knowledge of counsel's performance at trial and the sufficiency of defendant's claims. *People v. Moore*, 207

Ill. 2d 68, 78-79 (2003). We review *de novo* the court's ruling on the preliminary *Krankel* inquiry. *Jolly*, 2014 IL 117142, ¶ 28.

¶ 14 Defendant's ineffective assistance argument requires that we first determine whether his underlying claim had potential merit. Defendant argued that counsel was ineffective for failing to file a motion to suppress evidence because the search of the tote, which contained defendant's mail, personal items, and an illegal firearm, was beyond the scope of the warrant. "A defendant may not challenge the validity of a search unless it involves an affront to his personal fourth amendment rights." *People v. Brown*, 277 Ill. App. 3d 989, 994 (1996). To seek suppression of items seized from a home, a defendant must prove that he possessed a legitimate expectation of privacy in the areas searched or property seized. *Id.* A defendant's transitory presence at the location subject to the search is insufficient to establish a legitimate privacy interest. *Id.* at 995.

¶ 15 We find that defendant did not have a privacy interest to contest the search that uncovered the handgun. The record established that the police obtained a search warrant to search Jones' house for evidence related to the possession of cannabis. "A lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search." *United States v. Ross*, 456 U.S. 798, 820-21 (1982). Here, the search of the house lawfully extended to the tote that was located in the basement. Although defendant was at Jones' house at the time of the search, there was no indication that he either had a privacy interest in the house or was located near the tote when the police arrived. Additionally, defendant's statements during the *Krankel* hearing established that he had a transitory presence in Jones' home, which is insufficient to establish standing to contest the search of the house. *Brown*, 277 Ill. App. 3d at 995.

¶ 16 Despite his lack of a privacy interest in the property subject to the warrant, defendant argues that he had a privacy interest in the tote that was analogous to an individual's privacy interest in his or her handbag or purse. In support of his position, defendant cites to *People v. Gross*, 124 Ill. App. 3d 1036 (1984). The defendant in *Gross* was at Tom Sawyer's apartment when police executed a search warrant that specifically named Sawyer and his apartment. *Id.* at 1037. While executing the warrant, an officer searched defendant and her purse, which was lying near defendant on a table. *Id.* The search of defendant's purse uncovered cocaine, and defendant was placed under arrest. *Id.* Defendant filed a motion to suppress evidence, and the trial court granted defendant's motion. *Id.* On appeal, we found that the State could not argue that the police reasonably believed that the purse, which was sitting next to defendant and contained pictures of defendant, "was a part of the premises described in the search warrant rather than the defendant's personal property." *Id.* at 1041. This court affirmed the trial court's ruling. *Id.*

¶ 17 *Gross* does not alter our decision in the present case. The storage tote at issue is distinct from a purse because there is no indication that it was found in defendant's immediate vicinity. As defendant acknowledged, the tote was used for storage and its placement in the basement was consistent with this use. Therefore, unlike *Gross*, the police had reason to believe that the tote was part of the premises described in the search warrant and potentially contained the items described in the warrant. Moreover, the discovery of defendant's mail did not conclusively establish that the other items inside the tote belonged exclusively to defendant. Because the tote may have also reasonably contained evidence of possession of cannabis, the police lawfully continued the search of the tote and discovered the handgun. Therefore, counsel's decision not to

file a motion to suppress did not constitute ineffective assistance as such a motion would have no chance of success due to defendant's inability to establish standing to contest the search.

¶ 18 In coming to this conclusion, we reject defendant's argument that the cause should be remanded for the appointment of conflict-free counsel and further proceedings because counsel argued, during the hearing on the motion to withdraw the guilty plea, that a motion to suppress evidence would not have been frivolous. However, defendant expressly elected to have counsel continue to represent him on the motion to withdraw the guilty plea, which occurred after the preliminary *Krankel* hearing. As a result, counsel was thrust into the position of arguing the merits of defendant's underlying claim of the validity of the motion to suppress evidence. Counsel's assumption of a contrary position does not form the basis of an ineffective assistance claim as defendant waived any conflict by electing to have counsel continue to represent him, and counsel's representation was ultimately effective advocacy of his client's position.

¶ 19 CONCLUSION

¶ 20 The judgment of the circuit court of Peoria County is affirmed.

¶ 21 Affirmed.