2017 IL App (1st) 150602-U

No. 1-15-0602

Order filed August 7, 2017

First Division

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 DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 14 CR 8597
	)	
DAVID TRUITT,	)	Honorable
	)	Mauricio Araujo,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE SIMON delivered the judgment of the court.
Justices Harris and Mikva concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for delivery of a controlled substance is affirmed where the State proved that he delivered heroin beyond a reasonable doubt. The trial court conducted a sufficient preliminary inquiry, pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984), into defendant's *pro se* posttrial allegations of ineffective assistance of trial counsel.

¶ 2 Following a bench trial, defendant David Truitt was convicted of delivery of a controlled substance (heroin) (720 ILCS 570/401(d)(i) (West 2012)) and sentenced, as a Class X offender, to six years' imprisonment. On appeal, defendant contends that the State failed to prove him guilty of delivery of a controlled substance beyond a reasonable doubt. He also contends that the

trial court failed to sufficiently inquire into his *pro se* posttrial claims of ineffective assistance of trial counsel pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984). We affirm.

¶ 3 Defendant was arrested on April 12, 2014, as a result of a Chicago police narcotics investigation and surveillance near 4952 West Chicago Avenue. He was subsequently charged with two counts of delivery of a controlled substance. Count I alleged that defendant delivered less than one gram of heroin within 1,000 feet of a school and Count II alleged that he delivered less than one gram of heroin. The State ultimately *nolle prossed* count I and the case proceeded to a bench trial.

¶ 4 At trial, Officer Kevin Graney testified that, at approximately 6:40 p.m., on April 12, 2014, he was part of a surveillance team conducting a narcotics investigation near 4952 West Chicago Avenue. During the investigation, Graney saw a woman approach an individual, whom Graney identified in court as defendant, and engage him in a brief conversation. After their conversation, defendant walked down a gangway and entered a door "leading to residences." Defendant remained inside the building for approximately 20 to 30 seconds. Defendant emerged from the gangway and summoned the woman. She then entered the gangway and handed defendant folded U.S. currency in exchange for an unknown object that defendant tendered to her with "two pinched fingers." The woman placed the object into her left jacket pocket. Graney testified that he was approximately "50 to 75 feet" from the two individuals when the transaction occurred, that his view was unobstructed, and that, during the hand-to-hand transaction, no other persons were in the immediate vicinity of defendant.

¶ 5 After seeing this hand-to-hand transaction, Graney radioed his enforcement officers and indicated that he witnessed a suspect narcotics transaction. He described the buyer of the suspect narcotics as a woman, wearing a tan hoodie and black jeans, walking northbound on Lavergne

Avenue. As Graney radioed the enforcement officers, defendant briefly re-entered the residence before emerging and returning to the corner of Chicago and Lavergne. After learning that that the female suspect was detained, Graney arrested defendant. The woman was relocated to Graney's location where he identified her as the woman who participated in the hand-to-hand transaction with defendant.

¶ 6 On cross-examination, Graney testified that it was just "turning dark" when he observed the suspect narcotics transaction. Graney explained that, when he first saw defendant, he was in his covert vehicle, which was parked on the south side of Chicago Avenue, approximately 15 feet west of Lavergne Avenue. Graney estimated that he was "125 feet, 150 feet" away from defendant when he first observed him. He stated that he was approximately "50 to 75 feet" away from defendant when defendant walked to the gangway and engaged in the hand-to-hand transaction. Graney knew that the woman tendered defendant U.S. currency because it was "the color green that money is and same size and shape." Graney acknowledged that he did not recover any narcotics or currency from defendant.

¶ 7 Officer Ted Jozefczak testified that, at approximately 6:30 p.m., on April 12, 2014, he was acting as an enforcement officer for a surveillance team conducting a narcotics investigation near 5000 West Chicago Avenue. During the investigation, Jozefczak received a call from Officer Graney, describing the female participant of a suspect narcotics transaction. Graney described the woman as a black female, wearing a tan jacket and black pants, who left the area heading northbound on Lavergne. Approximately one to one and a half minutes after receiving the call from Graney, Officer Jozefczak observed a woman matching that description and walking on the sidewalk near 945 North Lavergne. Officer Jozefczak approached the woman for a field interview and she subsequently directed him to her left jacket pocket, which contained a

ziplock bag. Inside the bag there was a tinfoil packet that contained suspect heroin. Jozefczak arrested the woman and relocated her to Officer Graney, who identified her as the woman with whom defendant had engaged in a hand-to-hand transaction. The woman was identified as Bernette Ross.

¶ 8 The parties stipulated that, if recalled, Officer Jozefczak, would testify that he recovered one item of suspect heroin from Ross, which he kept in his control until he inventoried the item. The parties also stipulated that, if called, Melissa McCann, a forensic chemist at the Illinois State Police Crime Lab, would testify that the item tested positive for .2 grams of heroin. The State rested and the court denied defendant's motion for a directed finding.

¶ 9 Based on this evidence, the court found defendant guilty of delivery of a controlled substance. In announcing its decision, the court stated that the officers were not impeached "in any fashion or form," and that there was "some question" regarding how far Officer Graney was from defendant at the time he observed the transaction. The court noted that, initially, Graney was 125 feet away from defendant, but that, when defendant walked to the gangway, he was 50 feet away, and thus the officer had an opportunity to observe the suspect narcotics transaction. The court then recounted the evidence presented, including Graney's description of the hand-to-hand transaction and that the narcotics, consistent with Graney's testimony, were discovered in Ross's left jacket pocket.

¶ 10 Prior to sentencing, defendant filed a *pro se* posttrial motion for a new trial in which he alleged, in pertinent part, that a new trial was warranted because trial counsel: (1) erroneously stipulated that the chain of custody for the recovered narcotics was complete; (2) failed to object to the introduction of the narcotics into evidence where Ross was "out of the officer's sight for two blocks after making the alleged drug buy"; (3) failed to file a motion to quash arrest or

suppress evidence; (4) did not visit with him or spend any time discussing a defense with him prior to trial; and (5) refused to ask questions that would have impeached Officer Graney and that defendant wanted counsel to ask. In the motion, defendant also alleged that, during his case, official and prosecutorial misconduct had taken place because police reports were changed and/or discarded.

¶ 11 On September 25, 2014, the court heard defendant's *pro se* motion for a new trial. The court acknowledged that, pursuant to *Krankel*, it was required to conduct a preliminary inquiry into defendant's allegations of ineffective assistance. Defendant requested that he be allowed to argue his motion *pro se*. After admonishing defendant about the rights he would be waiving if he elected to represent himself and defendant acknowledged understanding those rights, the court granted the Public Defender's Office leave to withdraw. The court then recounted, in order, defendant's allegations of ineffective assistance and asked defendant to elaborate on why he believed counsel was ineffective for stipulating to chain of custody. Defendant stated that, on his third court date, counsel wanted to file for a continuance by agreement, but he instructed counsel not to file the motion because he did not "want to be here over no year or 15 months on a delivery that I didn't do." Defendant eventually agreed to take counsel's advice and allow him to file the continuance. Defendant stated that, on the next court date, counsel asked him if he was ready for trial. Defendant stated that he was, essentially, surprised about proceeding to trial because he was under "the impression [that he] was going to hear a motion." After hearing defendant's allegation, the court noted that its preliminary inquiry might be "lengthy" and asked defendant if he wished for the court to continue addressing his allegations or if he preferred to set the matter for a different date. Defendant elected to continue the matter on a different date because he needed to obtain certain documents from the State.

¶ 12 At the subsequent hearing on defendant's motion, the court sought to clarify that it did not mean to impress upon the Public Defender's Office that it was granted leave to withdraw. The court explained that it could not grant defense counsel leave to withdraw until it ruled on defendant's motion. The court then continued the hearing until defense counsel was present.

¶ 13 At the next hearing, with defense counsel present, the court heard defendant's motion. In recounting defendant's allegations of ineffective assistance, the court found that his first three claims of ineffectiveness all pertained to trial strategy *i.e.* (1) stipulating to the chain of custody for the recovered narcotics; (2) failing to object to the introduction of the narcotics into evidence where Ross was "out of the officer's sight for two blocks after making the alleged drug buy"; and (3) failing to file a motion to quash arrest or suppress evidence. The court also found that defendant's fifth allegation of ineffective assistance, regarding counsel's alleged failure to ask any questions to impeach Officer Graney, was trial strategy.

¶ 14 The court then addressed defendant's fourth allegation of ineffectiveness; that defense counsel never visited him or spent ample time discussing the case with him. In addressing this claim, the court asked defense counsel if he had ever met with defendant. Counsel replied that he and defendant had "numerous face-to-face conversations." Defendant then engaged the court in an extended colloquy and accused his attorney and the court of misleading him during the pretrial proceedings. Specifically, defendant alleged that, on the date of trial, he was not ready and not aware that the case would be proceeding to trial on that date. The court asked defense counsel if he had records of his communications with defendant. Counsel responded yes, and reiterated that he had numerous face-to-face conversations with defendant. Counsel also stated that he had numerous telephone communications with defendant. Defendant accused defense

counsel of lying and stated that they spoke on the phone only once. The court asked counsel if he visited defendant in jail and counsel responded that he had not.

¶ 15 Defendant then stated that, during his case, he spoke to counsel for a total of 10 minutes. He alleged that he asked counsel "to get the witnesses," including Ross, to corroborate his defense, but that counsel failed to do so. The court asked counsel if defendant ever told him about the witnesses. Counsel responded that defendant had not. Defendant accused counsel of lying. The State pointed out that Ross was listed on the incident report. Defendant then argued that Ross's case was "thr[own] out" and that, therefore, his case was "tainted from day one." The court ultimately found that defendant failed to sufficiently show that counsel did not spend ample time with him preparing the case.

¶ 16 Before addressing the remaining claims in defendant's *pro se* motion, the court noted that it ruled against defendant on his five claims of ineffectiveness and pointed out that counsel was still on the case. Defendant asked to proceed *pro se*. After again being admonished by the court and acknowledging that he understood his rights, defendant elected to represent himself. The court then granted the Public Defender's Office leave to withdraw.

¶ 17 In arguing that the police reports were changed as a result of official/prosecutorial misconduct, defendant again alleged that counsel was ineffective for stipulating to the chain of custody. The court explained chain of custody to defendant and asked him to elaborate on his claim. Defendant argued that counsel should not have stipulated to a complete chain of custody because Ross told police that she did not purchase the drugs from defendant. The court once again found that counsel's actions constituted trial strategy and were within his purview. The court ultimately denied defendant's *pro se* motion for a new trial and sentenced him, as a Class X offender, to six years' imprisonment.

¶ 18 On appeal, defendant first contends that the State failed to prove beyond a reasonable doubt that he delivered a controlled substance where there was no physical evidence presented connecting him to the recovered narcotics and Officer Graney's testimony was contrary to human experience.

¶ 19 When a defendant challenges the sufficiency of the evidence to sustain a conviction, the standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Brown*, 2013 IL 114196, ¶ 48. Under this standard of review, we must give proper deference to the trier of fact who observed the witnesses testify, because it was in the " 'superior position to assess the credibility of witnesses, resolve inconsistencies, determine the weight to assign the testimony, and draw reasonable inferences therefrom.' " *People v. Phillips*, 2015 IL App (1st) 131147, ¶ 16 (quoting *People v. Vaughn*, 2011 IL App (1st) 092834, ¶ 24). As such, the reviewing court may not substitute its judgment for that of the trier of fact on these matters. *Brown*, 2013 IL 114196, ¶ 48. A defendant's conviction will be reversed only if the evidence is so improbable or unsatisfactory that there remains a reasonable doubt of the defendant's guilt. *People v. Lloyd,* 2013 IL 113510, ¶ 42.

¶ 20 To sustain a conviction for delivery of a controlled substance, the State had to prove that defendant knowingly delivered a controlled substance. *People v. Brown*, 388 Ill. App. 3d 104, 108 (2009); see 720 ILCS 570/401 (West 2012). Delivery is defined as "the actual * * * transfer of possession of a controlled substance, with or without consideration, whether or not there is an agency relationship." 720 ILCS 570/102(h) (West 2012).

¶ 21 In the present case, the evidence, when viewed in the light most favorable to the prosecution, was sufficient to establish that defendant delivered .2 grams of heroin. Officer

Graney testified that, during a narcotics investigation and surveillance, he observed defendant engage in a suspect narcotics transaction. During the transaction, defendant had a brief conversation with Ross and then walked down a gangway where he entered a door leading to residences. Defendant remained inside the building for about 20 seconds and, after emerging from the gangway, summoned Ross, who then entered the gangway. There, she handed defendant folded U.S. currency in exchange for an unknown object that defendant tendered to her with "two pinched fingers." Ross placed the object into her left jacket pocket. Graney testified that he was approximately "50 to 75 feet" from the two individuals when the transaction occurred and that his view was unobstructed. Graney, radioed his enforcement officers, informing them that he had witnessed a suspect narcotics transaction and provided them with Ross's description. Enforcement Officer Jozefczak testified that he approached Ross for a field interview and she directed him to her left jacket pocket where he recovered the heroin. This evidence was sufficient to prove beyond a reasonable doubt that defendant delivered a controlled substance. See *People v. Smith*, 185 Ill. 2d 532, 541 (1999) ("The testimony of a single witness, if it is positive and the witness credible, is sufficient to convict").

¶ 22 Defendant, nevertheless, argues that his conviction should be reversed because the State failed to present physical evidence, *i.e.* narcotics and money, connecting him to the narcotics recovered from Ross. Defendant also argues that Officer Graney's testimony was not detailed or consistent enough to prove that he sold narcotics to Ross because defendant was a known vendor of "street goods," such as CD's, clothing, and cigarettes. As such, defendant claims that he could have been selling those or similar items to Ross. Defendant further argues that Officer Graney's testimony was "contrary to human experience" where, if his testimony is to be believed, he was parked in a designated bus stop directly across from the gangway. Defendant maintains that,

from this vantage point, Graney could not have seen the narcotics transaction because his view would have been obstructed by a tree. In support of this argument, defendant has appended to his brief print outs of street views from Google Maps, showing the gangway in question. Defendant finally points to alleged inconsistencies in Graney's testimony, regarding the distance from which he observed the transaction, as further proof that his testimony was incredible and unreliable.

¶ 23 We note, initially, that defendant does not argue that the State failed to offer any proof regarding some element of the offense with which he was charged. Rather, the majority of defendant's arguments center on an analysis of the weight that should be given to the testimony of Officer Graney. As such, defendant's contentions are essentially asking this court to retry him by reweighing the evidence presented at trial and substituting our judgment for that of the trial court. This we cannot do. As mentioned, the "determination of the weight to be given to witnesses' testimony, their credibility, and the reasonable inferences to be drawn from the evidence are the responsibility of the fact finder," which heard the testimony and observed the witnesses. See *Phillips*, 2015 IL App (1st) 131147, ¶ 16.

¶ 24 That said, while we must give proper deference to the trier of fact on issues of witness credibility, those determinations are not completely conclusive or binding. *In re Jonathon C.B.*, 2011 IL 107750, ¶ 59. Rather, we will reject a trier of fact's credibility findings if the witness was "so wholly incredible or so thoroughly impeached that [their testimony] is incapable of being used as evidence against [the] defendant." See *People v. Sanders*, 2012 IL App (1st) 102040, ¶ 15. In announcing decision the trial court specifically found that the officers were not impeached "in any fashion or form." Although the court noted that there was "some question" regarding how far Officer Graney was from defendant at the time he observed the transaction,

the court resolved this alleged inconsistency in favor of the State. Here, we cannot say that Officer Graney's testimony was so wholly incredible or thoroughly impeached such that it would lead us to reject the trier of fact's credibility determinations.

¶ 25 In reaching this conclusion, we briefly note that we have not considered the appendix to defendant's brief in his attempt to, essentially, impeach Officer Graney on appeal with matters not brought before the trial court. See *People v. Garvin*, 2013 IL App (1st) 113095, ¶ 23 ("Generally, attachments to briefs not included in the record are not properly before the reviewing court and cannot be used to supplement the record."). Although this court will take judicial notice of geographical facts, such as, for example, that a certain city is located within a certain county, courts generally will not take judicial notice of the precise location of a single city lot or subdivision within city lines. See *People v. Clark*, 406 Ill. App. 3d 622, 633 (2010) (citing 14A Ill. L. & Prac. Criminal Law § 197 (1999). Given this, we will not take judicial notice that a tree obstructed Officer Graney's view and deem his testimony incredible on this basis.

¶ 26 Finally, contrary to defendant's argument, the absence of physical evidence does not raise a reasonable doubt of his guilt. Although narcotics or money were not found on defendant's person, the record shows that, shortly after the transaction with Ross, defendant briefly entered a building before returning to the corner of Chicago and Lavergne. As mentioned, it is the responsibility of the fact finder to draw reasonable inferences from the evidence. See *Phillips*, 2015 IL App (1st) 131147, ¶ 16. In doing so, the court was not required to disregard the inferences that flow from the evidence or search out all possible explanations consistent with a defendant's innocence and raise them to a level of reasonable doubt. *Brown,* 2013 IL 114196, ¶71 (citing *People v. Wheeler*, 226 Ill. 2d 92,117 (2007)). Again, we will not substitute our

judgment for that of the trier of fact on these matters, and we will reverse a defendant's conviction only when the evidence is so improbable or unsatisfactory that it creates a reasonable doubt as to the defendant's guilt. *Lloyd*, 2013 IL 113510, ¶ 42. This is not one of those cases.

¶ 27 Defendant next contends that the trial court's preliminary *Krankel* inquiry into his *pro se* posttrial claims of ineffective assistance of counsel was insufficient because the court summarily rejected four of his five claims as "trial strategy" without inquiring into the factual basis of those claims. Defendant requests that this court remand the matter so the trial court may conduct a proper *Krankel* inquiry.

¶ 28 Pursuant to *Krankel*, and its progeny, when a defendant presents a colorable *pro se* posttrial claim of ineffective assistance of counsel, the trial court is not required to automatically appoint new counsel. *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003). Rather, the trial court must first conduct an adequate preliminary inquiry into the factual basis for defendant's claims to determine whether appointment of new counsel is warranted. *Krankel*, 102 Ill. 2d at 189; *Moore*, 207 Ill. 2d 68, 77-78 (2003). If the trial court determines that the claim lacks merit or pertains only to matters of trial strategy, the court need not appoint independent counsel to argue defendant's claim. *People v. Jolly*, 2014 IL 117142, ¶ 29. If, however, the examination reveals possible neglect of the case, independent counsel must be appointed, and a full evidentiary hearing of defendant's claim should be held. *Moore*, 207 Ill. 2d at 78.

¶ 29 On review, the operative concern is whether the trial court conducted an adequate inquiry into defendant's *pro se* allegations of ineffective assistance of counsel. *Moore*, 207 Ill. 2d at 78. If the court fails to conduct the necessary preliminary inquiry as to the factual basis of the defendant's claims, the case must be remanded for the limited purpose of allowing the court to do so. *People v. Remsik-Miller*, 2012 IL App (2d) 100921, ¶ 9. In conducting its inquiry, the trial

court may: "(i) ask defense counsel to 'answer questions and explain the facts and circumstances' relating to the claim; (ii) briefly discuss the claim with the defendant; or (iii) evaluate the claim based on its observation of defense counsel's performance at trial 'and the insufficiency of the defendant's allegations on their face.' " *People v. Willis*, 2016 IL App (1st) 142346, ¶ 17 (quoting *Moore*, 207 Ill. 2d at 78-79). If the trial court's probe reveals that defendant's claim lacks merit because it is " 'conclusory, misleading, or legally immaterial' or do[es] 'not bring to the trial court's attention a colorable claim of ineffective assistance of counsel,' " the trial court may be excused from further inquiry. *People v. Tolefree*, 2011 IL App (1st) 100689, ¶ 22. (quoting *People v. Burks*, 343 Ill. App. 3d 765, 774 (2003)); see also *People v. Ford*, 368 Ill. App. 3d 271, 276 (2006). We review *de novo* whether the trial court conducted a proper *Krankel* inquiry. *People v. Robinson*, 2015 IL App (1st) 130837, ¶ 72.

¶ 30 Here, the record shows that the trial court properly inquired into defendant's claims of ineffective assistance and determined, based on its observation of defense counsel's performance at trial and the insufficiency of defendant's allegations on their face, that four of his five claims pertained to matters of trial strategy. These four claims were that defense counsel: (1) erroneously stipulated that the chain of custody was complete; (2) did not object to the admission into evidence of the heroin recovered from Ross; (3) failed to file a motion to quash arrest and suppress evidence; and (4) did not ask any questions to impeach Officer Graney. See *People v. Anderson*, 2013 IL App (2d) 111183, ¶ 65 (whether to enter into a stipulation is a matter of trial strategy); *People v. Perry*, 224 Ill. 2d 312, 344 (2007) (decision regarding whether and when to object are matter of trial strategy); *People v. Mabry*, 398 Ill. App. 3d 745, 751 (2010) (the decision whether to file a motion to suppress is generally a matter of trial strategy that is left to defense counsel's discretion); *People v. Salgado*, 263 Ill. App. 3d 238, 246 (1994) (whether and

how to cross-examine a witness is generally a matter of trial strategy). As mentioned, if the court determines that defendant's claim pertains only to matters of trial strategy, the court need not appoint independent counsel to argue defendant's claim and may deny the *pro se* motion. *Jolly*, 2014 IL 117142, ¶ 29.

¶ 31 That said, the record nevertheless shows that the trial court allowed defendant to explain why he thought counsel's trial strategy amounted to ineffectiveness. Indeed, at two hearings and for extended amounts of time, the trial court encouraged defendant to fully explain why these instances of trial strategy constituted ineffective assistance of counsel. The court engaged in a lengthy discussion with defendant and explained to him that these decisions were part of defense counsel's discretion. In doing so, the court also inquired about defendant's final allegation of ineffectiveness *i.e.* that defense counsel never visited him or spent ample time discussing the case with him prior to trial. In addressing this claim, the court asked defense counsel if he had ever met with defendant. Counsel replied that he and defendant had "numerous face-to-face conversations" and that he also spoke to defendant on the telephone. The court ultimately found that defendant failed to sufficiently show that counsel did not spend ample time with him preparing the case. Given this record, we cannot say that the court's preliminary inquiry into defendant's allegations was in any way insufficient.

¶ 32 In reaching this conclusion, we are not persuaded by defendant's argument that the trial court was required to further inquire into counsel's decision not call Ross as a witness. This claim, like the majority of defendant's claims, pertains to a matter of trial strategy that was insufficient on its face to trigger a *Krankel* inquiry. See *People v. Wilborn*, 2011 IL App (1st) 092802, ¶ 79 (it is well-established that decisions regarding what witnesses to call at trial and what evidence to present on defendant's behalf ultimately rest with trial counsel and are

considered matters of trial strategy). Therefore, the trial court did not err in conducting its preliminary *Krankel* inquiry.

¶ 33 For the reasons stated, we affirm the judgment of the Circuit Court of Cook County.

¶ 34 Affirmed.