2017 IL App (1st) 160737-U

No. 1-16-0737

Order filed September 15, 2017

Sixth Division

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. 11 CR 4655
	)	
LAMAR COLLINS-THOMPSON,	)	Honorable
	)	Frank G. Zelezinski,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE CONNORS delivered the judgment of the court.
Justices Cunningham and Delort concurred in the judgment.

ORDER

¶ 1 *Held*: After a limited remand for a preliminary *Krankel* inquiry into defendant's *pro se* posttrial allegations of ineffective assistance of trial counsel, the trial court did not err in declining to appoint new counsel to further pursue defendant's claims of ineffectiveness.

¶ 2 Defendant, Lamar Collins-Thompson, appeals from a judgment following our limited remand to the trial court for the purpose of conducting a preliminary inquiry into his *pro se* claims of ineffective assistance of trial counsel pursuant to *People v. Krankel*, 102 Ill. 2d 181

(1984). See *People v. Collins-Thompson*, 2015 IL App (1st) 130392-U, ¶ 55. On remand, the trial court held a preliminary *Krankel* inquiry and denied defendant's *pro se* motion alleging ineffective assistance of counsel.

¶ 3 Defendant appeals, arguing that the trial court erred in not appointing independent counsel and conducting a full *Krankel* hearing because the record demonstrates counsel's possible neglect of the case based on counsel's alleged failure to investigate eyewitnesses and present physical evidence. Defendant also argues that, on remand, the trial court failed to make the required preliminary *Krankel* inquiry into some of his *pro se* claims of ineffectiveness. For the reasons set forth herein, we affirm the judgment of the trial court.

¶ 4 Following a 2012 bench trial, defendant was convicted of one count of attempt first degree murder of Michael Jones (720 ILCS 5/8-4(a) (West 2010)) and three counts of aggravated battery with a firearm against Vincent Davis, Michael Kelley, and Christopher Mitchell (720 ILCS 5/12-4.2(a)(1) (West 2010) (renumbered and amended as 720 ILCS 5/12-3.05(1) by P.A. 96-1551, Art. 1, § 5 (eff. July 1, 2011)). The trial court sentenced him to 33 years' imprisonment for his attempt murder conviction and three separate, consecutive 9-year terms for his aggravated battery with a firearm convictions.

¶ 5 Although we set forth the evidence presented at defendant's trial on direct appeal (*Collins-Thompson*, 2015 IL App (1st) 130392-U, ¶¶ 4-15), we recount the facts here to the extent necessary to resolve the issues raised in this appeal.

¶ 6 The evidence adduced at trial showed that, on the night of February 26, 2011, a pair of shootings occurred at a teen nightclub in Richton Park, Illinois. The first shooting took place inside of the club. Witnesses testified to observing a fight, during which defendant pulled out a

gun and fired a series of shots which hit and injured Michael Kelley, Vincent Davis, and Christopher Mitchell. The second shooting occurred in the parking lot as patrons fled the nightclub. Camille Donald was running through the lot, and was struck by a van. When a few men, including Michael Jones and Myron Hogue, exited a car to assist the woman, Hogue saw defendant exit the van armed with a gun. When Jones and Hogue returned to the car to avoid a confrontation, defendant walked up to the car and fired his gun into the back passenger-side window, hitting Jones.

¶ 7 The trial court found defendant guilty of one count of attempt first degree murder and four counts of aggravated battery with a firearm[1]. After the trial court denied counsel's motion for a new trial, defendant informed the court that he wished to proceed *pro se* and asked for a continuance so that he could prepare his own motion for a new trial alleging ineffective assistance of counsel. The trial court granted defendant a continuance so that he could prepare a written motion. On the next court date, defendant informed the court that he was unable to access the law library or put his motion in writing. The court stated that the motion needed to be in writing and did not allow defendant to present his claims orally.

¶ 8 The case proceeded to sentencing, and the trial court re-appointed counsel to represent defendant. After a hearing, the court merged one of the aggravated battery counts into the attempt first degree murder count and sentenced defendant to 33 years' imprisonment for the attempt murder count and three consecutive 9-year terms on the aggravated battery counts.

¶ 9 On direct appeal, defendant attacked the sufficiency of the evidence supporting his convictions for attempt first degree murder and aggravated battery of Davis and Mitchell. He

[1] The fourth count of aggravated battery with a firearm of Jones merged into the attempted murder charge of Jones.

also requested that the case be remanded for a *Krankel* hearing. We affirmed his convictions, but remanded the case to the trial court for the limited purpose of conducting a preliminary inquiry into the factual basis of defendant's *pro se* claims of ineffective assistance of trial counsel as required by *Krankel*. *Collins-Thompson*, 2015 IL App (1st) 130392-U, ¶ 55.

¶ 10 On remand, the trial court heard defendant's *pro se* claims of ineffective assistance of trial counsel. Defendant and his former counsel were present at the hearing and defendant was given an opportunity to argue his claims. We note that, on remand, defendant raised numerous claims of ineffective assistance of counsel, but we recount only those claims which he raises in this appeal.

¶ 11 Defendant first claimed that trial counsel failed to interview any of the alibi witnesses, of whom he informed counsel, including: his brothers, Ronald Harrell, Kenneth Weston, and Malcom Bell; his cousin, Dante Wilson; and a man named Eimeris Washington. Defendant alleged that Eimeris Washington would testify that defendant was not in his van at the time that it struck the fleeing woman, and therefore did not exit the van after the accident. This testimony, defendant alleged, would directly contradict the testimony of Myron Hogue, one of the men who attempted to assist the woman who was struck by the van, and who testified that defendant exited the van before shooting Michael Jones.

¶ 12 With regard to this claim, counsel informed the court:

> "Judge, I'm looking at my – at my notes, and I notice that Cortez Washington, and Eimeris Washington – well, at least Cortez, anyway, indicated that [defendant] was seen firing a gun at least twice into a green car. So I noted that from the descriptions of the statements in the – in the police reports that they didn't comport with * * * what

> [defendant] is talking about. Now that's as to Cortez and * * * Eimeris. * * * I explained to [defendant] that I did not believe that Cortez and Eimeris * * * would be good witnesses because they said one thing in the reports and did not indicate at all that [defendant] was not a part of anything and was never in the van.

Defendant disputed the content of Eimeris Washington's statement, stating "Eimeris Washington never made – his statement was never anything in the lines of that."

¶ 13 Defendant also alleged that Dante Wilson, Ronald Harrell, Kenneth Weston, and Malcom Bell would testify that he was not the shooter and that he was already leaving the area when the gunman started shooting. Defendant asserted that he, Harrell, Weston, and Bell left the area in his car, while Wilson got separated from the group. Defendant alleged that the testimony of these witnesses would contradict the testimony of the State's witnesses.

¶ 14 With regard to this claim, counsel informed the court that defendant had never given her the names of Ronald Harrell, Dante Wilson, or Malcom Bell. She also stated that she had spoken with defendant's mother, but his mother informed her that "her son" had moved to Kankakee County and that she did not know his new address. Counsel also stated that she had made "separate notes" at the visit, but that those were "in the large file."

¶ 15 Defendant further alleged that defense counsel was ineffective for failing to call Dibonni Keel as a witness. Keel had given defendant an affidavit which corroborated defendant's version of events, and defendant had given the affidavit to defense counsel. Defendant noted that Keel "would have been the only witness" on his behalf.

¶ 16 With regard to this claim, defense counsel informed the court that she had received the affidavit and had spoken with Keel on the morning of trial. Keel told counsel that his attorney

had advised him not to testify because he had " 'other stuff' going on." Counsel further explained that she did not think Keel would be a credible witness.

¶ 17 Defendant next alleged that defense counsel was ineffective for failing impeach Michael Kelley by calling a police officer to testify to the contents of his written statement. At trial, Kelley testified that he saw defendant pull out a gun. On cross-examination, defense counsel asked Kelley if, in his pretrial statement, he had told officers that the shooter was wearing a black and blue baseball cap or other dark clothing. Kelley denied making that statement. Defendant alleged that Kelley's pretrial statement contained this description, and that counsel told him she was not going to call the officer to testify to the contents of Kelley's statement because "there [were] no investigators to issue subpoenas."

¶ 18 With regard to this claim, counsel responded that, after reviewing Kelley's statement, she realized that the statement did not give a description of the clothing that the shooter had been wearing. Once counsel realized that that the officer would not testify that Kelley had told him that the shooter was wearing a black and blue baseball cap and dark clothing on the night of the shooting, she decided that "there [was] no point in bringing him in."

¶ 19 Defendant also alleged that defense counsel was ineffective for failing to further cross-examine witness Christopher Mitchell with a "pretrial signed statement" that he had given to police. At trial, Mitchell identified defendant as the shooter but admitted that he "didn't see" the person with the gun. On cross-examination, defense counsel asked "so you don't know who shot you, do you, sir?" Mitchell responded: "Now I know who shot me. I found out who shot me." Counsel then asked Mitchell if he had told police that the shooter was "wearing a red button-up and braids." Mitchell responded "[n]o ma'am, but I do remember that red and black shirt."

Defendant alleged that, in his written statement, Mitchell stated that the shooter had braids, and that counsel was ineffective for failing to confront Mitchell with his statement or call officers to testify to the contents of the statement. Defendant cited case law stating that when a witness denies making a prior inconsistent statement it is "incumbent on the cross examiner to prove that such a statement was made." [2] The trial court did not ask counsel to respond to this claim.

¶ 20 Defendant finally claimed that defense counsel was ineffective for failing to obtain the results of a gunshot residue (GSR) kit that had been administered to four people in the van. With regard to this claim, counsel informed the court that she had frequently asked the State about the GSR results, but the State informed her that they either did not have the results, or that the GSR kits were never tested. Counsel stated that not ordering a test of the GSR kits was a defense strategy. She explained that, if the State did not test the kit, she could use this fact to argue reasonable doubt. However, if counsel ordered the test, and defendant's kit tested positive for GSR, she would be obligated to turn the results over to the State.

¶ 21 After hearing all of defendant's claims, the trial court denied defendant's *pro se* motion alleging ineffective assistance of counsel. The court noted that the decision to call witnesses, and the extent which to cross-examine or impeach the witnesses was a matter of trial strategy. Regarding alibi witnesses, the court noted that counsel had sent an investigator to speak to defendant's mother, but that his mother was unable to locate defendant's brothers and cousins. On March 30, 2016, this court allowed defendant's late notice of appeal.

¶ 22 On appeal, defendant claims that the trial court erred in failing to inquire further into his claims of ineffective assistance or appoint independent counsel to represent him in a full *Krankel*

[2] Defendant cited *People v Garza*, 180 Ill. App. 3d 263, 269 (1989).

hearing. Defendant argues that he raised multiple claims which showed counsel's possible neglect of the case.

¶ 23 Pursuant to *Krankel*, and its progeny, when a defendant presents a colorable *pro se* posttrial claim of ineffective assistance of counsel, the trial court must conduct an adequate preliminary inquiry into the factual basis for the defendant's claims to determine whether appointment of new counsel is warranted. *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003); *Krankel*, 102 Ill. 2d at 189. 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 should be appointed, and a full evidentiary hearing of defendant's claim should be held. *Moore*, 207 Ill. 2d at 78.

¶ 24 "The operative concern for the reviewing court 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. 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).

¶ 25 Where, as here, a trial court has properly conducted a *Krankel* inquiry and reached a determination on the merits, we will not reverse unless the trial court's decision was manifestly erroneous. *People v. Robinson*, 2015 IL App (1st) 130837, ¶ 72. " 'Manifest error' is error that is clearly plain, evident, and indisputable." *Id*. (quoting *Tolefree*, 2011 IL App (1st) 100689, ¶ 25).

¶ 26 I. Alibi Witnesses

¶ 27 First, defendant claims that trial counsel failed to interview potential alibi witnesses, including Eimeris Washington, the driver of the van; Dante Wilson, defendant's cousin; and defendant's brothers, Kenneth Weston, Malcom Bell, and Ronald Harrell. He also argues that counsel was ineffective for failing to call Dibonni Keel as a witness.

¶ 28 A. Eimeris Washington

¶ 29 We find that the trial court did not err in denying defendant's claims regarding Eimeris Washington. At the *Krankel* inquiry, defendant argued that counsel was ineffective for failing to interview Eimeris Washington. In response, counsel stated that she did not believe either of the Washington brothers would be good witnesses because their statements to police did not support defendant's claims that he was not involved in the shooting outside the club and that he was not in the van that hit Donald. The trial court discussed the claim with both defendant and trial counsel. While defendant claimed that the police reports he received contained Eimeris's statement and that the statement actually supported his version of events, defense counsel explained that the contents of his statement did not support defendant's theory of the case. Thus,

counsel made the decision not to locate and interview Eimeris Washington. Given counsel's explanation of the nature of Eimeris's statement, it was not manifestly erroneous for the court to determine, essentially, that defendant's claim lacked merit because it was legally immaterial.

¶ 30 In reaching this conclusion, we are not persuaded by *People v Haynes*, 331 Ill. App. 3d. 482, 483 (2002), cited by defendant in support of his argument that the trial court erred in failing to appoint independent counsel or continue the inquiry to examine the police reports and evaluate Eimeris's statement. Here, unlike *Haynes*, defendant was not convicted based on the testimony of a single, 11-year-old witness, who testified that the victim was not holding a gun, while defendant alleged that several uninterviewed witnesses would testify that the victim did have a gun in his hand. Rather, in the case at bar, defendant was convicted based on the testimony of multiple eyewitnesses. In addition, unlike in *Haynes*, the facts elicited at trial and the *Krankel* hearing do not "strongly suggest possible neglect" of the case. See *Haynes*, 331 Ill. App. 3d at 485. Rather, the facts suggest that counsel decided not to interview Eimeris Washington because the contents of his statement did not contribute to defendant's theory of the case. Accordingly, the trial court did not err in denying this claim of ineffective assistance.

¶ 31 B. Cousin and Brothers

¶ 32 Defendant next contends that the trial court erred in failing to appoint independent counsel with regard to his claims that trial counsel was ineffective for failing to interview his cousin, Dante Wilson, and his brothers, Kenneth Weston, Malcom Bell, and Ronald Harrell. These witnesses, he alleged, would have confirmed that he was leaving the club before the shooting started and that another man was the shooter.

¶ 33 We find that the trial court's decision to deny these claims of ineffective assistance was not manifestly erroneous, where the record reflects that counsel's performance was not deficient. The record shows that, at the *Krankel* inquiry, counsel informed the court that defendant did not provide her with the names or contact information of his family members, including Dante Wilson, Ronald, Harrell, or Malcom Bell. Notwithstanding defendant's failure to do so, counsel sent an investigator to speak with defendant's mother, Daphney Bell, who told the investigator that her "son" had moved to a different county and did not have his new address. Logically, if defendant had provided counsel with the names of these potential witnesses, defendant's mother may have been able to provide more information regarding their whereabouts. However, given defendant's failure to do so, we will not now deem counsel's performance deficient. See *People v. Domagala*, 2013 IL 113688, ¶ 38 (adequacy of counsel's investigation is judged against a standard of reasonableness given all the circumstances with heavy deference to counsel's judgment). See also *People v. Williams*, 147 Ill. 2d 173, 247 (1991) ("We cannot fault defense counsel for failing to pursue a witness who was apparently unavailable."). Accordingly, the trial court did not err in denying this claim of ineffectiveness.

¶ 34 C. Dibonni Keel

¶ 35 Defendant also contends that the trial court erred in denying his claim that counsel was ineffective for failing to call Dibonni Keel as a witness. Keel had given defendant an affidavit explaining his version of events, and defendant had given the affidavit to defense counsel.

¶ 36 We find that the trial court's dismissal of this claim was not manifestly erroneous. It is well-settled that " '[d]ecisions concerning which witnesses to call at trial and what evidence to present on defendant's behalf ultimately rest with trial counsel' " and are generally immune from

claims of ineffective assistance of counsel. *People v. Cooper*, 2013 IL App (1st) 113030, ¶ 63 (quoting *People v. West*, 187 Ill. 2d 418, 432 (1999)). At the *Krankel* inquiry, defense counsel responded that she received the affidavit and had spoken with Keel on the morning of trial. Keel told counsel that his attorney had advised him not to testify because he had " 'other stuff' going on." Counsel further explained that she did not think Keel would be a credible witness. Upon speaking to Keel, learning that he was advised by his attorney not to testify, and judging his credibility, counsel made the strategic decision not to call him as a witness. Under these circumstances, the trial court did not err in denying this claim of ineffectiveness.

¶ 37 II. Impeachment of State Witnesses

¶ 38 Second, defendant argues that the trial court erred in denying his claims that counsel was ineffective for failing to impeach two State witnesses: Michael Kelley and Christopher Mitchell. In regard to Kelley, he argues that counsel was ineffective for failing to call a police officer to testify that Kelley had given a different description of the shooter in his statement to police. In regard to Mitchell, defendant argues that counsel was ineffective for failing to impeach him with a prior inconsistent statement he made to police. Defendant alleges that Mitchell's pretrial statement indicated that he told police that the shooter's hair was in braids, but, on cross-examination, denied that he told the officers that the shooter had braids.

¶ 39 We find that the trial court did not err in denying this claim of ineffective assistance. "Generally, the decision whether or not to cross-examine or impeach a witness is a matter of trial strategy which will not support a claim of ineffective assistance of counsel." *People v. Pecoraro*, 175 Ill. 2d 294, 326 (1997). Here, the record shows that the counsel made the strategic decision not to further impeach Kelley and Mitchell.

¶ 40 At the *Krankel* inquiry, counsel informed the trial court that she had intended to call an officer to testify about Kelley's description of the shooter. However, counsel explained that, upon reviewing the police report containing Kelley's statement, she realized that Kelley did not provide a description of what the shooter had been wearing. Upon this realization, counsel stated that "there [was] no point in" presenting the testimony of the officer.

¶ 41 With regard to Mitchell, the record shows that he testified on direct examination that he did not see who had shot him. On cross-examination, he reiterated that his identification of defendant was based on what other people had told him, and not his personal observations. Under these circumstances, it was not objectively unreasonable for counsel to decline to further attack Mitchell's credibility on cross-examination, and argue in closing that Mitchell did not personally see defendant with a gun.

¶ 42 In reaching this conclusion, we are not persuaded by defendant's argument that the trial court's preliminary inquiry regarding counsel's cross-examination of Mitchell was insufficient because the court did not specifically question counsel about her cross-examination of Mitchell. A trial court is not required to question counsel during a *Krankel* inquiry and can evaluate defendant's claims based on its discussion with defendant and its observation of defense counsel's performance at trial. See *Willis*, 2016 IL App (1st) 142346, ¶ 17. Accordingly, we find that the trial court's denial of this claim of ineffective assistance was not manifestly erroneous.

¶ 43 III. Physical Evidence

¶ 44 Finally, defendant argues that the trial court erred in denying his claim that counsel was ineffective for failing to investigate physical evidence collected by police. Specifically, defendant contends that counsel failed to seek the results of GSR tests that had been

administered to the occupants of the van that struck the woman who was fleeing the shooting. We disagree.

¶ 45 During the *Krankel* inquiry, counsel informed the court that she had asked the State about the test results and that the State responded that analysis on the GSR kit was never done. She further explained the strategy of not ordering tests of forensic evidence on her own: if the State does not perform the test or present the evidence at trial, "that's a point in lack of reasonable doubt," but if defense orders a test, and the results are unfavorable to defendant, counsel has an obligation to turn that evidence over to the State. Given that counsel's decision not to order the GSR test was a matter of trial strategy, we find that the trial court did not err in denying this claim of ineffective assistance. See *Cooper*, 2013 IL App (1st) 113030, ¶ 63 (quoting *West*, 187 Ill. 2d at 432 (" '[d]ecisions concerning which witnesses to call at trial and what evidence to present on defendant's behalf ultimately rest with trial counsel' " and are generally immune from claims of ineffective assistance of counsel).

¶ 46 For the foregoing reasons, we affirm the judgment if the circuit court of Cook County.

¶ 47 Affirmed.