2017 IL App (2d) 141057-U
No. 2-14-1057
Order filed March 28, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. KEVIN W. WHEAT, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Stephenson County. No. 13-CF-270 Honorable Michael P. Bald, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Hutchinson and Burke concurred in the judgment.

ORDER

¶ 1 *Held:* (1) The trial court properly denied defendant's motion to quash a search warrant and suppress its fruits; the State's informant was reliable and swore to a recent drug purchase, after two previous purchases, from defendant at his home, creating a substantial basis on which to find probable cause to search defendant's home; (2) the trial court properly denied defendant's *pro se* claim that counsel was ineffective for failing to call certain witnesses, as the court's inquiry revealed that there was no colorable basis for the claim; however, the court did not inquire into his claim that counsel was ineffective for misleading him into rejecting a plea offer, and thus we remanded the cause for that inquiry.

¶ 2 After a jury trial, defendant, Kevin W. Wheat, was convicted of possessing cocaine with the intent to deliver (720 ILCS 570/401(a)(2)(A) (West 2012)) and sentenced to 22 years'

imprisonment. Defendant appeals, contending that (1) the court erred in denying his motion to quash the warrant that authorized the search of his home and to suppress the fruits of the search; and (2) the court erred in how it addressed his *pro se* claims that his counsel was ineffective (see *People v. Krankel*, 102 Ill. 2d 181 (1984)). We remand.

¶ 3 On November 22, 2013, a confidential informant (the CI) and Katherine Ludewig, a Freeport police officer working for the State Line Area Narcotics Team (SLANT), swore out a complaint to search defendant and the property at 436½ North West Avenue in Freeport, a three-story residence with a front (east) door and a rear (west) door. The purpose was to seize "cocaine, cocaine paraphernalia, other controlled substances, equipment used in the packaging, weighing, and distribution of cocaine and other controlled substances, other illegal items or substances, evidence of possession, ownership or lease of the premises ***, and United States currency found in close proximity to any controlled substances, cannabis or other illegal items and substances." The complaint stated that Ludewig and the CI "now appear[ed] before the undersigned Judge of the Circuit Court and request the issuance of a search warrant."

¶ 4 In the complaint, the CI stated as follows. She had met with Ludewig and another SLANT agent three times within the past three months "in regards to a narcotics investigation involving [defendant]. The most recent occasion occurred within the past week, involving [defendant] and the residence of [*sic*] 436½ North West Avenue." On the first two occasions, Ludewig gave the CI cash "to be used in the controlled purchase of cocaine from [defendant] in the City of Freeport, Stephenson County, Illinois"; the CI called defendant to arrange the purchase; the CI traveled "to a location within *** Freeport," met defendant, and handed him the cash that Ludewig had supplied; and the CI left, returned to Ludewig, and handed her the cocaine.

¶ 5 The CI's affidavit continued as follows. On the third occasion, she met with Ludewig and another SLANT agent about a planned purchase involving defendant and the residence at 436½ North West. The CI called defendant at the same number as before, then traveled to the residence. From her previous contacts with him, she knew that this was his home. She went to the rear (west) door, entered an enclosed porch, and "proceeded through a second door on the left (north) side[,] which led to [defendant's] residence." Defendant let the CI in. She handed defendant the cash, and he gave her cocaine. The CI then left and met with Ludewig and the other SLANT agent and handed the cocaine to Ludewig. Both before and after the transaction, a SLANT agent searched the CI for currency and illegal substances and found none.

¶ 6 Ludewig stated the following in the complaint. She had met with the CI "on three occasions within the past three (3) months in regards to a narcotics investigation involving [defendant]." On the first occasion, after being searched and given cash, the CI met with defendant "in a location with [*sic*] the City of Freeport." After several minutes, defendant left the area and the CI headed to a prearranged location where she handed Ludewig the cocaine that she said she had purchased from defendant. Later, Ludewig showed the CI a copy of a Department of Corrections photograph of defendant, and the CI identified him as the man whom she knew as "Kevin Wheat" and who had sold her cocaine.

¶ 7 Ludewig's statement continued as follows. The second purchase from defendant took place at "a residence located in the City of Freeport." Another officer observed the CI enter the house through the front door and, after several minutes, exit. In other respects, the description paralleled that of the first transaction. On the third occasion, "which occurred in the past week," the CI traveled to the area of 436½ North West while under surveillance by Ludewig and another officer. Two other agents observed the CI go to the rear (west) side of the residence, where she

was out of the agents' sight. After several minutes, the agents saw the CI leave the west end and travel to a prearranged debriefing location, where she handed Ludewig cocaine that she said she had bought from defendant inside the residence. During the investigations, the CI provided the number that she said that she had used to contact defendant.

¶ 8 Ludewig stated that tests from all three transactions indicated the probable presence of cocaine. According to the Law Enforcement Agencies Data System, defendant was currently on mandatory supervised release (MSR) for a 2008 conviction of manufacturing or delivering cocaine, with the registered address of 436½ North West in Freeport and the phone number given by the CI.

¶ 9 On November 22, 2013, the judge issued a warrant. It stated that Ludewig and the CI "ha[d] signed and sworn to a complaint for a search warrant before me" and it authorized the search of defendant's person and the property at 436½ North West. The police executed the warrant that day and arrested defendant. He was charged by complaint with unlawful possession of cocaine with the intent to deliver.

¶ 10 On November 27, 2013, defendant was charged by information with the same offense. That day, at his preliminary hearing, after the judge found probable cause for the charge, defendant's attorney stated that defendant had just requested a "402 conference." See Ill. S. Ct. R. 402(d) (eff. July 1, 2012). Defendant confirmed the attorney's statement. After a short recess, the judge indicated that there had been a Rule 402 conference. Defendant's attorney said that he had informed defendant of "the highs and lows"; that there was nothing more that could be accomplished at the time; and that he and the State would continue negotiations. The record says nothing more directly about any such negotiations or any plea offers.

¶ 11 On January 6, 2014, defendant moved to quash the search warrant and suppress the evidence that had been seized as a result of the search of the property. He did not contend that the warrant improperly authorized the search of his person.

¶ 12 Defendant argued primarily that the complaint did not provide probable cause to find incriminating evidence on the premises on the date of the search, for two reasons. First, the alleged drug sales took place on three unspecified dates within a three-month span. Second, there was an unreasonable delay between the criminal activity and the issuance of the warrant.

¶ 13 The State responded as follows. The court would have to uphold the warrant as long as the issuing judge had had a substantial basis to find probable cause. The CI had alleged that she participated in three drug transactions with defendant. Because she had appeared under oath before the issuing judge, no further evidence of her reliability was needed. The delay between the sales and the issuance of the warrant was not excessive: there were three transactions over three months, and the final one occurred much less than a month before November 22, 2013. The State also argued that, even if the warrant had been invalid, the police relied on it in reasonable good faith. Thus, under *United States v. Leon*, 468 U.S. 897 (1984), as codified in Illinois (see 725 ILCS 5/114-12(b)(1) (West 2012)), the evidence should not be suppressed.

¶ 14 The trial court held a hearing on the motion. Defendant did not introduce evidence, confining his argument to the complaint and the warrant themselves. He contended as follows. The complaint contained little information about the CI, such as how long she had known defendant; although she described him, the description could have come from the information accompanying the photograph that Ludewig showed her. No information supported the CI's reliability; there were no statements about past operations in which she had been involved.

¶ 15 Further, defendant contended, the information about the three transactions was very limited: the times and locations of the first two were given in the most general terms, and even the third transaction's date was given only as within the past week. The connection to defendant's residence was slight, for three reasons. First, only one of the three transactions was specifically alleged to have taken place there. Second, cocaine can easily be moved or destroyed, so the delay was critical. Third, the CI said almost nothing about the residence except that she bought an unspecified amount of cocaine there: she recited no facts relating to the presence of drugs, paraphernalia, scales, or any other incriminating evidence.

¶ 16 The trial court denied defendant's motion, with a limited exception. The judge explained that the warrant application relied on three separate hand-to-hand exchanges of cocaine between defendant and the CI, the final one occurring inside defendant's home. The CI had appeared before the issuing judge. The delay between the criminal activity and the issuance of the warrant was not unreasonable and did not negate the substantial basis for probable cause. The court reserved ruling on whether to suppress a flat-screen television and a video surveillance system.[1]

¶ 17 In pretrial discovery, defendant's attorney stated that he might call Steve Enck and Kyle Dailey as witnesses and might use a four-page document that included a subpoena and defendant's bank statements. On September 27, 2014, at a pretrial hearing, defendant's attorney stated that he would probably not call Dailey. Also on that date, the State moved that, if defendant intended to argue that a specified other person had possessed the cocaine, he be

[1] Apparently, the court did not specifically rule on the admissibility of these items. However, at trial, the State introduced testimony about the camera and television feed and a photograph of the camera.

required to disclose the person's name in discovery. The court granted the motion. Defendant never made any such disclosure.

¶ 18 The cause proceeded to trial. The State first called Brandae Hilby, a Freeport police officer, who testified as follows. On November 22, 2013, she helped perform surveillance for the search at 436½ North West. After the building was secured, Hilby moved to the rear and helped to search it. As she approached the back door, she saw a surveillance camera; in the living room a television was on. It showed the emergency response team outside. In the master bedroom, police collected a paper that listed names vertically with numbers to the side of each name. The police also found letters addressed to defendant at 436½ North West and a cell phone (another was recovered from his person). In the kitchen was a box of sandwich bags, of which 141 remained and 9 had been taken.

¶ 19 Keith Chesnut, an Illinois State Police trooper who assisted in the search, testified as follows. Two photographs showed the inside of a closet; the baseboard had been pulled away from the wall and a hole had been cut in the drywall. In the void were plastic bags containing suspected cocaine. The second photograph also showed a scale that was found alongside the bags. Two other photographs showed the entryway to the apartment, including the security camera that was above the door and was angled to detect anyone who approached. To enter the apartment itself, a person had to proceed upstairs, where he could not observe the door directly. Chesnut identified two bags of suspected cocaine; the larger one weighed 74.9 grams. Rhonda Earl, a forensic scientist with the state police crime lab, testified that the larger bag tested positive for the presence of cocaine.

¶ 20 Jeffrey Zalaznik, a Freeport police detective, testified as follows. On the afternoon of November 22, 2013, he and another detective drove into the parking lot in back of the residence.

Defendant was standing in the parking lot, near a vehicle. Zalaznik advised him of the warrant and handcuffed him. Defendant did not resist. Inside his pocket were a wallet with a large amount of cash and a cell phone. To Zalaznik's knowledge, no drugs were found in the car.

¶ 21 John Clark, a state police officer whom the court qualified as an expert in narcotics sales and investigations, testified as follows. He provided perimeter security while the search was initiated, then went inside and assisted. To get to the kitchen, Clark ascended a flight of stairs and turned a corner. He identified a photograph of a garbage bag that he had seen in the kitchen. The bag contained an empty sandwich bag that matched those in the package on the counter. Sandwich bags are routinely used to package drugs.

¶ 22 Clark testified that the amount of cocaine found was consistent with delivery but not with personal use. At the typical price, it would be worth $7300 if sold by the gram. Defendant's wallet had contained $2375 cash, an amount indicative of drug selling. The paper with handwritten names and numbers was a type of item that is commonly found in drug-related searches; its purpose is to keep track of people who owe the seller money.

¶ 23 Clark testified that the building had a security camera pointing to the entry door, with a monitor with a live feed inside. The camera would be useful to a drug dealer, as it could deter robbers interested in the drugs or cash inside and alert the dealer to police. The scale recovered from the closet would ensure that he was selling the desired amount. In Clark's expert opinion, defendant had possessed cocaine with the intent to deliver.

¶ 24 The State rested. During the lunch break, the judge asked defendant's attorney whether he was ready to begin his case. The attorney said that, some time ago, he had disclosed Dailey and Enck as his "main two witnesses" and had later added "people from the State Bank." He continued:

"Through preparing this case, I came to the conclusion that Kyle Daley [*sic*] would not be called and I don't think he appears on the list of witnesses because I had no intention of calling him. I had spoken to Mr. Enck and that was for about what he was going to testify to and things of that nature and how his testimony would go. And he lives in, I believe, it's the state of Iowa. He indicated he would be willing to come here on his own behalf [*sic*] so I wouldn't need to go through processes of getting out of state subpoenas served and things of that nature. And I've kept him up to date with when the court date is and when I would need him here and I expected him here about 1, 1:30. I'll go out and check again, but I don't think it really affects what I'm going to do here. He wasn't here when I checked a moment ago and I will check again before I formally give an answer.

But at this point I've discussed that if [defendant] wants to testify and advised him that I don't think it is in his best interest that he testify in his case in chief. And as far as bank records and as far as Mr. Enck and the way the testimony has come out, I don't intend on presenting them to testify at this time. So I guess the question ultimately come up with [*sic*] is it—and that's my decision as trial counsel and the strategy of this. And I think that's my sound decision and I have the sole decision on who to call to testify with the exception of [defendant]. Now, again I'll go check and see if Mr. Enck is here because it is worth noting, but I don't think it is going to change my decision, Your Honor."

¶ 25 The judge admonished defendant about his right to testify and asked whether he wished to do so. Defendant said that he would, except that the State would introduce his criminal

record. His attorney then said that he had a motion to exclude defendant's prior convictions and would file it now. He exited the courtroom to make copies. A colloquy ensued:

"THE DEFENDANT: Your Honor, are we on the record?

THE COURT: We're on the record but you probably shouldn't address the Court unless your attorney is here.

THE DEFENDANT: It's about him.

THE COURT: About him?

THE DEFENDANT: Yeah, he's not going to call my witnesses and didn't subpoena my witnesses and all of this would have been solved by actually visiting me at the jail.

THE COURT: Why don't you wait just a minute because he should be here when we hear this kind of—

THE DEFENDANT: This is amazing."

¶ 26 Defendant's attorney returned. He said that he had just checked the building for Enck but had not seen him. He then introduced his motion. After hearing arguments, the judge excluded two convictions from Utah but allowed a felony drug conviction in a 2005 Stephenson County case. He then asked defendant again whether he wanted to testify. Defendant responded that he did not, because the prior conviction was too prejudicial. The judge noted defendant's complaints about his attorney and allowed him to explain. The following colloquy ensued:

"THE DEFENDANT: I was aware I was going to have witnesses. If I wasn't going to have witnesses, I mean, I should have known about this before trial.

THE COURT: Okay. I'm at a little bit of a loss because I don't know what you mean if you had known you didn't have witnesses.

> THE DEFENDANT: I mean the burden of proof is not on me, but everybody knows that a jury is going to assume people guilty, so you got to explain some stuff because they have been allowed to put hearsay as far as expert witness [*sic*] in to say everything is hearsay, sandwich baggies, all kinds of bullshit like that. And then they sit there and, I mean, try to link stuff together that's relatively innocent stuff and I mean what's somebody to do if that's all they got to go off of if you don't explain yourself?
>
> THE COURT: All right. Is that the only complaint that you have, because if that's the complaint we'll just move into arguments then."

¶ 27 Defendant said that there was no evidence that the drugs had been his, and that Clark's testimony had proved nothing: "the stuff that he testified to was basically innocent stuff that *** thrown on a table in a pile looks bad, but if you actually say where everything came from and what it was for, I mean it's not bad." He added that the jury was likely to believe the police officer unless he could "explain[] them [*sic*] innocent things which you're not allowed to do[.]" The judge again explained the State's burden and told defendant, "If there is nothing further, I thought you were complaining earlier about not having other witnesses." Defendant responded, "Yeah, I mean they should have been subpoenaed. They should have been here."

¶ 28 The judge asked defendant's attorney to respond. The attorney noted that he had subpoenaed Kyle Hiester,[2] who was "a no-show to this point," and "Mary Shianna at the bank,"

[2] At a pretrial hearing, the assistant State's Attorney told the court that, after being placed on MSR for the prior offense, defendant registered his employer as Hiester Construction but that Becky Hiester, who was on the State's witness list, would testify that he did not actually work there. At the trial level, defendant did not name Kyle or Becky Hiester as a witness whom his attorney should have called. In his appellate brief, defendant does not contend specifically that

who was "scheduled to be here at 3" but was not. The attorney added, "And the other witnesses that I had essentially were Kyle Daley [*sic*] who I had indicated I decided that would be a bad idea to call Kyle Daley [*sic*] and then I discussed that with [defendant] in advance of even the pretrial I think." Next, the attorney noted that "the remaining witness," Enck, lived out of state but had said that he would appear without being subpoenaed. The attorney had called Enck several times to keep him informed of the case's progress so that he could appear. He continued:

> "But as I indicated, Your Honor, even before I had checked to see if Mr. Enck was here, I had come to the trial strategy that I don't think it would be a prudent move to put on any evidence at this point. And I think the Court and counsel are aware that trial strategy changes sometimes mid-trial and I'm entitled to not put on witnesses that I had listed in the list of witnesses or put them on or only call some of them. And the decision on who to call at trial is that—is just that. Trial strategy. And that's soundly in the discretion of trial counsel and that is my decision."

Thus, the attorney said, he would put on no evidence.

¶ 29 Eventually, the jury found defendant guilty. At defendant's request, the cause proceeded to sentencing, with the court to consider afterward defendant's posttrial motions. After the parties presented arguments, defendant allocuted at length. We give those parts pertinent here.

¶ 30 Defendant contended that there had been "[n]o actual physical evidence that [he] possessed any drugs." He continued:

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his attorney should have called, or promised that he would call, anyone from Hiester Construction. In his reply brief, he mentions Kyle Hiester in passing but does not elaborate at all. We consider any argument relating specifically to Hiester Construction forfeited. See Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016).

"Jeff Rawley (*phonetic*) caught the exact same charges I caught. I'm being sent to prison for it today. He gets his possession with intent charges dropped to get charges on me. He seeks me out an [*sic*] entraps me ***. Jeff Rawley has never spent a day in jail. He supposedly made three buys from me. Each time he was given marked money, never in all three buys was I ever seen; one buy outside, one buy on disclosed [*sic*] residence and the next buy to try to collect within a week of the raid.

On the third buy, Jeff Rawley was searched but not his truck. The police lost Jeff Rawley when he went to the back of the building of the triplex [*sic*]. *** All three buys there was marked money given to Jeff Rawley and none recovered. All three buys I was never seen."

¶ 31 Defendant continued:

"Why in the first two buys was there no arrest or search warrants made [*sic*]? But the third buy at the triplex a warrant is made. The answer is Jeff Rawley lived at 436½ West Street [*sic*] for 6 or 7 years prior to the raid. He ensured the police [*sic*] cocaine would be found there. Again, I will ask why for three Class X felony buys were no charges brought?"

¶ 32 Defendant contended that the police had recruited Rawley as the CI and that the police (but not the issuing judge) knew that Rawley was a drug dealer working off charges and had resided at 436½ North West for several years. He continued:

"[The State] prove[s] absolutely nothing, but the best was yet to come, my lawyer tells me he didn't subpoena my witnesses. He had 10 months and 2 days of trial to tell me he was going to screw me. I could have fired him. But he waits to tell me when it's time to explain the real story. *** I'm still at a loss for words for that.

> The jury was wrong in finding me guilty. But when you only hear little bits and pieces of a story, that's all you know. It's not their fault. They never got to hear that the money was from the bank. I had a roommate that could have answered all the jury's questions."

¶ 33 Defendant reiterated that his roommate could have explained "all the innocent things used as evidence." Further, his bank statements could have explained the cash found on his person. Defendant "got duped into going to trial." continued, "Why would I not cop out to lower time if I'm not going to present a defense."

¶ 34 Toward the end of his allocution, defendant stated:

> "Also, the prosecution has offered me 11 years and then he [(the reference is unclear)] told me a counter, so he was willing to give me single digits, so I don't see why my sentence should change now. It would just show how this court system is everything I've stated. Because if my attorney [had] subpoenaed and called my witnesses, there's no way I could have been found guilty. The jury still assumed me guilty with no proof, but if the state—if the state offered single digits then, the only reason they would want more time now would be out of pure vindiction (*sic*)."

¶ 35 The trial court sentenced defendant to 22 years in prison. After his motions for a new trial and to reconsider the sentence were denied, he timely appealed.

¶ 36 On appeal, defendant contends first that the trial court erred in denying his motion to quash the search warrant as it applied to 436½ North West and to suppress the evidence seized from the premises. He argues that the issuing judge lacked a substantial basis to find probable cause that evidence of crime would be found there. He asserts that the warrant application was defective in two respects. First, the initial two purchases contributed nothing to probable cause,

in that (1) they took place as long as three months before November 22, 2013; and (2) they lacked any connection to the place to be searched, as their locations were described only as somewhere in Freeport. Second, as to the final purchase, (1) the date was unclear; and (2) the CI stated only that she had purchased cocaine there, not that she had observed any incriminating evidence there. Defendant also contends that *Leon* does not aid the State, because the application was so lacking in the indicia of probable cause that the police could not reasonably have relied on the warrant.

¶ 37 We hold that the trial court did not err in denying defendant's motion to quash and suppress. Although the warrant application contained scant detail, it sufficed to create probable cause to search defendant's residence. Even if it did not, the police relied in reasonable good faith on it. The primary consideration is that the CI appeared personally before the issuing judge and swore that she bought cocaine from defendant inside his home. The prior transactions between defendant and the CI, and the fact that defendant was on MSR for a drug offense at the pertinent times, further supported the warrant.

¶ 38 When presented with a warrant application, a magistrate must decide whether, given all the information set forth in the application, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Illinois v. Gates*, 462 U.S. 213, 238 (1983); *People v. McCarty*, 223 Ill. 2d 109, 153 (2006). On review, we may not substitute our judgment for that of the issuing magistrate. *Id.* Instead, we decide only whether the magistrate had a substantial basis for finding probable cause. *Id.*

¶ 39 We cannot say that the warrant application in this case was a model for such applications or that it made the issuing judge's task easy. Nonetheless, it sufficed.

¶ 40 First, we note that the CI appeared in person before the issuing judge and was under oath and recited facts that she personally knew. Under these circumstances, no further showing of her reliability was required. See *People v. Kornegay*, 2014 IL App (1st) 122573, ¶ 26; *People v. Hancock*, 301 Ill. App. 3d 786, 792 (1998). Therefore, the issuing judge could credit her statements in deciding whether to grant the warrant application.

¶ 41 Second, the final transaction, albeit described almost summarily in the complaint, did supply a factual basis for probable cause. The CI and Ludewig stated that the sale took place "within the past week." The natural import of this phrase is that the sale occurred no more than 7 days—or at the most 14 days—before November 22, 2013. We shall assume that the sale took place 14 days before the application, on the basis that (1) "the past week" *could* be taken to mean the week preceding the one of which November 22, 2013, was the final day; and (2) precedent requires us to use "the farthest remote date within the period." *People v. Gant*, 150 Ill. App. 3d 180, 184 (1986) (affiant stated that he bought cocaine from defendant twice in the last month; court assumed that earlier purchase occurred a month before complaint for warrant was filed).

¶ 42 Even assuming that the transaction took place 14 days before the warrant application was presented, that delay was far from unreasonable. "There is no hard-and-fast rule" for when a complaint for a search warrant must be made, "except that it should not be too remote." *People v. Montgomery*, 27 Ill. 2d 404, 405 (1963). *Montgomery* noted the statement in an annotation that a delay of fewer than 20 days had never been found unreasonable (*id.*; see 162 A.L.R. 1406, 1414 (1946)). *Gant* noted that, under the case law discussed in the same annotation, "an interval of less than 20 days had never been held to be unreasonably long and one of more than 30 days had always been held to be unreasonably long." *Gant*, 150 Ill. App. 3d at 184. Thus, the timing of the transaction, albeit imprecisely described, favored granting the warrant.

¶ 43 The location of the transaction also favored granting the warrant, albeit without the detail found in some other cases. The CI stated that she bought cocaine from defendant inside his residence. *Kornegay*, which also involved a single transaction inside the defendant's residence, supports the conclusion that the application here sufficiently implicated defendant's home.

¶ 44 In *Kornegay*, a CI and a police detective appeared before a judge and swore to a complaint for a warrant to search the defendant's residence. The complaint disclosed that the CI told the detective the following. Within the last 48 hours, he had gone to an apartment at a specific address to buy 10 bags of cannabis from a man later identified as the defendant. He knocked; the defendant opened the door and asked him what he wanted; the CI responded that he wanted 10 bags of cannabis. The defendant told the CI to wait by the door. A short time later, he returned, holding a large clear bag that held numerous smaller clear bags, each containing cannabis. The defendant then gave the CI 10 of the small bags, and the CI paid him $100. As the CI left, he saw that the defendant was still holding the large bag, which still contained numerous smaller bags. Later, the CI smoked some of what he had bought and received the same high that he had received from smoking cannabis before. The CI also told the detective that he had purchased cannabis from the defendant on a regular basis for the past month and that the defendant had never denied him cannabis. *Kornegay*, 2014 IL App (1st) 122573, ¶ 4.

¶ 45 On appeal from his conviction of unlawful use of a weapon and possession of heroin, the defendant argued that his trial counsel had been ineffective for failing to move to quash the search warrant and suppress the results of the search of his apartment. *Id.* ¶ 15. The court disagreed, holding that the motion would not have been meritorious. The court first held that, because the CI had sworn to the complaint, alleged facts within his personal knowledge, and appeared before the issuing judge, his reliability had been established. *Id.* ¶ 26.

¶ 46 The court then held that the complaint had provided a substantial basis for probable cause to search the defendant's apartment. The court's explanation was terse, but it stressed the role of "the informant's personal observations, the degree of detail offered and police corroboration of the information." *Id.* ¶ 35. It also noted that the CI had admitted using controlled substances and had purchased cannabis from the defendant during the previous month; had never been denied by the defendant; and had bought $100 worth of cannabis within the previous 48 hours. *Id.* Thus, the hypothetical motion to suppress would have failed, both on probable-cause grounds and on good-faith grounds. *Id.* ¶¶ 36-37

¶ 47 We acknowledge that the complaint in *Kornegay* presented a slightly stronger factual basis for probable cause than did the one here: in *Kornegay*, there were allegations from which it could be directly inferred that contraband was stored inside the residence at the time of the sale. Nonetheless, the inference could have been drawn here, albeit with less obvious support. The issuing judge could reason that the sale took place inside the home because that was where defendant had stored the cocaine and the packaging materials.

¶ 48 We turn to the residual support that the first two transactions provided. Defendant argues that they have "no bearing" on whether there was probable cause to search his home, because (1) the information was stale; and (2) the purchases had no connection with the residence. We acknowledge these weaknesses; the first two transactions, considered separately, would not have provided a substantial basis for probable cause. Nonetheless, the issuing judge could have considered that they showed that defendant had sold cocaine to the CI twice before the final sale. Thus, the earlier transactions added to the balance in favor of issuing the warrant. We conclude that the trial court did not err in holding that the issuing judge had had a substantial basis on

which to find probable cause; *a fortiori*, the court did not err in holding that, in any event, the police relied in good faith on the warrant. Therefore, we reject defendant's first claim of error.[3]

[3] At the trial level, the State did not raise, and the court did not consider, an alternative basis for upholding the warrant: that defendant was on MSR.

In *Kornegay*—which neither party cited in the trial court or on appeal—the court noted that the defendant had been on MSR at all times pertinent to the issuance of the warrant and, as a result, had a reduced expectation of privacy in his residence. *Id.* ¶ 43. The court inferred that, as required by law, the defendant had signed an agreement setting forth the conditions of his release from prison. *Id.* ¶ 44 (citing 730 ILCS 5/3-3-7 (West 2006)). The agreement included a condition that he consent to a search of his residence. *Id.* ¶ 46 (citing 730 ILCS 5/3-3-7(a)(10) (West 2010)). Therefore, the court concluded, the defendant's status as a parolee (and his being on home monitoring) validated the search. *Id.* ¶ 48.

Kornegay relied on *People v. Wilson*, 228 Ill. 2d 35 (2008), in which the court held that the warrantless and nonconsensual search of the defendant's residence by his parole officer did not violate the fourth amendment. The court noted that the warrant requirement had been held unnecessary "in cases involving probationers and parolees when the search is deemed reasonable. [Citations.]" *Id.* at 40. Thus, although the statutory consent-to-search provision to which the defendant had agreed as a condition of MSR did not make the search consensual (*id.* at 39), the defendant's "status as a parolee, coupled with the plain language of his search condition, reduced his expectation of privacy in his residence to a level that society would not recognize as legitimate. Accordingly, the special protection normally afforded to an individual's home [did] not apply to him." *Id.* at 52. The court cited the Supreme Court: " '[T]he Fourth Amendment

¶ 49 We turn to defendant's second claim on appeal: that the cause must be remanded for new posttrial proceedings, with the appointment of new counsel for defendant, based on his allegations that his trial counsel was ineffective. Defendant notes that, both after the State rested and during his allocution, he complained about his attorney's neglect of his case, primarily his failing to call certain witnesses despite having assured defendant that he would do so. Defendant stated that he rejected a plea offer only because of these assurances, which went unfulfilled.

¶ 50 Defendant notes that he alleged that the witnesses, his roommate at the time of the search and an employee of his bank, could have produced exculpatory evidence. He notes further that his attorney did not explain his surprise decision to put on no evidence, offering only the bare conclusion that it was "trial strategy." Defendant contends that the judge's decision to inquire no further was error, because he made a sufficient showing to merit the appointment of new counsel to pursue his claims that his attorney had been ineffective.

¶ 51 The State responds in part that the record does not bear out defendant's statement that he had been offered a plea agreement of any kind. Moreover, the State argues that the record does not completely bear out defendant's assertion that he was surprised by his attorney's decision to forgo putting on witnesses and does not suggest what testimony the witnesses would have provided to overcome the strong evidence of guilt. The State observes that, before trial, the court

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does not prohibit a police officer from conducting a suspicionless search of a parolee.' " *Id.* (quoting *Samson v. California*, 547 U.S. 843, 857 (2006)).

Although *Wilson* and *Kornegay* appear to support upholding the search of defendant's home even without the warrant or probable cause, we decline to decide defendant's claim on this ground, as the State never raised it at the trial level and does not do so now.

granted the State's motion to require defendant to disclose a specific name in discovery if he intended to argue that another person had possessed the cocaine. Defendant never did so.

¶ 52 New counsel is not automatically required whenever a defendant raises a *pro se* posttrial claim of ineffective assistance of counsel. *People v. Ayres*, 2017 IL 120071, ¶ 11. However, the trial court must conduct some type of inquiry into the factual basis of the defendant's claim. *Id.*

¶ 53 Defendant raised his allegations twice: first, after the State rested its case, and second, during his allocution. Defendant's statements on the record were sufficient to raise a *Krankel* issue. See *People v. Pence*, 387 Ill. App. 3d 989, 995-96 (2009). On the first occasion, he complained that his attorney had decided not to call any witnesses, even though he had assured defendant earlier that he would. The judge asked him to explain his complaint, which he did, and also asked the attorney to respond, which he did. On the second occasion, defendant repeated his grievance and put forth a new one: that his attorney's assurance that he would call the witnesses defendant wanted had persuaded him to decline a plea offer with a recommended sentence of 11 years or "single digits." He also explained at some length why he believed that he had been framed by the police, in collaboration with Rawley, whom he apparently believed had been the CI. On this occasion, the judge did not inquire further.

¶ 54 We consider separately the trial court's responses (1) to defendant's allegation that his attorney neglected his case by failing to call various witnesses; and (2) to defendant's allegation that his attorney in effect misled him into declining a plea offer. We do not address defendant's conspiracy theory, as he does not now contend that it should have caused the trial judge to inquire further. See Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016) (claims not raised are forfeited).

¶ 55 We turn to defendant's claim that his attorney failed to call certain witnesses after promising to do so. The record shows that, at a pretrial hearing, the attorney told the court that

he would probably not call Dailey. We have earlier noted that defendant did not specifically mention Hiester. Therefore, he could not claim of unfair surprise as to these two potential witnesses. That left Enck and Shianna, the former apparently defendant's roommate and the latter an employee of defendant's bank. We cannot find any error as respects these two potential witnesses.

¶ 56 We note first that, when defendant made his assertions, the trial judge did inquire further of both defendant and his attorney. The questions and answers shed little light on the matter, however. Under the circumstances, the inquiry need not have proceeded further. See *Pence*, 387 Ill. App. 3d at 994.

¶ 57 Defendant contended that Enck could have explained and thus neutralized some of the evidence that the State had introduced. He did not explain what that evidence was, however, even in general terms. As the State notes, defendant did not assert (then or in allocution) that Enck or anyone else besides defendant had actually possessed the cocaine, and he did not explain how Enck might have countered the bags of cocaine and a scale that were found inside the apartment and the drug ledger that was found in defendant's bedroom.

¶ 58 To be sure, defendant's attorney did little to assist the judge, stating blandly that his decision not to call Enck was "trial strategy" based on how the State's case had developed—even though he also said that he had expected Enck to appear and would search the courthouse for him. Nonetheless, the attorney's failure to explain his decision could not make up for defendant's original failure to provide any specific ground for finding possible neglect. Defendant spoke at some length, but there was little for the judge to grasp onto.

¶ 59 The situation is not greatly different as regards Shianna, the bank employee. Again, neither defendant nor his attorney gave the judge much to go on. Defendant in essence asserted

that Shianna could have provided an innocent explanation for the thousands of dollars on defendant's person when he was arrested. The attorney again resorted to the general claim of "trial strategy" while also conceding that Shianna was supposed to have appeared but was a "no show." Again, the weakness of the attorney's explanation did not compensate for the nebulousness of defendant's claim of neglect. What the bank records could have shown was unclear, except that a recent felony parolee whose employment status was dubious (according to the State's representations at the pretrial hearing) was able to withdraw thousands of dollars in cash from his account. We cannot say that defendant's assertions about the witnesses who were not called required further inquiry, much less the appointment of new counsel.

¶ 60 We turn to defendant's other claim: that he declined a plea offer only because he relied on his attorney's representation at the time that he would call the witnesses whom defendant wanted him to call. Defendant made this representation during allocution. The trial judge made no inquiry into this claim at any point.

¶ 61 We note that, although the record does not bear out defendant's assertion that the State made any plea offer, neither does it establish otherwise. The offer would not necessarily show up on the record. We do know that, very early in the case, defendant requested and obtained a Rule 402 conference; it led nowhere at the time, but his attorney said that the parties would continue to negotiate. Thus, we cannot rely on the State's contention that the record does not bear out defendant's statement that he had been offered a plea agreement. The record is inconclusive, and, by declining to inquire, the judge did not allow the making of a record on the potential issue.

¶ 62 Under the circumstances, we conclude that we must order a remand for the trial court to inquire into the factual basis for defendant's claim that his trial attorney's misleading advice

induced him into rejecting a plea offer (or offers), to his prejudice. We stress that we do not hold that the court must appoint new counsel for defendant: that depends entirely on the results of the court's inquiry. An appointment would require a reason to find possible neglect by defendant's trial attorney. However, the inquiry is necessary. Therefore, we remand the cause for the required inquiry into this claim of ineffectiveness (but not those that we discussed earlier), and any further appropriate proceedings. See *id.* at 996.

¶ 63 Remanded.