

NOTICE

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2017 IL App (4th) 150567-U

NO. 4-15-0567

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

November 15, 2017
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	DeWitt County
JESSE L. EMMERSON,)	No. 13CF47
Defendant-Appellant.)	
)	Honorable
)	Timothy J. Steadman,
)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Presiding Justice Turner and Justice Holder White concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err by declining to appoint new counsel in response to defendant’s *pro se* allegations of ineffective assistance of counsel.

¶ 2 Defendant, Jesse L. Emmerson, pleaded guilty to aggravated battery with a firearm. The trial court sentenced him to 12 years in prison. Defendant filed a *pro se* motion to withdraw his guilty plea, claiming his counsel provided ineffective assistance. After a hearing, the court denied defendant relief. Defendant appealed, claiming the trial court erred by declining to appoint new counsel in light of his allegations. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In September 2013, defendant was indicted on two counts: (1) attempt (first degree murder), a Class X felony (count I) (720 ILCS 5/8-4(a)(1), 9-1(a)(1)) (West 2012)); and (2) aggravated battery with a firearm, a Class X felony (count II) (720 ILCS 5/12-3.05(e)(1))

(West 2012)). The charges stemmed from an incident on September 8, 2013. Defendant and his girlfriend, Amy Richardson, were at Richardson's sister Crystal's house. Crystal's boyfriend, Bill, and his friend, Jason, were arguing at the house. Jason accused Bill of owing him money and wanted Crystal's book of coins as payment. Jason took the book of coins without Crystal's permission. Defendant asked if he should go after Jason to retrieve the coins and someone said yes. Defendant chased Jason in his vehicle until they both stopped. Defendant shot Jason as he sat in the driver's seat. Jason suffered non-life-threatening injuries.

¶ 5 Defendant appeared with retained counsel at his arraignment. At a status hearing, the trial court announced on the record that counsel's license to practice law had been suspended. Defendant requested the appointment of the public defender. After appointment, that attorney realized he had a conflict of interest. In June 2014, the court appointed Kevin Hammer to represent defendant. Hammer disclosed to defendant a potential conflict of interest but, after the two discussed the matter, defendant waived the potential conflict. Hammer represented defendant throughout the life of the case.

¶ 6 In September 2014, defendant pleaded guilty to count II in exchange for the State's agreement to dismiss count I and recommend no more than 20 years in prison. The trial court fully admonished defendant, informing him he would be required to serve 85% of his sentence. The court asked counsel if they agreed with the court's statement concerning the 85% rule. Both agreed. The prosecutor gave a statement of the factual basis supporting the guilty plea. At the conclusion, the court asked Hammer if he agreed that the State "could adduce evidence substantially as represented." Hammer stated: "I do, Judge. I would add that there are two videotaped confessions *** from [defendant]. There's also two eye witnesses that can

corroborate some of that. *** [S]o, there certainly would be that evidence that would come out at trial.”

¶ 7 The trial court asked defendant if (1) he was “in any way” forced to plead guilty, (2) “anyone promised [him] anything else to get [him] to plead guilty,” (3) Hammer had “answered any questions [he had] about [his] case to [his] satisfaction,” and (4) he was “pleading guilty of [his] own free will.” Defendant answered the first two questions in the negative and the last two questions in the affirmative. The court accepted defendant’s guilty plea as entered knowingly and voluntarily.

¶ 8 In November 2014, the trial court conducted the sentencing hearing. Before pronouncing sentence, the court asked: “Counsel, before we go any further, we are in agreement this would be an 85% sentence, correct[?]” Both counsel agreed. After considering the evidence presented, the presentence investigation report, the factors in aggravation and mitigation, and recommendations of counsel, the court sentenced defendant to 12 years in prison.

¶ 9 Within 30 days, on November 21, 2014, defendant filed a handwritten letter, claiming Hammer “misrepresented and mislead” him on “numerous occasions.” Defendant claimed Hammer (1) told him he would hire a private investigator but did not; (2) never requested a gunshot residue test because it was “irrelevant”; (3) did not request a fingerprint analysis of the weapon; (4) told him if he “wanted to see [his] kids *** again[, he] would take the open plea”; (5) told him he could not withdraw his plea; (6) told him there “was nothing [defendant] could do” about an ineffective assistance claim; (7) represented he “could get [him] [a sentence of] six to eight years max”; and (8) advised he would get day-for-day credit while in jail.

¶ 10 The State filed a response to defendant's *pro se* posttrial motion, requesting the trial court conduct a *Krankel* inquiry. See *People v. Krankel*, 102 Ill. 2d 181 (1984). On January 7, 2015, the trial court did so. Defendant explained to the court that within 30 days of pleading guilty, he asked Hammer if he could withdraw his guilty plea. Hammer told him he would have to wait until the sentencing hearing. Defendant also testified he asked for "different representation" and Hammer again told him he would have to wait until sentencing. He also said "one of the complaints" was that "they didn't take gunshot residue" tests. He asked Hammer to request the test, but Hammer said it "was irrelevant."

¶ 11 The trial court interrupted defendant's testimony to ask Hammer about the gunshot residue tests. Hammer said these tests, along with fingerprint analysis, would not carry much weight "in this particular case for various reasons." He denied telling defendant the tests were irrelevant. He said:

"[Defendant] gave a videotaped Mirandized confession admitting that it was his gun. In that confession, the police asked him where the gun was.

He told them that he had hid it on a remote farm area. The gun was found exactly where [defendant] said it would be. There was no issues of identity. In my opinion, there was no need to get gun residue tests. There was no need to do fingerprints. The only area where that may be applicable is if there was going to be a defense that someone else shot the gun. The overwhelming evidence in the case was that my client shot the gun.

The only theory that was even workable would have been that his fiancée shot the gun, but she gave statements. The other witnesses testified that when my client got back he made some statements it was him. There was simply no other

evidence to suggest that that was the case, so it was discussed in the same breath an investigator was discussed but, after looking at the facts and discussing those with my client, all matters of trial strategy, it was my opinion that we didn't need to get fingerprints, and that we didn't have to have gun residue tests, but those issues were—were decidedly—decided in the facts that were with the case. So I'll leave that with the court as far as those two issues go.”

¶ 12 After Hammer's statement, the trial court asked defendant if he had any other specific complaints about counsel. Defendant said: “Um, besides that, I mean, no.” He claimed he told the police where the gun was so they could conduct fingerprint analysis on it. The court then stated:

“All right. Well, let me try to explain this. All right. First of all, based on the case and the knowledge your attorney had of the police reports, access to your videotaped statement, etc., there's absolutely no possible neglect here involved on the part of counsel relating to gunshot residue or fingerprints. First of all, it's extremely rare to get fingerprints off a handgun. And gunshot residue is not easy to get either and a lot of times it's inconclusive.

It didn't matter anyway, [defendant], because of the strength of the State's case against you by way of your own statements to the police, which were recorded. So it's not like he could have made an argument, if you were an attorney, that somehow your statement was coerced or you lied to the police when you confessed. There's no suggestion of that. Then you have other corroboration set forth in the factual basis so it's really not a claim of ineffectiveness—

ineffective assistance of counsel for you to complain about your attorney's performance here.

These are matters of trial strategy. He gave you his best advice, which was to go ahead under the difficult circumstances and enter a plea and get at least a partial plea agreement. So, the court finds that there are no claims of possible neglect regarding the representation of trial counsel. Show new counsel shall not be appointed.”

The court granted Hammer leave to file a motion to withdraw defendant's guilty plea based upon defendant's statement to the court that he “didn't know what was going on when he pleaded guilty.”

¶ 13 On April 6, 2015, Hammer filed a motion for leave to withdraw defendant's guilty plea, an affidavit from defendant, and a certificate in compliance with Illinois Supreme Court Rule 604(d) (eff. Dec. 11, 2014). Defendant's motion alleged his guilty plea was involuntary because (1) he “did not understand anything, the entire process,” (2) his sentence was excessive, and (3) he did not understand the 85% rule.

¶ 14 On July 1, 2015, defendant filed a *pro se* petition to withdraw guilty plea and vacate sentence. He alleged he had “two [credible] eyewitnesses that can refute the testimony and statements made by Ms. Amy Richardson, and there is no factual basis to support a guilty plea.” He alleged Hammer told him the witnesses' statements would not be “valid” in court because they were statements from family members. He also alleged he asked Hammer to explain why he should accept the plea agreement and Hammer told him “ ‘that if you go on to jury trial, you will lose and receive 30-60 years in prison and will never see your son again.’ ” Defendant also alleged Hammer said “ ‘If you enter a plea of guilty, I will see that you get a 6-10

year plea bargain at 50%.’ ” He alleged his guilty plea was “a direct result of coercion and false promises made by [Hammer.]” He said he relied on Hammer’s false statements in pleading guilty. Finally, he alleged he had made “an honest effort” to withdraw his plea before sentencing, but Hammer told him it was too late.

¶ 15 On July 9, 2015, the trial court conducted a subsequent *Krankel* hearing in response to defendant’s second *pro se* motion. The court asked Hammer to explain the eyewitness issue raised by defendant. Hammer said that Amy Richardson purportedly made statements to defendant’s family members that she was the one who fired the weapon. Hammer said there were conflicting stories on this topic, yet he spoke with one of the two people who Richardson supposedly said something to and that person “denied that.” Patricia Tegenkamp, defendant’s aunt, told Hammer that defendant and Richardson spent the night with her on the night of the shooting. Tegenkamp said she knew defendant had done something wrong, as she overheard defendant and Richardson “planning defenses and making sure their stories were straight.” Hammer said it was from that conversation with Tegenkamp that he decided he could not use her as a witness. Hammer said he did not interview Richardson, but during her police interviews, she never claimed to have fired the weapon.

¶ 16 Hammer said he reviewed defendant’s videotaped confessions several times. During defendant’s first confession, he implied Richardson could have been the one who fired the weapon. However, in his second confession, he changed his story to a more detailed account and indicated he was the one who shot the victim. Hammer said there was no evidence to suggest Richardson was present either in the vehicle or in the area at the time of the shooting. Hammer said, during his investigation, he discovered that when defendant returned to Crystal’s house, defendant “made some statements that it was him.”

¶ 17 After hearing briefly from defendant, the trial court opined that Richardson’s statements seemed unreliable to Hammer after he had conducted his own investigation. The court said Hammer’s decision on whether he would call certain witnesses at a potential trial was a matter of trial strategy, especially in light of defendant’s videotaped confession that he shot Jason. The court found Hammer’s decision was objectively reasonable. With regard to defendant’s allegation that Hammer promised a 6- to 10-year sentence at 50%, the court stated it did not “think [it] even need[ed] to address that.” Hammer’s responsibility was to advise his client “as to alternative courses of actions and what might be the most prudent course to take, whether it be a trial or to try to solicit a favorable plea agreement.” The court found “no suggestion that any claims in this pleading by the defendant *** are meritorious, that all of the claims pertain to matters of trial strategy. There is no reason that counsel cannot proceed to represent his client.”

¶ 18 After considering Hammer’s motion to withdraw defendant’s guilty plea, the trial court denied the motion, finding the record and the transcripts “affirmatively refute[] the allegations.” This appeal followed.

¶ 19 II. ANALYSIS

¶ 20 Defendant claims the trial court erred in failing to appoint new counsel after the *Krankel* inquiry where he had made sufficient allegations that Hammer was ineffective. We affirm.

¶ 21 Under *Krankel* and its progeny, if a defendant makes a *pro se* posttrial claim of ineffective assistance of counsel, the trial court must examine the factual basis underlying the claim. *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003). The court need not appoint new counsel for the defendant merely because he or she has raised a claim of ineffective assistance. *Moore*, 207

Ill. 2d at 78. Instead, “the trial court must conduct an adequate inquiry ***, that is, [an] inquiry sufficient to determine the factual basis of the claim.” (Internal quotation marks omitted.) *People v. Ayres*, 2017 IL 120071, ¶ 11. Having ascertained the factual basis of the claim, the court then should determine whether the claim has any potential merit. “If the trial court determines that the claim lacks merit or pertains only to matters of trial strategy, then the court need not appoint new counsel and may deny the *pro se* motion. However, if the allegations show possible neglect of the case, new counsel should be appointed.” (Internal quotation marks omitted.) *Ayres*, 2017 IL 120071, ¶ 11.

¶ 22 Here, defendant claims counsel’s failure to (1) investigate the case thoroughly, (2) obtain gunshot residue tests on defendant, and (3) obtain fingerprint analysis on the weapon, suggests counsel’s neglect of the case and are things that cannot be characterized as matters of trial strategy. Defendant claims there is a dispute as to who actually committed the offense. He argues that, just because the gun was his and he led police to the location of the gun, there is no indication that he was the one who committed the offense. Instead, he believed, after locating the weapon, the officers would conduct a fingerprint analysis and determine who had fired the gun. Defendant emphasizes that Hammer did not speak to Richardson, even though defendant had insinuated that it may have been her who, in fact, shot Jason. Further, defendant contends Hammer should have contacted two eyewitnesses who reportedly heard the gunshots. Defendant argues Hammer failed to properly and thoroughly investigate all avenues of a possible defense, thereby neglecting defendant’s case. Defendant also claims Hammer neglected his case during the postplea proceedings when Hammer filed a “bare-bones motion” seemingly without putting forth effort, analysis, or thought.

¶ 23 Here, the trial court engaged both defendant and counsel in dialogue and gave each side the opportunity to thoroughly explain his respective position. After hearing from counsel, the court determined defendant's complaints pertained only to matters of trial strategy, not deficient representation. Where "a trial court has reached a determination on the merits of a defendant's ineffective assistance of counsel claim, we will reverse only if the trial court's action was manifestly erroneous." *People v. Tolefree*, 2011 IL App (1st) 100689, ¶¶ 25, 29 (the court addressed the *de novo* standard of review in the context of a trial court's dismissal of ineffective assistance claims without a determination of the merits).

¶ 24 The record before us indicates defendant made a Mirandized videotaped confession of the crime and thereafter, pleaded guilty. The trial court thoroughly admonished defendant before accepting his guilty plea. Defendant unequivocally told the court he was pleading guilty on his own free will and understood the rights he was waiving as a result. He clearly indicated he was not coerced or promised anything in return. Hammer was faced with the facts surrounding the police investigation, which indicated (1) defendant appeared at the police department the day after the shooting, allowing time to eliminate any gunshot residue, (2) it was likely Jason could have easily identified defendant as the shooter, (3) defendant admitted he hid the weapon, which would make any fingerprint analysis moot, and (4) Tegenkamp (defendant's aunt) made a statement that she heard defendant and Richardson planning and coordinating their version of the events. Given these circumstances, we find defendant's claims of ineffective assistance of counsel either pertain to trial strategy or are without merit. Counsel was faced with overwhelming evidence against defendant and, relying on his experience and expertise, advised defendant accordingly. We find no neglect on Hammer's part. Therefore, we conclude the trial

court's decision not to appoint new counsel upon hearing from defendant and Hammer was not manifest error.

¶ 25

III. CONCLUSION

¶ 26 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 27 Affirmed.