2018 IL App (1st) 161524-U
Order filed: December 7, 2018

FIRST DISTRICT
Fifth Division

No. 1-16-1524

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 15 CR 3901
	)	
MARSHALL NATHAN,	)	Honorable
	)	Erica L. Reddick,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hoffman and Hall concurred in the judgment

ORDER

¶ 1 *Held*: We affirm defendant's conviction and Class X sentence for delivery of a controlled substance over his contentions that the circuit court erred by declining to appoint new counsel to represent him at a full hearing under *People v. Krankel*, 102 Ill. 2d 181 (1984), and by relying upon a prior conviction contained in his presentence investigation report, which was not sufficiently attributed to him, in sentencing him as a Class X offender.

¶ 2 Following a bench trial, defendant-appellant, Marshall Nathan, was convicted of delivery of a controlled substance (heroin) and sentenced, based on his criminal background, as a Class X

offender to six years' imprisonment.[1] On appeal, defendant contends that, after a preliminary inquiry of his *pro se* posttrial allegations of ineffective assistance of trial counsel under *People v. Krankel*, 102 Ill. 2d 181 (1984)), the circuit court erred by: (1) not appointing independent counsel and conducting a full *Krankel* hearing where defendant showed counsel's possible neglect based on counsel's failure to contact certain witnesses; and (2) by relying upon a prior conviction contained in his presentence investigation report (PSI), which was not sufficiently attributed to him, in sentencing him as a Class X offender. We affirm.[2]

¶ 3 At trial, Chicago police officer Curtis Ivy testified that, on January 30, 2015, he was part of a team of officers conducting a controlled purchase of narcotics near West 64th Street and South Ashland Avenue. Officer Ivy acted as the undercover "buy officer." He wore plainclothes and drove an unmarked vehicle, which he parked in a parking lot adjoining a McDonald's restaurant (restaurant) on the northwest corner of 64th Street and Ashland Avenue. Officer Ivy walked south through the parking lot to 64th Street, where he saw a man whom he identified in court as defendant, standing on the sidewalk just west of the restaurant. Officer Ivy approached defendant and asked him who was working that day, meaning if there was anyone selling narcotics. Defendant asked: "what you looking for?" Officer Ivy said: "that D." Defendant told Officer Ivy to follow him. They walked west on 64th Street to Marshfield Avenue and then walked south on Marshfield Avenue to the 6400 block, stopping at an apartment building there. Defendant asked Officer Ivy: "how many do you want?" Officer Ivy responded: "two," and gave defendant $20 in prerecorded funds. Defendant accepted the money and entered the building

[1] Throughout the record on appeal, defendant's first name appears as both "Marshall," and "Marshal." We refer to him here as "Marshall."

[2] In adherence with the requirements of Illinois Supreme Court Rule 352(a) (eff. July 1, 2018), this appeal has been resolved without oral argument upon the entry of a separate written order stating with specificity why no substantial question is presented.

while Officer Ivy remained on the sidewalk. Defendant reemerged from the building and handed Officer Ivy two packets containing white powder. Officer Ivy took the packets and walked away from the area. As he did so, he radioed the officers on his team that there was a "positive narcotics transaction," and provided them with a description of defendant, along with defendant's last known location. After enforcement officers detained defendant, Officer Ivy relocated to the area, and identified him as the man who sold him the two packets of white powder. Officer Ivy returned to the police station and gave the two packets of white powder to Chicago police officer Reginald Dukes to be inventoried.

¶ 4 Chicago police officer Robert Davis testified that, on January 30, 2015, he was working as a surveillance officer and saw Officer Ivy and another man, whom he identified in court as defendant, on 64th Street and Marshfield Avenue. The pair walked south on Marshfield Avenue and stopped 25 to 30 feet away from Officer Davis at an apartment building. Officer Ivy gave defendant money and defendant went inside the building before reemerging minutes later and handing Officer Ivy an unknown item. Officer Ivy and defendant parted ways and Officer Davis followed defendant, who walked north on Marshfield Avenue to 65th Street. Defendant stopped at a church located just east of Marshfield Avenue and stood there with a group of other men. After Officer Ivy radioed that there had been a positive narcotics transaction, Officer Davis, who was about 60 feet away from defendant, directed police officers to defendant's location, who arrived minutes later, and detained defendant. The officers completed a contact sheet for defendant for identification purposes and released him.

¶ 5 Chicago police officer Reginald Dukes testified that, on January 30, 2015, he was working as an enforcement officer assigned to the controlled purchase of the narcotics in question. After Officer Ivy radioed that the buy was positive and provided a description of the

suspect, Officer Dukes drove to 64th Street and Marshfield Avenue and detained defendant, who matched Officer Ivy's description. Officer Ivy arrived and identified defendant as the man who sold him the suspect narcotics. Officer Dukes conducted a pat-down search of defendant and did not recover any prerecorded funds. A police officer took defendant's information, but he was not arrested at that time. Defendant was arrested on February 13, 2015. At the police station, Officer Dukes received the two packets of suspect narcotics from Officer Ivy and inventoried them.

¶ 6 The parties stipulated that, if called, a forensic scientist from the Illinois State Police Crime Lab would testify to receiving the two items recovered from defendant. The items had a combined weight of 0.2 grams and the item tested positive for the presence of 0.1 grams of heroin.

¶ 7 The trial court found defendant guilty of delivery of a controlled substance. Defendant filed a motion for a new trial and an amended motion for new trial.

¶ 8 On April 12, 2016, the circuit court acknowledged that it had received a letter from defendant which alleged he was denied the effective assistance of trial counsel. The letter had two attachments, a motion for appointment of counsel other than the office of the Cook County Public Defender and a complaint which defendant had made to the Attorney Registration and Disciplinary Commission (ARDC) regarding his trial counsel. The court asked defendant if the letter included all of his claims of ineffectiveness of trial counsel that he wished to make and defendant confirmed that it did. The court continued the matter for a preliminary *Krankel* hearing.

¶ 9 On April 26, 2016, the circuit court conducted a preliminary inquiry as to defendant's claims of ineffective assistance of trial counsel pursuant to *Krankel*. The court informed

defendant that the purpose of the inquiry was to determine whether he stated a sufficient factual basis for the claims that his trial counsel was ineffective. The court recited each of defendant's claims and posed questions to both trial counsel and defendant about each claim. As relevant here, defendant stated he provided trial counsel with a list of individuals for whom he was working on the day of the controlled narcotics purchase, and information regarding a drug rehabilitation center. The list is not contained on the record on appeal. Defendant claimed that the investigation of individuals on the list and the treatment center could have verified that, at the time of the incident, he was on his way to treatment and then to work, but he was unsure whether counsel ever contacted them.

¶ 10 The court read into the record defendant's one-page list which included the contact information of two individuals for whom defendant had worked and information about his treatment program. When asked by the court to respond, defense counsel stated:

> "[DEFENSE COUNSEL]: On June 23rd, 2015, I went to division two to visit [defendant] to go over this case. At that time he did give me a list.
>
> I went over that list of witnesses with him and asked [him] how they are pertinent to this case. In which he indicated to me that on that day he was heading towards those addresses—on his way to those addresses he stopped by a [r]estaurant.
>
> And it is there at that [r]estaurant he showed a guy where to [buy] drugs, building at corner, defendant started walking. Then this guy asked if he could buy the dope for him. At this point my client says another guy out there the defendant doesn't know him. He said—drugs. Defendant kept walking towards, those addresses—my client told me at that point an unmarked SUV came and officers

searched him. So given that information, I felt these witnesses were not really pertinent in terms of a trial that I didn't feel they would be alibi witnesses considering my client tells me he never made it to those addresses. He was on his way.

That's what is communicated to me on June 23, 2013.

THE COURT: Okay. [Defendant], hearing that is there anything additional you want me to consider regarding this allegation.

THE DEFENDANT: First of all I did not say I showed him two—whatever phrase he said I showed them to him. That never happened. That never happened.

THE COURT: Okay.

THE DEFENDANT: Never happened.

THE COURT: Anything else you want the Court to consider.

THE DEFENDANT: That's it."

¶ 11 After further inquiry into defendant's remaining allegations of ineffective assistance, the court denied his claims without appointing new counsel or conducting a full *Krankel* hearing. In doing so, the court found that defendant's claims pertained only to matters of trial strategy and did not show possible neglect of the case. Specifically, the court noted that counsel "offered a reasonable explanation" for not further investigating the individuals on defendant's list where defendant explained that he had not been to the locations of those individuals, but stopped at a restaurant. After hearing arguments on defendant's amended motion for new trial, the court denied it.

¶ 12 At sentencing, the circuit court reviewed defendant's PSI to which was attached criminal history reports from the Chicago Police Department (CPD) and the Illinois State Police (ISP), which reflected, in pertinent part, that he was convicted of robbery on December 16, 1980, in case Nos. 8019752 and 821511.[3] He was also convicted of robbery in 1989. The court asked the parties for any amendments or corrections to defendant's PSI. Defense counsel informed the court that he had reviewed the PSI with defendant and that defendant was "questioning" two robbery convictions in case Nos. 8019752 and 821511. Counsel pointed out that the PSI listed a December 16, 1980, date for both cases. The State informed the court that defendant's "rap sheet" indicated that he pled guilty to a robbery in case No. 8019752 and was sentenced to two years' probation. The trial court sustained defendant's objection to the use of the robbery conviction in case No. 821511, finding that the case number was based on the same information attributable to the case No. 8019752 and that "maybe it was a duplicate." The court overruled defendant's objection in case No. 8019752 and asked him if he had any other corrections or amendments to the PSI. Defendant said there were none.

¶ 13 The court then heard arguments in aggravation and mitigation. In aggravation, the State argued that, based on a 1980 robbery conviction (case No. 8019752) and 1989 robbery conviction, defendant was subject to mandatory Class X sentencing and asked for the maximum term. In mitigation, defense counsel asked the court to sentence defendant to the minimum Class X term of six years' imprisonment because the offenses which made him Class X eligible were "from the 80s." The court sentenced defendant, based on his criminal background, as a Class X

[3] The sentencing transcript shows that the parties referred to defendant's robbery conviction as case No. "819752." However, defendant's PSI refers to the conviction as case No. "8019752."

offender to a sentence of six years' imprisonment. Defendant did not file a motion to reconsider sentence. Defendant appealed.

¶ 14 On appeal, defendant first contends that the circuit court erred by failing to appoint new counsel to represent him at a full *Krankel* hearing. Defendant argues that he showed counsel's possible neglect of the case based on counsel's failure to investigate witnesses, who "may have supported a theory that [he] was passing through the area and mistakenly identified [him] as the person dealing drugs."

¶ 15 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.

¶ 16 Where, as here, the circuit court reached a decision on the merits of a defendant's ineffective assistance of counsel claim, that ruling will not be disturbed on review unless there was manifest error. *People v. Tolefree*, 2011 IL App (1st) 100689, ¶ 25. "Manifest error" is error which is clearly plain, evident, and indisputable. *Id.*

¶ 17 We find that the circuit court did not err by denying defendant's claim that his trial counsel failed to investigate the alleged individuals for whom defendant worked on the day in question. The record shows that the court inquired into this specific claim during its preliminary

inquiry. In doing so, the court discussed the claim with both defendant and trial counsel. While defendant essentially claimed that the alleged witnesses would have served as his alibi, counsel determined that the witnesses were not pertinent because defendant explained that he had not been to their locations but stopped at a restaurant on the date in question. Counsel explained that he reached this conclusion after discussing the matter with defendant, who told him that he stopped at a restaurant while he was walking to the potential witnesses' addresses. At the restaurant, defendant showed "a guy" where to buy drugs—a building at the corner—and was then detained by police. Defendant's statements to counsel are consistent with the State's version of events. Given defendant's explanation—that on the date in question, he had not been to the locations of the potential witnesses, but stopped at a restaurant, and the alleged witnesses would not be able to provide relevant information in this matter—it was not manifestly erroneous for the court to determine that defendant's claim of ineffectiveness lacked merit. See *Tolefree*, 2011 IL App (1st) 100689, ¶ 34.

¶ 18 Defendant next contends that he was improperly sentenced as a Class X offender because his 1980 robbery conviction in case No. 819752 contained in the PSI was not sufficiently attributed to him.

¶ 19 Defendant acknowledges that he did not preserve this issue in a motion to reconsider sentence, but asks that we review it for plain error. See *People v. Hillier*, 237 Ill. 2d 539, 544 (2010) (when a defendant fails to raise a claim before the trial court, he forfeits the claim). The plain-error doctrine permits a reviewing court to consider unpreserved errors when " 'the evidence in a criminal case is closely balanced or *** the error is so fundamental and of such magnitude that the accused was denied a right to a fair trial.' " *People v. Harvey*, 211 Ill. 2d 368, 387 (2004) (quoting *People v. Byron*, 164 Ill. 2d 279, 293 (1995)). Prior to addressing plain

error, however, we must first determine whether any error occurred. See *People v. Herron*, 215 Ill. 2d 167, 187 (2005).

¶ 20 Section 5-4.5-95 of the Unified Code of Corrections mandates enhanced Class X penalties for recidivist offenders. 730 ILCS 5/5-4.5-95 (West 2014). As such, an adult defendant convicted of a Class 1 or Class 2 felony must be sentenced as a Class X offender "after having twice been convicted *** of an offense that *** [is] now classified *** as a Class 2 or greater Class felony" as long as the relevant offenses were "separately brought and tried and arise out of a different series of acts." 730 5/5-4.5-95(b) (West 2014). A Class X sentence has a range of 6 to 30 years' imprisonment in prison. See 730 ILCS 5/5-4.5-25 (West 2014).

¶ 21 Here, defendant was convicted of delivery of a controlled substance, a Class 2 offense. See 720 ILCS 570/401(d)(i) (West 2014). The court sentenced defendant as a Class X offender to six years' imprisonment based on his 1980 robbery conviction and 1989 robbery conviction.

¶ 22 Defendant does not dispute that his delivery of a controlled substance conviction is a Class 2 offense, nor that his prior robbery convictions are Class 2 offenses. Rather, defendant argues that the circuit court erred in relying upon his 1980 robbery conviction in case No. 8019752, which was included in the PSI, in sentencing him as a Class X offender because it showed discrepancies. Specifically, defendant points out that an ISP criminal history report listed the offender of the robbery conviction as "Nathan, Marshalle," not Marshal Nathan. The ISP report also listed the offender's date of birth as June 15, 1958, and not September 20, 1960—defendant's date of birth. In addition, defendant relies upon a CPD report regarding the robbery. The CPD report does not list the offender's date of birth or address, but includes a photograph of defendant. Defendant maintains that the court should have required further evidence from the State about the robbery conviction before relying upon that conviction and sentencing as a Class

X offender. Because defendant has completed his prison sentence, he asks this court to reduce his mandatory supervised release period to two years or, in the alternative, remand for resentencing.

¶ 23 We initially note that "a PSI, with its statutorily mandated requirements, is generally viewed as a reliable source of a defendant's criminal history" (*People v. Jones*, 2016 IL 119391, ¶ 40), because the legislature provided a safeguard to ensure the accuracy of the information contained in a PSI: the presentation of a report to the parties, at least three days prior to sentencing. 730 ILCS 5/5-3-4(b)(2) (West 2014). "One of the purposes of this advance notice is to allow the parties to bring any errors in the report to the court's attention, so that the failure to object results in a concession of its accuracy and the waiver of any claims of inaccuracy." *People v. Matthews*, 362 Ill. App. 3d 953, 967-68 (2005); see also *People v. Williams*, 149 Ill. 2d 467, 495 (1992) (no purpose would be served by giving the parties notice of the PSI at least three days prior to the imposition of sentence if they could later raise objections to the report for the first time on appeal).

¶ 24 Here, defendant did not challenge the accuracy of the PSI at the sentencing hearing on the now complained-of discrepancies between his identifying details, and those of the offender in the robbery conviction. As such, by failing to raise a specific objection regarding the prior robbery conviction in case No. 8019752, he conceded the accuracy of the PSI with respect to that conviction. *Matthews*, 362 Ill. App. 3d at 968. This is especially proper where, as here, the record shows that defendant reviewed the PSI and questioned its accuracy on other points.

¶ 25 At sentencing, defense counsel informed the court that he had reviewed the PSI with defendant and that defendant was "questioning" it on the basis that it incorrectly reflected two prior robbery convictions. Specifically, defendant indicated that he did not remember having

"one" of those charges and "they're the same." The State informed the court that defendant's "rap sheet" indicated that he pled guilty to robbery in case No. 8019752, but that another charge was stricken with leave to reinstate. The court agreed with defendant and found that his robbery conviction in case No. 821511 was based on the same information attributable to the robbery conviction in case No. 8019752, and "maybe it was a duplicate." The court then asked defendant if he had any further corrections or additions to make to the PSI and defense counsel informed the court that there was nothing further.

¶ 26 Notably, defendant did not claim that he was not the offender in case No. 8019752 or raise the discrepancies between his identifying details and those of the offender in the robbery conviction. Had defendant, in fact, believed that he did not have a prior conviction for robbery, he certainly knew how to inform defense counsel and the court as to the alleged inaccuracy of the PSI, as he did with the claim that one of his robbery convictions was a duplicate. See *Jones*, 2016 IL 119391, ¶ 38.

¶ 27 To the extent that defendant relies upon the plain-error doctrine to overcome his failure to challenge the PSI on the specific basis that his robbery conviction was not sufficiently attributed to him, his argument fails because there was no error. As mentioned, a PSI is generally a reliable source for the purpose of inquiring into a defendant's criminal history. *Id.* ¶ 37. In this case, defendant's PSI included the robbery conviction in case No. 8019752. The reliability of defendant's PSI was not undermined by the reports of the ISP or CPD such that the circuit court erred in sentencing him as a Class X offender. The mere fact that the ISP report misspelled defendant's name as "Nathan, Marshalle," and incorrectly listed his birthday is of little import, especially where the CPD report included a photograph of defendant. Moreover, the State informed the court that defendant had pled guilty to robbery in case No. 8019752. Accordingly,

we find that defendant's PSI established he had been convicted of robbery in case No. 8019752. In light of this record, defendant has failed to establish that an error occurred and, thus, plain error cannot be established. See *Herron*, 215 Ill. 2d at 187 (the first step of plain-error review is determining whether any error occurred).

¶ 28 Because there was no error, defendant cannot demonstrate that he was prejudiced by his trial counsel's failure to raise this claim in a posttrial motion. To establish ineffective assistance of counsel, a defendant must demonstrate that his counsel's performance was fundamentally deficient and, but for counsel's deficient performance, the result of the proceeding would have been different. *People v. Coleman*, 183 Ill. 2d 366, 397-98 (1998) (citing *Strickland v. Washington*, 466 U.S. 668, 694 (1984). Further, the failure to file a fruitless motion does not constitute ineffective assistance of counsel (see *People v. Givens*, 237 Ill. 2d 311, 331 (2010)) and, therefore, defendant's claim of ineffective assistance of counsel must also fail. See *People v. Patterson*, 217 Ill. 2d 407, 438 (2005).

¶ 29 For these reasons, we affirm the judgment of the circuit court of Cook County.

¶ 30 Affirmed.