2018 IL App (4th) 160280-U

NO. 4-16-0280

FILED
July 6, 2018
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
MARCUS ANTOINE ROGERS,	)	No. 15CF201
Defendant-Appellant.	)	
	)	Honorable
	)	Robert L. Freitag,
	)	Judge Presiding.

PRESIDING JUSTICE HARRIS delivered the judgment of the court.
Justices Knecht and Cavanagh concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court's finding that defendant's *pro se* ineffective-assistance-of-counsel claim lacked merit and did not warrant the appointment of independent counsel was not manifestly erroneous.

(2) The street-value fine imposed by the trial court was in compliance with the authorizing statute and defendant was not entitled to a reduction of his fine.

¶ 2 Following a bench trial, defendant, Marcus Antoine Rogers, was convicted of two counts of unlawful delivery of a controlled substance within 1000 feet of a church and one count of possession of a controlled substance with intent to deliver within 1000 feet of a church (720 ILCS 570/407(b)(2) (West 2014)). The trial court sentenced him to three concurrent 15-year prison terms. Defendant appeals, arguing the court erred by (1) failing to appoint independent counsel to investigate his posttrial ineffective-assistance-of-counsel claim and (2) imposing a

$300 street value fine. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In February 2015, defendant was charged by indictment with various drug-related offenses, including two counts unlawful delivery of a controlled substance within 1000 feet of a church (720 ILCS 570/407(b)(2) (West 2014)), two counts of unlawful delivery of a controlled substance (720 ILCS 570/401(d)(i) (West 2014)), one count of possession of a controlled substance with intent to deliver within 1000 feet of a church (720 ILCS 570/407(b)(2) (West 2014)), one count of unlawful possession of a controlled substance with intent to deliver (720 ILCS 570/401(d)(i) (West 2014)), and one count of unlawful possession of a controlled substance (720 ILCS 570/402(c) (West 2014)). The charges were based on allegations that defendant possessed heroin and delivered it to a confidential police source during the course of two controlled drug buys in February 2015.

¶ 5 In October and November 2015, defendant's bench trial was conducted. The State presented the testimony of the confidential source, who described purchasing heroin from defendant and turning it over to the police, as well as the testimony of various police officers involved in the investigation. The State's evidence showed that, following defendant's arrest, money that was used during the controlled buys was found in defendant's possession, and a cell phone that matched the phone number used to set up the controlled buys was found in defendant's pocket. During a search of defendant's apartment, the police discovered one-inch plastic packaging bags, a scale, a substance that tested positive for heroin, and substances that were suspected of containing heroin but which were never tested.

¶ 6 The State's evidence also included a video surveillance recording of the outside of

defendant's apartment taken during the first controlled buy and which showed the confidential source entering and leaving the apartment. Additionally, the State submitted an audio recording of the second controlled buy along with a transcript of that recording.

¶ 7 At the conclusion of the bench trial, the trial court found defendant guilty of all of the charges against him. In reaching its decision, the court described the confidential source's credibility as "pretty weak" but found that other evidence "carrie[d] the day," including the money evidence and the audio recording.

¶ 8 In December 2015, defendant sent a letter to the trial judge, alleging his trial counsel violated his constitutional rights by withholding evidence from him. Specifically, he maintained his counsel did not inform him of the audio recording of the second controlled buy until after his trial had started and the confidential source was on the witness stand. Defendant asserted he had asked his trial counsel whether the State's evidence included any audio or video recordings, and his counsel "stated there was no audio[,] just a video."

¶ 9 That same month, the trial court conducted defendant's sentencing hearing. At the outset, the court addressed defendant's letter and *pro se* ineffective-assistance claim. Defendant maintained he met with his defense counsel, Jennifer Patton, four or five times, and the only evidence they discussed was "the marked money." He asserted he elected to go to trial because "no other evidence was presented to [him,]" and he had no knowledge of the audio recording. Defendant asserted that had he known about the audio recording he would not have gone to trial. On questioning by the court, defendant asserted he specifically asked about "overhear" evidence, and Patton "said nothing." He asserted the "overhear" evidence was never brought to his attention, and the only evidence that was disclosed to him was the "marked money" and the video

surveillance recording.

¶ 10 The trial court next questioned Patton regarding defendant's claims. She responded as follows:

> "Judge, my only response would be, per my notes and in my file, on April—back on April 3rd of 2015, was the first time—actually, my intern went down and met with [defendant]. At that time[,] he had all the reports and all the videos at that time. And I cannot recall [the intern's] last name off the top of my head. He went through all those reports and videos with [defendant]. I spoke with [defendant] after that. Initially—not really pertaining to the evidence, we initially talked about drug court and his possibility of that. I worked for months trying to get him into drug court. We talked about the evidence, and how I thought that it was overwhelmingly [*sic*], not just the marked money, but the [confidential source's] testimony, the videos, and—and the marked money being on him was overwhelming[,] I thought. Ms. Barnes [(the McLean County Public Defender)] went down with me at one point and also spoke with [defendant] that we thought a plea was in his best interest, especially with the offers that were being given to us by the State at that point. [Defendant] was adamant at all times that he was innocent and that he did not think the State could prove its case, [*sic*] and that he wanted to go to trial. And at that time we were set for trial. I believe [defendant]—the one thing that did come up on the day of trial was an actual transcript of the overhear. That was given to me on the day of trial and that was shown to [defendant] on that day, and that was the day that I had received it as well. But the actual video was in ev-

idence the entire time. We had it the entire time. I personally—I don't recall sitting down with [defendant]—I don't have a note that I sat with [defendant] and watched that with him. My intern would have done that just for time sake. We went through the police reports though, where the report—the search warrant, and the request to do [the] overhear was there, and we discussed the evidence on several occasions."

¶ 11 In response, defendant acknowledged meeting with Patton's intern but asserted that he was only shown the video surveillance recording of the confidential source entering and leaving his apartment. He reiterated that he had no knowledge of the "overhearing device." The following colloquy then occurred between the trial court and Patton:

"THE COURT: Okay. Ms. Patton, no one's really given me an answer to this question yet. [Defendant] said that he asked you specifically, ['']is there any overhear evidence,['] and you did not answer him. Do you recall him ever asking you that? Do you recall ever discussing audio evidence with him at all?

MS. PATTON: Judge, we talked about videos in general. I don't remember using the term 'audio[.'] We talked about the videos of the [confidential source] that were uncharged. There were videos of the [confidential source] that you saw in court, and the overhear that was played in court as well. I don't—when you ask me about the audio, I don't think I used the word 'audio' with him. I said, ['']there's the tape of the confidential source, of the buy, from the day in question.['] "

¶ 12 Ultimately, the trial court rejected defendant's claim, finding he did not have "a

factual basis for claiming ineffective assistance." It found that, while there may have been "communication issues" between defendant and Patton, it did not believe that defendant was "told about the marked money and nothing else." The court found that, according to Patton, "a lot of other evidence was discussed with" defendant, "including the videos, which included the audios and the overhears, and so forth."

¶ 13 The trial court next denied a motion filed by defendant for a new trial and continued with defendant's sentencing. Ultimately, the court sentenced defendant to three concurrent 15-year prison terms in connection with the two counts of unlawful delivery of a controlled substance within 1000 feet of a church and the one count of possession of a controlled substance with intent to deliver within 1000 feet of a church. In orally pronouncing defendant's sentence, the court also imposed a street-value fine in an amount "supported by the evidence at trial," which the State had argued was $100. In its written order, the court imposed a $300 street-value fine.

¶ 14 In December 2015, defendant filed a motion to reconsider his sentence, arguing it was excessive. In April 2016, the trial court denied defendant's motion.

¶ 15 This appeal followed.

¶ 16 II. ANALYSIS

¶ 17 A. *Pro Se* Posttrial Ineffective-Assistance-of-Counsel Claim

¶ 18 On appeal, defendant first argues the trial court erred by failing to appoint independent counsel to represent him in connection with his *pro se* posttrial ineffective-assistance-of-counsel claim. He contends his ineffective-assistance claim and the court's inquiry into that claim under *People v. Krankel*, 102 Ill. 2d 181, 464 N.E.2d 1045 (1984), showed Patton "possi-

bly neglected" his case and warranted the appointment of independent counsel to investigate and litigate his claim.

¶ 19 A *Krankel* inquiry "is triggered when a defendant raises a *pro se* posttrial claim of ineffective assistance of trial counsel." *People v. Ayres*, 2017 IL 120071, ¶ 11, 88 N.E.3d 732. "[T]he goal of any *Krankel* proceeding is to facilitate the trial court's full consideration of a defendant's *pro se* claim and thereby potentially limit issues on appeal." *Id.* ¶ 13. When a *pro se* posttrial ineffective-assistance claim is made, the following procedure is required:

> "[T]he trial court should first examine the factual basis of the defendant's claim. 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." *People v. Moore*, 207 Ill. 2d 68, 77-78, 797 N.E.2d 631, 637 (2003).

Further, "[a] court can conduct [a *Krankel*] inquiry in one or more of the following three ways: (1) questioning the trial counsel, (2) questioning the defendant, and (3) relying on its own knowledge of the trial counsel's performance in the trial." *People v. Peacock*, 359 Ill. App. 3d 326, 339, 833 N.E.2d 396, 407 (2005).

¶ 20 "If 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, 960 N.E.2d 27. " 'Manifest error' is error that is clearly plain, evident, and indisputable." *Id.*

¶ 21 On appeal, defendant argues the record shows Patton possibly neglected his case

by failing to inform him of the audio recording of the second drug buy prior to his bench trial. He maintains the audio recording was a critical piece of evidence and, had he known that it existed, he would have pleaded guilty rather than proceed to trial. As discussed, however, the trial court rejected defendant's ineffective-assistance claim, finding it was without merit. The court's comments reflect that it found defendant's allegations were not credible and that Patton's representations indicated the overhear evidence was discussed with defendant. After reviewing the record, we can find no clearly plain, evident, or indisputable error by the court in reaching its decision.

¶ 22 In arguing his ineffective-assistance claim to the trial court, defendant initially asserted that the only evidence Patton discussed with him was "the marked money" and that "no other evidence was presented to [him]." Defendant also asserted that Patton "said nothing" in response to his explicit inquiry about "overhear" evidence. Later, defendant alleged that the only evidence disclosed to him was the "marked money" and the video surveillance recording.

¶ 23 In responding to defendant's claims, Patton acknowledged that she did not have a note which indicated she listened to the audio recording with defendant and that she likely would have delegated that responsibility to an intern. However, Patton also set forth her efforts to persuade defendant to accept plea agreements offered by the State and asserted she expressed to defendant that the evidence against him was overwhelming. Significantly, Patton asserted she went through the police reports and a search warrant with defendant and stated as follows: "and the request to do [the] overhear was there, and we discussed the evidence on several occasions." Although she stated she did not remember using the word "audio" when speaking with defendant she asserted that she informed him there was a "tape of the confidential source, of the buy, from the day in question."

¶ 24 Here, contrary to defendant's assertions on appeal, Patton's statements to the trial court did refute his claim that the audio recording evidence was not brought to his attention or discussed with him prior to trial. Although Patton may not have used the word "audio" to describe the evidence, her statements indicate the "overhear" evidence was discussed with defendant. Additionally, her statements regarding her discussions of the evidence with defendant and her efforts to get him to accept a plea agreement due to the overwhelming evidence of his guilt directly contradict defendant's claims that only minimal evidence was disclosed to him. The record reflects the trial court relied on Patton's representations over those made by defendant, and we can find no manifest error in that decision.

¶ 25 We note that defendant argues the trial court misunderstood his ineffective-assistance claim and mistakenly believed that he was asserting that Patton had not told him about any of the evidence against him except for the "marked money." We disagree and find the record shows no mistake or mischaracterization of defendant's argument by the court. Rather, the court's comments reflect that, given Patton's response to defendant's claim, the court found defendant was not credible. In particular, the court stated it did not believe defendant's assertions that Patton discussed only one or two pieces of the State's evidence with him. Again, we can find no error in the court's determination.

¶ 26 Finally, we also disagree with defendant's assertion that the trial court applied the wrong standard when deciding whether to appoint independent counsel to evaluate his *pro se* claim. The record reflects the court conducted an inquiry into defendant's *pro se* ineffective-assistance claim by questioning both defendant and Patton. It found defendant's and Patton's assertions were conflicting and that Patton's version of events was more credible than defendant's

version. As discussed, "[i]f the trial court determines that the [defendant's ineffective-assistance] claim lacks merit ***, then the court need not appoint new counsel and may deny the *pro se* motion." *Moore*, 207 Ill. 2d at 77-78. That is precisely what occurred in the present case, and we can find no reversible error.

¶ 27 B. Street-Value Fine

¶ 28 On appeal, defendant also argues that the trial court erred by imposing a $300 street-value fine. He maintains the evidence supported only the imposition of a $100 fine and asks that his street-value fine be reduced to that amount. The State concedes this issue. We disagree.

¶ 29 Section 5-9-1.1(a) of the Unified Code of Corrections (Unified Code) provides for the imposition of a street-value fine, stating as follows:

> "When a person has been adjudged guilty of a drug related offense involving *** possession or delivery of a controlled substance ***, in addition to any other penalty imposed, a fine shall be levied by the court at *not less than the full street value* of the *** controlled substances seized."
>
> 'Street value' shall be determined by the court on the basis of testimony of law enforcement personnel and the defendant as to the amount seized and such testimony as may be required by the court as to the current street value of the *** controlled substance seized." (Emphasis added.) 730 ILCS 5/5-9-1.1(a) (West 2014).

The imposition of a street-value fine without a sufficient evidentiary basis constitutes plain error. *People v. Lewis*, 234 Ill. 2d 32, 48-49, 912 N.E.2d 1220, 1230 (2009).

¶ 30 Here, defendant's argument suggests that a fine imposed by a trial court pursuant

to section 5-9-1.1(a) of the Unified Code is limited to the street value of the drug at issue. However, the statute sets forth only the minimum amount of a street-value fine that must be imposed and does not prohibit a court from exceeding that amount. *People v. Otero*, 263 Ill. App. 3d 282, 285, 635 N.E.2d 1073, 1075 (1994). When only the minimum amount of a fine is specified in a statute, "constitutional limitations determine the maximum amount." *People v. Coleman*, 391 Ill. App. 3d 963, 978, 909 N.E.2d 952, 966 (2009) (stating that, on its face, section 5-9-1.1(a) authorized the imposition of a $1 million fine where evidence showed the street value of the drugs at issue in the case was $92,600); see also *People v. McCreary*, 393 Ill. App. 3d 402, 408, 915 N.E.2d 745, 749 (2009) (finding that although the evidence showed the street value of the drugs at issue was $634.95, the "imposition of a [$1500] street-value fine was proper, as it was more than the value of the drugs seized"). In this instance, there is no dispute that the trial court imposed "not less than the full street value" of the heroin at issue as required by the statute. Further, defendant has not presented any constitutional argument to challenge the fine imposed. Thus, we decline to accept the State's concession and find defendant is not entitled to relief on the grounds asserted in his brief.

¶ 31 Finally, to the extent that defendant argues that no evidence was presented as to the street value of the heroin found in his apartment and which formed the basis for his conviction for possession with intent to deliver, we must also disagree. Evidence presented at defendant's trial established that the confidential source purchased 0.1 gram of heroin for $50 during each of the two controlled drug buys. Thus, there was an undisputed evidentiary basis for finding that the street value of 0.1 gram of heroin was $50. The State submitted an exhibit showing the heroin found in defendant's apartment also weighed 0.1 gram, and as a result, the trial court

could reasonably infer that amount of heroin also had a street value of $50.

¶ 32 III. CONCLUSION

¶ 33 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its $75 statutory assessment against defendant as costs of this appeal.

¶ 34 Affirmed.