2018 IL App (4th) 170861-U

NO. 4-17-0861

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
September 21, 2018
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. EDWARD JORDAN, Defendant-Appellant.	) Appeal from the) Circuit Court of) McLean County) No. 13CF1010)) Honorable) Scott D. Drazewski,) Judge Presiding.

JUSTICE CAVANAGH delivered the judgment of the court.
Justices Knecht and Turner concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Because there is no reasonable probability that suppressing the recordings of defendant's telephonic negotiations with a confidential informant would have changed the outcome of the trial in this drug case, defendant has failed to prove his trial counsel rendered ineffective assistance by omitting to move for such suppression.

(2) By questioning defendant and his trial counsel about a *pro se* claim of ineffective assistance, the trial court made an adequate inquiry into the factual basis of the claim.

¶ 2 In December 2014, at the conclusion of a bench trial, the trial court found defendant, Edward Jordan, guilty of unlawful delivery of a controlled substance within 1000 feet of a church (720 ILCS 570/407(b)(1) (West 2012)), unlawful possession of a controlled substance (720 ILCS 570/402(c) (West 2012)), and aggravated fleeing or attempt to elude a police officer (625 ILCS 5/11-204.1(a)(4) (West 2012)). The court, however, found that the second conviction merged into the first.

¶ 3 In February 2015, the trial court sentenced defendant to 13 years' imprisonment for unlawful delivery and 3 years' imprisonment for aggravated fleeing, ordering that the terms run concurrently.

¶ 4 Defendant appealed, and we remanded the case for compliance with *People v. Krankel*, 102 Ill. 2d 181 (1984). *People v. Jordan*, 2017 IL App (4th) 150244-U, ¶ 29. In November 2017, on remand, the trial court held a *Krankel* hearing, at the conclusion of which the court found no merit in any of defendant's *pro se* claims of ineffective assistance. Accordingly, the court declined to appoint substitute counsel to litigate the claims.

¶ 5 Defendant appeals again. In this second appeal, he makes two arguments.

¶ 6 First, he argues that audio recordings of telephone conversations he had with a confidential informant, Jarvis Heads, in which he made arrangements to sell cocaine to Heads, were inadmissible under section 14-5 of the Criminal Code of 2012 (720 ILCS 5/14-5 (West 2012)) and that trial counsel rendered ineffective assistance by failing to move for the suppression of the recordings on that basis. We find no reasonable probability, however, that excluding the recordings would have changed the outcome of the bench trial.

¶ 7 Second, defendant argues that on remand the trial court failed to conduct an adequate inquiry into one of his *pro se* claims of ineffective assistance. We disagree. On remand, the court questioned both defendant and trial counsel about the claim, and the court's inquiry was careful and comprehensive.

¶ 8 Therefore, we affirm the judgment.

¶ 9 I. BACKGROUND

¶ 10 A. The Confidential Informant Agreement, the Controlled Purchase, the Car Chase, and the Search of Defendant's Apartment

¶ 11 Defendant waived a jury, and in September and December 2014, the trial court held a bench trial. The evidence in the trial tended to show the following.

¶ 12 In June 2013, the Bloomington police arrested Heads for unlawfully possessing a controlled substance with the intent to deliver it. This arrest was especially problematic for Heads because he already was on probation for unlawfully delivering cocaine. A Bloomington detective, Jared Bierbaum, offered Heads a way out of his legal dilemma: if Heads would be a confidential informant, the State would refrain from prosecuting him for the June 2013 felony drug offense.

¶ 13 Pursuant to the confidential informant agreement, Heads made telephone calls to defendant to arrange for another purchase of cocaine. With permission from Heads, Bierbaum recorded these telephone conversations. Also, by having Heads use the speakerphone function on his cell phone, Bierbaum listened to what defendant said in the telephone conversations while they were underway. According to Bierbaum's testimony, he began recording and listening in on these telephone conversations on July 17, 2013.

¶ 14 In a telephone conversation on July 25, 2013, defendant told Heads he could buy cocaine from him, defendant, by paying $150 to a man at the intersection of Howard and Washington Streets in Bloomington. Heads was supposed to tell the man that "Murph" had sent him ("Murph" being defendant's nickname), and if the man knew what Heads was talking about, he was the man to pay. Heads went to the intersection and paid $150 to Donald Dickerson, who, in the trial, admitted receiving payment from Heads.

¶ 15 The next day, July 26, 2013, in Bierbaum's presence and with the speakerphone on, Heads telephoned defendant again to see if Dickerson had passed on to him the money.

Dickerson had. Defendant told Heads to meet him at his, defendant's, apartment, which was at Clayton Street and Oakland Avenue.

¶ 16 Heads testified to all this: the confidential informant agreement; his speaker-phone conversations with defendant, with Bierbaum listening; his payment of the $150 to Dickerson; and, finally, his receipt of cocaine from defendant in the controlled transaction.

¶ 17 The night when (it was agreed telephonically) defendant would deliver the $150 worth of cocaine to Heads, Bierbaum dropped Heads off a couple of blocks from defendant's apartment, and Heads walked the rest of the way there. Two Bloomington police officers, Todd McClusky and Stephen Brown, were in an unmarked van, doing surveillance on the apartment, using night vision goggles. They knew what defendant looked like, either from photographs or, as McClusky testified, from "know[ing] him very well." They watched Heads sit down in front of the apartment and await defendant's arrival. Soon, defendant arrived in his white Chevrolet Tahoe. McClusky wrote down the license plate number. Heads and defendant went into the apartment, and a few minutes later, the two of them reemerged. Defendant climbed back into the driver's seat of his Tahoe and drove away. He was the only person in the Tahoe. Heads walked back to Bierbaum's vehicle and handed him a bag of crack cocaine.

¶ 18 Three Bloomington police officers, members of the street crimes unit—Steven Statz, Justin Shevely, and Nikolai Jones—turned on the sirens and emergency lights of their squad cars and attempted, without success, to pull the Tahoe over. The Tahoe ran through stop signs and, at the intersection of Lincoln and Main Streets, crashed into another vehicle, injuring its driver. The driver of the Tahoe then got out and ran. While Jones assisted the injured driver, Statz and Shevely ran after the driver of the Tahoe but did not catch him. None of those three police officers (Statz, Shevely, or Jones) got a good enough look at the driver of the Tahoe to

identify him as defendant (although, as we said, McClusky and Brown watched defendant get into the driver's seat of the Tahoe and drive away from his apartment immediately before the car chase began).

¶ 19 As soon as defendant drove away from his apartment, McClusky got out of his squad car and stood at the front door of the apartment, and another police officer stood at the back door, in case defendant returned and tried to reenter the apartment. Afterward, in a search of the apartment, the police found paraphernalia powdered with white residue, including a digital scale, plastic Baggies, and a razor blade. They found 0.9 grams of crack cocaine under a bed. And they found a Virgin Mobile receipt with the number (309) 200-4791. In the Tahoe, they found defendant's Illinois identification card and a cell telephone with the number (309) 706-7653. Those were the two numbers that Heads had called to reach defendant, according to Bierbaum's testimony.

¶ 20 B. Bierbaum's Summary of the Telephone Conversations, in His Testimony

¶ 21 In the bench trial, the State played audio recordings (People's exhibit No. 2) of the telephone conversations between Heads and defendant while the judge followed along with a transcript of the conversations. (Unlike People's exhibit No. 2, though, the transcript was not admitted in evidence; the State provided it to the trial court and defense counsel merely as an aid).

¶ 22 After playing the recordings, the prosecutor questioned Bierbaum about some of the enigmatic expressions that Heads and defendant had used in their telephone conversations. Bierbaum explained that, often, Head and defendant were "speaking in code." For example, defendant told Heads he had " 'got it together.' " That meant "the crack was ready to be picked up." Another coded expression was "playing basketball." That meant "you want a ball of crack."

¶ 23 The prosecutor asked Bierbaum where he was when these telephone conversations took place. He answered: "We were in a[n] [undercover] police vehicle parked in the parking deck in Bloomington. I was alone with the confidential source."

¶ 24 The prosecutor asked Bierbaum:

"Q. *** [The second call was] just a continuation of the first call?

A. Correct.

Q. And what was the purpose of the second one?

A. I believe the [confidential source] said we were trying to get [defendant] to meet in—[o]r trying to get instructions to drop off the money and who to drop off the money to for the crack cocaine.

* * *

Q. In reference to the other two calls, when did this third call take place?

A. Approximately two hours later.

Q. Did something transpire in the meantime?

A. Yeah. We had already dropped off the money, so this call was made an hour and a half after we gave the money. And the call was—[y]ou know, we gave it two hours because [defendant] was kind of ambiguous when it might happen as to later that night, tomorrow. That call was placed[,] and further discussions were had with [defendant] as to specifically when we could get the crack cocaine we had ordered and already paid for.

Q. I now want to direct your attention to July 26, 2013, the following day. Were there contacts made with [defendant] that day?

A. Yes.

Q. I guess explain how that was initiated.

A. So, again, through recorded phone calls[,] we made contact with [defendant], and he did provide the specific details about where we were going to get the crack cocaine; that it was ready and we needed to come pick it up.

Q. Where was the meet location determined to be?

A. His residence at 601 South Clayton Street in Bloomington."

¶ 25 Bierbaum testified that before Heads went to defendant's residence, there was a surveillance meeting. Bierbaum searched the undercover vehicle and searched Heads, confirming he had no money or drugs on him. Defendant told Heads on the telephone that he was on his way, and he instructed Heads to meet him at the Clayton Street address. Bierbaum dropped Heads off "a little bit away from the target's residence on Clayton Street" and watched Heads walk to defendant's apartment. The members of the surveillance team watched him too—he was "in constant surveillance as he approached 601 South Clayton Street." About an hour later, Heads returned to Bierbaum's undercover vehicle with "a large white chunk of crack in a little [B]aggie."

¶ 26 C. Purported Evidence of a Joint Federal and State Narcotics Investigation

¶ 27 Bierbaum testified he was the "case agent" in charge of the investigation of defendant and that the investigation began on July 17, 2013, the date Bierbaum began recording the telephone conversations between Heads and defendant.

¶ 28 The prosecutor asked Bierbaum:

"Q. Okay. And what particular type of telephone calls?

A. We had an overhear, which is basically just an order that we are allowed to record telephone calls. And so we started making recorded telephone calls to [defendant]."

¶ 29 Another Bloomington detective, Kevin Raisbeck, testified his first interaction with the investigation was on July 25, 2013. His responsibilities were to do a video surveillance of the money transfer, collect evidence in defendant's apartment, and interview him. When interviewing defendant, Raisbeck told him he worked with the United States Drug Enforcement Administration (DEA).

¶ 30 After Raisbeck testified, the State offered, and the trial court admitted in evidence, People's exhibit No. 12, the "Bloomington Police Department Vice Unit Investigative Summary," which Bierbaum had drafted. This document stated that the telephone conversations were "audio recorded pursuant to a Federal DEA Overhear Authority issued by DEA Task Officer Kevin Raisbeck," and the heading of each page included "DEA # I4130069."

¶ 31 D. The Trial Court's Stated Reasons for Finding Defendant Guilty of Unlawfully Delivering Cocaine

¶ 32 The trial court explained that in finding defendant guilty of unlawfully delivering cocaine to Heads, the court relied heavily on Heads's testimony, which the court found to be corroborated by other evidence, including the telephone calls. The court stated it did not give much weight to what specifically was said in the recorded telephone conversations, since the conversations abounded in ambiguous street slang. But the court "did place a lot of emphasis in essence upon when those conversations took place, who participated or were involved as participants in the conversations, and then what took place immediately thereafter."

¶ 33 Specifically, the trial court stated:

"There is some dispute as it relates to what the meaning, the interpretation of [*sic*] the inference may be as it relates to certain statements by each of those individuals, and I would indicate that I didn't place a lot of weight, that being upon one's entire presentation of what that means on the street, but I did place a lot of emphasis in essence upon when those conversations took place, who participated or were involved as participants in the conversations, and then what took place immediately thereafter, and what took place immediately thereafter would corroborate in essence the testimony of Mr. Heads such as meeting with Mr. Dickerson in order to give him money for purposes of a controlled substance, for example, talking to the [d]efendant and then going to his residence, meaning the [d]efendant's residence as corroborated by the police officers, not only as far as the residence, but the time.

The controlled buy aspects in essence that were described by the officers as far as what safeguards and measures were put into place ***. There's also circumstantial evidence, that being the possession of scales, the possession of [B]aggies, the possession of razor blades, the two phones that [defendant] had, *** the phone in the [d]efendant's possession, meaning ringing when the officer called that number to corroborate in essence that it was the [d]efendant who the conversation was with ***."

¶ 34 E. Defendant's Posttrial Letter to the Trial Court

¶ 35 While awaiting sentencing, defendant sent the trial court a *pro se* letter, in which he complained of trial counsel's performance. In the fourth numbered paragraph of his letter, defendant wrote: "I had many questions about my case [and] my trial[,] before and after the

trial[,] that my [p]ublic [d]efender[,] Mrs. Carla Barnes[,] refused to even ask. In fact[,] Mrs. Carla Barnes told me [straightforwardly[,] 'This is Bloomington, you can[']t win—even if you are really innocent.' "

¶ 36 F. The *Krankel* Hearing

¶ 37 On November 20, 2017, on remand, the trial court held a *Krankel* hearing. After defendant quoted to the court paragraph 4 of his *pro se* letter, the court asked him: "All right. Can you clarify on this point, [Defendant]?"

¶ 38 Defendant explained that Barnes had never discussed or reviewed with him the discovery materials and had never showed him the purported warrant to record his telephone conversations with Heads.

¶ 39 The trial court asked Barnes for her response. She stated:

> "As far as speaking with him, I went over discovery with him. Not only did I go over discovery with him, [but] I sent him our paralegal[,] and she reviewed discovery with him as well. There were multiple occasions to review his discovery.
>
> THE COURT: With respect to the representation that he was never shown a warrant upon request for the overhear?
>
> MS. BARNES: Your Honor, he was shown all of the documents that I have in my possession, which does have a search warrant, which he was given access to."

In order to confirm there was a combined federal and state investigation of defendant, Barnes gave the trial court four pages from People's exhibit No. 12, which already was in the record.

Also, Barnes testified that before the bench trial, she personally verified Raisbeck's status as a deputized DEA agent by talking with him about it.

¶ 40 The trial court told defendant:

> "THE COURT: All right. Then on the next item, I think it's actually something that you have addressed, but I don't want to make it appear as though I'm glossing over it. The fourth issue as itemized within your letter and then summarized by the [a]ppellate [c]ourt is that you allege ineffective assistance of counsel by Ms. Barnes because she advised you that you could not win at trial. You've already had an opportunity to speak to that issue, [Defendant].
>
> [DEFENDANT]: Yes, I did.
>
> THE COURT: Okay. Just wanted to make sure."

¶ 41 After further dialogue with defendant and Barnes, the trial court summed up by discussing each of the numbered paragraphs in defendant's *pro se* letter as well as additional complaints that defendant made in the *Krankel* hearing. The court concluded that all of his *pro se* claims of ineffective assistance lacked merit and that the claims did not justify the appointment of substitute counsel.

¶ 42 This appeal followed.

¶ 43 II. ANALYSIS

¶ 44 A. The Claim of Ineffective Assistance of Counsel in Omitting to Move for the Suppression of the Audio Recordings

¶ 45 To prevail on a claim of ineffective assistance of counsel, a defendant must show that (1) counsel's performance was deficient and (2) the deficiency prejudiced the defendant. *People v. Bew*, 228 Ill. 2d 122, 127 (2008). Courts may proceed directly to the question of prejudice, without addressing counsel's performance. *People v. Hale*, 2013 IL 113140, ¶ 17. "In

order to establish prejudice resulting from failure to file a motion to suppress, a defendant must show a reasonable probability that: (1) the motion would have been granted, and (2) the outcome of the trial would have been different had the evidence been suppressed." (Internal quotation marks omitted.) *Bew*, 228 Ill. 2d at 128-29.

¶ 46 Defendant argues that if trial counsel had moved for the suppression of the audio recordings of his telephone conversations with Heads, the trial court would have granted the motion because although Heads consented to the recording of the telephone conversations, defendant never consented, the record contains no overhear warrant, and under Illinois statutory law the judicially unauthorized recordings were inadmissible unless both parties to the conversation consented. See 720 ILCS 5/14-2, 14-5 (West 2012); 725 ILCS 5/108A-1 (West 2012).

¶ 47 As defendant acknowledges, federal statutory law is less demanding: only one person to the telephone conversation has to consent to its being recorded. 18 U.S.C. § 2511(2)(c) (2000). The supreme court has held: "[E]lectronic surveillance evidence gathered pursuant to federal law, but in violation of the [Illinois] eavesdropping statute, is not inadmissible absent evidence of collusion between federal and state agents to avoid the requirements of state law." *People v. Coleman*, 227 Ill. 2d 426, 439 (2008). Defendant argues, however, that the electronic surveillance evidence in this case could not have been gathered pursuant to federal law, considering that, according to Bierbaum's testimony, he began recording telephone calls on July 17, 2013, and Raisbeck, who was the only DEA task-force agent involved in this case, testified his first interaction with the investigation was on July 25, 2013. To defendant, the DEA label looks slapped on after the illegal eavesdropping already occurred, as if the label served no

function other than to—collusively—exempt the Bloomington police from the requirements of Illinois law.

¶ 48 Let us assume, for the sake of argument, that a motion for suppression would have been granted on the rationale that defendant provides. Defendant still must "show a reasonable probability that *** the outcome of the trial would have been different had the evidence been suppressed." (Internal quotation marks omitted.) *Bew,* 228 Ill. 2d at 128-29. We see no such reasonable probability.

¶ 49 Because the telephone conversations were carried on largely in ambiguous street slang, the trial court did not find the precise content of the conversations to be very enlightening. The recordings served only to reveal exactly what Heads and defendant had said to each other, which, because it was in code, had little usefulness to the court as the trier of fact. As the court explained, it gave more weight to the testimony and to the circumstances immediately following the telephone conversations. Had the recordings been excluded, nothing would have prevented Heads and Bierbaum from summarizing the telephone conversations in plain, uncoded English, just as they did in the bench trial. The speakerphone function on Heads's cellular telephone, which enabled Bierbaum to hear what defendant was saying in the conversations, had nothing to do with the recording device. Bierbaum did not have to record the telephone conversations to listen to them by speakerphone while they were underway. See *People v. Armbrust*, 2011 IL App (2d) 100955, ¶ 7 ("[W]e conclude that the use of the speakerphone feature on a cell phone does not transform the cell phone into an eavesdropping device ***."). Judging by the court's own explicit analysis as the trier of fact, subtracting the audio recordings would not have made any difference.

¶ 50 For two reasons, defendant disagrees. First, he argues that without the recordings of the telephone conversations, Bierbaum's account of the conversations would have been less precise because he would have had to rely on his unaided memory. We conclude, however, that even if Bierbaum had recounted the substance of the telephone conversations in general terms, the evidence against defendant would still be overwhelming. The controlled buy and defendant's flight would leave no doubt that, immediately beforehand, he and Heads entered into a drug deal over the telephone.

¶ 51 Second, defendant argues that Bierbaum's testimony recounting the substance of the telephone conversations would be objectionable as hearsay. But even if what Heads said in the telephone conversations was hearsay, what defendant said clearly was not hearsay, because he was a party-opponent. An out-of-court statement by a party opponent is not hearsay. Ill. R. Evid. 801(d)(2) (eff. Jan. 1, 2011). In the telephone conversations, it was defendant's statements that mattered.

¶ 52 In sum, defendant has failed to show prejudice from trial counsel's omission of a motion for suppression of the audio recordings; he has failed to show a reasonable probability that the outcome of the trial would have been different had the recordings been suppressed. Without a showing of prejudice, a claim of ineffective assistance must fail. *Bew*, 228 Ill. 2d at 128-29.

¶ 53 B. The Adequacy of the Preliminary Inquiry Pursuant to *Krankel*

¶ 54 Beginning with its decision in *Krankel*, the supreme court has held that when a defendant makes a *pro se* posttrial claim of ineffectiveness of counsel, the trial court must inquire into the factual basis of the claim. *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003). No specific procedure is prescribed, but, generally, an adequate inquiry will include "some

interchange" between the trial court and trial counsel. *Id.* at 78. Or "[a] brief discussion between the trial court and the defendant may be sufficient." *Id.* 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." *Id.*

¶ 55 Defendant argues: "Here, the trial court failed to inquire into [defendant's] written claim, labeled (4), that his attorney did not ask questions of the witnesses who testified against [defendant] as he asked her to do." But defendant said nothing, in paragraph 4, about asking questions of *witnesses*. That is a new interpretation of paragraph 4. In their conversation with one another in the *Krankel* hearing, both the trial court and defendant interpreted paragraph 4 as complaining of trial counsel's failure to review discovery materials with defendant in their attorney-client meetings and to discuss any questions raised by those materials. The court explored that claim with both defendant and trial counsel and confirmed that defendant had nothing further to add regarding that claim. The inquiry was perfectly adequate. We decline to remand this case for a second *Krankel* hearing.

¶ 56 III. CONCLUSION

¶ 57 For the foregoing reasons, we affirm the trial court's judgment. We award the State its statutory assessment of $75 as part of our judgment (55 ILCS 5/4-2002(a) (West 2016)).

¶ 58 Affirmed.