2024 IL App (4th) 230575-U

NO. 4-23-0575

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
June 27, 2024
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Mason County
TREVOR L. JUSTICE,	)	No. 22CF10
Defendant-Appellant.	)	
	)	Honorable
	)	Michael L. Atterberry,
	)	Judge Presiding.

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

ORDER

¶ 1 *Held*: (1) Defendant failed to establish counsel was ineffective for failing to file a timely motion to reinstate his right to a jury trial.

(2) Defendant failed to establish counsel was ineffective for failing to request his restraints be removed during the bench trial.

(3) The trial court's alleged error in refusing to appoint new counsel following a *Krankel* inquiry (see *People v. Krankel*, 102 Ill. 2d 181 (1984)) was harmless beyond a reasonable doubt.

¶ 2 Following a bench trial, defendant, Trevor L. Justice, was convicted of aggravated fleeing or attempting to elude a peace officer and driving with a suspended or revoked license. The trial court sentenced him to concurrent terms of five years' imprisonment, and defendant filed a timely notice of appeal.

¶ 3 On appeal, defendant argues (1) defense counsel was ineffective for failing to file a timely motion to reinstate his right to a jury trial, (2) counsel was ineffective for failing to request defendant's restraints be removed during the bench trial, and (3) the trial court erred in refusing to appoint new counsel following a *Krankel* inquiry (see *People v. Krankel*, 102 Ill. 2d 181 (1984)). We affirm.

¶ 4 I. BACKGROUND

¶ 5 On March 9, 2022, the State charged defendant with unlawful possession of less than five grams of methamphetamine (count I) (720 ILCS 646/60(a), (b)(1) (West 2022)), aggravated fleeing or attempting to elude a peace officer (count II) (625 ILCS 5/11-204.1(a)(1) (West 2022)), and "driving while license revoked or suspended (6^{TH} for D.U.I.)" (count III) (*id.* § 6-303(a), (d-3)). The State voluntarily dismissed count I prior to presenting its case at trial.

¶ 6 At a status hearing on September 14, 2022, defense counsel informed the trial court that "after conversations with my client and [the State] in the jury room, [defendant] has advised that he would be waiving his right to [a] jury trial before the court this morning." In examining defendant with respect to his decision, the court asked him if anyone had made any threats or promises in exchange for his waiver, and the following colloquy ensued:

> "DEFENDANT: There was an agreement between myself and my defense counsel and the State.
>
> THE COURT: A partial type of agreement?
>
> DEFENDANT: Yes, [Y]our Honor.
>
> THE COURT: That's not revealed yet but that's the only thing that's been discussed, no one said that your arm is going to be twisted or that you will undergo some kind of torture or anything like that?

DEFENDANT: No tape over my mouth, [Y]our Honor.

THE COURT: All right, that's a figure of speech you understand?

DEFENDANT: Yes, sir.

THE COURT: Okay, all right, the court having examined the defendant in open court finds the defendant understands the determination as to whether to waive his right to jury trial is solely his and his alone. The court will find that waiver is knowingly and voluntarily made. The court will find in the defendant's opinion it is in his best interest to waive jury at this point in time. So the court will accept your waiver of jury trial in this matter."

The record shows that defendant also signed a written jury waiver form on the same date as the hearing.

¶ 7 Defendant's bench trial was conducted on March 2, 2023. Richard Cowser, the chief of police for the Forest City Police Department, was the only witness to testify. Chief Cowser testified that he was on patrol on March 5, 2022, "in an unmarked Dodge Ram fixated [*sic*] with lights and a siren and municipality police plates." He observed a Ford Thunderbird with no front license plate drive past him. As the vehicle passed him, he saw that the vehicle had a rear license plate, and he ran the plate through the Law Enforcement Automated Data System. Chief Cowser discovered that the license plate on the Thunderbird belonged to a different vehicle. Chief Cowser "initiated a traffic stop by turning on [his] emergency lights and then tried making that traffic stop." The driver of the Thunderbird, later identified as defendant, began to slow down and pull toward the shoulder of the road before "taking off at a higher rate of speed." Chief Cowser activated his sirens and informed dispatch that he was pursuing a vehicle that was refusing to stop. Approximately three minutes after first attempting to stop defendant, another

police officer, Officer Kenneth McMillion, joined the pursuit. Officer McMillion "did try to say over the radio or over the intercom several times to pull over, gave him instructions to stop." In response to the commands, defendant stuck his hand out of the window and "actually flipped [McMillion] off." Chief Cowser then pulled in front of defendant's vehicle, and Officer McMillion remained behind defendant in an attempt "to sandwich him in." At this point, defendant "actually slammed on his brakes and caused Officer [McMillion] to hit the rear end of his vehicle. Once the vehicle was stopped, we ordered the suspect out of the vehicle at gunpoint." Once defendant was in custody, he identified himself, "gave his date of birth, and stated he did not have a driver's license." Chief Cowser testified that he measured defendant's highest speed during the pursuit at 104 miles per hour in a 50-miles-per-hour speed zone. A certified copy of defendant's driving record was admitted into evidence without objection, showing that his driver's license had been revoked since 2004.

¶ 8 The trial court found defendant guilty of both counts and, on April 28, 2023, sentenced him to concurrent terms of five years' imprisonment.

¶ 9 On May 18, 2023, defendant filed a "Motion for Reinstatement of Jury Trial." He alleged that "he waived his right to [a] jury trial based on his understanding he would be allowed to attend rehab prior to going to trial or accepting any plea." Thus, according to defendant, "he did not understandingly waive his right to [a] jury trial because he was under the impression he would be allowed to go to rehab before the case moved further in return for his jury trial waiver." Defendant also filed a *pro se* "Ineffective Assistance of Counsel Claim and Motion for New Trial." Defendant argued, in relevant part, that counsel was ineffective for failing to (1) file a timely motion to reinstate his right to a jury trial and (2) request that the trial court conduct a hearing pursuant to Illinois Supreme Court Rule 430 (eff. July 1, 2010) to determine the

necessity of restraints at trial. Defendant "request[ed] that he be appointed counsel to represent him in a [*Krankel*] hearing to present his ineffective assistance of counsel claims to the court."

¶ 10 On May 31, 2023, the trial court conducted a hearing on defendant's motions. The court began by examining, with defendant and defense counsel, the factual basis of each of the ineffective-assistance claims raised in defendant's *pro se* motion. With respect to defendant's claim that counsel was ineffective for failing to request his restraints be removed during trial, counsel stated that she did not address the issue with the court because it was a bench trial and not a jury trial. The court indicated it was never aware that defendant was in restraints during his trial and, as a result, he suffered no prejudice. Ultimately, the court found defendant's claims of ineffective assistance lacked merit, stating:

> "The court doesn't believe that appointing counsel to assist him with the *Krankel* claim *** would add anything here. The court doesn't believe this rises to the level of—well, *** I'll state it this way, the court believes this *** does not constitute a valid claim of ineffective assistance."

¶ 11 After addressing each of the claims in defendant's *pro se* motion, the trial court turned to defendant's motion for reinstatement of a jury trial, and the corresponding claim that counsel was ineffective for failing to file the motion sooner. The court asked the State about its understanding of the factual basis for defendant's claim, and the State responded as follows:

> "[THE STATE]: A couple of things, [Y]our Honor.
>
> First of all, there was a conversation between myself, [defense counsel], and [defendant] in which [defendant] was informed that if he were to find a bed in a residential rehab facility and be accepted into that that the State would consider furlough to go to that and would agree that if he found a bed and was accepted the

State would be agreeable to a furlough. [Defendant] was also informed at that time that the State could agree to that if it happened but there was no guarantee because ultimately whether to allow a furlough is in the discretion of the court. The State can agree with anything. The court can deny it.

So [defendant] was informed of all of these matters before he waived his right to jury trial. [Defendant] was also admonished at the time he waived his right to jury trial of the finality and the irrevocability of his waiver to his right to jury trial."

The court then had the following exchange with defendant:

"DEFENDANT: Your Honor, if I may interrupt. I would just say that since that motion you have decided is untimely would be another factor of ineffective assistance of counsel claim, [Y]our Honor, because I did request that be raised at a hearing on—I believe it was November 3rd. I was represented by [defense counsel's] assistant, Mr. Courtney, who brought up on the record that a reinstatement of jury trial should be filed in the matters and it was never filed until now.

THE COURT: Okay, November 3rd, [defendant], would in fact be more than 30 days beyond your waiver. So even at that point in time it would have been untimely.

DEFENDANT: It was requested that she do that before then, [Y]our Honor.

THE COURT: Well, okay—well, you have changed your—it's a changing—

DEFENDANT: Nothing has changed.

THE COURT: —argument of facts. Yes, it has. You indicated you raised it in November. I'm just noting that November would have been well beyond 30 days.

DEFENDANT: But I have asked her prior to that—

THE COURT: Well—

DEFENDANT: —to raise the issue of the jury trial waiver and she refused.

THE COURT: Based on the facts and the arguments before the court, the court is denying—

DEFENDANT: Good.

THE COURT: —the Motion for Reinstatement of Jury Trial.

These matters are being raised now. Even at the times that you're stating they would have been untimely, [defendant], so I'm denying that motion."

¶ 12 This appeal followed.

¶ 13 II. ANALYSIS

¶ 14 On appeal, defendant argues (1) defense counsel was ineffective for failing to file a timely motion to reinstate his right to a jury trial, (2) defense counsel was ineffective for failing to request defendant's restraints be removed during the bench trial, and (3) the trial court erred in refusing to appoint new counsel following a *Krankel* inquiry.

¶ 15 A. Ineffective Assistance of Counsel

¶ 16 Criminal defendants have the right to the effective assistance of counsel under both the United States and Illinois constitutions. U.S. Const., amends. VI, XIV; Ill. Const. 1970,

art. I, § 8. Claims of ineffective assistance of counsel are analyzed under the framework set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), and adopted by our supreme court in *People v. Albanese*, 104 Ill. 2d 504, 525-26 (1984). "To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced the defendant." *People v. Domagala*, 2013 IL 113688, ¶ 36. "More specifically, a defendant must show that counsel's performance was objectively unreasonable under prevailing professional norms and that there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *Id.* (quoting *Strickland*, 466 U.S. at 694). "Because a defendant must establish both a deficiency in counsel's performance and prejudice resulting from the alleged deficiency, failure to establish either proposition will be fatal to the claim." *People v. Sanchez*, 169 Ill. 2d 472, 487 (1996). We review claims of ineffective assistance of counsel *de novo*. See, *e.g.*, *People v. Hale*, 2013 IL 113140, ¶ 15.

¶ 17 1. *Waiver of Right to Jury Trial*

¶ 18 First, defendant argues counsel was ineffective for failing to file a timely motion to reinstate his right to a jury trial. He claims counsel performed deficiently by failing to file the motion when he requested counsel do so on November 3, 2022. Defendant further contends that, under the circumstances, "prejudice is presumed if there is a reasonable likelihood that the defendant would not have waived his jury right in the absence of the alleged error."

¶ 19 "The right to a trial by jury is a fundamental right guaranteed by the federal Constitution [citations] and the Illinois Constitution of 1970 [citation]." *People v. Bannister*, 232 Ill. 2d 52, 65 (2008). "Under the Illinois Constitution, the right to a trial by jury includes the right to waive a jury trial." *People v. McIntyre*, 2022 IL App (2d) 200535, ¶ 8. "Although a defendant

has a right to a trial by jury, once he has voluntarily waived that right he cannot then withdraw his waiver as a matter of right." *People v. Peacock*, 324 Ill. App. 3d 749, 753 (2001); see *McIntyre*, 2022 IL App (2d) 200535, ¶ 10 ("[O]nce a defendant validly waives the right to a jury trial *** there is no fundamental right to withdraw the waiver."). "Nonetheless, a trial court may permit the defendant to withdraw the waiver. Whether to do so is a matter that is ordinarily within the discretion of the trial court unless the circumstances indicate the defendant failed to realize the consequences of his waiver." (Emphasis and internal quotation marks omitted.) *McIntyre*, 2022 IL App (2d) 200535, ¶ 8.

¶ 20 Here, defendant cannot establish either that counsel's performance was deficient or that he suffered prejudice under *Strickland*. First, he cannot establish deficient performance by counsel. Defendant claims an agreement existed with the State in which he agreed to give up his right to a jury trial. However, as the State notes, the record does not contain any of the other terms that comprised the purported agreement when it was presented to the trial court. Further, if, as he now claims, the agreement was that the State would agree to a furlough in the event he found a residential treatment facility that would accept him as a patient, he has failed to establish either that he did, in fact, find a residential treatment facility or that the State subsequently reneged on its agreement not to object to a furlough. Further, there is no evidentiary support for his assertion that he asked his counsel to request the reinstatement of his jury trial right on November 3, 2022, or at any other time prior to trial. In the absence of this essential information, defendant cannot establish counsel's performance in failing to request reinstatement of his right to a jury trial sooner was ineffective.

¶ 21 Second, defendant cannot establish he was prejudiced by counsel's untimely request for the reinstatement of his right to a jury trial. Defendant relies on *People v. Townsend*,

2020 IL App (1st) 171024, and *People v. McCarter*, 385 Ill. App. 3d 919 (2008), in support of his argument that, under the circumstances, to establish prejudice, he need not demonstrate the result of trial would have been different absent the alleged error because "the law presumes prejudice when there exists a reasonable probability that the defendant would have chosen to waive a jury trial, or in this case maintain that right to a jury trial." In *Townsend*, the court stated, "Where a defendant claims that trial counsel was ineffective for usurping the defendant's right to waive a jury trial, the defendant need not show that a bench trial would have reached a different outcome in order to satisfy the *Strickland* analysis." *Townsend*, 2020 IL App (1st) 171024, ¶ 24. "Rather, prejudice is presumed if there is a reasonable probability that the defendant would have waived a jury trial in the absence of the alleged error." (Internal quotation marks omitted.) *Id.* "This presumption of prejudice stems from the fact that the denial of one's right to a bench trial is a 'structural defect affecting the framework within which the trial proceeds, ***' and such structural defects cannot be subjected to a harmless error analysis." *McCarter*, 385 Ill. App. 3d at 943 (quoting *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991)).

¶ 22 Defendant's reliance on *Townsend* and *McCarter* is unavailing. The critical distinction between those cases and the instant case is that in the former cases, counsel's alleged errors impinged upon the defendant's right to waive a jury trial or, stated differently, the right to a bench trial. Here, on the other hand, defendant contends that counsel's alleged error impinged upon his ability to withdraw his waiver of his right to a jury trial. However, as noted above, criminal defendants do not possess a fundamental right to withdraw a waiver of the right to a jury trial. See *Peacock*, 324 Ill. App. 3d at 753 ("Although a defendant has a right to a trial by jury, once he has voluntarily waived that right he cannot then withdraw his waiver as a matter of right."); *McIntyre*, 2022 IL App (2d) 200535, ¶ 10 ("[O]nce a defendant validly waives the right

to a jury trial *** there is no fundamental right to withdraw the waiver."). Instead, the decision to allow a defendant to withdraw his waiver is left to the discretion of the trial court. *McIntyre*, 2022 IL App (2d) 200535, ¶ 8. Because counsel's alleged error in this case did not implicate defendant's fundamental right to waive a jury trial, the presumption of prejudice articulated in *Townsend* and *McCarter* does not apply to defendant's claim. Accordingly, we reject defendant's assertion that prejudice is presumed under the circumstances and, because he advances no argument that he suffered actual prejudice, we find he failed to establish counsel was ineffective. See *Sanchez*, 169 Ill. 2d at 487 ("Because a defendant must establish both a deficiency in counsel's performance and prejudice resulting from the alleged deficiency, failure to establish either proposition will be fatal to the claim.").

¶ 23 2. *Restraints*

¶ 24 Next, defendant argues counsel was ineffective for failing to request that his restraints be removed during the bench trial. Relying on *People v. Reese*, 2017 IL 120011, he contends that the use of restraints is inherently prejudicial, and the State is unable to establish that the error was harmless beyond a reasonable doubt.

¶ 25 Our supreme court "has long held that the use of physical restraints in court is warranted only when there has been a showing of manifest need for the restraints." *Id.* ¶ 46. "[E]ven when there is no jury, any unnecessary restraint is impermissible because it hinders the defendant's ability to assist his counsel, runs afoul of the presumption of innocence, and demeans both the defendant and the proceedings." *People v. Allen*, 222 Ill. 2d 340, 346 (2006). "A defendant may be shackled when there is reason to believe that he or she may try to escape, that he or she may pose a threat to the safety of people in the courtroom, or when necessary to maintain order during the trial." *Reese*, 2017 IL 120011, ¶ 46. The trial court has the discretion to

decide whether and how to restrain a defendant. *Id.* ¶ 47. "The trial court should state on the record the reasons for allowing the defendant to remain shackled, and the defendant's attorney should be given an opportunity to present reasons why the defendant should not be restrained." *Id.* (citing *People v. Boose*, 66 Ill. 2d 261, 266 (1977)); see Ill. S. Ct. R. 430 (eff. July 1, 2010) (providing that trial courts, upon becoming aware of restraints, must conduct a hearing to determine their necessity, allow the defendant to be heard, and make specific findings on certain enumerated factors). "The showing of manifest need for restraints must be established clearly on the record." *Reese*, 2017 IL 120011, ¶ 47.

¶ 26 Here, the State does not dispute defendant was restrained throughout the trial and that there was no hearing establishing a manifest need for the restraints, as required by Rule 430. However, defendant did not object to the use of restraints at any point during the trial, and at the hearing on defendant's posttrial motions, defense counsel stated she did not address the issue with the court because it was a bench trial and not a jury trial. Further, the court indicated at the hearing "that it was not even aware that [defendant] was in restraints" during the trial.

¶ 27 Even assuming, *arguendo*, counsel performed deficiently in failing to address the issue of restraints with the trial court, we find defendant cannot establish that he suffered actual prejudice as a result. As noted above, defendant cites *Reese* for the proposition that he does not need to prove actual prejudice because the use of restraints is inherently prejudicial. In *Reese*, the trial court rejected multiple requests from the defendant to have his restraints removed during his jury trial without first making a finding of a manifest need for the restraints. *Id.* ¶¶ 5-7. Our supreme court found that the "trial court's failure to follow the procedure established in *Boose* and subsequently codified in Rule 430 resulted in a violation of defendant's right to due process." *Id.* ¶ 49. The *Reese* court further stated that the use of restraints "is inherently

prejudicial," and "[t]o establish that the due process violation was harmless, [t]he State must prove beyond a reasonable doubt that the [shackling] error complained of did not contribute to the verdict obtained." (Internal quotation marks omitted.) *Id.* ¶ 50.

¶ 28 Defendant's reliance on *Reese* is unpersuasive, as the facts of that case are distinguishable from those now before us. Specifically, the defendant in *Reese* made a contemporaneous objection to the use of restraints and therefore preserved the issue for appeal. On appeal, he argued that the trial court's failure to comply with Rule 430 violated his due process rights. *Id.* ¶ 45. Here, on the other hand, defendant did not object at trial and did not preserve the issue for appeal. His only avenue for raising this claim on appeal was to argue plain error or ineffective assistance of counsel, and he has chosen the latter. Thus, because the analysis in *Reese* addressed a preserved claim of a due process violation, whereas the claim in this case is for ineffective assistance of counsel, *Reese* is inapposite.

¶ 29 Instead, the instant case is more analogous to the Third District's decision in *People v. Owens*, 2022 IL App (3d) 190151. In that case, because defense counsel did not object to the use of restraints at trial, defendant argued on appeal that defense counsel was ineffective for failing to object. *Id.* ¶ 37. Specifically, the defendant argued "that, because shackling a defendant at trial without a *Boose* hearing amounts to structural error, affecting the fairness of his trial, *Strickland* prejudice must be presumed and the State bears the burden of persuasion." *Id.* ¶ 38. The *Owens* court rejected this argument, noting, "[T]he supreme court has held in *Allen* that a *Boose* hearing violation does not automatically constitute reversible error; rather, an actual showing 'that it prevented [the defendant] from obtaining a fair trial' is required." *Id.* (quoting *Allen*, 222 Ill. 2d at 354). "Therefore, *Strickland* prejudice cannot be presumed, and defendants are required to prove it to establish a successful claim of ineffective assistance of a counsel." *Id.*

¶ 30 We agree with the *Owens* court and hold that to prevail on his ineffective-assistance claim, defendant must establish "that there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *Domagala*, 2013 IL 113688, ¶ 36 (quoting *Strickland*, 466 U.S. at 694). However, defendant has made no attempt to argue the result of the proceeding would have been different had counsel objected to the use of restraints, nor would we be inclined to accept such an argument given the trial court's statement that it was unaware of the restraints and considering the overwhelming evidence of defendant's guilt. Accordingly, we find defendant has failed to establish that counsel rendered ineffective assistance for failing to object to the use of restraints at his bench trial.

¶ 31 B. *Krankel*

¶ 32 Lastly, defendant argues the trial court erred in failing to appoint new counsel following a *Krankel* inquiry. Specifically, defendant contends the court should have appointed new counsel when he "proved possible neglect by defense counsel where counsel failed to file a timely motion to reinstate jury trial and failed to request the court to release [him] from restraints during his bench trial."

¶ 33 "The common law procedure developed from our decision in *Krankel* is triggered when a defendant raises a *pro se* posttrial claim of ineffective assistance of counsel." *People v. Jolly*, 2014 IL 117142, ¶ 29 (citing *Krankel*; *People v. Patrick*, 2011 IL 111666, ¶ 29). The supreme court has summarized the *Krankel* procedure as follows:

> "[W]hen a defendant presents a *pro se* posttrial claim of ineffective assistance of counsel, the 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 (2003).

In examining the factual basis of the defendant's claim, "the trial court may inquire with trial counsel about the facts and circumstances surrounding the defendant's allegations" and "may also briefly discuss the allegations with defendant." *Jolly*, 2014 IL 117142, ¶ 30. Additionally, "the trial court is permitted to base its evaluation of the defendant's *pro se* allegations of ineffective assistance of counsel on its knowledge of defense counsel's performance at trial." *Id.* "A trial court's failure to appoint new counsel to argue a defendant's *pro se* posttrial motion claiming ineffective assistance of counsel can be harmless beyond a reasonable doubt." *Moore*, 207 Ill. 2d at 80.

¶ 34 Here, even if we were to assume the trial court erred in declining to appoint new counsel following the *Krankel* inquiry, we would nonetheless find the error was harmless beyond a reasonable doubt. Defendant contends he showed possible neglect by defense counsel, such that new counsel should have been appointed, "where counsel failed to file a timely motion to reinstate jury trial and failed to request the court to release [him] from restraints during his bench trial." However, as we discussed above, to prevail on either of these claims, defendant would have been required to establish, in part, that he suffered actual prejudice from counsel's deficient performance, meaning "there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *Domagala*, 2013 IL 113688, ¶ 36 (quoting *Strickland*, 466 U.S. at 694). Given the overwhelming evidence of his guilt, any assertion that defendant would have been able to establish there was a reasonable probability he

would have been acquitted if tried by a jury or without restraints lacks arguable merit. Accordingly, we find that any alleged error by the trial court in failing to appoint new counsel following the *Krankel* inquiry was harmless beyond a reasonable doubt.

¶ 35 III. CONCLUSION

¶ 36 For the reasons stated, we affirm the trial court's judgment.

¶ 37 Affirmed.