No. 118728

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	) Appeal from the Appellate Court of Illinois, Fifth District,
Plaintiff-Appellant,	) No. 5-13-0085
	) There on Appeal from the Circuit Court of the
v.	) Twentieth Judicial Circuit, St. Clair County, Illinois,
	) No. 10 CF 1007
JAMES CHERRY,	) The Honorable Michael N. Cook,
Defendant-Appellee.	) Judge Presiding.

REPLY AND CROSS-APPELLEE'S BRIEF
OF PLAINTIFF-APPELLANT
PEOPLE OF THE STATE OF ILLINOIS

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ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

STATEMENT OF FACTS RELEVANT TO CROSS-APPEAL

Shortly before his sentencing hearing, defendant submitted a letter to the trial judge asserting that his retained counsel, Paul Storment III, had been ineffective. C172-75.[1] Among other things, defendant argued that Storment failed to investigate and "did not interview any eye witnesses even though [defendant] provided him with their information," but defendant did not identify the alleged eyewitnesses. C172. Defendant also contended that he had "provided [counsel] with the information of witnesses that could have contradicted the [State's witnesses'] testimony," but did not name them or describe their testimony. C173.

At defendant's sentencing hearing, in his statement in allocution, defendant began to argue that trial counsel had been ineffective, but the trial judge interjected that the issue was irrelevant to defendant's sentence, and further stated that "these are matters which would be more properly brought up at appeal." C232-35. After sentence was imposed, Storment moved to withdraw as counsel. C239-40. Defendant confirmed that there had "been a breakdown in [their] lawyer/client relationship" and requested a new attorney. C240. The trial judge granted Storment's motion to withdraw and appointed the public defender to represent defendant. C177, C240.

The public defender filed a motion to reconsider sentence, C243, which the trial court denied, C246. The trial court then, sua sponte, revisited defendant's letter criticizing Storment, construing the letter as a pro se motion for new trial based on the ineffective

[1] "C_" denotes the common law record; "Peo. Br. _" denotes the People's opening brief; and "Def. Br." denotes defendant's brief as appellee and cross-appellant.

assistance of trial counsel. C247. In a written order, the court noted that pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984), "the defendant's pro se letter/motion must be reviewed by the court," and it set the matter for a hearing on that issue. *Id.* At the hearing, the public defender asked the trial court "to consider the allegations in the pleading." C259. The court held that defendant had failed to show prejudice and denied his claim. C262-63.

The appellate court affirmed, rejecting defendant's argument that prejudice should be presumed. A8. It concluded that "defendant's allegations regarding his trial counsel are either refuted by the record, present general allegations that are not supported by specific information, or fail to demonstrate how he was prejudiced by the alleged failures" of post-trial counsel. A9. Defendant has cross-appealed that holding, claiming that he is entitled to a remand for a new hearing on his ineffective assistance claim. Def. Br. 13-23.

ARGUMENT

I. Armed Violence Is Properly Predicated on Aggravated Battery Causing Great Bodily Harm.

Whether aggravated battery causing great bodily harm is a proper predicate for armed violence turns on whether it is an "offense" that "makes the possession or use of a dangerous weapon either an element of the base offense, an aggravated or enhanced version of the offense, or a mandatory sentencing factor that increases the sentencing range." 720 ILCS 5/33A-2(b) (2010). To answer that question, this Court must interpret two statutory phrases "base offense" and "aggravated or enhanced version" according to well-established canons of statutory construction. Thus, "[e]ach word, clause, and sentence of a statute must be given a reasonable meaning, if possible, and should not be rendered superfluous." *People*

v. Gutman, 2011 IL 110338, ¶ 12. Further, the Court "must assume that the legislature intended the term[s] to have [their] ordinary and popularly understood meaning," and it may rely on dictionaries to define them. *People v. Beachem*, 229 Ill. 2d 237, 244 (2008).

Defendant offers no satisfactory construction of the crucial statutory language. Indeed, he attempts to bypass the issue, asserting that the People's arguments, at least regarding the meaning of "aggravated or enhanced version," "do not merit consideration" because the People cite no "authority other than general definitions." Def. Br. 12. Principles of forfeiture and waiver do not apply, however, where the issue concerns the construction of a statute. As common sense dictates, this Court is not constrained by the arguments of the parties on such questions because implying "forfeiture would mean that this [C]ourt's construction of a particular statute could change from case to case." *JP Morgan Chase Bank, N.A., v. Earth Foods, Inc.*, 238 Ill. 2d 455, 461-62 (2010). And in any event, dictionaries are, in fact, proper "authority" for statutory construction arguments. *Beachem*, 229 Ill. 2d at 244.

As the People have argued, the statutory language excludes three distinct categories of offenses as predicates for armed violence, based, respectively, on (1) the elements of the base offense; (2) the existence of an aggravated form of the offense; or (3) the presence of a mandatory sentencing factor. *See* 720 ILCS 5/33A-2(b); *see also* Peo. Br. 11-13. The first category depends on the elements of the specific offense alleged as the predicate felony for armed violence; the latter two categories require scrutiny of other provisions in the criminal code to identify either an aggravated form of the offense or a sentencing factor. Defendant does not argue that aggravated battery causing great bodily harm makes the use or possession of a firearm a mandatory sentencing factor, and thus the third category does not apply.

Nor does defendant clearly argue that the first category applies. Although he quibbles with the People's definition of "base offense," defendant does not assert that aggravated battery causing great bodily harm is a "base offense" that makes possession or use of a firearm an element. *See* Def. Br. 5-10. Such an argument would be meritless, in any event. The natural reading of the statute requires that a "base offense" have a single set of elements: to be excluded as a predicate, "the possession or use of a dangerous weapon" must be "an element of *the base offense*," 720 ILCS 5/33A-2(b) (emphasis added). As discussed, *see* Peo. Br. 10-11, there is no single, generic offense of "aggravated battery" that could serve as the base offense; rather, there are twenty-four separate forms of aggravated battery, each with distinct elements. Only one of those forms is excluded as a predicate due to the elements of the base offense: battery that is aggravated by the "[u]se[of] a deadly weapon other than by the discharge of a firearm," 720 ILCS 5/12-4(b)(1) (2010).

Defendant argues primarily that aggravated battery causing great bodily harm falls within the second category of excluded offenses because "aggravated battery with a firearm is a firearm-enhanced version of the base offense of aggravated battery." Def. Br. 5. But as the People explained in their opening brief, this argument fails because the relevant "base offense" is "aggravated battery causing great bodily harm," and aggravated battery with a firearm is not an "enhanced" version of this offense because it does not encompass the same elements. Peo. Br. 11-13. Both as a matter of logic and under the dictionary definition, an "aggravated or enhanced version of the offense" must have the same elements as the base offense and add an aggravating circumstance. *See Black's Law Dictionary* 75 (9th ed. 2009) (an "aggravated" crime is one "made worse or more serious by circumstances such as

violence, the presence of a deadly weapon, or the intent to commit another crime"); *id.* at 277 (defining "aggravating circumstance" as "[a] fact or situation that increases the degree of liability or culpability for a criminal act"). Defendant offers no sensible alternative interpretation of this statutory language.

Defendant's various contentions that the People's construction of the statute produces "absurd" consequences, s*ee* Def. Br. 7-8 (People's argument means "there can never be an aggravated or enhanced version of" an offense, which is "absurd"); Def. Br. 10 (People's interpretation of statute "would effectively undo the 2007 amendment" to the statute, which is "absurd to imagine"), rest on a misapprehension of the People's argument. Contrary to defendant's claim, the People do not maintain that "there can never be an aggravated or enhanced version of any offense," Def. Br. 10. Rather, as discussed, an "aggravated or enhanced" version of an offense consists of the base offense plus the addition of one or more aggravating factors.

Proper application of the People's definition of "aggravated or enhanced version of the offense" also defeats defendant's claim that the People's "interpretation would effectively undo the 2007 amendment" by permitting armed violence to be predicated on "criminal sexual assault, kidnapping, robbery, and vehicular hijacking," *see* Def. Br. 10. Those crimes are excluded as part of the second category because, among other things, they exist in "aggravated or enhanced" forms that include "the possession . . . of a dangerous weapon" as an element. *See* 720 ILCS 5/10-2(a)(6) (2014) ("A person commits the offense of aggravated kidnap[p]ing when he or she . . . commits the offense of kidnap[p]ing while armed with a firearm"); 720 ILCS 5/11-1.30(a)(8) (2014) ("A person commits aggravated criminal sexual

assault if that person commits criminal sexual assault and . . . the person is armed with a firearm"); 720 ILCS 5/18-2(a)(2) (2014) ("A person commits armed robbery when he or she violates Section 18-1 [(Robbery; aggravated robbery)]; and . . . he or she . . . is . . . armed with a firearm"); 720 ILCS 5/18-4(a)(4) (2014) ("A person commits aggravated vehicular hijacking when he or she violates Section 18-3 [(Vehicular hijacking)]; and . . . he or she . . . is . . . armed with a firearm").

Defendant is also mistaken when he asserts that, under the People's theory, "aggravated battery causing great bodily harm could still serve as a predicate for armed violence" even if there were "[a] version of aggravated battery causing great bodily harm with the additional element of 'the possession or use of a dangerous weapon,'" Def. Br. 7-8. In that counterfactual scenario, there would exist an "aggravated or enhanced" form of aggravated battery causing great bodily harm that included use of a firearm as an element, and aggravated battery causing great bodily harm would thus fall within the second category of excluded offenses. The People have simply argued the logical converse. Because there is no crime in the Code that includes both "great bodily harm" and "the possession or use of a dangerous weapon" as aggravating factors, aggravated battery causing great bodily harm is *not* an offense that "makes the possession or use of a dangerous weapon . . . an element of . . . an aggravated or enhanced version of the offense," 720 ILCS 5/33A-2(b), and it is therefore a proper predicate for armed violence.

The appellate court's conclusion to the contrary should be reversed, and petitioner's conviction for armed violence reinstated.

II. Defendant Is Not Entitled to Further Post-Trial Proceedings Because He Cannot Demonstrate that Post-Trial Counsel's Alleged Deficiencies Prejudiced Him.

In his cross-appeal, defendant asserts that he is entitled to a new hearing on his post-trial motion alleging ineffective assistance of trial counsel because post-trial counsel was ineffective in presenting that motion. Defendant concedes that he cannot demonstrate that he was prejudiced by post-trial counsel's allegedly deficient performance, Def. Br. 20 ("[defendant] cannot possibly show prejudice"), and the appellate court rejected his ineffective assistance claim on that basis, A8 ("We need not address whether the performance was objectively unreasonable, as we can dispose of the defendant's claim because he suffered no prejudice."). Instead, he argues that he should not have to make such a showing.

Defendant's argument should be rejected. In nearly every circumstance, the test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), determines whether counsel was constitutionally effective. Under that test, defendant must show both that (1) counsel's performance was deficient; and (2) but for counsel's errors, there is a reasonable probability that the outcome of the proceeding would have been different. *Strickland*, 466 U.S. at 687-88, 694. In the rare instance that counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing," the complete "denial of Sixth Amendment rights . . . makes the adversary process itself presumptively unreliable," and defendant need not demonstrate actual prejudice. *United States v. Cronic*, 466 U.S. 648, 659 (1984). The difference between *Cronic*'s complete failure of adversarial testing and *Strickland*'s deficient performance "is not of degree but of kind." *Bell v. Cone*, 535 U.S. 685, 697 (2002). "[O]nly non-

representation, not poor representation, triggers a presumption of prejudice." *Miller v. Martin*, 481 F.3d 468, 473 (7th Cir. 2007). For *Cronic* to apply, an attorney's failure must be "complete" and pervade the entire proceeding. *Bell,* 535 U.S. at 696-97. Here, post-trial counsel filed a motion to reconsider sentence and orally argued defendant's allegations of ineffective assistance. Because defendant was not completely deprived of post-trial counsel's assistance, *Strickland* should govern, and he should be required to demonstrate prejudice.[2]

Defendant suggests that *Cronic* should apply because he was entitled to an evidentiary hearing on his claim of ineffective assistance of trial counsel, and his post-trial attorney deprived him of that hearing. *See* Def. Br. 14 ("[Defendant's] *Krankel* claims were advanced to the second stage, a post-trial evidentiary hearing, and he was entitled to effective representation of counsel at the adversarial evidentiary hearing[.]"). Defendant relies on *Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000), which held that *Cronic* applies if counsel's failures deprived a defendant of a key procedure to which he is constitutionally entitled (there, a direct appeal). A presumption of prejudice is proper under such circumstances because counsel's deficiency has led to a "denial of the entire judicial proceeding itself." *Id.*

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[2] Phrased in the alternative, defendant argues that "[i]f this Court upholds the Appellate Court's ruling and declines to apply the *Cronic* test, this Court should find that [defendant] did not receive the effective assistance of counsel under *Strickland*, and the requirement to show prejudice should be relaxed." Def. Br. 15. But petitioner provides no authority for a new, "relaxed" *Strickland* standard, and his argument is indistinguishable from a contention that prejudice should be presumed under *Cronic*. Furthermore, to the extent that defendant now seeks to rely on *Strickland*, he raised no such argument below, *see* A8 (noting that defendant "failed to address" *Strickland*'s prejudice prong, instead "arguing only that he met his burden under the *Cronic* standard"), and it is therefore forfeited, *e.g.*, *Wisam 1, Inc. v. Ill. Liquor Control Com'n*, 2014 IL 116173, ¶ 23.

This argument fails, however, because defendant was not entitled to an evidentiary hearing. Contrary to his contention, post-trial counsel was *not* appointed pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984), and the trial court never determined that a full-fledged evidentiary hearing was warranted.[3] *See* Def. Br. 18 (stating that "counsel was appointed to represent [defendant] and present his claims of ineffective assistance of counsel at an adversarial, evidentiary hearing"). *Krankel* and its progeny established a procedure for evaluating whether a defendant's post-trial allegations of ineffective assistance of trial counsel have sufficient merit to warrant the appointment of a new attorney. *See People v. Moore*, 207 Ill.2d 68, 77-78 (2003). If a trial judge finds, on review of the allegations, "that the claim lacks merit or pertains only to matters of trial strategy, then the court need not appoint counsel and may deny the *pro se* motion," but if "the allegations show possible neglect of the case, new counsel should be appointed." *Id.* at 78.

Petitioner's post-trial attorney was not appointed because defendant's allegations were deemed sufficiently meritorious under this test. Rather, at the conclusion of defendant's sentencing hearing, both defendant and his trial counsel expressed to the judge that their relationship had broken down, and the court appointed the public defender for all future proceedings, including the filing of a motion to reconsider sentence. C240. Representing petitioner as to his allegations of ineffective assistance was not even

[3] In their Appellee's Brief in the appellate court, the People accepted defendant's representation that counsel was appointed pursuant to *Krankel*, and argued only that "*Krankel* counsel" was not ineffective. As appellee on this issue, however, the People may support the appellate court's judgment on any basis appearing in the record. *See*, *e.g.*, *People v. Denson*, 2014 IL 116231, ¶ 17 ("a prevailing party may defend its judgment on any basis appearing in the record").

contemplated at this time, as the trial judge had stated (erroneously) that defendant's ineffective-assistance allegations were not properly before him. C232-35. Thus, it is not the case, as defendant asserts, that his "*Krankel* claims were advanced to the second stage, a post-trial evidentiary hearing." *See* Def. Br. 14.

The trial judge later recognized his error in categorically rejecting petitioner's contentions at the post-trial stage, *see Moore*, 207 Ill. 2d at 74, 77-79 (trial court erred by failing to consider post-trial allegations of ineffective assistance and stating that issues instead should be pursued on appeal), and set a hearing at which "the defendant's pro se letter/motion [would] be reviewed by the court," C247. At the ensuing hearing, petitioner was entitled to, and he received, a threshold *Krankel* determination on the merits of his claim. The trial court found that defendant had failed to sustain his burden to make a threshold showing of *Strickland* prejudice.

Defendant asserts that "if the ruling of the Appellate Court is allowed to stand, [defendant] will have received a lower standard of representation than that afforded to postconviction petitioners," Def. Br. 21-22, but defendant fared no worse than a pro se postconviction petitioner who raises an ineffective assistance claim and fails to support it. A postconviction petitioner is entitled to counsel only if his pro se petition survives summary dismissal, *see* 725 ILCS 5/122-4 (2014), a procedure that is analogous to *Krankel*'s preliminary review of a defendant's post-trial allegations. Petitioner's post-trial letter to the court suffered from the same deficiencies as a postconviction petition alleging ineffective assistance for failure to investigate and call witnesses that neglects to name the witnesses or describe their testimony. Such a petition is subject to summary dismissal, *see People v.*

Denton, 227 Ill. 2d 247, 254-55 (2008) (failure to attach affidavits or explain their absence merits summary dismissal), without the appointment of counsel.

Furthermore, once counsel is appointed in the postconviction context, he need provide only "reasonable assistance." *People v. Greer*, 212 Ill. 2d 192, 203-04 (2004). Here, because the "posttrial motion [is] a critical part of the criminal proceeding," post-trial counsel is held to a higher standard of representation that of *Strickland*. *See People v. Abdullah*, 336 Ill. App. 3d 940, 950 (4th Dist. 2002). Even applying *Strickland*'s more demanding standard, petitioner has failed to demonstrate that his post-trial counsel was ineffective.

Thus, defendant is not entitled to further proceedings on his post-trial motion, and this Court should deny a remand.

CONCLUSION

This Court should reverse the judgment of the Illinois Appellate Court, Fifth District, vacating defendant's armed violence conviction; reinstate the judgment of the Circuit Court of St. Clair County; and deny defendant's request for further post-trial proceedings.

January 12, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is twelve pages.

/s/ Erin M. O'Connell
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CERTIFICATE OF FILING AND SERVICE

The undersigned certifies that on January 12, 2016, the foregoing **Reply and Cross-Appellee's Brief of Plaintiff-Appellant People of the State of Illinois** was filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, and copies were served upon the following, by placement in the United States mail at 100 West Randolph Street, Chicago, Illinois 60601, in envelopes bearing sufficient first-class postage:

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Additionally, upon its acceptance by the Court's electronic filing system, the undersigned will mail twelve e-stamped copies of the brief to the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois 62701.

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