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2012 IL App (3d) 100239-U

Order filed March 19, 2012

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 13th Judicial Circuit,
Plaintiff-Appellee,)	La Salle County, Illinois,
)	
v.)	Appeal No. 3-10-0239
)	Circuit No. 09-CF-330
)	
JUSTIN L. COVERT,)	Honorable
)	Cynthia M. Raccuglia,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Presiding Justice Schmidt and Justice McDade concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court failed to conduct a proper inquiry into the defendant's posttrial claims of ineffective assistance of counsel; thus, the matter must be remanded with instructions to the trial court to conduct a proper inquiry under *People v. Krankel*, 102 Ill. 2d 181 (1984) and *People v. Baltimore*, 292 Ill. App. 3d 159 (1997).
- ¶ 2 Following a jury trial, the defendant, Justin L. Covert, was found guilty of one count of burglary and was sentenced to a prison sentence of 15 years. He does not appeal his conviction, nor his sentence. He maintains that the trial court erred in failing to conduct an inquiry into his

posttrial allegations of ineffective assistance of trial counsel. *People v. Krankel*, 102 Ill. 2d 181, 189 (1984); *People v. Baltimore*, 292 Ill. App. 3d 159 (1997). The defendant seeks a remand to the circuit court for a proper consideration of his posttrial allegations of ineffective assistance of trial counsel. We grant the defendant's request and remand this matter for further proceedings consistent with this order.

¶ 3

FACTS

¶ 4 The defendant was charged with burglary of the garage of Mark and Leigh Jilbert on the evening of July 9, 2009. Mark Jilbert testified that at approximately 11:45 p.m. that evening, he awoke to the sounds of a home alarm which was set to be activated by a motion sensor in his garage. Jilbert left the house and went toward the garage to investigate. While walking along the exterior of the house, toward the front of the garage, he heard a loud noise near the main garage door. He then moved toward the side door of the garage. He saw the door open and the defendant coming out of the garage. Jilbert grabbed the defendant and the two struggled across the lawn in front of the house. Eventually, the defendant was subdued by Jilbert until deputies arrived.

¶ 5 Leigh Jilbert testified that she observed Mark and the defendant near the garage and shouted to her daughter to call 911. She also told her daughter to get help from their next door neighbor, Doug Lauzon.

¶ 6 Lauzon testified that he woke up to the sounds of a disturbance at the Jilbert house. He heard shouting, looked out his bedroom window, and saw Mark confronting somebody, although he did not recall if he saw any physical contact. Lauzon went out to see if he could help. When

he arrived, he saw Jilbert holding the defendant on the ground. The police arrived shortly thereafter.

¶ 7 La Salle County Deputy Keith Pinney testified that he arrived at the scene approximately fifteen minutes after being dispatched. When he arrived, he observed that Jilbert had the defendant pinned to the ground. After Pinney arrested the defendant, he inspected the garage and found a dirt bike leaning against the front door of the garage. Jilbert told Pinney that the bike would not have been stored in that location and must have been moved to the spot near the door. Nothing was missing from the garage.

¶ 8 Jilbert also testified that, a few days after the incident, his son found a pry bar under a bush in an empty lot adjacent to the Jilbert property.

¶ 9 The defendant's parents, Kathy and Gary Covert, testified that the defendant had injured his foot and could not walk without crutches on the date of the incident. They also testified that they had been with the defendant until approximately 10:30 p.m. They further testified their backyard was "kitty-corner" from the Jilbert's back yard and that both back yards were adjacent to the same vacant lot. According to the Coverts, children, teenagers, and other people often walked through their backyard and the adjacent vacant lot at all hours of the day and night.

¶ 10 Defense counsel sought court permission to introduce evidence that there were other burglaries in the area, but the trial court denied the request, observing that the admission of such evidence "could go either way."

¶ 11 The jury convicted the defendant of burglary. At the sentencing hearing, the defendant was allowed to make a statement in allocution. The defendant made the following statement to the trial court:

"I would like to say that [defense counsel] didn't fully do everything I could have - he could have used in my defense properly [sic] and argue specific instances to the Jilberts. My father had stuff to say. He wouldn't ask him that.

There was further evidence that was not brought out in the trial that I feel, me, personally, that a jury would have changed their mind."

¶ 12 The trial court's immediate response to the defendant's statement was as follows:

"All right. In order to determine a sentence in this matter it's obvious probation is not an option because it's not allowed in a case such as this.

So the question is how long in prison and in order to make that determination, I need to, in fact, review in length the factors in aggravation and the factors in mitigation ***."

¶ 13 After weighing the aggravating and mitigating factors, the trial court then sentenced the defendant to a term of imprisonment of 15 years. The defendant brought this appeal, challenging only the trial court's failure to inquire into his claim of ineffective assistance.

¶ 14 ANALYSIS

¶ 15 The defendant submits that the matter should be remanded for the trial court to properly inquire into his claim of ineffective assistance of counsel. We agree. The law on this matter is clear. Where the defendant raises a *pro se* posttrial claim of ineffective assistance of counsel, the trial court should examine the factual basis of the claim, and 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. *People v. Moore*, 207 Ill. 2d 68, 77-78 (2004); *Krankel*, 102 Ill. 2d at 189. On appeal, the operative concern for the reviewing court is whether the trial court "conducted an adequate inquiry into the defendant's *pro se* allegations of ineffective assistance of counsel." *People v. Bomar*, 405 Ill. App. 3d 139, 147 (2010) (quoting *Moore*, 207 Ill. 2d at 78). We review *de novo* the question of whether the trial court erred in the manner in which it addressed the defendant's posttrial claims of ineffective assistance of counsel. *Bomar*, 405 Ill. App. 3d at 147.

¶ 16 A defendant's *pro se* claims of ineffective assistance of counsel following trial must receive "at least some investigation." *People v. Barnes*, 364 Ill. App. 3d 888, 899 (2006). An adequate examination of the *pro se* claim can include *any* of the following: (1) the trial court may ask defense counsel about the circumstances surrounding the claim; (2) the trial court may ask the defendant questions about his claim; or (3) the trial court may address the defendant's claim based upon its personal knowledge of defense counsel's performance at the trial, or the facial insufficiency of the defendant's allegations. *Moore*, 207 Ill. 2d at 78-79. Only if the trial court's inquiry reveals no legitimate allegations of ineffectiveness against defense counsel may the trial court reject outright the defendant's allegations. *People v. Jackson*, 131 Ill. App. 3d 128, 139 (1985) ("It seems elementary that during the evaluation of defendant's claims, some interchange between the court and the defendant's counsel must take place.").

¶ 17 Where, however, there is no inquiry and there is no indication that the trial court gave adequate consideration to the claim, the only appropriate action for the appellate court is to remand the matter so that the trial court can conduct a proper inquiry. *Moore*, 207 Ill. 2d at 79;

Baltimore, 292 Ill. App. 3d at 165; *Bomar*, 405 Ill. App. 3d at 147. Here, there was no inquiry and no indication that the trial court gave *any* consideration to the claim. The only appropriate action, therefore, is for this court to remand the matter so that the trial court can conduct a proper inquiry.

¶ 18 The State maintains that the trial court must have based its dismissal of the defendant's ineffective assistance claims on its personal knowledge of defense counsel's performance. See *Moore*, 207 Ill. 2d at 78-79. While we would like to assume that the trial court dismissed the defendant's claim based upon a thoughtful analysis, the record here does not allow us to engage in such speculation. In fact, the record revealed a complete lack of any response or acknowledgment by the trial court of the defendant's claim. Based upon the failure of the trial court to even acknowledge the defendant's claim, it would be inappropriate for this court to speculate as to the trial court's analysis or lack thereof. *Bomar*, 405 Ill. App. 3d at 148.

¶ 19 The State also maintains that remand for a proper inquiry is unnecessary because the defendant's allegations of ineffective assistance were facially insufficient. *People v. Ford*, 368 Ill. App. 3d 271, 276 (2006). We cannot agree. In *Ford*, the appellate court held that no *Krankel* violation had occurred because "the trial court allowed defendant to present his complaints and responded to them in open court." *Id.* In dicta, the appellate court then commented that its review of the record allowed it to conclude that the defendant's allegations were facially insufficient. *Id.* Given that the trial court in the instant matter, unlike in *Ford*, completely failed to address the defendant's allegations, we cannot engage in an independent analysis of the record to determine the merits of the defendant's claims. That is what a *Krankel* inquiry is supposed to

determine. *Moore*, 207 Ill. 2d at 79; *Baltimore*, 292 Ill. App. 3d at 165; *Bomar*, 405 Ill. App. 3d at 147.

¶ 20 The State lastly maintains that, even if the trial court erred in not conducting an inquiry into the defendant's *pro se* allegations of ineffective assistance of counsel as required under well-settled precedent, the error was nonetheless harmless beyond a reasonable doubt. See *People v. Garland*, 254 Ill. App. 3d 827, 834 (1993); *People v. Traina*, 230 Ill. App. 3d 149, 154 (1992) (error is harmless where a reviewing court can safely conclude that a trial, without the error, would have produced the same result). The State points out that the evidence of guilt was overwhelming and the sentence was not disputed. We agree with those two observations. Nonetheless, we cannot agree that the State has established that the error was harmless beyond a reasonable doubt. While the State has correctly stated the law regarding harmless error, it ignores our supreme court's admonishment in *Moore* that, where the trial court had made no inquiry into the defendant's ineffective assistance of counsel claims, "it is simply not possible to conclude that the trial court's failure to conduct an inquiry into those allegations was harmless beyond a reasonable doubt." *Moore*, 207 Ill. 2d at 81. The fact that it is difficult to determine from the record whether the defendant's claim of ineffective assistance has any merit only compounds the trial court's error.

¶ 21

CONCLUSION

¶ 22 The trial court failed to conduct a proper inquiry into the defendant's posttrial claims of ineffective assistance of counsel. The cause is, therefore, remanded to the trial court with directions to the trial judge to conduct a proper inquiry into the defendant's posttrial claims of ineffective assistance of counsel.

¶ 23 Cause remanded with directions.