

that the circuit court erred in failing to *sua sponte* conduct a posttrial inquiry into his claim of ineffective assistance of counsel. For the following reasons, we affirm the judgment of the circuit court.

¶ 3 The following evidence was adduced at the defendant's second jury trial. Brian Roberson testified that he was working at the MotoMart on September 30, 2008, at approximately 2 p.m. when he observed the defendant take a bottle of MD 20/20 ("Mad Dog") from the cooler, walk to the end of the aisle, and tuck it in his pants. Roberson testified that because he was stocking the cooler at the time, he was only three to four feet away from the defendant, and thus had a clear view of the defendant taking the Mad Dog out of the cooler. Roberson stated that he did not see Jennifer Livingston, the woman with the defendant, open the cooler. He observed the defendant and Livingston turn and walk toward the counter, where they purchased some items. Roberson did not observe the defendant remove the Mad Dog from his pants or pay for it. Roberson then confirmed with the cashiers that the defendant had not paid for the Mad Dog, and called the police. Roberson watched the defendant through the store window as he walked to the bus stop across the street, where the police arrested him.

¶ 4 Michael Gabel testified that he was working as the cashier in the MotoMart that day, and that the defendant and Livingston purchased two sodas using a LINK card. He stated that the defendant did not appear nervous, evasive, or to be walking differently. Gabel did not sell the defendant or Livingston any Mad Dog.

¶ 5 Detective Matt Eiskant testified that he responded to the dispatch's report of a retail theft. He found the defendant, who matched the description given by Roberson, at the bus stop. When Eiskant asked the defendant for the Mad Dog, the defendant responded that it was in Livingston's diaper bag, but that he had paid for it. The defendant produced a receipt, which Eiskant examined and knew it was not a receipt for the Mad Dog. Eiskant testified

that the bottle was cold, as though it had recently been in a cooler. Another officer took the defendant back to MotoMart, where Roberson identified him. Eiskant testified that he obtained a statement from Livingston, stating that he sought to determine whether Livingston had some accountability in the theft because the Mad Dog was found in her bag. However, after reading the defendant his *Miranda* rights, Eiskant testified that the defendant "took all responsibility" for stealing the Mad Dog. Eiskant stated that he then took the defendant into custody. Livingston gave another statement at the police station, which was videotaped.

¶ 6 In a letter filed in the defendant's case on November 3, 2008, Livingston stated that the incident was "[her] mess up" and that the defendant had only confessed because she was already on probation, and she had feared that their child would be taken into protective custody. Livingston also called the Belleville police station in November 2008, stating that she had stolen the alcohol from the MotoMart and had given a false witness statement in her September interview.

¶ 7 We now turn to the procedural timeline of this case, which bears the substance of the instant appeal. As stated, this appeal results from the defendant's retrial. His first trial occurred on June 8, 2009. Before that trial began, the State presented a motion *in limine*, stating that if Livingston testified, her videotaped interview would be used for impeachment purposes. At a pretrial hearing, the defendant's counsel, Andrew Liefer, said it was doubtful that Livingston would testify. At trial, Livingston was not called to testify, but Liefer suggested Livingston's guilt through the questioning of the State's witnesses and in his closing argument. The defendant was found guilty of retail theft and burglary.

¶ 8 On June 10, June 16, and July 29, 2009, the defendant wrote letters to the court, complaining that Liefer should have called Livingston to testify that she had stolen the Mad Dog. He attached Livingston's November 3, 2008, letter and proof of her November 2008 phone call. Separately, Liefer filed a motion for new trial on July 10, 2009.

¶ 9 On July 28, 2009, a posttrial hearing was held in which the trial judge, John Baricevic, took the defendant's letters as motions. The defendant agreed that his motions alleged an unfair trial. The defendant stated that he had told Liefer that he wanted Livingston to testify. Judge Baricevic stated that he had reviewed the defendant's motion, and the reason he had asked the defendant to verbalize his arguments at this hearing was to determine whether they alleged incompetency of counsel, "which may have raised an argument of whether a new attorney was needed for this particular motion." Judge Baricevic stated that based on the written *pro se* motions and the defendant's oral comments, this was disagreement over trial strategy, and thus he found: "[S]eparate counsel is not necessary to address these issues that [the defendant] raises. *** Pursuant to my finding that they are trial strategy, I'll deny [the defendant's] *pro se* motions ***." The court then sentenced the defendant. The defendant appealed, and on June 3, 2011, this court reversed his conviction due to a faulty jury instruction and remanded the case for a new trial.

¶ 10 While awaiting retrial, the defendant again wrote to the court. On August 12, 2011, the defendant wrote a letter alleging judicial misconduct and ineffective assistance of counsel, stating that based on his first trial, he feared a conspiracy regarding his retrial in which his appointed counsel would end up "in bed" with the prosecutor and judge, when "all evidence points to Jennifer J. Livingston." (Emphasis omitted.) The defendant wrote again on August 24, 2011, reiterating his claims regarding Liefer's counsel and the evidence against Livingston.

¶ 11 At a pretrial hearing on August 29, 2011, Judge Baricevic asked the defendant about the allegations in his letters. The defendant responded that the attorneys and the judge had overlooked the improper jury instruction. Judge Baricevic agreed and told the defendant that it was for this reason that he had received a new trial, and that regarding his conspiracy allegation, there had been no communications between himself and the attorneys. The

defendant noted that he had remained incarcerated while waiting for a new trial, on a charge for which he should not have been adjudged guilty. Judge Baricevic responded that there was no question that sufficient evidence was presented in the first trial to find the defendant guilty, but "maybe the evidence will be different this time." Judge Baricevic then found that there was "nothing in [the defendant's complaints] that would suggest that Mr. Liefer has broken any canons of ethics or is incompetent."

¶ 12 On October 27, 2011, the State filed a motion *in limine* stating that if Livingston testified, her videotaped interview would be used for impeachment purposes. The defendant's second trial began October 31, 2011, with the State proceeding only on one burglary charge. The State called all its witnesses and rested; the defendant's counsel called no witnesses and rested.

¶ 13 On November 1, 2011, outside the presence of the jury, Judge Baricevic informed the parties that he had received a *pro se* letter from the defendant. Judge Baricevic told the defendant that he had not read it, because defendant was represented by counsel, but he had scanned it and determined that the content concerned Liefer continuing as the defendant's attorney.¹ The defendant responded that he wanted Liefer to continue as his attorney, but also wanted him to present the evidence against Livingston to the jury. Judge Baricevic responded that an attorney has to consider a number of legal principles when representing a client, regarding "admissibility of evidence on whether evidence is relevant or not, the issues of trying to raise evidence that would be ruled inappropriate before the jury." Judge Baricevic stated, "There's an issue of accountability that even if what you're saying is true,

¹The defendant's letter contested the evidence presented against him and claimed, "[I was] forced to have Andrew Liefer to represent me as well as you Judge who on Aug 29th 2011 said that you thought I was guilty based on the evidence in my last trial but I got proof that I'm not guilty and my attorney won't get it out ***." (Emphasis omitted.)

you may still be guilty if certain elements can be proven." Judge Baricevic noted that "there are some things which a lawyer is obligated to make decisions of during a trial," and though the defendant had the right to decide whether or not he would testify at trial, "some decisions about presenting evidence are Mr. Liefer's decision not yours." Judge Baricevic informed the defendant that if he chose to represent himself, he could make those decisions. When asked whether he wanted Liefer to remain on the case, the defendant responded, "I got no choice really." Judge Baricevic informed the defendant that his letter would be put in the file, so if he felt that the court's action on his letter was inappropriate, he would have the right to appeal. The closing arguments were then presented to the jury. As he had at the first trial, Liefer suggested that Livingston was the guilty party, as she was the one in control of the bag containing the stolen alcohol. The jury found the defendant guilty of burglary.

¶ 14 Liefer filed a posttrial motion requesting an arrest of judgment or new trial, which was heard at the defendant's November 8, 2011, sentencing hearing. The motion was denied, and the court sentenced the defendant. The defendant did not reiterate his complaints regarding Liefer's counsel during the hearing, and he did not file any further *pro se* pleadings.

¶ 15 On appeal, the defendant asserts the circuit court erred in failing to *sua sponte* conduct a posttrial inquiry into his *pro se* claims of ineffective assistance of counsel, pursuant to the rule in *People v. Krankel*, 102 Ill. 2d 181 (1984). The defendant asserts his letters of August 12, August 24, and November 1, 2011, triggered a duty on the part of the trial judge to reconsider his claims of his counsel's ineffectiveness at his posttrial proceedings. We disagree.

¶ 16 We begin with a review of the requirements and procedure of a *Krankel* hearing. Under *Krankel*, a *pro se* posttrial motion alleging ineffective assistance of counsel can trigger a trial court's obligation to appoint new counsel and set the claims for a hearing. See *Krankel*, 102 Ill. 2d at 189. However, it is well established that when a defendant presents

a *pro se* posttrial motion alleging ineffective assistance of counsel, the trial court is not automatically required to appoint new counsel to assist the defendant. *People v. Moore*, 207 Ill. 2d 68, 77 (2003). Rather, the trial court should first examine the factual bases of the defendant's claims. *Id.* at 77-78. If the trial court determines that the claims lack merit or pertain only to matters of trial strategy, then the court does not need to appoint new counsel and it may deny the defendant's *pro se* motion; however, if the claims show that the trial counsel may have neglected the case, new counsel should be appointed. *Id.* at 78. The court may make this assessment through a discussion with the defendant, or may base its evaluation of the allegations on its knowledge of defense counsel's performance at trial and the insufficiency of the allegations on their face. *Id.* at 78-79. The main concern for the reviewing court in these types of cases is whether the trial court conducted an adequate inquiry into the defendant's *pro se* allegations of ineffective assistance. *Id.* at 78.

¶ 17 The defendant did not file a posttrial motion claiming ineffective assistance of counsel. The defendant's contention is that his *pretrial* allegations triggered the court's obligation to conduct a *Krankel* hearing. This is refuted by the Illinois Supreme Court's decision in *People v. Jocko*, which held that a circuit court is not required to conduct a *Krankel* inquiry, prior to trial, into a defendant's *pro se* allegations of ineffective assistance of counsel. 239 Ill. 2d 87, 93 (2010). *Jocko* explains that while there is "nothing to prevent" a circuit court from addressing a *pretrial pro se* claim at the conclusion of the trial, *Krankel* is inapposite in the context of a *pretrial* assertion of ineffective assistance of counsel.² *Jocko*,

²In so holding, the court noted that under the requirements of *Strickland v. Washington*, a defendant alleging ineffective assistance of counsel must demonstrate " 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *Jocko*, 239 Ill. 2d at 92 (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)). The court reasoned that prior to trial, no outcome

239 Ill. 2d at 92-93. *Jocko*, then, establishes that a trial judge's revisiting of a defendant's pretrial assertions of ineffective assistance of counsel is discretionary. *Id.* at 93. Further, the appellate court has found that the supreme court has "explicitly applied *Krankel* only to posttrial motions." *People v. Washington*, 2012 IL App (2d) 101287, ¶ 19. As such, we reject the defendant's assertion that the trial court was required to revisit his pretrial *pro se* filings during his posttrial hearing.

¶ 18 Furthermore, we find that the trial court's decision not to revisit the defendant's assertion was well founded. The appellate court has held that decisions regarding what witnesses to call and what evidence to present are generally matters of trial strategy that cannot form the basis of an ineffective assistance of counsel claim, and where the defendant's *pro se* posttrial ineffective assistance claims address only matters of trial strategy, the court may dismiss those claims without a *Krankel* inquiry. *People v. Ward*, 371 Ill. App. 3d 382, 433-34 (2007). Thus, it appears that even if the trial court in this instance had chosen to *sua sponte* return to the issue at the posttrial hearing, it could properly have dismissed the claim based on its assessment that this was trial strategy: an evaluation founded on its multiple discussions with the defendant, its knowledge of defense counsel's performance at trial, and the insufficiency of the allegations on their face. See *Moore*, 207 Ill. 2d at 78-79. Indeed, the record reflects that the same relief that the defendant now seeks—a *Krankel* inquiry—was conducted after the defendant's first trial, and his claim of ineffective assistance was properly determined to be his counsel's trial strategy based on those facts. The defendant's second trial presented nearly identical facts, and his complaint regarding his attorney did not change. The trial court, with its substantial knowledge of the facts of this case and the insufficiency of the defendant's repeated claim, was not required to again evaluate the defendant's allegations.

has been determined; thus, counsel's errors cannot be analyzed by the court to determine whether they affected that outcome. *Jocko*, 239 Ill. 2d at 92.

We note that the main concern for the reviewing court is whether the trial court conducted an "adequate inquiry" into the defendant's allegations. *Moore*, 207 Ill. 2d at 78. The record before us certainly demonstrates this to be the case, and we find the trial court's decision not to inquire further to be wholly reasonable.

¶ 19 For the foregoing reasons, we affirm the judgment of the circuit court of St. Clair County.

¶ 20 Affirmed.