

Nos. 1-12-2565, 1-13-1621 (cons.)

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 11 CR 5151
)	
RENE DOMINGUEZ,)	Honorable
)	James M. Obbish,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE DELORT delivered the judgment of the court.
Justices Cunningham and Connors concurred in the judgment.

ORDER

¶ 1 **Held:** The trial court erred when it denied defendant’s posttrial claim of ineffective assistance of counsel without conducting a sufficient preliminary inquiry into the factual allegations of his claim under *People v. Krankel*, 102 Ill. 2d 181 (1984).

¶ 2 Following a bench trial, defendant Rene Dominguez was convicted of kidnapping pursuant to section 10-1(a)(1) of the Criminal Code of 1961 (the Code) (720 ILCS 5/10-1(a)(1) (West 2010)), aggravated domestic battery pursuant to section 12-3.3 (a-5) of the Code (720 ILCS 5/12-3.3(a-5) (West 2010)), and domestic battery pursuant to 12-3.2(a)(1) of the Code (720

ILCS 5/12-3.2(a)(1) (West 2010)). Because of his criminal history, defendant was convicted of two Class X 15-year prison terms for the kidnapping and aggravated domestic battery convictions and a 3-year term for the domestic battery conviction to run concurrently. On appeal, defendant contends that the trial court failed to inquire into his *pro se* posttrial claim of ineffective assistance of counsel pursuant to *People v. Krankel* 102 Ill. 2d 181 (1984)). We remand the cause for further proceedings.

¶ 3 At trial, Melissa Castanon testified that on March 8, 2011 about 4 a.m., defendant arrived at her home at 4949 South Artesian. Defendant was her boyfriend and the father of her youngest child, but she “was trying to have nothing to do with him at all.” Defendant asked Castanon whether he could come inside her home. She let defendant in and he spent the night. On the morning of March 9, 2011, she received a phone call from a man. Defendant asked who was calling and the two argued. That evening Castanon received a phone call from another man, and defendant became angry. Later that night, while she was in the kitchen, defendant grabbed Castanon and carried her to the bedroom. He choked her until she felt like she was “going to pass out” and then “banged” her head against the wall a few times. He then punched her on the right side of her face twice before leaving to get duct tape from another room in the house. He taped her mouth, wrists, and ankles, and told her to lie on the floor. Defendant struck Castanon’s legs with an extension cord. He then went to the kitchen and got a knife. He cut the tape off of her and ordered her to lie down on the bed. Defendant told her she could not leave the house until her face was healed. He again stayed at her home for the night.

¶ 4 On March 11, 2011, defendant told Castanon that he did not want her to take her son to school and instructed her to give him her phone and keys. She eventually took her son to school,

and used the office phone to call the police. The police arrived at the school, and escorted Castanon back home.

¶ 5 Officer John O'Connor testified that he observed bruises on Castanon's "forehead, neck, and a part of her body covered by a sweatshirt." When he arrived at Castanon's home, he observed defendant fleeing out the side door running towards the alley. He pursued defendant on foot, but defendant was arrested about a block away by other officers.

¶ 6 The trial court found defendant guilty of kidnapping, aggravated domestic battery, domestic battery, and unlawful restraint. The court merged unlawful restraint into kidnapping and sentenced defendant as a Class X offender to 15 years for kidnapping and 15 years for aggravated domestic battery. The court sentenced defendant to three years for domestic battery.

¶ 7 Defendant filed a *pro se* motion for a new trial in which he alleged that a new trial was warranted because trial counsel: (1) failed to call two witnesses, "Guadalupe Mendoza and Bety [sic]" to testify that he was living with Melissa when arrested; (2) failed to object to his mandatory Class X sentence; (3) misled him into trial by telling him that the prosecution "did not have evidence on him" and not showing him the discovery; and, (4) did not call his original attorney to testify that Castanon told him that defendant was innocent of sexual assault, kidnapping, and unlawful restraint. Defendant also alleged that his trial counsel failed to investigate claims that the State threatened Castanon for claiming that he was innocent.

¶ 8 The clerk of the circuit court marked defendant's *pro se* motion for a new trial as "filed" on August 16, 2012. Defendant also filed a *pro se* notice of appeal (No. 1-12-2565), which the court previously marked as "filed" on August 13, 2012. On May 8, 2013, the court heard defendant's motion for a new trial. The court commented that the motion was received on August 9, 2012 and placed on the court's call on August 23, 2012 but "that never happened."

The court acknowledged that it read defendant's motion and stated that it "seem[ed] to be primarily addressed at the allegations of what the Defendant would perceived to be ineffective assistance of counsel by his [trial] attorney." The court then stated that it would have addressed the motion with defendant and his trial counsel in a *Krankel* hearing, "had it been appropriately placed on call" on August 23, 2012. The court did not conduct a hearing because defendant was incarcerated and his private counsel was not present. The court denied defendant's *pro se* motion for a new trial. Defendant filed a second notice of appeal. (No. 1-13-1621).

¶ 9 In this case, defendant filed two notices of appeal from the same conviction. Although the parties have raised no issue concerning this court's jurisdiction, a reviewing court has an independent duty to examine its jurisdiction and to dismiss an appeal if jurisdiction is wanting. *People v. Aldama*, 366 Ill. App. 3d 724, 725 (2006). Supreme Court Rule 606(b) states as follows:

"When a timely posttrial or postsentencing motion directed against the judgment has been filed ***, any notice of appeal filed before the entry of the order disposing of all pending postjudgment motions shall have no effect and shall be stricken by the trial court. *** This rule applies whether the timely post-judgment motion was filed before or after the date on which the notice of appeal was filed." Ill. S. Ct. R. 606(b) (eff. Mar. 20, 2009).

In this case, defendant filed a *pro se* motion for new trial on August 16, 2012 and his *pro se* notice of appeal on August 13, 2012. Because defendant's notice of appeal was filed before the court ruled on his motion for a new trial, defendant's notice of appeal had no effect, and we lack jurisdiction in that case. Thus, we dismiss defendant's appeal in No. 1-12-2565.

¶ 10 In appeal No. 1-13-1621, defendant contends that the trial court failed to inquire into his *pro se* posttrial claim of ineffective assistance of counsel pursuant to *Krankel* and that the case should be remanded so the trial court can conduct a proper preliminary inquiry. The State

counters that remand is not warranted because defendant was represented by privately retained counsel, his claim of ineffective assistance of counsel lacked merit, and any trial court error was harmless beyond a reasonable doubt.

¶ 11 Pursuant to *Krankel*, when a defendant presents a *pro se* posttrial claim of ineffective assistance of counsel, the trial court must conduct some type of preliminary inquiry into the factual basis to determine if it shows possible neglect of the case warranting appointment of new counsel. *People v. Patrick*, 2011 IL 111666, ¶ 43. A trial court may conduct this preliminary inquiry by: (1) questioning trial counsel about the facts and circumstances surrounding defendant's allegations; (2) requesting more specific information from defendant; or (3) relying on its own knowledge of defense counsel's performance at trial and the insufficiency of defendant's allegations on their face. *People v. Moore*, 207 Ill. 2d 68, 78-79 (2003). If, after a preliminary investigation into the allegations, the 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 motion. *Id.* at 78. However, if the allegations show possible neglect of the case, the trial court should appoint new counsel to argue defendant's ineffective assistance claims. *Id.* "[T]he operative concern for the reviewing court is whether the trial court conducted an adequate inquiry into defendant's *pro se* allegations of ineffective assistance of counsel." *Id.* If the court fails to conduct the necessary preliminary examination as to the factual basis of the defendant's allegations, the case must be remanded for the limited purpose of allowing the court to do so. *People v. Remsik-Miller*, 2012 IL App (2d) 100921, ¶ 9. Where the court fails to conduct an inquiry into a defendant's ineffective assistance of counsel claims, we apply a *de novo* standard of review. *People v. Tolefree*, 2011 IL App (1st) 100689, ¶ 25 (citing *Moore*, 207 Ill. 2d at 75).

¶ 12 As a preliminary matter, we address the State’s reliance on *People v. Pecoraro*, 144 Ill. 2d 1 (1991), to argue that *Krankel* does not apply to privately retained counsel. In *Pecoraro*, our supreme court held that the trial court was not required to appoint new counsel pursuant to *Krankel* and alter the attorney-client relationship where the defendant had retained private counsel to represent him both at trial and at the hearings on his posttrial motions. *Id.* at 14-15. However, since *Pecoraro*, our supreme court has implicitly rejected the notion that *Krankel* only applies to appointed counsel. See *People v. Taylor*, 237 Ill. 2d 68, 78 (2010) (Burke, J., specially concurring) (“the majority assumes, without deciding, that *Krankel* applies to privately retained counsel since it addresses the merits of defendant’s claim on a factual basis”). Moreover, this court has stated that it did not believe that *Pecoraro* stood “ ‘for the proposition that a trial court is free to automatically deny a *pro se* request for new counsel simply because the defense counsel who was allegedly ineffective was privately retained.’ ” *People v. Willis*, 2013 IL App (1st) 110233, ¶ 66 (quoting *People v. Johnson*, 227 Ill. App. 3d 800, 810 (1992)). Thus, we reject the State’s contention that *Krankel* does not apply to privately retained counsel.

¶ 13 We find that the trial court erred when it did not conduct a *Krankel* hearing. In this case, defendant’s *pro se* motion for a new trial clearly alleged an ineffective assistance of counsel claim. Once alerted to defendant’s claim, the court was required to inquire into the factual basis of his allegations by conducting an adequate preliminary investigation. *Moore*, 207 Ill. 2d at 78-79. Although the transcript from the hearing shows that the trial court did read defendant’s motion for a new trial, there is no evidence that the court made any type of inquiry into defendant’s ineffective assistance of counsel claims. Instead, the trial court merely noted that although a *Krankel* hearing was appropriate, it could not conduct a hearing because neither defendant nor his counsel were present. We find that a *Krankel* hearing was required in this

case. Accordingly, remand is necessary so that the trial court can conduct a preliminary inquiry into these claims pursuant to *Krankel*.

¶ 14 The State argues that defendant's claim is without merit, and thus should not be remanded. While some of the particular bases listed in the ineffective assistance of counsel motion appear to be meritless, others might conceivably warrant further examination in light of the victim's constantly mutating version of events. Regardless of the ultimate merits of defendant's ineffective assistance of counsel claim, the trial court is not absolved from its duty to conduct a proper preliminary investigation into defendant's claim. *Moore*, 207 Ill. 2d at 79. Although defendant's claims may not be meritorious, the court should have afforded him an opportunity to explain and provide support for his claim. See *People v. Robinson*, 157 Ill. 2d 68, 86 (1993) (holding that the trial court should afford a defendant the opportunity to specify and support his complaints and not "precipitously and prematurely" deny the motion); *People v. Barnes*, 364 Ill. App. 3d 888, 899 (2006) (holding that a defendant's *pro se* claims of ineffective assistance of counsel following trial must receive "at least some investigation."). Although *Krankel* requires only a limited inquiry and can be satisfied in different ways, there must be "some type of inquiry into the underlying factual basis of defendant's *pro se* posttrial claim of ineffective assistance of counsel." *Moore*, 207 Ill. 2d at 79. Thus, defendant's claim may be without merit or pertain to matters of trial strategy; however, the trial court must make that determination after an adequate inquiry. *Id.* at 78.

¶ 15 Alternatively, the State contends that even if the court did err by not performing an adequate inquiry into the allegations of ineffective assistance of counsel, any resultant error was harmless. Specifically, it cites *Moore* arguing that a trial court's decision "may be based upon its own knowledge of defense counsel's performance at trial and the merit of the defendant's

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allegation on their face.” Without an adequate investigation and factual assessment of defendant’s claims on the record “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. Because the operative concern for the reviewing court is whether the trial court conducted an adequate inquiry into the *pro se* defendant’s allegations of ineffective assistance of counsel, we remand this case for the limited purpose of allowing the trial court to conduct the required preliminary investigation. See *Moore*, 207 Ill. 2d at 79.

¶ 16 For the foregoing reasons, in No. 1-12-2565 we dismiss the appeal, and we vacate the denial of defendant’s *pro se* ineffective assistance of counsel motion and remand case No. 1-13-1621 to conduct an inquiry into defendant’s posttrial allegations of ineffective assistance.

¶ 17 No. 1-12-2565, Dismissed.

¶ 18 No. 1-13-1621, Vacated and remanded with directions.