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2014 IL App (3d) 120381-U

Order filed January 9, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2014

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. 3-12-0381
) Circuit No. 07-CF-379
KEITH MACKOWIAK,)
) Honorable
Defendant-Appellant.) H. Chris Ryan, Jr.,
) Judge, Presiding.

PRESIDING JUSTICE LYTTON delivered the judgment of the court.
Justices McDade and Schmidt concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court conducted an adequate inquiry into defendant's posttrial claims of ineffective assistance of counsel. However, we remand the cause for further posttrial proceedings because the trial court did not admonish defendant in compliance with Illinois Supreme Court Rule 401(a).
- ¶ 2 After a jury trial, defendant, Keith Mackowiak, was found guilty of two counts of first degree murder (720 ILCS 5/9-1(a)(1) (West 2006)). The trial court sentenced defendant to two consecutive terms of natural life imprisonment. On appeal, defendant argues that the trial court erred in

conducting a joint hearing on his posttrial motion that both (1) alleged ineffective assistance of counsel and (2) argued for a new trial. Defendant further contends that the court erred in allowing him to proceed *pro se* without admonishing him pursuant to Illinois Supreme Court Rule 401(a) (eff. July 1, 1984). We affirm in part, reverse in part, and remand for further posttrial proceedings.

¶ 3

FACTS

¶ 4 Following a jury trial, defendant was found guilty of two counts of first degree murder. Defendant filed a "Motion for New Trial *pro se* Amendment." At a posttrial hearing, defense counsel stated that he was planning to file a motion for a new trial when defendant filed his *pro se* motion. The trial court had received defendant's *pro se* motion before the hearing and advised defendant that he could not proceed on his motion as long as he was represented by counsel. Defendant responded that he did not know what motions counsel had prepared, and he was not comfortable allowing counsel to present the motions to the court. Counsel showed his motion to defendant, and defendant asked that his motion supplement counsel's motion. The court responded that defendant could only supplement counsel's motion with a claim of ineffective assistance of counsel. The court stated that if defendant wished to terminate his representation by defense counsel, the court would consider defendant's entire *pro se* motion. Defendant terminated counsel's representation, and the court instructed counsel not to file his motion. The court directed defendant to "go ahead and argue your motion for new trial *pro se*."

¶ 5 Defendant argued: (1) he was denied his right to a sanity plea; (2) he received an unfair trial due to prosecutorial misconduct; (3) the State suborned perjury; (4) the trial court erroneously denied his motion to suppress evidence; and (5) he was coerced into retaining counsel because the court did not allow him access to the law library or time to analyze supplemental discovery. Defendant also

argued that counsel was ineffective because he: (1) did not object to the State's prosecutorial misconduct and elicitation of perjured testimony; (2) refused to request that the court excuse two jurors for cause; (3) failed to use evidence revealed in discovery to impeach various witnesses' testimony; (4) presented evidence of defendant's mental health examination by stipulation instead of witness testimony; (5) failed to call blood spatter and crime reconstruction experts to testify; (6) did not explain the lack of fingerprints in certain areas of the victims' home; and (7) did not challenge the inconsistency between the pathologist's testimony and defendant's statements. As a result, defendant asked that the court grant him a new trial.

¶ 6 The State noted that defendant refused to cooperate with his first attorney in the preparation of an insanity defense and did not pursue the issue when he represented himself before trial. Defendant objected, and the court responded that "[i]t's argument of counsel" and allowed the State to proceed. The State said that defendant's other arguments had already been litigated and adopted its previous positions. The State also indicated that defense counsel's decisions were strategic and counsel was "an experienced attorney and did his job and did it well."

¶ 7 In response, defendant asked to submit a document to the court, but the court denied the request, stating "it's just argument *** it's not evidentiary motions."

¶ 8 The court asked defense counsel whether he had discussed with defendant: (1) an insanity defense; (2) the jury selection issue; (3) mental health stipulations; and (4) retaining a blood spatter expert. Counsel explained his position with respect to these issues. Defendant objected to counsel's response to the court's mental health stipulation inquiry, and the court denied the objection.

¶ 9 The court concluded that defense counsel was effective and that it had already ruled on defendant's other arguments. The court denied defendant's motion for a new trial. The court then

sentenced defendant to two consecutive terms of natural life imprisonment.

¶ 10

ANALYSIS

¶ 11

I

¶ 12 Defendant argues that, under our supreme court's decisions in *People v. Krankel*, 102 Ill. 2d 181 (1984) and *People v. Moore*, 207 Ill. 2d 68 (2003), the trial court should have conducted a preliminary inquiry into his *pro se* allegation of ineffective assistance of counsel before it accepted his waiver of counsel. We review the trial court's inquiry into defendant's ineffective assistance of counsel claim *de novo*. *Moore*, 207 Ill. 2d 68. Our primary concern is whether the trial court conducted an adequate inquiry into defendant's *pro se* allegation of ineffective assistance of counsel. *Id.*

¶ 13 When 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." *Id.* at 77-78. If a defendant's claim lacks merit or pertains only to matters of trial strategy, new counsel need not be appointed and the court may deny the *pro se* motion. *Id.* In conducting this preliminary inquiry, the trial court may question defense counsel, question defendant, or rely on its own knowledge of counsel's performance. *People v. Peacock*, 359 Ill. App. 3d 326 (2005). The court may also ask the State for information relating to defendant's allegations. See *People v. Jolly*, 2013 IL App (4th) 120981. If defendant's allegations show possible neglect of the case, new counsel should be appointed. *Moore*, 207 Ill. 2d 68. New counsel would then represent defendant at the hearing on defendant's *pro se* claim of ineffective assistance. *People v. Munson*, 171 Ill. 2d 158 (1996). The preliminary investigatory hearing is meant to be neither adversarial nor evidentiary. *Jolly*, 2013 IL App (4th) 120981.

¶ 14 Initially, we note that neither *Krankel* nor *Moore* established a specific order for addressing a defendant's *pro se* motion in which he alleged ineffective assistance of counsel and argued for a new trial. Nonetheless, *Moore* directs that new counsel should only be appointed to argue defendant's *pro se* motion of ineffective assistance after the requirements of a preliminary hearing has been satisfied. *Moore*, 207 Ill. 2d 68.

¶ 15 Here, the trial court allowed defendant to argue his complete *pro se* motion for a new trial without proceeding directly to defendant's ineffective assistance arguments. Although this procedure commingled the presentation of defendant's ineffective assistance claims with his arguments for a new trial, the trial court's combined proceedings satisfied the requirements for a preliminary inquiry into defendant's claims of ineffective assistance of counsel. In the course of the hearing, the trial court conducted a sufficient inquiry into defendant's claims of ineffective assistance, questioning defense counsel in four specific areas. Because defendant argued a combined motion, the court also allowed the State to respond to all of defendant's arguments. While this procedure was unusual in that it allowed the State to comment on counsel's performance, the State's comments did not prejudice defendant's ineffective assistance proceedings. See *Jolly*, 2013 IL App (4th) 120981 (in conducting a preliminary ineffective assistance of counsel inquiry, the trial court is free to ask the State for information relating to defendant's allegations). Consequently, the court's preliminary inquiry into defendant's *pro se* argument of ineffective assistance of counsel was sufficient.

¶ 16

II

¶ 17 Defendant argues that a remand is necessary for further posttrial proceedings because the trial court did not admonish him in accordance with Illinois Supreme Court Rule 401(a) (eff. July 1,

1984) before it allowed him to proceed *pro se* on his motion for a new trial. The State concedes this issue.

¶ 18 The sixth amendment of the United States Constitution guarantees a defendant the right to effective assistance of counsel at all critical stages of criminal proceedings. U.S. Const., amends. VI, XIV; *People v. Hughes*, 2012 IL 112817. A defendant may waive this right only if he voluntarily, knowingly, and intelligently elects to do so. *People v. Campbell*, 224 Ill. 2d 80 (2006). A court shall not permit a waiver of counsel by a defendant accused of an offense punishable by imprisonment without addressing defendant in open court and informing him of and determining that he understands: (1) the nature of the charge; (2) the minimum and maximum sentence prescribed by law; and (3) that he has a right to counsel, and if he is indigent, to have counsel appointed for him by the court. Ill. S. Ct. R. 401(a) (eff. July 1, 1984).

¶ 19 In the present case, defendant elected to represent himself at a posttrial hearing on his motion for a new trial. The court accepted defendant's waiver without admonishing him of the nature of the charges, sentencing range, and his right to counsel. See Ill. S. Ct. R. 401(a) (eff. July 1, 1984). As a result, we reverse the court's denial of defendant's motion for a new trial and remand the cause for Rule 401(a) admonitions and further posttrial proceedings.

¶ 20 CONCLUSION

¶ 21 For the foregoing reasons, the judgment of the circuit court of La Salle County is affirmed in part and reversed in part, and the cause is remanded for further proceedings.

¶ 22 Affirmed in part and reversed in part; cause remanded for further proceedings.