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2014 IL App (3d) 130070-U

Order filed October 27, 2014

Modified upon denial of rehearing November 25, 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, La Salle County, Illinois,
Plaintiff-Appellee,)	
v.)	Appeal No. 3-13-0070
)	Circuit No. 09-CF-330
JUSTIN COVERT,)	Honorable
Defendant-Appellant.)	Cynthia M. Raccuglia, Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Presiding Justice Lytton and Justice Carter concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court failed to hold a proper *Krankel* inquiry where it held the "inquiry" in an adversarial fashion.

¶ 2 Defendant, Justin Covert, was convicted of burglary (720 ILCS 5/19-1(a) (West 2008)). At the ensuing sentencing hearing, defendant asserted that defense counsel had failed to elicit certain testimony and evidence at trial. Without response to these claims, the court sentenced defendant to a term of 15 years' imprisonment. On direct appeal, this court held that defendant's

comments at sentencing warranted a proper *Krankel* inquiry (see *People v. Krankel*, 102 Ill. 2d 181 (1984)), and remanded the matter with the instruction that such an inquiry be held. *People v. Covert*, 2012 IL App (3d) 100239-U. On remand, defendant took the witness stand and listed up to 16 separate *pro se* arguments for ineffective assistance of counsel. The court offered the State the opportunity to cross-examine defendant, but the State declined. The State argued that each of defendant's claims was without merit, and asked for a directed verdict. The court did not question defendant or the original defense counsel, and ruled that defendant's arguments would not proceed to the second stage of the *Krankel* process. Defendant appeals, arguing that he was not given a proper *Krankel* inquiry. We remand with directions.

¶ 3

FACTS

¶ 4

On July 21, 2009, defendant was charged by indictment with burglary (720 ILCS 5/19-1(a) (West 2008)). At the ensuing jury trial, the State elicited that on July 9, 2009, Mark Jilbert woke up to the sound of his house alarm. Investigating the cause of the alarm, Jilbert discovered defendant exiting his garage through the open garage door. The Jilberts' backyard was diagonally situated to the house where defendant lived with his parents, but Jilbert testified that he had never seen defendant before. A struggle between Jilbert and defendant ensued.

¶ 5

When Deputy Keith Pinney arrived at the scene, defendant was being pinned down by Jilbert. Pinney arrested defendant and inspected the garage. Pinney discovered that a dirt bike was leaning against the garage door; Jilbert testified that the bike is normally not parked there, as the door is normally closed after the bike goes in.

¶ 6

Jilbert also testified that days after the incident, his son found a crowbar in an empty lot adjacent to his property, approximately 50 to 70 feet from the garage door. Deputy Felicia Rasmussen testified that when she went to retrieve the crowbar, it was about 10 feet from the

garage, under a tree in front of Jilbert's house. The crowbar was not tested for fingerprints.

¶ 7 On the day that she retrieved the crowbar, Rasmussen also visited two other homes in the neighborhood. One homeowner showed Rasmussen marks where someone had apparently tried to pry open a door on his home. He first noticed the marks on July 12, but did not know when they were created. Another homeowner showed Rasmussen similar marks on his windows.

¶ 8 Prior to calling any witnesses, defense counsel, Tim Cappellini, sought permission from the court to introduce evidence of other burglaries in the area. The court ruled that the evidence would not be allowed. Defense counsel then informed the court that defendant had chosen not to testify. The court, in turn, asked defendant: "[I]s that true in consultation with Mr. Cappellini that you have decided not to testify?" Defendant responded in the affirmative. The court then asked if this decision was defendant's voluntary choice, and defendant again responded "Yes[.]"

¶ 9 Defendant's parents each testified that, less than a week prior to the alleged burglary, defendant had fallen off a roof and injured his ankle. They testified that defendant was limited to walking with crutches up until approximately July 9. They also testified that they had been with defendant until approximately 10:30 on that night. After closing arguments, the jury found defendant guilty of burglary.

¶ 10 At sentencing, defendant made the following statement to the court:

"I would like to say that during trial that I feel that Mr. Cappellini didn't fully do everything I could have—he could have used in my defense properly and argue specific instances to the Jilbert's. 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."

The court gave no response to defendant's complaints, and ultimately sentenced defendant to a term of 15 years' imprisonment as a Class X offender. Defendant appealed to this court.

¶ 11 On direct appeal, this court found that the trial court erred in failing to conduct an inquiry into his posttrial allegations of ineffective assistance of trial counsel. *Covert*, 2012 IL (App) 3d 100239-U, ¶ 17 ("Where *** 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."). Finding that the trial court gave *no* consideration to defendant's ineffective assistance of counsel claims, we remanded for a proper inquiry pursuant to *Krankel*, 102 Ill. 2d 181.

¶ 12 On remand, the trial court asked defendant if he would like a public defender appointed. Defendant said no, stating: "I thought I was here to talk about Mr. Cappellini's ineffective assistance of counsel." The court explained that another public defender was necessary "in order to perfect any issue." When the court appointed Assistant Public Defender Mike Olewinski, he too expressed confusion at the necessity of an attorney at the initial inquiry stage. The court explained that it wanted Olewinski to "file anything on the inquiry aspect."

¶ 13 At the subsequent hearing, defendant took the witness stand and read from a prepared document. Defendant raised the following issues concerning his trial counsel's performance: (1) counsel's investigator omitted from his summary of defendant's statement that defendant had followed two individuals into Jilbert's garage; (2) counsel failed to: (a) ask defendant's father questions regarding his garage service door being pried open the night of the burglary; (b) have the crowbar found near the Jilbert garage fingerprinted; (c) interview other homeowners to determine if the pry marks found on other homes were connected to the crowbar; (d) raise the issue that defendant told Jilbert that two other people had been in his garage; and (e) cross-

examine Jilbert "to any effect for our defense"; (3) counsel neglected to discuss with defendant what his testimony would be and his option to testify; (4) defendant did not understand what "impeach" meant, and that he was still able to testify despite his testimony being impeached; (5) counsel physically pushed and intimidated defendant, and that counsel admitted this; (6) counsel did not introduce medical records concerning defendant's ankle or have a medical expert testify to the condition of defendant's ankle; (7) counsel did not ask Jilbert about keys found near the crowbar; (8) counsel made no opening statement, had no defense planned, and told defendant that he "better prepare a defense"; and (9) counsel treated him unprofessionally while in the presence of the jury, including shaking his head in disagreement with defendant and "mak[ing] a mockery of [defendant] in front of the jury."

¶ 14 Defendant also added other issues not present in that document. He asserted that counsel failed to argue "anything concerning the dirt bike." Defendant also claimed that he raised concerns as to counsel regarding his ability to receive a fair trial in front of a particular judge, and that counsel "just didn't do anything about it."

¶ 15 The court then invited the State to cross-examine defendant, but the State declined. The State moved for a directed finding. In support of its motion, the State addressed each of defendant's claims in turn, arguing that none raised any issue of ineffective assistance. Olewinski was not invited to make any argument.

¶ 16 The court granted the State's motion for a directed verdict, finding that "nothing I have heard here today in any way rises to the level of ineffective assistance of counsel." The court reiterated that, with the exception of defendant's desire to substitute judges, nothing was presented to the court that it was not already aware of and contradicted by the record. Further, the court stated that there was no need to proceed to the second stage "because I stand by the fact

that any decisions made by Mr. Cappellini were trial strategy and I was part of some of them."
Defendant appeals.

¶ 17

ANALYSIS

¶ 18

Defendant contends that the proceedings on remand did not constitute a proper inquiry under *Krankel*, 102 Ill. 2d 181. The manner in which a trial court conducts *Krankel* proceedings is subject to *de novo* review. See *People v. Moore*, 207 Ill. 2d 68 (2003).

¶ 19

Under *Krankel*, 102 Ill. 2d 181, a defendant raising *pro se* posttrial claims of ineffective assistance of counsel is entitled to have those claims heard by the trial court. The process due to defendant making such claims is broken down into two distinct steps. First, the trial court must examine the factual bases of the defendant's claims. *Moore*, 207 Ill. 2d 68. If the allegations show "possible neglect of the case," new counsel is appointed to represent the defendant in a full hearing on his *pro se* claims. *Id.* at 78.

¶ 20

The first stage, under which the trial court examines the factual bases of the defendant's claims, is commonly known as a *Krankel* inquiry. *E.g.*, *People v. Taylor*, 237 Ill. 2d 68 (2010). At this stage, "[t]he 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." *Moore*, 207 Ill. 2d at 78. 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 68.

¶ 21

In conducting a *Krankel* inquiry, some interchange between the trial court and trial

counsel is usually necessary. *Id.*; *People v. Jackson*, 131 Ill. App. 3d 128 (1985). A brief discussion between the court and the defendant may, however, be sufficient. *Moore*, 207 Ill. 2d 68. The trial court may also deny the *pro se* motion if the claims are facially insufficient, contradicted by the record, or pertain merely to matters of trial strategy. *Id.* Facially insufficient claims are those that are conclusory or bald allegations that counsel simply failed to render effective assistance or are otherwise misleading or legally immaterial. See, e.g., *People v. Ford*, 368 Ill. App. 3d 271 (2006); *People v. Radford*, 359 Ill. App. 3d 411 (2005).

¶ 22 Importantly, the first-stage inquiry is not an adversarial process. E.g., *People v. Jolly*, 2013 IL App (4th) 120981. "[N]o case law suggests that the State should be an active participant during the preliminary inquiry. In fact, typically, virtually no opportunity for State participation is offered during the preliminary inquiry." *People v. Fields*, 2013 IL App (2d) 120945, ¶ 40 (listing cases). Anything beyond *de minimis* participation by the State at the inquiry stage creates a risk that it will become an adversarial proceeding. *Id.*; see also *Jolly*, 2013 IL App (4th) 120981 (finding error where State was allowed to question defense counsel).

¶ 23 In *Fields*, the court conducting the *Krankel* inquiry first allowed the defendant, proceeding *pro se*, to explain each claim for ineffective assistance. *Fields*, 2013 IL App (2d) 120945. Following each claim, the State gave its position, frequently arguing that claims were not sufficiently specific or that they concerned matters of trial strategy. The trial court granted the State's motion to deny the defendant's request to have counsel appointed.

¶ 24 The appellate court found that "the trial court invited at least equal participation by the State into the preliminary inquiry." *Id.* ¶ 41. The court found that by allowing "the State to assert that defendant's claims warranted no further investigation, the hearing changed from one consistent with *Krankel* and its progeny to an adversarial hearing." *Id.* Rejecting a harmless

error argument, the court remanded the matter for a new preliminary inquiry. *Fields*, 2013 IL App (2d) 120945.

¶ 25 We find that the hearing in the instant case became an adversarial proceeding instead of a first stage *Krankel* inquiry. The State was offered an opportunity to cross-examine defendant, and argued against each of defendant's claims. Though the State did not cross-examine, and did not present any evidence, we find that simply allowing the State to advocate against defendant rendered the proceedings improperly adversarial. See *Fields*, 2013 IL App (2d) 120945.

¶ 26 As the State did in *Fields*, the State here concedes that case law supports the proposition the preliminary *Krankel* inquiries are not to be adversarial. However, the State contends that the case at hand is unique in that defendant was represented in the hearing. In both *Fields*, 2013 IL App (2d) 120945, and *Jolly*, 2013 IL App (4th) 120981, the defendants were unrepresented. It does not appear that the trial court appointed new counsel to the defendant for the purposes of the first stage, "initial inquiry" hearing. The record demonstrates that the trial court was notifying the public defender and the defendant that the public defender would be needed "to file anything on the inquiry aspect" and "in order to perfect any issue." in the event the first stage inquiry resulted in the need for a second stage hearing. This is further demonstrated by the fact that this public defender was not invited to make any argument following the defendant's recitation of his grievances to the court.

¶ 27 Even if, as the State argues, the defendant was represented by the public defender during this initial inquiry hearing, the record is clear that the scope of the hearing went far beyond an initial inquiry into the defendant's claims of ineffective assistance of counsel and included, to the point of being dominated by, participation by the State in an adversarial fashion.

¶ 28 Further, it should be noted that the trial court here engaged in no exchange with either

defendant or defense counsel. While some of the defendant's claims were contradicted by the record or were clearly matters of trial strategy, others fell into neither category—such as defendant's claims regarding the counseling he received concerning his potential testimony. None of defendant's claims could be called facially insufficient. Some of defendant's claims, therefore, require at least some interchange between the trial court and defense counsel or a brief discussion with defendant.

¶ 29 Finally, defendant requests that proceedings on remand be held before a different trial judge. Because the State does not contest this issue, we grant defendant's request and order that remand proceedings be reassigned to a different judge. See *People v. Tally*, 2014 IL App (5th) 120349 (granting defendant's request for a new trial judge because State did not oppose the request).

¶ 30 CONCLUSION

¶ 31 The cause is, therefore, remanded to the trial court for an initial inquiry into defendant's claims of ineffective assistance of counsel and such further proceedings as may be required after that inquiry. Those proceedings should be held before a new trial judge.

¶ 32 Remanded with directions.