

No. 1-13-1476

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County
)	
v.)	No. 07 CR 21975
)	
TYRONE OWENS,)	Honorable
)	Steven J. Goebel,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's denial of the defendant's *pro se* motion alleging ineffective assistance of counsel is vacated where the court conducted an improper preliminary *Krankel* inquiry.

¶ 2 Following a bench trial, the defendant, Tyrone Owens, was convicted of three counts of aggravated criminal sexual assault (720 ILCS 5/12-14(a)(4) (West 2006)), and two counts of kidnapping (720 ILCS 5/10-1(a)(1), (a)(2) (West 2006)). The trial court merged the kidnapping counts into the aggravated criminal sexual assault counts and sentenced the defendant to three consecutive 15-year terms of imprisonment. On appeal, the defendant argues that the trial court

failed to conduct a proper preliminary inquiry into his *pro se* motion alleging ineffective assistance of trial counsel pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984). For the reasons that follow, we vacate the denial of defendant's *pro se* motion and remand with instructions.

¶ 3 The evidence at trial established that, on September 17, 2007, the defendant was driving near 71st Street and Jeffrey Boulevard in Chicago when he forced T.L. into his vehicle, drove her to his apartment, and committed acts of sexual penetration by use of force. The defense's theory of the case was that the defendant was a pimp and businessman who hired T.L. as a "stripper and a hooker." The defendant testified that T.L. voluntarily entered his vehicle and consented to having sexual intercourse with him. Following closing arguments, the defendant was found guilty of three counts of aggravated criminal sexual assault and two counts of kidnapping.

¶ 4 Prior to sentencing, the defendant filed a *pro se* motion alleging that his trial attorneys provided ineffective assistance. Specifically, the defendant asserted that his attorneys were ineffective because they: (1) failed to interview and present the testimony of his current and former employees; (2) failed to interview and present the testimony of the owner of J&J Beauty Supply; (3) failed to cross-examine the detectives with "vigor"; (4) failed to investigate and obtain surveillance footage from South Shore Bank and Walgreens; (5) failed to impeach T.L. by introducing "her many arrests"; (6) refused to request a jury trial; (7) stipulated to the testimony of a nurse and doctor without obtaining his consent; and (8) failed to prepare him for trial and instructed him to lie and testify that he was a pimp.

¶ 5 In February 2013, the trial court held a preliminary *Krankel* hearing to investigate the defendant's claims of ineffective assistance. The defendant appeared *pro se*. At the hearing, the court's procedure was to go through each claim, allowing the defendant an opportunity to explain

or elaborate. The court periodically interjected and asked the defendant for additional information. The court then asked defense counsel and the State for their responses. The State did not respond or otherwise participate in the *Krankel* hearing as to the defendant's initial claims regarding trial counsel's failure to interview and present the testimony of his employees. As to the remaining claims, the State argued they lacked merit for a variety of reasons. For example, as to the defendant's claim that defense counsel was ineffective for failing to present the testimony of the owner of J&J Beauty Supply, the State asserted that his testimony regarding "phone records" was not relevant, that the defendant is "a prolific liar" who "can't keep his stories straight," and his claim was "ludicrous," "silly," and a "red herring."

¶ 6 The State also argued that some of the defendant's claims were rebutted by the record. For example, regarding the defendant's claim that defense counsel failed to cross-examine the detectives about withholding surveillance footage from police-observation-device (POD) cameras, the State maintained that the issue was "fully vetted" during a hearing on a motion to dismiss in which defense counsel questioned the detectives about their alleged failure to preserve the video recording.

¶ 7 On another claim, relating to defense counsels' alleged failure to investigate the scene of the kidnapping and obtain surveillance footage from South Shore Bank and Walgreens, defense counsel stated that she did, in fact, visit 71st Street and South Jeffery Avenue and found no cameras at that location. She also explained that, because she was not assigned to the defendant's case until a year-and-a-half after the incident took place, she did not believe that any surveillance footage from privately owned cameras would be available. The State agreed with defense counsel, noting that if the defendant believed the bank's surveillance footage was

"valuable," then he should have shared this information with his attorney "in the beginning of the case" and not "wait[ed] until [the video] can't be obtained."

¶ 8 As to the defendant's claim that his trial attorneys were ineffective for failing to impeach T.L. with her prior convictions and arrests, both defense counsel and the State noted that T.L. was, in fact, impeached with a prior conviction. Defense counsel and the State also pointed out that T.L. could not be impeached with her resisting arrest charge because she was never convicted of that offense and, as a consequence, the law did not allow defense counsel to do what the defendant alleges they should have done.

¶ 9 The State and defense counsel also disputed the defendant's allegation that his trial attorneys were ineffective for telling him that he could not have a jury trial. Defense counsel stated that she advised the defendant on several occasions that the decision to waive a jury ultimately rested with the defendant, and "[a]t no point did we tell him he could not have a jury." The State also reminded the court that, when the defendant was representing himself, he indicated that he had "a lot of faith in your Honor" and was willing to have a bench trial.

¶ 10 With respect to the defendant's claim that defense counsel failed to prepare him for trial and told him to lie and testify that he is a pimp, the State recalled that the defendant's testimony at trial was extraordinarily detailed, he appeared comfortable and confident on the witness stand, answered questions with ease, and showed no signs of nervousness or being ill-prepared. The State also stated that it had conversations with the defendant, when he was representing himself, in which he acknowledged being a pimp.

¶ 11 After hearing arguments from defense counsel and the State, the trial court gave the defendant an opportunity to respond. The trial court then addressed the defendant's allegations in

detail and determined that each of his claims lacked merit. In denying the motion, the court declined to appoint new counsel or proceed to a full evidentiary hearing.

¶ 12 At a subsequent sentencing hearing, the trial court merged the two kidnapping counts into the three aggravated criminal sexual assault counts and sentenced the defendant to three consecutive 15 year terms of imprisonment. This appeal followed.

¶ 13 On appeal, the defendant contends that the trial court failed to conduct a proper preliminary *Krankel* inquiry because it improperly allowed the State to argue against his claims. The State responds by arguing its participation was limited and any error was harmless beyond a reasonable doubt.

¶ 14 When a defendant, *pro se*, raises posttrial claims of ineffective assistance of counsel, he is entitled to have those claims heard by the trial court. *Krankel*, 102 Ill. 2d at 189. New counsel is not automatically appointed when a defendant alleges ineffective assistance of counsel. *People v. Moore*, 207 Ill. 2d 68, 77 (2003). Rather, "the trial court should first examine the factual basis of the defendant's claim." *Id.* at 77-78. If, after a preliminary investigation into the allegations, the court concludes that the defendant's claims are facially insufficient, contradicted by the record, or pertain merely to matters of trial strategy, the court may deny the claim. *Id.* at 78. If, however, the defendant's allegations reveal "possible neglect," the court should appoint new counsel to assist the defendant in presenting his claim. *Id.* at 78.

¶ 15 During the preliminary-inquiry phase, "some interchange between the trial court and trial counsel regarding the facts and circumstances surrounding the allegedly ineffective representation is permissible and usually necessary in assessing what further action, if any, is warranted on a defendant's claim." *Id.* In other words, the court may (1) discuss the allegations with the defendant, (2) briefly question defense counsel regarding the allegations, and (3) rely on

its personal knowledge of defense counsel's performance at trial. *Id.* at 78-79. A preliminary *Krankel* hearing "should operate as a neutral and nonadversarial proceeding." *People v. Jolly*, 2014 IL 117142, ¶ 38. Because the defendant is essentially acting *pro se* for purposes of the preliminary proceedings, "it is critical that the State's participation at that proceeding, if any, be *de minimis*." *Id.* "Certainly, the State should never be permitted to take an adversarial role against a *pro se* defendant at the preliminary *Krankel* inquiry." *Id.* We review *de novo* the manner in which the trial court conducted its *Krankel* hearing. *Id.* ¶ 28.

¶ 16 In this case, the trial court erred when it permitted the State to participate in an adversarial fashion during the preliminary *Krankel* inquiry. The trial court invited at least equal participation by the State into the preliminary inquiry of the defendant's *pro se* ineffective-assistance claims. The court went through the defendant's allegations one by one, allowing the defendant to elaborate and then allowing defense counsel *and* the State to comment on and argue against the defendant's claims. Although the State did not participate to the extent present in *Jolly*, it nonetheless responded fully to defendant's claims and gave its positions, arguing that the defendant's claims were not supported by the record, concerned irrelevant matters, lacked merit, or that the law did not allow defense counsel to do what the defendant alleged they should have done. Thus, the State effectively argued against the defendant at a proceeding where he appeared *pro se*. By allowing the State to advocate against the defendant, the proceeding was clearly transformed into an adversarial hearing, which is contrary to the intent of a preliminary *Krankel* inquiry. See *Jolly*, 2014 IL 117142, ¶ 40 (trial court committed reversible error where the State was permitted to question the defendant, solicit testimony from defense counsel, and argue against the defendant's claims at a preliminary *Krankel* inquiry).

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¶ 17 For the reasons stated, we vacate the trial court's denial of the defendant's *pro se* motion alleging ineffective assistance of counsel and remand the cause for a new preliminary *Krankel* inquiry, without the State's adversarial participation.

¶ 18 Vacated and remanded with instructions.