SIXTH DIVISION
August 5, 2016

No. 1-14-1916

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. 13 CR 23143
	)	
DAVID PEARSON,	)	Honorable
	)	Neil J. Linehan,
Defendant-Appellant.	)	Judge Presiding.

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

ORDER

¶ 1 ***Held:*** (1) The trial court's preliminary inquiry under *People v. Krankel*, 102 Ill. 2d 181 (1984), was not inadequate because the court was not required to inquire *sua sponte* regarding defense counsel's failure to file a motion to suppress; (2) the fines and fees order is corrected to reflect credit for presentence incarceration against fines; and (3) the mittimus is corrected to reflect additional days of presentence custody credit.

¶ 2 Following a bench trial, defendant David Pearson was convicted of possession of a stolen motor vehicle and sentenced to eight years' imprisonment as a Class X offender. On appeal, he contends that the trial court's preliminary inquiry into his claim of ineffective assistance of

counsel was inadequate under *People v. Krankel*, 102 Ill. 2d 181 (1984). Additionally, he seeks presentence custody credit toward five assessments and contends that his mittimus should be corrected to reflect four additional days of presentence custody credit. For the following reasons, we correct the fines and fees order, modify the mittimus, and affirm the judgment of the trial court in all other respects.

¶ 3 Defendant was charged with one count of possession of a stolen motor vehicle. The court appointed the public defender to represent defendant. During pretrial proceedings, defendant told the court that he wished to proceed *pro se* due to a "conflict of interest" with defense counsel and his belief that she was "not representing" him. The court admonished defendant regarding his right to counsel and the role of an attorney. Following these admonishments, defendant agreed to be represented by the public defender.

¶ 4 At trial, Detective Herhold testified that at approximately 11 p.m. on November 21, 2013, he was driving an unmarked squad car and noticed a conversion van without license plates near 111th Street and Pulaski Road. Herhold turned his car around and observed the van drive slowly through a 7-Eleven store parking lot and exit onto Kedzie. He activated his emergency lights, but the van turned onto 109th Street and accelerated toward Troy. The driver, later identified as defendant, "lost control" and jumped from the van at 107th Street and Troy. The van hit a tree and defendant fled into an alley, with Herhold driving five feet behind. The alley was brightly lit and Herhold saw defendant's face. Defendant "hopped" a fence and Herhold pursued on foot. More units arrived at the scene and officers found defendant "hiding inside of a garbage can." Defendant was arrested and Herhold identified him in court. Herhold did not see anyone else leave the van and did not know if anyone had been in the van with defendant.

¶ 5 Officer Turney testified that he responded to a radio call regarding the car chase. At 107th and Kedzie, he observed a black conversion van without license plates "up against a tree." He searched the area and found defendant inside a garbage can. After detaining defendant, Turney returned to the van to look for contraband and record the vehicle identification number. The keys were in the ignition, the column was not "peeled," and the door was undamaged. Turney drove the van to the Morgan Park police station and contacted the owner, Yashmine Odom, who indicated the van had been taken by his former girlfriend, Crystal Pearson.

¶ 6 Turney and another officer met with defendant at the police station and Turney read defendant the *Miranda* rights from a form. Defendant indicated that he understood each right, but was not given a waiver form to sign. According to Turney, defendant stated that "he didn't take the vehicle" but that "his sister Crystal did." Defendant also indicated that he knew the vehicle was stolen, and that he removed the license plates "so the police [would not] stop him." During the investigation, Turney also learned that defendant lacked a valid driver's license and insurance for the van. Turney did not ask defendant to write down or "sign off" on a statement.

¶ 7 Odom testified that he previously lived with his ex-girlfriend, Crystal, and defendant, neither of whom drove Odom's van or had his permission to drive the van. At approximately 9:30 p.m. on November 21, 2013, Crystal entered Odom's record shop at 12719 South Halsted, sprayed him with "pepper spray," and left. Afterwards, a friend called Odom and informed him that Crystal had entered Odom's van, which was parked across the street from the store. Odom had the keys to the van, but testified that Crystal had copied them without his consent. Odom spoke with Crystal by phone, called the police, and went to the police station. At the station, he learned that his van had been recovered and was at the Morgan Park police station. When he retrieved the van, the license plates were missing and the front bumper was damaged. Odom had

no contact with defendant on the night of the incident, and only learned defendant had the van after he was arrested.

¶ 8 The trial court denied defendant's motion for directed finding.

¶ 9 Defendant testified that he had prior convictions for robbery (2008), manufacturing and delivery of cannabis (2007), and residential burglary (2003). According to defendant, Odom had lived with him and Crystal for 9 to 10 months in 2013, and owned a two-door Pontiac which he let defendant drive "around the block" or "to the store." Odom also let defendant drive the van. At approximately 9 p.m. on November 21, 2013, defendant noticed the van parked outside his house. The van had a license plate on the front, but defendant did not recall whether there was a license plate on the back. He asked Crystal if he could use the van to pick up a friend, and she gave him the keys. He did not speak with Odom. Defendant stated that he attempted to evade the police while driving the van because he lacked a valid driver's license and insurance. He testified that the police did not give him *Miranda* warnings, and he denied telling officers he knew the van was stolen. According to defendant, the police only asked whether his sister gave him the keys to the van. Defendant testified that he told police that Crystal had not given him the keys, and that he regretted not being "honest" with the officers.

¶ 10 The court found defendant guilty of possession of a stolen motor vehicle. In its findings, the court stated that Odom and Officer Turney testified credibly, there was "no question" the van was stolen, and defendant lacked Odom's permission to be in the vehicle. Thus, according to the court, the only issue was whether defendant "had knowledge" the van was stolen. The court concluded that defendant's testimony was "incredible" and that he "clearly admitted" to police that he knew the van was stolen. The court denied defendant's motion for new trial and

sentenced him to eight years' imprisonment as a class X offender based on his criminal background.

¶ 11 After the court admonished defendant of his appeal rights, defendant complained of "misrepresentation" and stated that he had also complained about defense counsel at the start of proceedings. Defendant gave a note to defense counsel, which she tendered to the court. After reviewing the note, which is not included in the record, the court asked defendant why he believed that counsel was "ill-prepared" for trial. Defendant stated that counsel "barely represented me" and "wasn't even ready for trial." Additionally, defendant alleged that the evidence showed he did not steal the car.

¶ 12 The court asked counsel whether she discussed the case with defendant. Counsel explained how she prepared for trial, communicated with defendant, and made "every decision" in "consultation" with him. The court told defendant that counsel did "what she should have done." The following colloquy occurred:

> "THE DEFENDANT: It was the fact that the way she was representing me and the way she was talking to me; talking down to me; everything. She was talking about some—
>
> THE COURT: How do you say she was talking down to you?
>
> THE DEFENDANT: It was phone calls. When I first met her, she was like—Oh, you got a background. You know how this goes. And, then the phone calls.
>
> THE COURT: Do you have a background?

THE DEFENDANT: Yes, I do. But, you don't have to rub it in my face and tell me: I know how this goes.

No motions. She didn't put in no motions. She just went straight to trial.

THE COURT: All right. First of all, she can't change your background?

THE DEFENDANT: Right.

THE COURT: Your background is your background. And, did you point out to him because of his background, that this was a Class X case?

DEFENSE COUNSEL: Yes, I did.

THE DEFENDANT: No. It's a motion called motion *in limine*. And, I was telling her about it and she acted like she didn't know about it.

THE COURT: Did you discuss a motion in limine with your client?

DEFENSE COUNSEL: Yes, Your Honor.

THE COURT: I believe—from what you're telling me and from what I have asked that you talk to your lawyer about is, unfortunately, your had a—and that's not—I chose the wrong word.

You have a strong belief that you are innocent, which I understand. And, I listened to the facts of the case. And, I felt and

> I found you guilty. And, I think, unfortunately, from that the basis of your disappointment in your lawyer, it happens a lot. And, I understand that. Particularly, for some reason and I don't know why—
>
> THE DEFENDANT: From the first day, Your Honor, when I met her, I came and told you. The first day. That's on record.
>
> THE COURT: And, we had long discussions from the beginning on this. So, that is why your lawyer was active and participated in your representation.
>
> I really think your frustration stems from your strong belief that you are innocent. And, my finding you guilty. And, I think you're having a hard time understanding that, which I understand."

¶ 13 The court subsequently denied defendant's motion to reconsider sentence.

¶ 14 Defendant raises three issues on appeal. Defendant first contends that the trial court conducted an inadequate preliminary inquiry under *Krankel* because the court did not inquire into defense counsel's failure to file a pretrial motion to suppress defendant's inculpatory statements to police. Defendant acknowledges that he complained to the court about counsel's failure to file a motion *in limine* and not a motion to suppress. However, because defendant testified that he did not receive the *Miranda* warnings before making the inculpatory statements, he argues that counsel's ineffectiveness was "readily apparent" and obliged the court to inquire *sua sponte* as to why a motion to suppress was not filed.

¶ 15 The State, in response, contends that the trial court adequately inquired into defendant's posttrial complaints and could conclude from the testimony at trial that a motion to suppress would have been futile. Alternatively, the State argues that any error in the court's failure to inquire regarding a motion to suppress was harmless, as counsel's decision not to file the motion was a matter of trial strategy and, moreover, the motion would not have been granted had it been filed.

¶ 16 Defendant maintains that he attempted to tell the court that counsel "did not file any pretrial motions to challenge whether [defendant] knew that the van was stolen," but lacked the legal knowledge to identify the motion by its correct name. Additionally, defendant claims there is no way to know whether a motion to suppress would have been granted, as counsel did not adequately inquire at trial into Officer Turney's credibility with respect to defendant's inculpatory statement.

¶ 17 Under *Krankel* and its progeny, when a defendant makes a *pro se* posttrial allegation of ineffective assistance of counsel, the trial court must conduct an adequate inquiry into the factual basis of the claim. *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003). If, following an inquiry, the court finds possible neglect of the case, new counsel should be appointed. *Id*. at 78. However, if the court determines that the claim lacks merit or pertains solely to trial strategy, it need not appoint counsel and may deny the defendant's motion. *Id*. We review *de novo* whether the trial court properly conducted a preliminary *Krankel* inquiry. *People v. Jolly*, 2014 IL 117142, ¶ 28. If the court properly conducted the inquiry and reached a determination on the merits, we will reverse "only if the trial court's action was manifestly erroneous." *People v. Robinson*, 2015 IL App (1st) 130837, ¶ 72.

¶ 18 In this case, the trial court's preliminary *Krankel* inquiry was not inadequate. As an initial matter, a defendant must "raise specific claims with supporting facts" before the trial court is obliged to consider an allegation of ineffective assistance. *People v. Walker*, 2011 IL App (1st) 072889-B, ¶ 34. Here, defendant never stated that counsel did not file a motion to suppress, but rather, complained that counsel failed to file a "motion *in limine*." Notably, as defendant made this complaint during a colloquy with the court regarding his criminal background, the context suggests that defendant was referring to a motion to bar the introduction of his prior crimes and not a motion to suppress his inculpatory statements. Moreover, although defendant raised several complaints regarding counsel's performance, none involved the admission of defendant's statements to police. As defendant never raised the issue of a motion to suppress, the court was not deficient for failing to inquire into the matter. *People v. Washington*, 2015 IL App (1st) 131023, ¶ 11 (for *Krankel* to apply, "defendant must make some allegation of ineffective assistance of counsel for the court to consider and provide some factual specificity of the reason for the allegation").

¶ 19 Defendant maintains, however, that the trial court should have made a *sua sponte* inquiry because defense counsel's ineffectiveness in not filing a motion to suppress was "readily apparent." Defendant relies on *People v. Williams*, 224 Ill. App. 3d 517 (1992), where trial counsel filed an unsuccessful motion for a new trial on the basis that two alibi witnesses were not called despite his knowledge of them. *Id*. at 521-23. On appeal, the defendant argued that the trial court erred in failing to conduct a *sua sponte Krankel* inquiry. *Id*. at 523. As the record showed that a "clear basis" existed to raise an allegation of ineffective assistance, and the trial court was aware of counsel's possible neglect, the defendant's failure to raise the allegation did

not result in a waiver of the ineffectiveness claim. *Id*. at 524. Consequently, this court remanded for a preliminary inquiry into counsel's performance. *Id*.

¶ 20 We find defendant's reliance on *Williams* misplaced. In *Williams*, although the defendant had not alleged attorney incompetence, the attorney's own actions revealed strong evidence that counsel had acted incompetently, and the trial court's comments reflected an awareness of that potential neglect. See *Williams*, 224 Ill. App. 3d at 524. *Williams* represents an unusual case, because "[o]rdinarily, a trial court should not be placed in a position of having to 'second-guess' defense counsel strategy." *People v. Gillespie*, 276 Ill. App. 3d 495, 502 (1995).

¶ 21 Here, defendant's argument asks us to fault the trial court for a failure to engage in exactly the kind of second-guessing that this court rejected in *Gillespie*. Defendant expressed dissatisfaction with counsel's performance, including a vague reference to a motion *in limine*. The trial court discussed defendant's complaints with defendant and trial counsel, and, on appeal, defendant raises no argument that the discussions regarding the issues explicitly raised were inadequate to meet the requirements of *Krankel*. Defendant does, however, argue that we should interpret defendant's vague reference to a motion *in limine* as an allegation that trial counsel erred in failing to file a motion to suppress his statement to the police. Defendant then asks us to make the inferential leap that because defendant denied being given the *Miranda* warnings during his trial testimony, counsel must have been aware before trial that defendant was alleging that his statement to the police was taken in violation of *Miranda*.

¶ 22 Adopting defendant's argument that defendant's vague references to pretrial motions combined with his trial testimony denying his statement to the police mandated a *sua sponte Krankel* inquiry would convert such inquiries from a narrow examination of a defendant's express allegations of attorney incompetence into a broad-ranging scouring of the trial record for

potential errors. We find nothing in the language of *Krankel* that mandates or even suggests such a result. *Gillespie,* 276 Ill. App. 3d at 502 ("Nothing in *Krankel* suggests that if the issue is not raised before the trial court a duty should be placed on the trial court to raise the issue of ineffectiveness of counsel *sua sponte.*"). Consequently, we conclude that the trial court did not err when it failed to inquire into potential neglect in regard to counsel's decision not to file a motion to suppress.

¶ 23 Next, defendant contends that five assessments imposed against him are fines that should be offset by presentence custody credit. Defendant was assessed a total of $379 in fines, fees, and costs. Although defendant did not challenge these assessments in the trial court, "a defendant may raise the issue of credit on appeal even if not raised in the trial court." *People v. Vasquez,* 368 Ill. App. 3d 241, 261 (2006) (citing *People v. Woodard,* 175 Ill. 2d 435, 457-58 (1997)).

¶ 24 A defendant incarcerated on a bailable offense who does not supply bail and against whom a fine is levied is allowed a credit of $5 for each day of presentence custody. 725 ILCS 5/110-14(a) (West 2014). A "fine" is punitive in nature and is imposed as part of a sentence for a criminal offense. *People v. Graves,* 235 Ill. 2d 244, 250 (2009). A fee, in contrast, seeks to recoup expenses incurred by the state, or to compensate the state for expenditures incurred in prosecuting the defendant. *Id*. The presentence custody credit applies only to reduce fines, not fees. *People v. Jones,* 223 Ill. 2d 569, 599 (2006).

¶ 25 The legislature's label for a charge is "strong evidence" of whether the charge is a fee or a fine. *Id*. at 583. Other relevant factors include whether the charge is only imposed after conviction and to whom the payment is made. *Graves,* 235 Ill. 2d at 251. However, the "most important factor is whether the charge seeks to compensate the state for any costs incurred as the

result of prosecuting the defendant." *Id*. at 250. We review the trial court's imposition of fines and fees *de novo*. *People v. Bowen*, 2015 IL App (1st) 132046, ¶ 60.

¶ 26 Defendant contends, and the State correctly concedes, that the $5 drug court assessment (55 ILCS 5/5-1101(f)(2) (West 2014)), $30 Children's Advocacy Center assessment (55 ILCS 5/5-1101(f-5) (West 2014)), and $15 State Police operations assessment (705 ILCS 105/27.3a(1.5) (West Supp. 2013)) imposed by the trial court are fines subject to offset by presentence custody credit. *People v. Rexroad*, 2013 IL App (4th) 110981, ¶ 53 (drug court assessment is a "fine" where the defendant did not participate in drug court); *Bowen*, 2015 IL App (1st) 132046, ¶¶ 66-67 (Children's Advocacy Center assessment is a "fine"); *People v. Moore*, 2014 IL App (1st) 112592-B, ¶ 46 (State Police operations assessment is a "fine"). Accordingly, all three charges should be offset by defendant's presentence custody credit.

¶ 27 Contrary to defendant's argument, however, neither the $2 State's Attorney records automation fee (55 ILCS 5/4-2002.1(c) (West 2014)) nor the $2 Public Defender records automation fee (55 ILCS 5/3-4012 (West 2014)) constitutes a fine. See *Bowen*, 2015 IL App (1st) 132046, ¶¶ 63-65. As this court noted in *Bowen*, the State's Attorney automation fee "is intended to reimburse the State's Attorneys for expenses related to automated record-keeping systems." *Id.* ¶ 63 (citing *People v. Rogers*, 2014 IL App (4th) 121088, ¶ 30). Although defendant argues that "establishing" an automated record keeping system suggests only future use of such a system, we believe that the language of the statute is broad enough to encompass current use of such systems and we continue to follow our decision in *Bowen*. We further noted in *Bowen* that "because the statutory language of both the Public Defender and State's Attorney Records Automation fees is identical except for the name of the organization," there is "no reason to distinguish between the two statutes," and therefore, "both charges constitute fees."

Id. ¶ 65. Accordingly, neither records automation fee is offset by defendant's presentence custody credit. Therefore, defendant is entitled to a total of $50 presentence custody credit for the $5 drug court fine, $30 Children's Advocacy Center fine, and $15 State Police operations fine, and we direct the clerk of the circuit court to correct the fines and fees order to reflect the correct sum of $329.

¶ 28 Finally, defendant contends, and the State correctly concedes, that his mittimus must be corrected to reflect four additional days of credit for presentence custody. A defendant is entitled to credit for any part of a day he spent in custody up to, but not including, the day of sentencing. 730 ILCS 5/5-4.5-100(b) (West 2014); *People v. Williams*, 239 Ill. 2d 503, 510 (2011). Here, the record establishes that defendant was arrested on November 21, 2013, and remained in custody until his sentencing on May 27, 2014, a total of 187 days, excluding the day of sentencing. The trial court, however, granted defendant presentence incarceration credit for 183 days. Remand is unnecessary, as this court may correct the mittimus at any time. *People v. Anderson*, 2012 IL App (1st) 103288, ¶ 35. Accordingly, we direct the clerk of the circuit court to amend the mittimus to reflect 187 days of presentence credit.

¶ 29 For the foregoing reasons, we correct defendant's fines and fees order, modify the mittimus, and affirm in all other respects the judgment of the trial court.

¶ 30 Affirmed; fines and fees order and mittimus corrected.