2017 IL App (1st) 142884-U

FOURTH DIVISION
February 9, 2017

No. 1-14-2884

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 2048
	)	
STEVEN MURPHY,	)	Honorable
	)	Michele M. Pitman,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE ELLIS delivered the judgment of the court.
Justices McBride and Howse concurred in the judgment.

O R D E R

¶ 1 *Held*: Remanded for limited purpose of conducting preliminary inquiry into defendant's *pro se* claims of ineffective assistance of counsel.

¶ 2 Following a jury trial, defendant Steven Murphy was convicted of two counts of aggravated criminal sexual assault (720 ILCS 5/12-14(a)(3) (West 2002) and sentenced to consecutive sentences of 20 years' imprisonment on each count. On appeal, defendant argues that the trial court erred by failing to hold a proper preliminary inquiry into defendant's *pro se*

claims of ineffective assistance of counsel under *People v. Krankel*, 102 Ill. 2d 181 (1984), and its progeny. We agree and remand for further proceedings.

¶ 3 Defendant was charged with eight counts of aggravated criminal sexual assault and two counts of criminal sexual assault stemming from an October 2002 attack on C.W. in Harvey, Illinois. At trial, the State proceeded on two counts of aggravated criminal sexual assault and two counts of criminal sexual assault.

¶ 4 At trial, C.W. testified that, in October 2002, she lived at 15830 South Loomis in Harvey with her four children and her brother-in-law. On the evening of October 13, 2002, C.W. had put her children to bed when she realized she needed milk. Not having a car, C.W. left her house with a $5 bill and walked down Loomis to 158th Street. She left wearing jogging pants, a t-shirt, and a buttoned-up shirt jacket.

¶ 5 While heading east on 158th Street, C.W. walked in the middle of the street because it was dark on the sidewalks. As she approached Lexington Street, she began to hear a whistling sound but saw no one around. C.W. continued walking when she heard the sound again before being struck in the head and pulled by her hair. C.W. described the attacker as a clean-cut African-American man wearing a mask. She further testified the attacker had a shiny gun that made a noise sounding like a rolling marble whenever his hand moved. The man said that he was going to kill her.

¶ 6 Holding the gun to her head, the man dragged C.W. northbound on Lexington to the front of an apartment building. Once there, the man forced C.W. to the back of the apartment building and told her to take her clothes off. The man searched her and took the $5 that was in C.W.'s pocket.

¶ 7 The man inserted his penis into C.W.'s mouth and forced her to perform oral sex on him. He then took his penis out of C.W.'s mouth, went behind her, and told her to bend over. The man tried to get "the anal part" but he could not and "it slipped into [her] vagina." Finally, the man took his penis out of her vagina and ejaculated on C.W.'s back.

¶ 8 C.W. testified that the man "rushed her to get dressed" and began pulling her by her hair down the alley. He took her to the side of a garage, made her get face down on the ground, and told her not to lift her head or he would kill her. He then told her to count to ten. C.W. began counting and only reached four or five before she heard feet running and saw from the corner of her eye a figure leaving the area. She jumped up and ran home.

¶ 9 C.W. took a shower, leaving her clothes in the bathroom, and called her children's father, Lawrence Davis. She did not tell Davis what had happened, but she was hysterical. Davis came over the next morning and C.W. called the police. On October 15, 2002, a Harvey police officer came to her house, and C.W. made a police report. The next day, a detective from the Harvey Police Department came to C.W.'s home. She gave the detective the clothes she had been wearing.

¶ 10 C.W. testified that, on December 9, 2010, Joe Thomas, an investigator from the Cook County State's Attorney's Office, visited her regarding the case. Until Thomas contacted her in 2010, she had not heard from anyone regarding the case since October 2002.

¶ 11 Lawrence Davis testified that he and C.W. have three children together. Early on October 14, 2002, he received a call from C.W., who was very upset. Arriving at her house the next morning, Davis saw C.W. crying and stayed with her until police arrived.

¶ 12 The parties stipulated that, on October 16, 2002, Detective Ward of the Harvey Police Department recovered a red t-shirt, black sweatpants, and a red plaid sweatshirt from C.W. He

inventoried the clothing, which was then submitted to the Illinois State Police Joliet Forensic Science Laboratory for analysis.

¶ 13 Kelly Krajnik testified that in 2003 she was employed by the Illinois State Police as a forensic scientist specializing in biology and DNA analysis. She testified that she received the red t-shirt belonging to C.W. and that it tested positive for semen at four stains. She identified another semen stain on C.W.'s black sweatpants. Additionally, hairs were collected from both the sweatpants and the t-shirt.

¶ 14 The parties stipulated that Leslie Rosier, a DNA analyst with Orchid Cellmark Laboratory in April 2003, was contracted to perform a DNA analysis on the cuttings from the red shirt. The testing resulted in a human male DNA profile suitable for comparison purposes.

¶ 15 Lyle Boicken, a forensic scientist in the field of forensic biology and forensic DNA analysis for the Illinois State Police Crime lab, testified that the DNA profile from C.W.'s case was entered into a computer database on April 28, 2003. On June 2, 2008, a notification was returned alerting Boicken of a match between the profile and defendant. Boicken then generated a report and requested a buccal standard from defendant.

¶ 16 Joseph D. Thomas, an investigator with the Cook County State's Attorney's Office, testified that he met with C.W. on December 9 and 16, 2010, to speak to her about the assault. Thomas arrested defendant on January 13, 2011. The same day, defendant was advised of his *Miranda* rights, signed a waiver of his *Miranda* rights, and spoke with Thomas. After being shown a photograph of C.W., defendant denied knowing her and said that "he'd never touch anything like that." Defendant then consented to and provided a buccal swab. Thomas testified defendant told him that, in 2002, he lived at 15731 South Lexington in Harvey, the same location where the sexual assault had occurred.

¶ 17 On January 14, 2011, the laboratory received a buccal standard from defendant and obtained a DNA profile from the sample. From this, Boicken formed the opinion that the DNA obtained from the red t-shirt matched the defendant's DNA. The DNA profile would be expected to occur in approximately one in 770 quadrillion black, one in 960 quadrillion Hispanic, or one in 3.1 quintillion White, unrelated individuals.

¶ 18 After the State rested, defendant's motion for a directed verdict was denied. Defendant presented no witnesses and did not testify. The jury found defendant guilty of two counts of aggravated sexual assault. Counsel for defendant filed a motion for a new trial.

¶ 19 Prior to the hearing on the motion for new trial, defendant wrote a letter to the trial court, in which he said that he "would like to speak on the grounds for a retrial." He wrote:

> "I'm not sure if my Public Defender Mr. Sneed, will hit all the key points of all the grounds needed for the retrial, because they were his mistakes and one might not see his own mistakes. But the lack of evidence and witnesses on my behalf was not presented in my case. I have giving [*sic*] the Public Defender the correct information on how to get in contact with one of my witnesses and he made no attempt to contact my witness, cause [*sic*] my witness was in contact with me for a while. Now I don't know how to get in contact with the witness myself, but I could lead my Public Defender in the right direction to locate the witnesses. Plus the Public Defender would not ask any of the question [*sic*] that I had for the victim or the young lady that was a lab tech. Because I have great questions to ask. And the one thing

> that bother [*sic*] me is the fact that in the police report the victim said she could not identify her assailer, but could tell he was nicely shaved under a mask. And that was said on the stand under oath.
>
> ***
>
> And one more thing before I end this letter. If you could, ask Mr. Sneed my Public Defender if he could put more effort in coming to see me. Out of the three and a half years that I have been fighting this case. He has only come to see me once. And I tryed [*sic*] to get my papers to go over a plan of action, but he ack [*sic*] like he didn't have time. ***"

At the hearing on the motion for new trial, the following exchanged occurred:

> "THE COURT: In the interim the Court received a letter from the defendant dated June 2, 2014. I have shown counsel the letter from the defendant.
>
> [Defendant], you wrote me, sir?
>
> [DEFENDANT]: Yes, ma'am.
>
> THE COURT: You seem to have some concerns. Let me address that with you right now. [Defense Counsel] is ready to proceed with your motion for new trial. Let me ask you first. Have you read your motion for new trial he has filed?
>
> [DEFENDANT]: No, ma'am.
>
> THE COURT: No. All right.

You wrote me this letter for what purpose, sir? Are you asking for [Defense Counsel] to still represent you?

[DEFENDANT]: Yes, at this moment, yes.

* * *

THE COURT: All right. [Defendant], what is the purpose of your letter, sir? You are talking about the motion and [Defense Counsel] proceeding with your motion, that you want to interject some things in your motion?

[DEFENDANT]: And concerns about the lack of evidence and the medical reports.

THE COURT: That was – that's all been decided at trial. Right now you are at the posttrial and the sentencing. So let me ask you this: Do you want [Defense Counsel] to proceed with your motion for new trial?

[DEFENDANT]: Yes.

THE COURT: Yes. Okay.

Is there anything you are telling me in your letter that – have you spoken to him, by the way?

[DEFENDANT]: Not really, no. He spoke to me just a moment ago.

THE COURT: Do you want me to pass it and do you want to talk to him further?

[DEFENDANT]: Yes.

THE COURT: How about this: You can be seated at counsel table there. He can show you the motion he just drafted, okay. Why don't you take a look at it, and you let me know – after you speak to him, I will address you again. Just have a seat at counsel table."

The court gave defendant time to speak with his trial counsel. When the case was recalled, the exchange continued as follows:

"THE COURT: Are you ready for them to proceed with your motion for a new trial?

[DEFENDANT]: Yes.

[DEFENSE COUNSEL]: Judge, if I could.

THE COURT: Yes.

[DEFENSE COUNSEL]: We did have some conversations regarding his letter and how he wished to proceed today, basically, asking the same things that you did, just to see if he is clear as to what the Court was asking. I believe that [Defendant] is clear as to what the Court is asking.

I explained to him that if he had any concerns at this point about me moving forward, that he needed to address the Court regarding that. I also explained to him that if he had issues, there are other procedures that will move forward where they'll look at my conduct and my representation. That's what we had discussed.

THE COURT: Is that correct, [Defendant]?

[DEFENDANT]: Yes, ma'am.

THE COURT: Are you ready for [Defense Counsel] to proceed with your motion for a new trial?

[DEFENDANT]: Yes."

¶ 20 Counsel for defendant then argued the motion for new trial. The court denied the motion and sentenced defendant to 20 years' imprisonment on each of the two counts, with the sentences to be served consecutively. Defendant filed a timely notice of appeal.

¶ 21 On appeal, defendant argues that the trial court did not conduct a proper preliminary *Krankel* inquiry into the ineffective assistance of counsel claims he raised in his letter. The State responds that defendant has forfeited his *Krankel* claims and any failure to conduct a *Krankel* inquiry was harmless beyond a reasonable doubt.

¶ 22 "The common law procedure developed in *Krankel* and subsequent cases is intended to promote consideration of *pro se* ineffective assistance claims in the trial court and to limit issues on appeal." *People v. Patrick,* 2011 IL 111666, ¶ 41. When a defendant presents a posttrial *pro se* claim of ineffective assistance of counsel, the trial court should first consider the factual basis underlying the defendant's claim. *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003). If the court determines that the points raised are meritless or pertain to trial strategy, then the court may deny the *pro se* motion. *Id.* at 78. But if the allegations show possible neglect of the case, then new counsel should be appointed to evaluate the defendant's claim. *People v. Chapman,* 194 Ill. 2d 186, 230 (2000).

¶ 23 A *pro se* defendant is not required to do anything more than bring his claim to the attention of the trial court. *Moore,* 207 Ill. 2d at 79. From there, the trial court may not simply

ignore a defendant's *pro se* posttrial claim of ineffective assistance of counsel. See *id.*; *People v. Sanchez*, 329 Ill. App. 3d 59, 66 (2002) ("The trial court should afford a defendant the opportunity to specify and support his complaints and not 'precipitously and prematurely' deny the motion." (quoting *People v. Robinson*, 157 Ill. 2d 68, 86 (1993))). The court may conduct its inquiry by questioning trial counsel or the defendant. *Moore*, 207 Ill. 2d at 78. "Also, the trial court can base its evaluation of the defendant's *pro se* allegations of ineffective assistance on its knowledge of defense counsel's performance at trial and the insufficiency of the defendant's allegations on their face." *Id.* at 79. Ultimately, "the 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." *Id.* at 78.

¶ 24 Whether the trial court conducted a proper preliminary *Krankel* inquiry is a legal question we review *de novo*. *People v. Jolly*, 2014 IL 117142, ¶ 28.

¶ 25 Defendant's letter to the trial court was sufficient to put the trial court on notice that he was claiming that his trial attorney was ineffective. The letter alleged that defense counsel (1) never contacted a witness despite being given contact information, (2) made no time to visit defendant or meet with him to "go over a plan of action," and (3) did not ask witnesses questions that defendant wanted asked. These are specific, free-standing claims of ineffective assistance of counsel. The claims clearly implicate counsel's effectiveness and put the court on notice that further inquiry was required. Even if the context of the claims was unclear, the trial court should have clarified any ambiguity by asking defendant regarding those claims.

¶ 26 And the trial court was cognizant that the letter contained allegations that defendant's counsel was ineffective, as it asked defendant whether he wanted his counsel to continue to represent him. At this point, the trial court was required to proceed with a preliminary *Krankel*

inquiry into these claims and make some type of inquiry into the factual basis, if any, for the claims. *Moore*, 207 Ill. 2d at 79. Although the court did inquire regarding the letter, it made no specific inquiry regarding the ineffective assistance of counsel claims.

¶ 27 The trial court's suggestion that defendant talk to his defense attorney does not suffice, as the same attorney was the subject of the ineffective assistance of counsel claims submitted to the court. Because of the inherent conflict in such a discussion, we doubt that defendant would have been able to candidly discuss his attorney's ineffectiveness. *Cf. Moore,* 207 Ill. 2d at 79 ("It would be inappropriate for trial counsel to argue a motion that is predicated on allegations of counsel's own incompetence.").

¶ 28 The State contends that defendant abandoned his *Krankel* claims, in that he informed the court he wished to continue to be represented by his attorney and never indicated in his letter that he wanted a different attorney. It asserts that, by not informing the court that he wanted a new attorney at the hearing on the motion for a new trial or at the sentencing hearing, defendant has forfeited his ineffective assistance of counsel claims. In support, the State relies on *People v. Lewis,* 165 Ill. App. 3d 97 (1988). The State's argument is not persuasive.

¶ 29 In *Lewis,* the defendant argued that he received ineffective assistance of counsel in a letter he wrote to the court but did not request new representation in the letter or any posttrial proceedings. *Lewis,* 165 Ill. App. 3d at 108-09. At the hearing on a motion for a new trial filed by defense counsel, the defendant was present but he did not say anything regarding his letters or his claims of ineffective assistance of counsel. *Id.* The court noted that the record indicated the trial judge, defense counsel, and the State were all unaware of the letter because there was no reference to it during the proceedings. *Id.* at 109. Because defendant did not pursue his claims of

ineffective assistance of counsel when given a chance during the hearing, the court determined that the defendant had forfeited the issue. *Id.*

¶ 30 In this case, as in *Lewis*, defendant raised an ineffective assistance of counsel claim in a letter to the court but did not request new representation. But unlike *Lewis*, in this case, the trial court, the State, and defendant's attorney were all aware of the letter claiming ineffective assistance of counsel. In fact, it was the first issue the trial court addressed in the hearing on defense counsel's posttrial motion, noting: "I have shown counsel the letter from the defendant." The trial court pointed out that, based on the letter, the defendant had "concerns," and it questioned defendant regarding whether he wanted his attorney to continue to represent him, demonstrating her awareness of the ineffective assistance of counsel claims. Thus, *Lewis* differs from this case. The trial court in this case was aware of the claims and should have conducted a preliminary *Krankel* inquiry, rather than solely directing its questions to defendant in the context of the posttrial motion.

¶ 31 As a final point, the State argues that any failure to hold a *Krankel* inquiry was harmless beyond a reasonable doubt, because the alleged ineffective assistance of counsel issues were various matters of trial strategy or irrelevant to the charges. We disagree. First, even if the State were correct that defendant's claims lacked merit, defendant had brought them to the court's attention in his letter, and "the trial court should have afforded him the opportunity to specify and support his complaints." *Moore*, 207 Ill. 2d at 80. Defendant was denied that opportunity here, where the court conducted no inquiry into these specific claims.

¶ 32 Second, as the court made no preliminary *Krankel* inquiry into defendant's ineffectiveness claims, there is no record from which we can determine whether the failure to conduct such an inquiry was indeed harmless. *Id.* at 81 (finding where there was no record made

regarding defendant's claims of ineffective counsel, it was "simply not possible to conclude that the trial court's failure to conduct an inquiry into those allegations was harmless beyond a reasonable doubt"). Accordingly, we reject the State's argument that the trial court's failure to hold a preliminary *Krankel* inquiry is harmless beyond a reasonable doubt.

¶ 33 For the reasons set forth above, we remand to the circuit court of Cook County for the limited purpose of conducting a preliminary *Krankel* inquiry.

¶ 34 Remanded with directions.