2017 IL App (1st) 150351-U

SIXTH DIVISION
JUNE 23, 2017

No. 1-15-0351

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. 14 CR 4350
	)	
ANDRES BULLEY,	)	Honorable
	)	Mary Colleen Roberts,
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 evidence was sufficient to support defendant's conviction for possession of burglary tools, where police officer found bolt cutters in bus next to stolen items after observing defendant and another man carry lawn mower onto bus. However, this case is remanded for the trial court to conduct an inquiry into defendant's claims of ineffective assistance of counsel pursuant to *People v. Krankel*. In addition, this case is remanded for resentencing because the trial court applied an incorrect sentencing range.

¶ 2 Following a bench trial, defendant Andres Bulley was convicted of burglary and possession of burglary tools. He was sentenced as a Class X offender due to his criminal

background, and the court imposed concurrent six-year terms in prison. On appeal, defendant contends the State failed to prove the elements of possession of burglary tools beyond a reasonable doubt. He further argues the trial court did not conduct an adequate inquiry into his claims of ineffective assistance of counsel as required by *People v. Krankel*, 102 Ill. 2d 181 (1984), thus requiring remand for consideration of those assertions. In addition, defendant argues his sentence for possession of burglary tools should be vacated and the case remanded for resentencing because the trial court was mistaken as to the mandatory minimum term for that Class 4 felony. He also asserts the mittimus should be corrected to accurately list the counts underlying his convictions.

¶ 3 Defendant and James Williams were charged together with burglary and the possession of burglary tools for taking lawn equipment from a garage in February 2014. Both were found guilty after a simultaneous bench trial. Williams is not a party to this appeal.

¶ 4 The burglary count against defendant alleged that he knowingly and without authority entered a garage at 3823 West 58th Street in Chicago with the intent to commit a theft (720 ILCS 5/19-1(a) (West 2012)). The possession of burglary tools count alleged that defendant knowingly possessed bolt cutters suitable for use in breaking into a building, with the intent to enter into a building to commit a theft therein (720 ILCS 5/19-2 (West 2012)).

¶ 5 At trial, Chicago police officer Robert Bell testified that at about 5 a.m. on February 23, 2014, he and his partner were on patrol near Springfield Avenue and 58th Street, which was a residential area, when he observed a "church bus parked in the alley and no lights on." Bell stopped the police vehicle and saw defendant and Williams, who were identified in court, emerge from a garage with a "bright red" lawn mower. The men carried the lawn mower onto the bus,

with defendant holding the body of the lawn mower and Williams holding the handle. They emerged from the bus without the lawn mower. Defendant looked in their direction and shouted something, then got into the bus with Williams and drove away. The officers stopped the bus less than a block away. Upon entering the bus, Bell observed the lawn mower and two pairs of hedge trimmers. Also in the back of the bus were three sets of bolt cutters and a canvas bag of tools. Bell identified photographs of those items in court, as well as a photograph of a pry bar recovered from the area near the garage door. Defendant and Williams were arrested. On cross-examination, Bell testified his patrol car was about five houses away from the bus when he first spotted it in the alley.

¶ 6 Danny Wong testified that police knocked on his door on the morning in question and they went to his attached garage, where the garage door was open three or four feet. Wong told the officers his lawn mower and two sets of hedge trimmers were missing, and he identified those three items in the church bus. Wong did not give defendant permission to take anything from his garage. On cross-examination, Wong stated he was last in his garage at 9 p.m. the previous night. Wong never saw defendant inside his garage.

¶ 7 Defendant testified and acknowledged his prior convictions for burglary in 2005 and theft in 2010. At the time in question, he and Williams were collecting junk in the church bus and he had fallen asleep at about 5 a.m. Upon waking, Williams pulled the bus into the alley, and defendant got off to relieve himself. As he got back on the bus, Williams noted that a lawnmower and other items were "sitting out here on the side." Williams asked defendant to go get them. Defendant got off the bus and looked at the items, which included a lawn mower and "two old weed whackers," along with a 50-foot utility cord and a "blower." He stated those items

were "sitting on the apron of the garage." He denied entering the garage. Defendant testified he thought the items were being thrown out and he did not think anyone would want them because they were old. Defendant and Williams picked up the lawn mower and other items and put them on the bus.

¶ 8 On cross-examination, defendant said the garage was not open when he took the items. He thought the items were trash because they were "rotted out" and "old." He did not tell Chicago police detective Ronald Skrip that the garage door was open when he saw the items. When defendant was shown a photograph of the inside of the church bus, he said that the items in the photograph were not the items he found near the garage.

¶ 9 In rebuttal, Officer Bell testified that when he entered the bus, a red and black lawnmower was in the center aisle, along with two red "weed whackers," a yellow bolt cutter and a canvas bag. Detective Skrip testified that when he interviewed defendant at about 3:30 p.m., defendant stated the garage door was open about six inches.

¶ 10 The trial court found defendant guilty of burglary and of the possession of burglary tools, stating the State's witnesses were more credible. The court also found defendant's testimony was "wholly unbelievable," noting defendant's description of the items as old was contradicted by the photos entered into evidence that depicted a "bright shiny almost new red" lawn mower. The court also noted that bolt cutters were found on the bus. The court set a date for the filing of defendant's posttrial motions and a presentence investigation report.

¶ 11 On November 20, 2014, defendant's counsel told the court that she filed a motion for new trial on defendant's behalf. The court asked if any other motions were pending. Defendant addressed the court, stating he had "sent [a motion] in" that he wanted to present himself.

¶ 12 Defendant's *pro se* motions, prepared in November and December 2014, are included in the record. Defendant's first motion, titled "Writ of Error Coram Nobis," alleged the items in the photographs entered into evidence were not the items that Wong described to the officers and that the State never proved that the items in the photographs belonged to Wong. Defendant further asserted that he should not have been convicted of possession of burglary tools because it was not shown that the bolt cutters were used in these events. Defendant argued the trial court would have ruled differently had that evidence been suppressed.

¶ 13 Defendant's second motion asserted, *inter alia*, that his arrest violated his constitutional rights, citing section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2012)). Defendant stated that he "begged his attorney [] to put a motion into quash arrest based on illegal search and seizure" but counsel did not present such a motion.

¶ 14 Attached to defendant's motion was an "addendum" stating his counsel was "ineffective for not raising the issue that the tools in the defendants [*sic*] case were never shown through any evidence on their use in this burglary." Defendant also attached his affidavit describing several conversations with counsel prior to trial.

¶ 15 The case was next heard on January 5, 2015, when the court entered a written order denying defendant's *pro se* motions. In that order, the court stated defendant's claims could not be considered because defendant "has not yet received a final order and judgment of conviction."

¶ 16 On that date, the court remarked as follows:

> "So I think the first order of business, Mr. Bulley, is that the Court's reviewed your motions, the two motions for postconviction relief, well the motion for postconviction relief, the addendum for postconviction relief and then the writ of error

> coram nobis and the Court has issued an order and for reasons stated in the order, first with respect for writ of error coram nobis, that is an avenue of relief that has been abolished. It doesn't exist. So that motion or that writ of error coram nobis is denied.
>
> With respect to your postconviction petitions, the postconviction petition and them [*sic*] the addendum to it, they're premature. The section that you write and titled them under Section 2-1401 provides that relief from a postconviction petition can only come when there -- when it is seeking relief from final orders and judgment. No judgment has been entered in this case yet. That's what's going to happen today. So your motions, your petition and then your writ of error, both are respectfully denied."

¶ 17 Defense counsel requested a ruling on the previously filed motion, and the court denied the motion.

¶ 18 At sentencing, the State noted that defendant was subject to mandatory Class X sentencing due to his prior burglary convictions. Defense counsel argued in mitigation that defendant attended some college and had a record of employment and that no physical harm resulted from these crimes.

¶ 19 In imposing sentence, the court noted:

> "I think all that mitigation factors into the minimum that I can sentence you to and unfortunately the minimum in this case because of your criminal background, two Class 2 or greater offenses means the minimum must be six years."

¶ 20 The court admonished defendant as to his right to challenge his sentence and his right to file an appeal. Defense counsel filed a motion to reconsider sentence, which the court denied, stating defendant could not receive a sentence of "anything less than six years."

¶ 21 After further colloquy, defendant asked the court about the motions he filed, and the court responded that it could not "advise you with respect to your motion for postconviction relief." Defendant indicated he understood the writ for error coram nobis was not a valid motion, and the following exchange then occurred:

> "THE COURT: That's gone [referring to the error coram nobis motion].
>
> DEFENDANT: I understand that. I'm talking about the post-judgment relief.
>
> THE COURT: You mean postconviction? That was premature. You put a lot of work into that. I want you to know the Court recognizes all the time and energy you put into that. And this file will go to the appellate attorney and that attorney will see everything that you wrote up and when you talk to that attorney you can let that attorney know that that's information that -- you can talk to that attorney about it. I can't tell you what to tell the attorney, okay?
>
> DEFENDANT: I understand.
>
> THE COURT: But it stays with the file. It doesn't go away. Do you understand that? It was premature so I had to deny it."

¶ 22 On appeal, defendant first contends that the State did not prove his guilt of possession of burglary tools beyond a reasonable doubt. Defendant does not challenge the sufficiency of the evidence underlying his burglary conviction.

¶ 23 Defendant contends the State did not prove he committed the offense of possession of burglary tools because it was not shown that he possessed the bolt cutters found in the bus or shown the bolt cutters were in working order and were used to enter the garage. The State

responds that the evidence as a whole established defendant's commission of that offense, pointing to the testimony that he was seen carrying the items from the garage onto the bus.

¶ 24 When considering a challenge to the sufficiency of the evidence, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *People v. Bradford*, 2016 IL 118674, ¶ 12. It is the responsibility of the trier of fact, which was the trial judge in this bench trial, to resolve conflicts in the testimony, weigh the evidence, and draw reasonable inferences from the facts. *Id*. Therefore, a reviewing court will not substitute its judgment for that of the trier of fact on questions involving the weight of the evidence or the credibility of witnesses, and a conviction will not be overturned unless the evidence is so improbable, unsatisfactory or inconclusive that it creates a reasonable doubt as to the defendant's guilt. *Id*.

¶ 25 Defendant was convicted of possession of burglary tools pursuant to section 19-2(a) of the Criminal Code of 2012 (720 ILCS 5/19-2(a) (West 2012)). To prove that offense, the State was required to show that defendant possessed "any key, tool, instrument, device, or any explosive, suitable for use in breaking into a building *** or any depository designed for the safekeeping of property" with the intent to enter that place and with the intent to commit a felony or theft therein. *Id*. To sustain a conviction under this statute in this case, the State was required to prove that the bolt cutters were designed for breaking and entering, that defendant possessed them with knowledge of their character, and that he intended to use them for breaking and entering. *People v. Matthews*, 122 Ill. App. 2d 264, 270 (1970).

¶ 26 Defendant first argues the State did not establish his possession of the bolt cutters or show he was aware the bolt cutters were inside the church bus, which was not his vehicle. Evidence of constructive possession of burglary tools is sufficient to convict, meaning the State need only establish the article was located in a place under defendant's immediate and exclusive control. *People v. Janis*, 56 Ill. App. 3d 160, 163 (1977) (affirming defendant's conviction for possession of burglary tools where police saw defendant inside the van from which tools were recovered). Officer Bell observed defendant and Williams carrying a lawn mower out of Wong's garage and onto the bus, and the bolt cutters were found in the bus near the lawnmower. The officer's testimony established that defendant was inside the bus in the area where the bolt cutters were later found. Therefore, the State established defendant's constructive possession of the bolt cutters.

¶ 27 Defendant further contends the State did not prove that the bolt cutters could have been or actually were used to enter the garage, asserting no evidence was presented that the garage had been locked. The State is not required to prove defendant's intent to break and enter a particular place; rather, the State need only establish his general intent to use the tools for a criminal purpose. See *People v. Obrochta*, 149 Ill. App. 3d 944, 952 (1986). That intent need not be presented by direct evidence; it may be inferred from the circumstances surrounding the defendant's possession of the tools. *Id*.; *Matthews*, 122 Ill. App. 2d at 270; *People v. Janis*, 56 Ill. App. 3d 160, 164 (1977) (conviction affirmed where police observed defendant in a van containing burglary tools and the van was parked in lot behind a store in which a burglary alarm had been activated). Although defendant asserts the bolt cutters were inoperable and coated with rust, the State does not have to provide direct evidence linking the tools found in the defendant's

possession to the method of entry. *People v. Johnson*, 88 Ill. App. 2d 265, 280 (1967). This court has affirmed a defendant's conviction for this offense based on his mere possession of bolt cutters, noting that tool could be used to cut a chain or lock on an outside storage shed or garage. *People v. Rodriquez*, 153 Ill. App. 3d 652, 661 (1987).

¶ 28 Defendant testified the garage door was closed and the items were outside the garage; however, Detective Skrip testified in the State's rebuttal case that defendant told him the garage door was open several inches. Defendant admitted to taking the items recovered from the bus, thinking they were trash; however, Officer Bell testified the lawnmower was "bright red." The trial court viewed photographs of the items entered into evidence and noted that the photographs were consistent with the officer's account. It was the task of the trial court to consider the testimony of witnesses and weigh their credibility. See *Bradford*, 2016 IL 118674, ¶ 12. When a defendant elects to explain his presence at or near the scene of the crime while denying participation in that event, he must "tell a reasonable story or be judged by its improbabilities." *People v. Johnson*, 88 Ill. App. 2d 265, 278 (1967) (quoting *People v. Lobb*, 17 Ill. 2d 287, 294 (1959)). Considering the evidence in the light most favorable to the State, the trial court could have concluded the elements of section 19-2(a) were met by the evidence of defendant's constructive possession of the bolt cutters as well as his intent to use the tools for a criminal purpose. Accordingly, defendant's conviction for the possession of burglary tools is affirmed.

¶ 29 We next consider defendant's contention that pursuant to *Krankel*, this case should be remanded for a preliminary inquiry into his claims of ineffective assistance of trial counsel. Defendant argues the trial court was required to consider the substance of his multiple allegations of counsel's deficient representation and erred in dismissing his claims in a summary fashion.

Because we are asked to consider the adequacy of the trial court's inquiry into defendant's claims of counsel's ineffectiveness, which is a question of law, our review is *de novo*. See *People v. Vargas*, 409 Ill. App. 3d 790, 801 (2011).

¶ 30 In *Krankel*, the defendant filed a *pro se* posttrial motion asserting his trial attorney was ineffective for failing to investigate and present an alibi defense. *Krankel*, 102 Ill. 2d at 187. The trial court in that case denied the motion after hearing the defendant's argument; however, on appeal, the parties agreed that counsel should have been appointed to represent the defendant for purposes of arguing the motion. *Id*. at 188-89. Following *Krankel*, a procedure has developed that "serves the narrow purpose of allowing the trial court to decide whether to appoint independent counsel to argue a defendant's *pro se* posttrial ineffective assistance claims." *People v. Patrick*, 2011 IL 111666, ¶ 39.

¶ 31 The main objective of a *Krankel* inquiry is to "facilitate the trial court's full consideration of a defendant'*s pro se* claim and thereby potentially limit issues on appeal*."* *People v. Ayres*, 2017 IL 120071, ¶ 13. Thus, when the trial court is presented with a motion alleging counsel's ineffectiveness, the court is required to conduct some inquiry to examine the factual basis of the defendant's claim. *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003). In making this inquiry, "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*. at 78. The court may also discuss the allegations directly with defendant. *Id*.

¶ 32 During the pendency of this appeal, our supreme court addressed a case in which the defendant, prior to his appeal, mailed a *pro se* petition to "withdraw guilty plea and vacate

sentence" to the trial court that merely alleged "ineffective assistance of counsel" with no further explanation of that claim. *Ayres*, 2017 IL 120071, ¶ 6. The supreme court concluded that filing raised a claim that warranted review under *Krankel*. *Id*. ¶ 23.

¶ 33 The supreme court observed that by inquiring further as to the defendant's claim, the circuit court creates a record for any claim raised on appeal. *Id*. ¶ 22. The supreme court further stated in *Ayres*:

> "Moreover, the inquiry is not burdensome upon the circuit court, and the facts and circumstances surrounding the claim will be much clearer in the minds of all involved when the inquiry is made just subsequent to trial or plea, as opposed to years later on appeal." *Id*. ¶ 21.

¶ 34 For those reasons, it has been described as "incumbent upon the trial court to examine the [*Krankel*] claim and its factual underpinnings." *Vargas*, 409 Ill. App. 3d at 801. The supreme court reiterated in *Ayres* that a defendant who raises such a contention need only "bring his or her claim to the trial court's attention." *Ayres*, 2017 IL 120071, ¶ 11, citing *Moore*, 207 Ill. 2d at 79.

¶ 35 In the case at bar, a review of the report of proceedings and the common law record reveals that the trial court did not consider the merits of defendant's ineffective assistance claim either in open court or in its written order. Therefore, this case must be remanded for the limited purpose of conducting a preliminary *Krankel* inquiry.

¶ 36 The trial court noted in its written order that defendant's motion included a claim of ineffective assistance of counsel, among other assertions. The court referred to defendant's citation to section 2-1401 of the Code as support for his motion and, thus, found the timing of

defendant's motion to be dispositive. The court stated that a motion brought pursuant to section 2-1401 could only be presented following a final order or judgment, and the court determined that defendant had "not been sentenced as of the date of his filing or this order."

¶ 37 In the court's remarks to defendant, the court explained the motion had to be denied because it was "premature" and that his allegations should be discussed with appellate counsel. Although the trial court was correct that a petition filed under section 2-1401 seeks relief from entry of a final judgment, we find that the trial court erred when it did not proceed to consider whether the contents of defendant's motion supported his claims of ineffective assistance of counsel, as required by *Krankel*.

¶ 38 Contrary to the trial court's ruling, it was not necessary for defendant's sentencing to have occurred for the court to consider his ineffective assistance claim. A *Krankel* motion must be presented after the defendant's trial is complete. *People v. Jocko*, 239 Ill. 2d 87, 93 (2010) (it cannot be determined until that point if counsel's errors may have had any effect on the trial's outcome); see also *Vargas*, 409 Ill. App. 3d at 799-801 and *People v. Scates*, 393 Ill. App. 3d 566, 571 (2009) (the defendants' claims of the ineffectiveness of trial counsel were raised prior to sentencing hearing; cases remanded for preliminary *Krankel* inquiries). Defendant's motion raised claims of his trial counsel's ineffectiveness, which is all defendant must do at this initial stage to warrant further inquiry into his claims under *Krankel*. See *Ayres*, 2017 IL 120071, ¶ 11.

¶ 39 The State contends that the trial court "made a sufficient inquiry into the matters underlying defendant's allegations," noting the court's remarks that it received and read the motion. The State further argues the allegations in defendant's motion would not have supported any claim of trial counsel's ineffectiveness. However, the trial court dismissed defendant's

claims as "premature" and conducted no substantive inquiry into his contentions. Therefore, this case must be remanded for the limited purpose of conducting a preliminary *Krankel* inquiry. See *People v. Mays*, 2012 IL App (4th) 090840, ¶ 58 (the trial court must undertake sufficient questioning to understand the defendant's claims and evaluate their potential merit).

¶ 40 It is necessary to address two additional claims raised by defendant regarding his sentence and the mittimus. The State concedes error as to both contentions.

¶ 41 Defendant first asserts that the trial court erroneously sentenced him to six years in prison for the Class 4 offense of possession of burglary tools, stating that was the minimum sentence for that offense. Defendant asks this court to vacate that sentence and remand for a new sentencing hearing or, in the alternative, reduce his sentence to the minimum statutory term.

¶ 42 Defendant was convicted of burglary, a Class 2 felony, and possession of burglary tools, a Class 4 felony. 720 ILCS 5/19-1(a), (b) (West 2012); 720 ILCS 5/19-2(a), (b) (West 2012). Defendant was found to be subject to sentencing as a Class X offender due to his prior criminal history, under the recidivist sentencing provisions in section 5-4.5-95(b) of the Unified Code of Corrections (730 ILCS 5/5-4.5-95(b) (West 2012)) that applies to a defendant who, as in this case, has been convicted of a Class 1 or Class 2 felony having already been twice convicted of any Class 2 or greater felony.

¶ 43 The sentencing range for a Class X felony is between 6 and 30 years in prison. 730 ILCS 5/5-4.5-25(a) (West 2012). Pursuant to that Class X sentencing range, the trial court imposed a term of six years for burglary. The court also imposed a concurrent six-year term for the Class 4 felony offense of possession of burglary tools; however, a Class 4 felony conviction is subject to a sentencing range of between one and three years in prison. 730 ILCS 5/5-4.5-45 (West 2012).

¶ 44 Although defendant failed to raise this issue in his motion to reconsider sentence, he contends the trial court's misapprehension of the correct sentencing range can be addressed under the plain error doctrine or as a claim of ineffectiveness of his trial counsel. An error in sentencing can warrant review under the plain error rule as a denial of the defendant's substantial rights; moreover, this court has found a trial court's misinterpretation of the proper sentencing range constitutes plain error. *People v. Hausman*, 287 Ill. App. 3d 1069, 1072 (1997).

¶ 45 The State concedes error on this point and argues that defendant's concurrent sentence for possession of burglary tools should be reduced to "an appropriate sentence for a Class 4 felony." This court may reduce the punishment imposed by the trial court pursuant to Illinois Supreme Court Rule 615(b)(4) (eff. Jan. 1, 1967). Here, the trial court expressly stated the intent to sentence defendant to the minimum possible term. However, because the trial court believed the minimum possible sentence was six years pursuant to the Class X felony range, we cannot conclude from the court's remark whether it would have imposed the minimum possible term under the Class 4 felony range, which is between one and three years in prison. Accordingly, we remand for resentencing on the Class 4 felony conviction for possession of burglary tools.

¶ 46 Defendant's remaining contention is that this court should correct the mittimus to accurately list the counts underlying his convictions. Our review of the record establishes that defendant was convicted of burglary and possession of burglary tools under Counts 1 and 3 of the indictment, respectively. The mittimus included in the record states that defendant was convicted of possession of burglary tools under Count 2; however, that count charged Williams with burglary. The State agrees that the mittimus should be corrected to reflect defendant's conviction for burglary tools on Count 3, as well as his burglary conviction under Count 1.

Pursuant to our authority under Illinois Supreme Court Rule 615(b)(1) (eff. Jan. 1, 1967), we order the clerk of the circuit court to correct the mittimus to reflect those convictions.

¶ 47 In conclusion, for the reasons set forth in this order, defendant's convictions are affirmed. However, this case is remanded with directions to conduct a *Krankel* inquiry into defendant's claim of ineffective assistance of counsel and for resentencing on defendant's conviction for possession of burglary tools. Additionally, the mittimus is to be corrected as stated above.

¶ 48 Convictions affirmed; remanded with directions.