

2017 IL App (1st) 150840-U

No. 1-15-0840

Order filed July 27, 2017

Fourth Division

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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. 11 CR 7464
)
LAVAR LEE,) Honorable
) Neera Walsh,
Defendant-Appellant.) Judge, presiding.

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

ORDER

- ¶ 1 *Held:* The trial court did not err in declining to appoint new counsel after conducting a preliminary *Krankel* inquiry into defendant's *pro se* claims of his counsel's ineffectiveness. However, this case is remanded for resentencing on defendant's aggravated domestic battery conviction to a term within the statutory range.
- ¶ 2 Following a bench trial, defendant Lavar Lee was convicted of aggravated criminal sexual assault, aggravated kidnapping and aggravated domestic battery of his former girlfriend, L.M. The trial court sentenced defendant to prison terms of 20 years for the sexual assault and 10

years each of the other two offenses, with those three terms to be served consecutively for a total sentence of 40 years. On appeal, defendant contends this case should be remanded for the appointment of new counsel and additional inquiry into his claims of his trial counsel's ineffectiveness pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984), based on counsel's failure to investigate L.M.'s injuries or medical and mental health history or the potential impeachment of a victim of "other crimes" evidence who testified at trial. In addition, defendant contends on appeal that his 10-year sentence for aggravated domestic battery exceeded the applicable statutory maximum of 7 years.

¶ 3 Before trial, the State filed a motion to admit proof of other crimes committed by defendant to demonstrate his intent and propensity to commit domestic violence. The motion described nine incidents of violence by defendant against L.M. and two of defendant's other former girlfriends, including Monique Miller. Over defense counsel's objection, the court granted the motion allowing the State to admit evidence as to three occurrences involving Miller: (1) a January 13, 1999, incident in which defendant approached Miller in a car while she was walking, demanded that she get into his car and then struck her in the head; (2) a December 27, 2000, incident in which defendant dragged Miller out of a car toward his vehicle when she had an order of protection against him; and (3) a February 4, 2002, incident in which defendant followed Miller and her boyfriend in a van as they walked and then pulled up beside them and fired a gun at them three or four times.

¶ 4 After that ruling, defendant asked the court if, as to the 2002 incident, he could "prove that [Miller] wasn't even there" and asked if he could "subpoena attendance records from her job and her school that she was going to" and suggested those records might "prove that she had to

have been lying.” In a later court appearance, defendant’s counsel, Assistant Cook County Public Defender (APD) Colleen Gorman, told the court that defendant was “of the mind that [Miller] was either working or going to school as she was every night back at that time, and so this couldn’t have possibly happened.” Counsel stated that she intended to subpoena any records “that still may exist.”

¶ 5 To that point, defendant’s case had been heard by Judge Joseph Michael Claps. In subsequent court appearances before Judge Neera Walsh, who then presided at trial, defense counsel told the court that defendant continued to request additional discovery as to Miller. Counsel reported that records of Miller’s school schedule had been sought and details of the 2002 incident would be explored when Miller was cross-examined at trial.

¶ 6 The testimony presented at defendant’s trial will be recounted only to the extent necessary to consider his claims on appeal. At trial, L.M. testified that she and defendant dated in 2008 and 2009 and had a child together. On the afternoon of April 15, 2011, defendant drove L.M. and their two-year-old child on an errand and then drove them to his residence in Chicago. L.M., who was in a relationship with another man, asked defendant to take her home.

¶ 7 L.M. went to the basement at defendant’s request, and defendant put a belt around her neck and slapped her face. L.M. grabbed the belt with her hands while he fastened it so she would be able to breathe. Defendant demanded that L.M. undress after voicing his displeasure that she was seeing another man. Defendant ordered L.M. to perform oral sex on him.

¶ 8 L.M. crawled on her hands and knees up the stairs to the kitchen at defendant’s direction when they needed to check on the child. Defendant held the belt around her L.M.’s neck. Defendant led L.M. back down into the basement, and defendant attached the belt to a concrete

pole and tied L.M. up as she sat on the floor. Defendant tied L.M.'s hands to the pole behind her body. Defendant put the belt in L.M.'s mouth and tightened the belt to the pole. Defendant put tape on L.M.'s mouth.

¶ 9 Defendant released her several hours later, and L.M. called several family members. Her brother, Martez, picked her up at defendant's house. L.M. was crying and showed him bruises and marks on her neck, arm, wrist and leg.

¶ 10 Martez brought L.M. to the home of their mother, Wanda. Wanda testified that L.M. looked "messed up." When asked to elaborate, Wanda stated, "She looked bad. She was all scratched up under her neck. *** Her arm, her leg. She showed me everywhere." Wanda said she had not noticed any of those marks when she had seen L.M. earlier that day.

¶ 11 The State entered into evidence photographs of L.M.'s injuries, including a mark on her neck from the belt and marks on her knees from crawling on the floor. Other photographs showed scrapes on L.M.'s elbow and wrist. On cross-examination, L.M. stated the photographs were taken about 24 hours after the April 15 assault.

¶ 12 Monique Miller testified that she and defendant had a relationship starting in 1997 when she was 14 years old and he was 18 or 19 years old. Miller described the January 13, 1999, and December 27, 2000, incidents. Miller did not testify about the 2002 incident.

¶ 13 The parties stipulated that defendant was arrested at 6:30 p.m. on April 17, 2011. The parties further stipulated that an employee of the Office of Emergency Management and Control (OEMC) would testify that a phone call was received on April 16, 2011, reporting that officers interviewed L.M. According to the stipulation, the officers "observed scars on [L.M.'s] arms but

they did not look brand new” and the officers “made no other observations to OEMC about her physical condition.”

¶ 14 The trial court found defendant guilty on all charged counts. The court recounted L.M.’s testimony and found it credible. The court also remarked on the photographs entered into evidence, noting they were taken the day after the assault and showed some scarring on L.M.’s body. The court also noted “there are injuries to her wrist, her neck and her legs which are clearly fresh injuries,” adding that one “could tell by the color.”

¶ 15 During posttrial proceedings, defendant filed a *pro se* motion raising numerous claims of the ineffectiveness of his trial counsel. In relevant part, defendant alleged the following omissions by trial counsel: (1) a failure to investigate Miller’s attendance records at school “to prove that [she] was never a shooting victim” on February 4, 2002; (2) a failure to object to the admission into evidence of the photographs of L.M.’s injuries; and (3) a failure to introduce medical records indicating that L.M. spent time in a “mental health facility” and had previously attempted suicide “to prove someone other [than] himself could have caused victim’s injuries including victim herself.”

¶ 16 After defendant read his motion into the record, the trial court held a hearing on defendant’s motion. The court noted that defendant’s case was placed on her call after being transferred from Judge Claps, and that the discovery of the records pertaining to Miller had been addressed. The court asked APD Vernon Schleyer, who tried the case with APD Gorman, about defendant’s claims, as APD Gorman was not available. APD Schleyer responded that the issue as to Miller’s whereabouts was investigated and discussed with defendant, and counsel noted that issue “was of great concern” to defendant. Counsel stated that although defendant’s “focus was

largely on Ms. Miller,” it was explained to defendant that he could be convicted even if the State did not present Miller’s testimony as to the 2002 incident, which is what eventually occurred at trial.

¶ 17 The court also asked APD Schleyer about defendant’s claim regarding the victim’s injuries. Counsel responded that the purpose of a stipulation was explained to defendant, and it was decided to stipulate to the officers’ testimony instead of calling them as witnesses “[b]ecause we believed that was the best spin we could get on the evidence.”

¶ 18 Denying defendant’s motion for new counsel, the court stated the evidence regarding Miller was “not relevant” and rejected defendant’s claim that his conviction arose from counsel’s inactions. The court also denied defendant’s motion for a new trial. Defendant was sentenced to 20 years in prison for aggravated criminal sexual assault and 10 years in prison for the offenses of aggravated kidnapping and aggravated domestic battery, with all of those terms to be served consecutively, for a total sentence of 40 years.

¶ 19 On appeal, defendant contends this case should be remanded for the appointment of counsel to pursue his claims of his trial counsel’s deficient representation. Defendant argues that even though the trial court addressed each of his assertions and inquired into counsel’s performance on each point, the court erred in denying his motion based on a finding that he was not prejudiced by counsel’s decisions.

¶ 20 In *Krankel*, our supreme court addressed the issue of a defendant’s *pro se* posttrial claim of the ineffective assistance of trial counsel, holding that new counsel should be appointed to represent the defendant for purposes of arguing the motion alleging the original attorney’s deficient representation. *Krankel*, 102 Ill. 2d at 188-89. 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.

¶ 21 “Under the appropriate circumstances, a *pro se* motion for a new trial based on allegations of ineffective assistance of trial counsel will mandate appointment of new counsel to assist in the motion.” *People v. Dixon*, 366 Ill. App. 3d 848, 852 (2006) (quoting *People v. Bell*, 197 Ill. App. 3d 613, 617 (1990)). The trial court is not required to automatically appoint new counsel when a defendant raises such a claim. *People v. Jolly*, 2014 IL 117142, ¶ 29.

¶ 22 When the trial court is presented with a motion alleging counsel’s ineffectiveness, the court must conduct an inquiry “sufficient to determine the factual basis of the claim.” *People v. Banks*, 237 Ill. 2d 154, 213 (2010). Our supreme court has provided a framework for the trial court’s inquiries:

“[T]he trial court should first examine the factual basis of the defendant’s claim. If the trial court determines that the claim lacks merit or pertains only to matters of trial strategy, then the court need not appoint new counsel and may deny the *pro se* motion. However, if the allegations show possible neglect of the case, new counsel should be appointed.” *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003).

¶ 23 Under the standard set out in *Moore*, the trial court considers whether the defendant’s claims fall into the category of professional decisions generally immune from claims of ineffective assistance, *i.e.*, trial strategy, or if the claims otherwise have no merit. *Moore*, 207 Ill. 2d at 77-78. A claim of ineffective assistance of counsel lacks merit if it is “conclusory, misleading or legally immaterial” or if it “does not bring to the trial court’s attention a colorable

claim of ineffective assistance of counsel.” *People v. Johnson*, 159 Ill. 2d 97, 126 (1994); *People v. Robinson*, 2015 IL App (1st) 130837, ¶ 71.

¶ 24 The trial court may question the defendant’s trial counsel about the facts and circumstances surrounding the defendant’s allegations and also may discuss the allegations with the defendant. *Jolly*, 2014 IL 117142, ¶ 30. The trial court may base its evaluation of the defendant’s *pro se* allegations of ineffective assistance of counsel on its knowledge of defense counsel’s performance at trial, as well as the “insufficiency of the defendant’s allegations on their face.” *Id.* (quoting and citing *Moore*, 207 Ill. 2d 68, 78-79 (2003)). Where the trial court has rendered a decision on the merits of the defendant’s ineffective assistance claim and found it unnecessary to appoint new counsel, that ruling should be reversed on appeal only where it is manifestly erroneous, meaning that error is “clearly plain, evident, and indisputable.” *People v. Willis*, 2016 IL App (1st) 142346, ¶ 18; *People v. Tolefree*, 2011 IL App (1st) 100689, ¶ 25.

¶ 25 We first consider defendant’s argument that his counsel was ineffective for failing to investigate Miller’s whereabouts on February 4, 2002. The court had granted the State’s motion *in limine* allowing evidence that defendant fired a gun at Miller and her boyfriend on that date, and defendant maintained that Miller fabricated that incident and that he could prove she was elsewhere that day. Defendant maintains that because Miller testified as to the two incidents in 1999 and 2000, her credibility was at issue and counsel was deficient in failing to investigate whether she lied about the 2002 incident.

¶ 26 Judge Claps heard defendant’s initial request for production of the records pertaining to Miller. Defendant requested records regarding Miller’s school and work attendance and school financial aid application. The case was transferred to Judge Walsh, who presided at defendant’s

trial, and defendant continued to request records of whether Miller was attending a particular school in 2002. On the first court date before that judge, APD Gorman stated that defendant continued to seek the records, as well as Miller's presence in court. Counsel told the court she did not believe the records were necessary because Miller could be questioned about the incident if she testified at trial. The court told defendant that Miller's school records were not probative of Miller's location or whether the 2002 incident took place. During that discussion, the court stated: "It doesn't matter what particular location it is and I believe your attorney is correct and this is something that is within the purview of an attorney to make that determination about." After hearing additional remarks from defendant, the court stated that defendant's counsel "found that those records are not necessary for her to effectively represent you." That discussion was repeated at another pretrial court date.

¶ 27 Ultimately, Miller was a State witness at defendant's trial. She testified as to the 1999 and 2000 incidents described in the motion *in limine*. However, the State did not elicit testimony about the 2002 incident.

¶ 28 As noted above, the trial court could base its ruling on defendant's *Krankel* claim on its own knowledge of counsel's performance, as well as on the substance of defendant's requests. See *Jolly*, 2014 IL 117142, ¶ 30. Here, Judge Walsh noted before trial that the records requested by defendant would not have proved what defendant sought to establish, *i.e.*, that the 2002 shooting incident involving Miller did not occur. APD Gorman considered defendant's request for the records and determined they were not necessary. Moreover, because Miller did not testify as to the 2002 incident, there is no merit to defendant's contention that his case was affected by counsel's failure to obtain records to impeach Miller's testimony regarding that incident.

¶ 29 Defendant's remaining claims of counsel's ineffectiveness involve evidence of L.M.'s injuries, as well as her medical and mental health history. Defendant claimed his counsel was deficient in not seeking additional information on those points to aid in his defense.

¶ 30 At trial, several photographs were admitted that showed marks on L.M.'s neck, knees, elbow and wrist. The parties stipulated that officers who interviewed L.M. the day after the assault reported that they observed marks on L.M.'s arms but that those marks did not "look brand new." Defendant contends his counsel should have objected to the admission of those photographs and should have investigated the possibility that L.M. inflicted those injuries herself.

¶ 31 At the hearing on defendant's motion, the court reviewed the stipulation. APD Schleyer told the court that the stipulation was discussed "at length" with defendant. Counsel explained that if the officers mentioned in the stipulation had been called to testify, they likely would have sought to correct any errors in their report. Therefore, counsel told the court, a decision was made to enter that evidence by stipulation, not by the officers' testimony, which was unlikely to help defendant's case.

¶ 32 APD Schleyer further stated:

"What our feeling was in terms of strategy at that time is that the stipulation got everything we could hope from those officers without giving those officers a chance to fix any errors and that was a strategic decision based on limiting the risk to the defendant at trial and that we discussed with him at the time."

¶ 33 The decision to stipulate to testimony, and thus waive the defendant's right of confrontation as to those witnesses, is left to counsel as "a matter of trial tactics and strategy."

People v. Campbell, 208 Ill. 2d 203, 217-18 (2003) (noting, however, that the defendant must agree when the stipulation amounts to the equivalent of a guilty plea). The discussion set out above established the strategy of defendant's counsel in stipulating to the officers' testimony. Furthermore, in finding defendant guilty, the trial court noted the photographs depicted injuries that were "clearly fresh." In addition, L.M.'s mother, Wanda, testified at trial that L.M. had scratches on her neck, arm and leg on the day of the attack that she had not noticed earlier that day. Thus, any argument by defense counsel that L.M. had inflicted those injuries herself would have been weighed the court's impression of the marks as being newly inflicted and against L.M.'s account of the attacks, as well as Wanda's testimony that she did not see the injuries to L.M. earlier in the day.

¶ 34 As to defendant's claim that counsel should have investigated whether L.M. spent time in a mental health facility and had previously attempted suicide. The court asked APD Schleyer at the *Krankel* hearing about any evidence of an attempted suicide. The record reflects that in asking that question, the court mistakenly referred to Miller, the proponent of the evidence of defendant's other crimes, and not to L.M., the victim in this case. Nevertheless, counsel responded: "We explained [to defendant] that is not relevant and would greatly injure our case if we were to attempt to introduce it." Even if counsel had verification of defendant's claims regarding L.M.'s medical and mental health history, and that information was somehow admissible, those facts would not necessarily have aided defendant's case, given that the injuries to L.M. appeared to have been recently inflicted and comported with her trial testimony as to the assault.

¶ 35 As a final note, we reject defendant's assertion that instead of requiring him to demonstrate counsel's "possible neglect" of his case, the trial court held him to the higher standard of actually proving that his counsel was ineffective. He argues the court denied his motion because he could not prove that counsel's performance prejudiced his case and the court did not refer to the "possible neglect" standard in its ruling.

¶ 36 Defendant's argument centers on the court's remark at the conclusion of the hearing that "it is not but for counsel's actions that there was a reasonable possibility or probability that the outcome would have been different, so respectfully, sir, your motion for a *Krankel* hearing is denied." The reference by the trial court to the general ineffectiveness standard by which counsel's performance was measured does not reflect that defendant was held to a standard higher than establishing counsel's possible neglect of his case. See *People v. Dixon*, 382 Ill. App. 3d 233, 247 (2008). By determining defendant had not shown counsel's decisions affected the outcome of his case, the court found defendant's claims of ineffectiveness of counsel were without merit and did not warrant the appointment of new counsel. That is the crux of a *Krankel* inquiry. *Moore*, 207 Ill. 2d at 77-78 (the defendant's motion may be denied if "the trial court determines that the claim lacks merit or pertains only to matters of trial strategy").

¶ 37 In conclusion on this issue, the trial court conducted a full inquiry into defendant's claims of his counsel's ineffectiveness. We find no basis to disturb the court's determination that defendant's claims lacked merit and thus did not require appointment of new counsel pursuant to *Krankel*.

¶ 38 Turning to defendant's final contention on appeal, he argues the trial court erred in sentencing him to 10 years in prison for aggravated domestic battery because that offense is a

Class 2 felony subject to a sentencing range of between 3 and 7 years in prison. Defendant asks that this court reduce his 10-year sentence to the maximum term of 7 years or remand this case for resentencing on that offense.

¶ 39 Aggravated domestic battery is a Class 2 felony (720 ILCS 5/12-3.3(b) (West 2010)) punishable by a term of between three and seven years in prison. 730 ILCS 5/5-4.5-35 (West 2010). Defendant's 10-year sentence for that offense was outside the range allowed by statute.

¶ 40 Although defense counsel did not object to the 10-year sentence during the sentencing hearing, defendant contends the trial court's misapprehension of the correct sentencing range can be addressed under the plain error doctrine or as a claim of the ineffectiveness of 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 that a trial court's misinterpretation of the proper sentencing range constitutes plain error. *People v. Hausman*, 287 Ill. App. 3d 1069, 1072 (1997).

¶ 41 Conceding the error, the State agrees that defendant's sentence for aggravated domestic battery should be reduced to the maximum statutory term of seven years. Although this court may reduce the punishment imposed by the trial court (Ill. S. Ct. R. 615(b)(4) (eff. Jan. 1, 1967)) without remanding, we find the better course of action in this case is to remand for resentencing, given that defendant is serving consecutive terms and the duration of his sentence for this offense will affect the overall length of his incarceration. Accordingly, defendant's 10-year sentence for aggravated domestic battery is vacated, and this case is remanded for resentencing on that conviction to a term within the statutory range.

¶ 42 In conclusion, the trial court's denial of defendant's request for new counsel on his ineffective assistance claims is affirmed. However, because defendant's 10-year sentence for aggravated domestic battery exceeded the statutory range, we remand this case to the trial court for resentencing on that conviction.

¶ 43 Affirmed and remanded for resentencing.