2017 IL App (1st) 152320-U

No. 1-15-2320

Order filed March 10, 2017

Sixth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 10 CR 5410
	)	
ANTHONY THOMAS,	)	Honorable
	)	Carol M. Howard,
Defendant-Appellee.	)	Judge, presiding.

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

ORDER

¶ 1 ***Held*:** The trial court conducted a proper *Krankel* inquiry into defendant's *pro se* posttrial allegations against his trial attorney. Affirmed.

¶ 2 Following a jury trial, defendant Anthony Thomas was found guilty of aggravated criminal sexual assault and sentenced to 15 years' imprisonment. We affirmed defendant's conviction and sentence on direct appeal, but remanded with directions for the trial court to conduct the required preliminary investigation pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984), and determine whether defendant's allegations against his trial attorney in his *pro se*

motion for a new trial were meritorious. *People v. Thomas*, 2014 IL App (1st) 130017-U. On remand, the trial court conducted the *Krankel* inquiry and denied defendant's motion for appointment of counsel and motion for a new trial. On appeal, defendant maintains that he is entitled to a new preliminary *Krankel* hearing because the State's active participation compromised the objective nature of the preliminary hearing, making it improperly adversarial. We affirm.

¶ 3 Our 2014 order set forth the trial evidence in detail, so we merely summarize it here. J.B. testified that defendant, from whom she accepted a ride as she exited a club, beat and sexually assaulted her. She positively identified defendant as her attacker in a photo array, a line-up, and in open court. DNA evidence established defendant's sperm was in J.B.'s vagina immediately after the attack. Corazon Reyes, a registered nurse (RN) in the emergency room where the police took J.B. for treatment, testified that J.B. told her she had been pulled into a car by an unknown person and raped. Dr. Asma Khatoon testified that she treated J.B. for injuries consistent with the physical beating that occurred before the sexual assault. She also stated that it is possible for an individual to have been sexually assaulted without having any vaginal or anal injuries. O.L. testified that defendant attacked her in a very similar fashion, namely, by inviting her into his car, driving her to a remote location, physically beating her after she refused to have sex with him, and engaging in non-consensual sexual penetration before driving away and leaving her.

¶ 4 After the State rested, the trial court granted defendant's motion for a directed verdict on the aggravated criminal sexual assault count alleging penis-to-anus contact. The court denied defendant's motion for a directed verdict on the count alleging penis-to-vagina contact. Defendant chose not to testify.

¶ 5 The jury found defendant guilty of one count of aggravated criminal sexual assault based upon penis-to-vagina sexual penetration. Defense counsel filed a motion for a new trial, which the court denied. The trial court sentenced defendant to 15 years' imprisonment for aggravated criminal sexual assault.

¶ 6 Defense counsel moved to reconsider the sentence. Defendant subsequently filed a *pro se* motion for new trial containing ten allegations of ineffective assistance of counsel and a motion for appointment of counsel to represent him in his motion for a new trial. At a hearing on "a motion," the court denied the motion to reconsider sentence. The parties made no mention of defendant's *pro se* motions, and the record of proceedings does not indicate whether defendant was present for the hearing.

¶ 7 On direct appeal, we found that "overwhelming evidence supported the verdict" and we denied all of his claims except his allegation of error based on *Krankel*. *People v. Thomas*, 2014 IL App (1st) 130017-U, ¶¶ 58, 69. We remanded "the matter for the limited purpose of allowing the trial court to conduct the required preliminary investigation." *Id.* ¶ 69.

¶ 8 On remand, when the trial court began to ask defendant about the individual allegations, defendant requested additional time to better present his *pro se* motion for a new trial and asked for representation of counsel. The court continued the case, explaining that before appointing counsel to represent him on his motion, a preliminary determination as to whether he set forth meritorious claims of ineffective assistance of counsel was required.

¶ 9 Defendant, an assistant State's Attorney (ASA), and an assistant Public Defender (APD) were present at the next court date. The ASA requested clarification as to whether the court "concluded [its] initial inquiry and [was] proceeding to a *Krankel* Hearing." The court then asked, "Just so the record is clear, we are proceeding on the motion for a new trial due to

ineffective assistance of counsel that was filed on October 23rd of 2012, is that correct?" Defendant responded in the affirmative.

¶ 10 Taking each of defendant's allegations in turn, the court struck three allegations at his request. The State did not participate when the court addressed, and ultimately denied, defendant's allegations of ineffective assistance based on trial counsel's failure to move to dismiss the "indictments for lacking sufficient specificity" and counsel's failure to object to racial discrimination during jury selection. The State did participate during the discussion of four of defendant's allegations.

¶ 11 In his motion, defendant alleged that trial counsel did not inform him "of any further evidence entering the trial other than the DNA complaint and proof of other crimes witnesses. [The APD] told [defendant] due to stipulations, the RN would not testify because the identity was not an issue. The defendant was not aware of any clothing entering the trial." When asked to clarify, defendant added that he "was told due to stipulations that the DNA experts wouldn't testify and they did testify." After the following colloquy, the court found that the allegation did not raise a valid claim:

> "[TRIAL COUNSEL]: Your Honor, I have documented ten confidential telephone calls with [defendant]. In addition that he had two private face-to-face visits. One of them [co-counsel] and I drove to spring — to the Department of Corrections where he was and had a visit with him.
>
> [Co-counsel] came to me for the sole purpose of explaining the DNA evidence for trial. In addition, I have some numerous letters from [defendant]. I haven't counted them. I certainly have

felt that I tried to address of all the evidence that was going to be used against him.

He certainly had ample opportunity to look at everything that I had because I always bring the file with me and I go visit people. I addressed all of his questions that he asked me. I showed him all the evidence.

As far as stipulations go, I recall there being eight stipulations. I doubt that I would have stipulated to the nurse's testimony anyway because this is such a serious case. The nurse did, in fact, testify regarding evidence that I thought that [co-counsel] did an excellent job crossing her. I believe that's it, judge.

THE COURT: Thank you. Would you like to add anything, state?

[ASA]: Your Honor, the only thing additional that I would add besides the state calling a nurse and that was for purposes of evidence collection and the chain of custody.

The emergency room doctor testified and [the APD] even called an additional nurse from the hospital as well. In part, to impeach a small portion of what the medical professional that the state had put forth and testified to and she presented that in evidence her case-in-chief."

¶ 12 The court next addressed defendant's allegations that trial counsel "failed to question the complainant about the defendant's car or clothing the defendant wore January 14, 2006," and that counsel "failed to cross-examine the State's proof of other crimes witness ([O.L.]), and her credibility." When asked how the litigation would have been different if trial counsel had questioned the complaining witness as defendant believed she should have, he responded, "Well the complaining witness had many different conflicting statements *** she had told the — the nurse another individual supposedly snatched her up in the alley. But then, she claims it was me after a nightclub." The court asked trial counsel whether there was any indication that the complaining witness at some point said that a different person had grabbed her and later accused the defendant. When counsel could not recall, the following discussion occurred:

> "[ASA]: I have gone through the transcripts of the victim's testimony. There was never any allegation that she named anybody by name. Only gave a description for which she was consistent with her report to medical professionals of the police and her testimony.
>
> THE COURT: She never picked out anyone else in the lineup or accused anyone else before accusing [defendant]?
>
> [ASA]: No.
>
> THE COURT: Upon what do you base your belief that she previously accused someone else?
>
> THE DEFENDANT: Well, she told the nurse that somebody snatched her up in the alley. Who was that if you are saying that she was in the car with me."

Finding that the cross-examinations were not deficient and that the outcome of the litigation would not have been different, the court denied both allegations.

¶ 13 Defendant next alleged that trial counsel's cross-examination of the nurse was deficient because counsel failed to establish whether the abrasions on J.B. were "old or freshly new." When the court asked the State how cross-examination consistent with defendant's allegation might have changed the outcome of the litigation, the State declined "to speak against [defendant] with regards to that point." The court concluded "that different questions concerning the abrasions on [J.B.'s] head would" not have changed the outcome and denied that allegation.

¶ 14 The court denied defendant's *pro se* motions for a new trial and for the appointment of counsel stating, "I don't believe that you set forth anything or alleged anything that goes to the issue of conscious failure to give you representation or suggest that had counsel acted differently, the outcome of the litigation would be different."

¶ 15 On appeal, defendant maintains that he is entitled to a new preliminary *Krankel* hearing because the State's active participation compromised the objective nature of the preliminary hearing, making it improperly adversarial.

¶ 16 The issue of whether the circuit court properly conducted a preliminary *Krankel* inquiry presents a legal question that we review *de novo*. *People v. Jolly*, 2014 IL 117142, ¶ 28.

¶ 17 Under *Krankel* and its progeny, when a defendant presents a *pro se* posttrial motion alleging ineffective assistance of counsel, the trial court must conduct some type of inquiry into the underlying factual basis of the defendant's claims. *People v. Moore*, 207 Ill. 2d 68, 79 (2003). If the allegations "show possible neglect of the case," the court should appoint new counsel to represent the defendant at an evidentiary hearing on his *pro se* claims. *Id.* at 77-78. However, if after the preliminary inquiry, the trial court determines that the claims lack merit or pertain only to matters of trial strategy, the court may deny the *pro se* motion without appointing counsel. *Id.* at 78.

¶ 18 "[T]he goal of any *Krankel* proceeding is to facilitate the trial court's full consideration of a defendant's *pro se* claims of ineffective assistance of trial counsel and thereby potentially limit issues on appeal." *Jolly*, 2014 IL 117142, ¶ 29. The trial court's method of inquiry during the initial inquiry is flexible (*People v. Fields*, 2013 IL App (2d) 120945, ¶ 40) and it may include a discussion with the defendant as well as some interchange with trial counsel (*Moore*, 207 Ill. 2d at 78). In addition, the trial court may base its evaluation of the *pro se* ineffective assistance of counsel claims on its knowledge of defense counsel's performance at trial. *Jolly*, 2014 IL 117142, ¶ 30; *People v. Flemming*, 2015 IL App (1st) 111925-B, ¶ 85. Because a defendant proceeds *pro se* during the court's preliminary investigation, the initial *Krankel* "inquiry should operate as a neutral and nonadversarial proceeding." *Jolly*, 2014 IL 117142, ¶ 38. If the State participates in the initial proceeding in a manner that is more than *de minimis*, then the potential exists that the inquiry becomes adversarial and circumvents the creation of an objective record for review. *Id.*

¶ 19 Defendant cites *Jolly* and *Fields* in support of his contention that the State's participation in the initial inquiry was adversarial in nature. In *Jolly*, the State conceded that the trial court erred in permitting the State's adversarial participation in the preliminary inquiry. *Id.* ¶ 26. Thus, the *Jolly* court addressed whether the error was harmless beyond a reasonable doubt and ultimately concluded that it was not. *Id.* ¶ 31, 40. During the preliminary inquiry in *Jolly*, the trial court "permitted the State to question defendant and his trial counsel extensively in a manner contrary to defendant's *pro se* allegations of ineffective assistance of counsel and to solicit testimony from his trial counsel that rebutted defendant's allegations." *Id.* ¶¶ 20-21, 40. In addition, the State "presented evidence and argument contrary to defendant's claims and emphasized the experience of defendant's trial counsel." *Id.* ¶ 40.

¶ 20 In *Fields*, the State pointed out that under *Krankel*, "to warrant appointment of counsel and further proceedings, defendant's allegations of ineffective assistance must be sufficiently detailed and may not simply challenge counsel's trial strategy." *Fields*, 2013 IL App (2d) 120945, ¶ 21. "[T]he trial court invited at least equal participation by the State," allowing it to comment and provide legal counterarguments on each one of the defendant's allegations, including that: the claims lacked specificity; the law did not require defense counsel to do what counsel allegedly should have done; some claims related to matters of trial strategy; and that, had a witness been called, the State indicated that it would have impeached the credibility of that witness with what it recalled was an extensive criminal background. *Id.* ¶ 22, 41. The *Fields* court concluded that the preliminary *Krankel* proceeding was adversarial and declined to find that the State's participation was harmless error. *Id.* ¶ 41-42.

¶ 21 Here, the State's participation was limited to providing the court with factual statements which were part of the trial record. First, within the context of defendant's allegation that trial counsel erroneously informed him that "due to stipulations" neither the "RN" nor the "DNA experts" would testify, the State indicated to the court that it had called a nurse and an emergency room doctor. The State added that defense counsel had called an additional nurse partly "to impeach a small portion" of the testimony of the State's medical professional witnesses. These facts were established at trial and did not rebut the factual basis for the allegation that trial counsel failed to inform defendant that certain witnesses would testify.

¶ 22 Other than subsequently declining to speak against defendant on the allegation regarding whether J.B's abrasions were old or new, the State's only additional contribution occurred during the discussion of defendant's assertion that J.B. told a nurse "another individual supposedly snatched her up in the alley. But then, she claims it was [him] after a nightclub." When defense

counsel could not recall such a statement, the State indicated that it had reviewed the transcript of J.B.'s testimony, that there was never an allegation that she named anyone by name, and that she gave consistent descriptions of her attacker. The court asked whether J.B. picked anyone else in the lineup or accused anyone else before accusing defendant. The State responded that she had not. We acknowledge defendant's argument in his reply brief that the ASA's representation "was not entirely accurate," as the emergency room nurse testified J.B. reported that she had been pulled into a car by an "unknown person" and raped, and a detective testified that J.B. told him "Tony," who she knew from the area, bought her a drink at the club, offered her a ride outside the club, and then assaulted her after she accepted the ride. Regardless of their accuracy, we find that the ASA's statements to the trial court were factual recitations. That the comments may not have included every detail verifiable in the record does not make them argumentative in nature.

¶ 23 Unlike in *Jolly* and *Fields*, the State's participation in this case was limited to conveying concrete and easily verifiable facts that did not transform the trial court's initial inquiry into an adversarial proceeding that was "contrary to the intent of a preliminary *Krankel* inquiry." *Jolly*, 2014 IL 117142, ¶ 40; see also *Fields*, 2013 IL App (2d) 120945, ¶ 40 (envisioning "a situation where the State may be asked to offer concrete and easily verifiable *facts* at the hearing" (emphasis in original)). Accordingly, we find no error in the trial court's resolution of the preliminary *Krankel* inquiry.

¶ 24 We affirm the judgment of the circuit court of Cook County.

¶ 25 Affirmed.