2018 IL App (2d) 150876-U
No. 2-15-0876
Order filed February 16, 2018

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. MUHAMMED A. GIBSON, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Stephenson County. No. 13-CF-281 Honorable Michael P. Bald, Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices McLaren and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's error in failing to conduct a *Krankel* hearing after the defendant, *pro se*, raised postplea claims of ineffective assistance of counsel was not harmless error.

¶ 2 Defendant, Muhammed A. Gibson, pleaded guilty to the offense of unlawful possession of a controlled substance with intent to deliver (720 ILCS 570/401(c)(2) (West 2014)) and was sentenced to 14 years' incarceration in the Illinois Department of Corrections. He appeals the order denying his motion to withdraw his guilty plea. We vacate and remand with instructions.

¶ 3 I. BACKGROUND

¶ 4 The Stephenson County State's Attorney charged defendant by amended information with unlawful possession of a controlled substance with intent to deliver within 1000 feet of a church (720 ILCS 570/407(b)(1) (West 2014)), a Class X felony, and unlawful possession of cannabis (720 ILCS 550/4(b) (West 2014)). At the preliminary hearing, the State established that on December 28, 2013, defendant was arrested outside Munzy's Bar in Freeport, Illinois, on an outstanding warrant. During a search of defendant's person incident to the arrest, the officers recovered 15 individually wrapped baggies of crack cocaine and a little less than $1000 in cash. The State also established that defendant was arrested within 1000 feet of a church.

¶ 5 Initially, defendant was represented by the public defender's office. On January 2, 2014, a private attorney, Mark Friedman, filed his appearance. Friedman represented defendant at the preliminary hearing and thereafter on several status dates. On March 21, 2014, defendant discharged Friedman after informing the court that he was "ineffective." Defendant requested the public defender, and assistant public defender Anthony Peska was appointed to represent him.

¶ 6 On May 9, 2014, Peska unsuccessfully argued a motion for discharge for violation of the speedy trial statute. On July 10, 2014, four days before defendant's jury trial was scheduled to begin, defendant moved to proceed *pro se* on the ground that he disagreed with Peska's strategy in filing the speedy trial motion. The next day, the court closely inquired into defendant's allegation of ineffectiveness, and defendant explained that he believed that Peska had surrendered an argument that could have been raised on appeal. Peska argued that he had a good-faith reason to file the motion, and the court agreed.

¶ 7 In that same hearing, defendant complained that Peska refused to measure the distance from where he was arrested to the church. Defendant also complained that Peska was not willing to obtain video surveillance tapes from establishments near where he was arrested. Again, the

court inquired into these allegations of ineffectiveness. Peska explained that he requested that the prosecution allow him to accompany an officer while they measured the distance to the church. Peska also indicated that he checked into the availability of video surveillance tapes and discovered that Munzy's Bar had recorded over the tape. Peska noted that all of his efforts were "insufficient" in defendant's eyes. The court allowed defendant to proceed *pro se*.

¶ 8 Defendant requested free transcripts of all prior proceedings and a continuance of the trial. The court granted the continuance, but over the course of several subsequent hearings, it denied the request for free transcripts. On August 25, 2014, defendant requested and was given time to obtain private counsel. On January 15, 2015, defendant appeared without counsel and requested that the court appoint counsel. The court appointed the public defender.

¶ 9 On January 23, 2015, Peska appeared with defendant and informed the court that defendant was dissatisfied with his representation and felt that he was "ineffective" because he advised defendant that surveillance videos from various downtown establishments were not relevant to the case. The court then addressed defendant, who expressed his belief that Peska "ain't presented nothing to me." Peska reiterated that the surveillance videos had no legal relevance. Peska stated: "[Defendant] disagrees with me on everything and doesn't agree with my legal opinion." The court again addressed defendant, who agreed that Peska told him that the videos were not relevant. The court informed defendant that Peska was acting competently and would remain his attorney.

¶ 10 On March 6, 2015, defendant pleaded guilty to an amended charge of unlawful possession of a controlled substance with intent to deliver, a Class 1 felony, and the court sentenced him to 14 years' incarceration, as agreed by the parties. The charge of unlawful possession of cannabis was dismissed. At the plea hearing, the court advised defendant that the

amended charge was a Class 1 felony, but because defendant had two prior Class X convictions, he was subject to Class X sentencing, with a range between 6 and 30 years' incarceration. Defendant stated that he understood the nature of the charge and the possible punishment. Defendant also agreed that the terms of the plea agreement were as indicated. Defendant stated that his guilty plea was knowing and voluntary. Defendant waived a presentence investigation and agreed to proceed with sentencing.

¶ 11 On March 20, 2015, at defendant's direction, Peska filed a motion to withdraw the guilty plea on the basis that defendant did not knowingly and intelligently waive his right to a jury trial or fully understand the court's admonishments. Then Peska filed an amended motion further alleging that defendant pleaded guilty because he felt he had no other option. On June 4, 2015, defendant filed a *pro se* motion to withdraw his guilty plea alleging that Peska failed to provide "even a reasonable level of assistance" in that counsel "never discussed [a] trial defense or preparation for trial," but "merely kept trying to get [defendant] to enter into an open plea to the Court." Defendant requested the appointment of new counsel not associated with the public defender's office.

¶ 12 On July 15, 2015, defendant, Peska, and the State appeared before the court on the motions to withdraw defendant's guilty plea. Peska stated that he would not "adopt" defendant's *pro se* motion because he disagreed with its factual assertions. The court indicated that Peska was the "attorney of record" for defendant and that the matter would proceed on the amended motion Peska filed before the court addressed defendant's *pro se* motion. The court gave defendant an opportunity to include additional matter in his *pro se* motion, but defendant declined. The court then proceeded with an evidentiary hearing on Peska's amended motion.

¶ 13 Peska called defendant as a witness. Defendant testified that he pleaded guilty because he was under Peska's influence. Defendant explained that he had wanted a different attorney throughout the proceedings, and then tried to represent himself. Defendant testified that when he was unsuccessful in obtaining certain transcripts on his own, he asked for an attorney, and the court again appointed Peska. According to defendant, Peska forced him to plead guilty and refused to mount a defense.

¶ 14 Peska attempted to establish that chief public defender Byron Sloan also assisted with defendant's case, but defendant denied that Sloan had offered any assistance. According to defendant, Peska pressured defendant into pleading guilty because he would not "fight the case." Defendant testified that Peska gave him two options: life in prison upon conviction after trial (defendant had two prior Class X felony convictions) or accept the 14 years' imprisonment that the State offered. Defendant acknowledged the transcript of his guilty plea where he stated in open court that he was satisfied with Peska's representation.

¶ 15 The State cross-examined defendant using the transcript of his guilty plea to establish that the court fully admonished defendant regarding his guilty plea and that defendant had told the court that no threats or promises were made to coerce him to enter into the plea agreement. Then Peska called Sloan to testify to his participation in defendant's case. Peska recalled defendant in light of Sloan's testimony. Defendant waived his attorney-client privilege and divulged his conversations with Sloan. According to defendant, Sloan never "was part of the case." The State again cross-examined defendant, but defendant was adamant that Sloan gave him no assistance. In closing argument, Peska argued that defendant's plea was not knowing or voluntary because he was confused over the nature of the charge, the evidence against him, and the range of penalties.

¶ 16 After arguments by counsel, the court ruled that it would not "receive" defendant's *pro se* motion and that the motion was "denied at this time without a hearing." The court also orally denied Peska's amended motion. On September 29, 2015, the court filed a written order denying Peska's amended motion, stating that defendant entered into the plea agreement with his "eyes open" and that he was aware of the consequences of the plea and the possible sentences. The court rejected consideration of defendant's *pro se* motion because defendant was represented by an attorney. Defendant filed a timely notice of appeal.

¶ 17 II. ANALYSIS

¶ 18 Defendant first contends that the court erred in not considering his *pro se* motion to withdraw his guilty plea. A *pro se* posttrial claim alleging ineffective assistance of counsel is governed by the procedure developed from our supreme court's decision in *People v. Krankel*, 102 Ill. 2d 181 (1984). *People v. Ayres*, 2017 IL 120071, ¶ 1. New counsel is not automatically required to be appointed. *People v. Moore*, 207 Ill. 2d 68, 77 (2003). Rather, the trial court must conduct some type of preliminary inquiry into the underlying factual basis, if any, of a defendant's *pro se* claim of ineffective assistance of counsel. *Ayres*, 2017 IL 120071, ¶ 11. This preliminary investigation may be conducted by: (1) questioning trial counsel about the facts and circumstances of the defendant's allegations; (2) requesting more specific information from the defendant; or (3) relying on its own knowledge of counsel's performance at trial and any insufficiency of the defendant's allegations on their face. *Moore*, 207 Ill. 2d at 78-79. If the allegations show possible neglect of the case, new counsel should be appointed. *Ayres*, 2017 IL 120071, ¶ 11. However, if the court determines that the claim lacks merit or pertains only to matters of trial strategy, the court need not appoint new counsel and may deny the *pro se* motion. *Moore*, 207 Ill. 2d at 78. There is virtually no opportunity for the State to participate during the

preliminary inquiry. *People v. Fields*, 2013 IL App (2d) 120945, ¶ 40. Whether the court conducted a proper preliminary *Krankel* inquiry is a legal question that we review *de novo*. *People v. Jolly*, 2014 IL 117142, ¶ 28.

¶ 19 Here, the court orally denied defendant's *pro se* motion without a hearing and then, in its written ruling, the court reiterated that it would not consider defendant's *pro se* motion because defendant was represented by counsel. Thus, the record is clear that the court did not conduct *any* type of *Krankel* inquiry. The State confesses error, but argues that the error was harmless pursuant to *People v. Skillom*, 2017 IL App (2d) 150681.

¶ 20 In *Skillom*, this court held that, even though the *manner* in which the trial court inquired into the defendant's *pro se* posttrial claim of ineffective assistance of counsel was procedurally improper, the error was harmless where the defendant's claims were rebutted by the objective record. *Skillom*, 2017 IL App (2d) 150681, ¶ 30. In *Skillom*, defense counsel brought the defendant's ineffective assistance claim to the trial court's attention at a hearing on the defendant's motion to withdraw his guilty plea, whereupon the trial court conducted an adversarial inquiry at which the State was allowed to cross-examine the defendant. *Skillom*, 2017 IL App (2d) 150681, ¶ 27. The defendant's sole allegation of ineffectiveness was that counsel gave incorrect advice as to whether the offense was probationable. *Skillom*, 2017 IL App (2d) 150681, ¶ 29. However, the trial court recalled that it fully admonished the defendant at the guilty plea hearing that he was subject to Class X sentencing, and the transcript of the guilty plea hearing corroborated the trial court's memory. *Skillom*, 2017 IL App (2d) 150681, ¶ 29. Consequently, this court noted that any prejudice resulting from counsel's incorrect advice was cured. *Skillom*, 2017 IL App (2d) 150681, ¶ 29.

¶ 21 Here, the court erred by failing to conduct *any* manner of a *Krankel* inquiry. Consequently, we need not determine whether the court afforded defendant an "adequate" inquiry (see *Moore*, 207 Ill. 2d at 78 (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)), because the trial court refused to inquire at all, being under the mistaken assumption that defendant's *pro se* allegations of ineffective assistance of counsel were not cognizable. For that reason, *Skillom* is inapplicable.

¶ 22 Nevertheless, the State argues that the court's denial of defendant's motion to withdraw his plea was "necessarily an implicit determination that the claims of ineffective assistance of counsel were without merit." We disagree. Under *Moore*, the court must examine the factual basis of the defendant's claim. *Moore*, 207 Ill. 2d at 78. As stated above, the record is clear that the court declined even to address defendant's ineffective assistance claims. Therefore, the court's denial of defendant's motion to withdraw his plea encompassed only those matters raised in Peska's amended motion.

¶ 23 Under *Moore*, it is doubtful that we could extend *Skillom* to the present situation, where no *Krankel* inquiry was attempted. Where the trial court does not consider a defendant's claims of ineffective assistance at all, "it is simply not possible to conclude that the trial court's failure to conduct an inquiry into those allegations was harmless beyond a reasonable doubt." *Moore*, 207 Ill. 2d at 81.

¶ 24 Even if we could apply harmless error, we cannot say that the objective record rebuts defendant's allegations of ineffective assistance. Throughout the proceedings leading up to the guilty plea, defendant made various allegations of ineffective assistance. While the court inquired into each of defendant's grievances and determined that they were either unfounded or

the result of differences in strategy, the record does not establish that defendant's *pro se* motion to withdraw his plea was limited only to those earlier allegations. Defendant's *pro se* written motion alleged broadly that Peska had no interest in representing him, but that Peska kept badgering defendant to enter an open plea. Those allegations go to conversations that were not part of the record. Nor can we conclude, as does the State, that had a *Krankel* inquiry been held, the court would have rejected defendant's claims. Defendant testified at the hearing to withdraw his plea that Peska pressured him to plead guilty. Defendant elaborated that Peska failed to contact witnesses and gather evidence that defendant felt were crucial to his defense. Defendant could have been referring to obtaining the surveillance videos that he complained about earlier, or he may have meant something else. When defendant raised those matters in his testimony under Peska's direct examination, Peska did not inquire into further details.

¶ 25 Defendant argues that we should remand for appointment of new counsel. That request is denied as premature. We disagree with defendant that the record demonstrates an actual conflict between Peska and defendant. At this stage, without an adequate *Krankel* inquiry, the record reflects that defendant's plea was entered knowingly and voluntarily. However, because a *Krankel* inquiry must be conducted, we vacate the judgment and remand. On remand, that inquiry must consist of the court's examination of defendant's *pro se* allegations of ineffective assistance to determine their precise factual basis. Then, the court may inquire of Peska and defendant, in accordance with *Moore*. See *Moore*, 207 Ill. 2d at 78. Also, a proper *Krankel* inquiry will be nonadversarial, meaning that the State's participation, if any, will be *de minimus*. See *Jolly*, 2014 IL 117142, ¶ 38. If, after conducting the *Krankel* inquiry, the court determines that defendant's claim of ineffectiveness is spurious or pertains only to trial strategy, the court shall reinstate its order denying defendant's motion to withdraw his guilty plea. Conversely, if

the court determines that Peska possibly neglected defendant's case, the court shall appoint new, conflict-free counsel to argue the motion to withdraw the guilty plea.

¶ 26 Accordingly, we vacate the order denying defendant's motion to withdraw his guilty plea, and we remand to the circuit court with instructions to conduct a preliminary inquiry into defendant's allegations of ineffective assistance of counsel in accordance with our supreme court's *Krankel* jurisprudence and consistent with this Order.

¶ 27 III. CONCLUSION

¶ 28 For the foregoing reasons, the judgment of the circuit court of Stephenson County is vacated, and the cause is remanded.

¶ 29 Vacated and remanded.