2018 IL App (2d) 160790-U
No. 2-16-0790
Order filed November 28, 2018



IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS,<br><br>Plaintiff-Appellee,<br><br>v.<br><br>BRANDON M. MOORE,<br><br>Defendant-Appellant. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Appeal from the Circuit Court of Lake County.<br><br><br><br>No. 15-CF-226<br><br>Honorable Daniel B. Shanes, Judge, Presiding. |

JUSTICE McLAREN delivered the judgment of the court.
Justices Hutchinson and Spence concurred in the judgment.

**ORDER**

¶ 1 *Held*: (1) The trial court did not improperly require defendant to represent himself on his *pro se* motion to withdraw his plea but instead properly conducted a *Krankel* inquiry as to the ineffectiveness claims therein; (2) as the trial court effectively denied defense counsel's motion to withdraw defendant's plea without a hearing and without obtaining a Rule 604(d) certificate, we remanded for new postplea proceedings; (3) as the trial court imposed a public defender fee without any discussion in open court, it conducted no "hearing" on the fee, and thus we vacated it outright.

¶ 2 Defendant, Brandon M. Moore, appeals from the denial of his *pro se* motion to withdraw his guilty plea to armed robbery (720 ILCS 5/18-2(A)(1) (West 2014)), arguing (1) that the trial court erred in requiring him to represent himself at the hearing on his motion without obtaining a

valid waiver of counsel, and (2) that a $750 public defender fee should be vacated because it was imposed without the requisite hearing. For the reasons that follow, we affirm in part, vacate in part, and remand for further proceedings.

¶ 3 I. BACKGROUND

¶ 4 On May 17, 2016, in the middle of his jury trial, defendant pleaded guilty to armed robbery (*id.*), in exchange for a 15-year prison sentence and the dismissal of other charges.

¶ 5 On June 7, 2016, defense counsel filed a motion to withdraw defendant's guilty plea. The motion alleged that defendant did not understand the terms of the plea negotiation, that defendant was not properly advised about his plea by his attorney, and that defendant was not properly advised about his plea by the trial court. Counsel did not file a certificate under Illinois Supreme Court Rule 604(d) (eff. July 1, 2017).

¶ 6 On June 14, 2016, defendant filed a *pro se* motion to withdraw his guilty plea and vacate his sentence, alleging as follows:

> "I was not advised by counsel as to the rights I was surrendering in pleading guilty. I had inadequate representation by counsel and did not knowingly and intelligently enter said plea of guilty. I was told by counsel 'Im [*sic*] done playing games' and that we would lose trail [*sic*]. Those statements felt like a result of force witch [*sic*] played a part of my pleaing [*sic*]. At the time of signing I was not informed that the plea of guilty would result in a waiver of any and all rights, I was told it was just a waiver for trial. Other reasons I wish to withdraw is because their [*sic*] is new evidence that has been entered on the case on my behalf that I wish to bring forth in court."

¶ 7 On June 29, 2016, defense counsel appeared in court without defendant present. The following colloquy took place:

"[THE STATE]: *** This is up on defendant's motion to withdraw his plea.

THE COURT: You're here on this. You also filed a pleading I think essentially to make sure you did not lose the third stage.

[DEFENSE COUNSEL]: Yes. I am not arguing the motion on his behalf.

THE COURT: I understand. Let's pick a day to bring him here and see what is going on."

¶ 8 The parties next appeared in court on August 15, 2016. The trial court told defendant that it brought him back because it wanted to hear from him regarding his motion. The court then summarized what it believed to be defendant's arguments. The court stated: "Two things that you are telling me are that you want to withdraw your plea because you think there's new evidence on the case that you want to bring forth in court and that, I'm summarizing this, essentially your attorney kind of pushed you into doing a plea. While you thought you were giving up your rights to trial you didn't think you were giving up all your rights?" Defendant agreed. The court asked defendant to identify the new evidence. Defendant responded: "I'm not very sure because I was mistaken about that." He stated: "I'm not sure if it is or it isn't." When the court asked defendant to give it some idea of what he was talking about, defendant responded: "Just something that would help me out as far as the case I thought was entered on the case." The court then asked about defendant's claim that he did not know that he was giving up certain rights. Thereafter, the following colloquy occurred:

"DEFENDANT: As far as that, when I came into court I thought I was just signing a waiver for trial. I didn't really know when she told me the deal and how they changed the charge, they had told me that last Wednesday. I had said that I didn't want to do it as far as the class X because I was concerned about the drug treatment program

and getting good time and things like that and then she told me, she said that I could get it but it's no way possible that I can get good time for a class X offense.

THE COURT: Well, it's 50 percent. You get day-for-day. It's not a truth in sentencing offense so the agreement was 15 years, and it's 50 percent so you are good on that, is that what you are talking about?

DEFENDANT: Nah, I'm not really good on the time.

THE COURT: What other credits are you talking about?

DEFENDANT: I'm saying like as far as me if I was to get in a drug program, get good time as far as to cut down the sentence.

THE COURT: Oh, I see.

DEFENDANT: I can't get that period. When you recommend it to me.

THE COURT: Yeah, we did talk about that.

DEFENDANT: Yeah, you didn't say it's no way possible you can change my date.

THE COURT: Right. We did have the whole conversation that I usually do. And I said I would recommend that department place you in a facility. Did I leave that off the mittimus? Maybe I did. I did leave that off the mittimus so that one's on me. I can send down a new mitt where it recommends DOC puts you in a facility that provides for substance abuse like we talked about. You are in on class x armed robbery, I don't know what they'll do like I told you back when you plead guilty.

DEFENDANT: That's the whole thing about that charge.

THE COURT: So they are not going to do it any ways?

DEFENDANT: I don't believe so. I didn't want to take that charge.

THE COURT: What, the armed robbery?

DEFENDANT: The armed robbery period.

THE COURT: So that's basically what this is about you don't think you want to take the charge any more?

DEFENDANT: No. The charge it's charged for something I didn't commit.

THE COURT: Yeah, right. Okay. Anything else you want to tell me about why I should let you withdraw your plea of guilty?

DEFENDANT: Well, sir, that's a lot of time in general for my first offense when I was just out there. I was just 19 years old, a kid still, but I still had a lot of responsibilities on my own. I had my own apartment. I was working. And this whole situation a lot of time taken out of my life before I can change it around. I would like to change it around sooner than later, and this will give me no opportunity at all to turn it around. This is for something I didn't do. I don't want that much time.

THE COURT: It is a lot of time, fifteen years.

DEFENDANT: That's a lot of time.

THE COURT: You were only 19. Okay. I'm glad I brought you here because I needed to hear yourself what this is about.

[State], your position on the defendant's motion to withdraw?

[THE STATE]: Judge, the transcripts speak for themselves, not just the plea that went through but this case went through a long period of time. We began a trial and as the evidence was coming, the defendant chose to plead guilty.

He was fully advised of the charges and the length of the plea.

So we would ask the Court to deny the defendant's motion.

THE COURT: [Defendant], I usually give the person who raised the motion the last say. Anything else you want to say?

DEFENDANT: Yes. In all due respect, sir, in my defense, I did not have the right representation. I believe that things came up in the case that were like last minute, things we could have done way sooner during the time that I was. It was a long time that I did work on this case but it was things that I didn't know that I found out right before and I feel like I had no fight. I feel like that in my representation it was like no way she would fight me. It's something that I didn't do. I told her the real story.

THE COURT: Like what was the problem with your representation?

DEFENDANT: I am saying it was just things she would say, like we were going to move this with this and this with that. And it just wasn't right like she wasn't doing things that were in my benefit. We would find out things later rather than sooner right before things that we could attack.

THE COURT: Actually, you wrote that in your motion too she told you you would probably lose the trial.

DEFENDANT: Yeah. It just felt like when at the time that I had took the time when she told me that she was done playing, like she gave up on me so it just felt like I was forced to take this. I was forced with so much time that it seemed like the right thing she forced me to do.

THE COURT: Okay. I understand."

¶ 9 Thereafter, the trial court reviewed with defendant in great detail everything that had happened leading up to the court accepting defendant's plea. The court concluded that it "[has] no doubt that it's a knowing and voluntary decision." The court further stated: "You haven't

shown anything, remotely close to an insufficient performance by your attorney." The court denied defendant's motion.

¶ 10 Defendant timely appealed.

¶ 11 II. ANALYSIS

¶ 12 Defendant argues that the matter must be remanded for further postplea proceedings, because the trial court required defendant to represent himself at the hearing on his motion to withdraw the guilty plea without obtaining a waiver of counsel. In response, the State argues that the trial court did not require defendant to represent himself at the hearing on his motion but, instead, properly inquired, under *People v. Krankel*, 102 Ill. 2d 181, 189 (1984), as to the basis of defendant's claims of ineffective assistance of counsel and determined that defendant's claims were without merit. Thus, according to the State, the trial court properly denied defendant's *pro se* motion.

¶ 13 First, we agree that defendant's claims of ineffective assistance of counsel in his *pro se* motion to withdraw his guilty plea triggered the trial court's duty to conduct a *Krankel* inquiry. See *People v. Ayres*, 2017 IL 120071, ¶¶ 11-18. Pursuant to *Krankel* and its progeny, when a defendant raises a *pro se* posttrial claim of ineffective assistance of counsel, the following procedure should be followed to determine whether new counsel should be appointed:

> " '[W]hen a defendant presents a *pro se* posttrial claim of ineffective assistance of counsel, the 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. Jolly*, 2014 IL 117142, ¶ 29 (quoting *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003)).

¶ 14 To determine whether new counsel should be appointed, "some interchange between the trial court and trial counsel regarding the facts and circumstances surrounding the allegedly ineffective representation is permissible and usually necessary." *Moore*, 207 Ill. 2d at 78. As part of that interchange, the trial court may question defense counsel and the defendant about the facts and circumstances surrounding the defendant's allegations. *Id.* However, an interchange with counsel or the defendant is not always necessary, as "the trial court can base its evaluation *** on its knowledge of defense counsel's performance at trial and the insufficiency of the defendant's allegations on their face." *Id.* at 79. In every case, the court must "conduct some type of inquiry into the underlying factual basis, if any, of a defendant's *pro se* posttrial claim of ineffective assistance of counsel." *Id.*

¶ 15 The State contends that the trial court conducted an adequate inquiry, found that defendant did not raise a discernible challenge to defense counsel's representation, and thus properly denied defendant's *pro se* motion. We agree that the trial court conducted an adequate *Krankel* inquiry. Indeed, the trial court asked defendant specifically about his concerns with his representation and allowed defendant ample time to explain. After doing so, the court concluded: "You haven't shown anything, remotely close to an insufficient performance by your attorney." Although the court did not expressly state that it was conducting an inquiry under *Krankel*, there is no requirement that it do so. See *People v. Dean*, 2012 IL App (2d) 110505, ¶ 15.

¶ 16 Nevertheless, defendant argues that, even if the *Krankel* inquiry was warranted and adequately conducted, he is entitled to a remand, because the trial court never ruled on the

motion to withdraw the guilty plea filed by defense counsel and because counsel failed to file a certificate showing compliance with Rule 604(d). We agree. This court was faced with a similar situation in *People v. Buchanan*, 2013 IL App (2d) 120447.[1] There, defense counsel filed a motion to withdraw the defendant's guilty plea. When the defendant later told the trial court that he had claims of ineffectiveness that he wished to raise, the court allowed him to do so in a written motion. The defendant then filed a *pro se* motion to withdraw his guilty plea, wherein he raised his ineffectiveness claims. The court conducted a hearing on the defendant's *pro se* motion, at which it questioned the defendant at length and allowed defense counsel to explain the facts and circumstances surrounding the claims. After the hearing, the court denied the defendant's *pro se* motion without addressing the motion that had been filed by counsel. We found that, although the trial court properly considered and rejected the defendant's claims of ineffectiveness, a remand was necessary. We stated:

> "[W]ithout any reference to the motion to withdraw defendant's guilty plea that had been previously filed by counsel, the court denied not only defendant's *pro se* motion but also, effectively, counsel's motion to withdraw the plea. It is not clear where the *Krankel* hearing ended and the rest of the hearing began. Upon concluding that defendant's *pro se* claims of ineffectiveness were without merit, the court should have clearly informed defendant that he was not entitled to conflict counsel and, at that point, allowed counsel to argue any remaining issues (or taken a proper waiver of counsel).
>
> *** [D]efense counsel filed an amended motion to withdraw the guilty plea. On the same day that counsel filed the amended motion, counsel filed the requisite Rule

[1] Neither party cited *Buchanan* in its brief. However, defendant filed a motion to cite the case as additional authority, and this court granted the motion.

> 604(d) certificate. The motion alleged that defendant did not knowingly, intelligently, and voluntarily waive his right to a jury trial, that defendant did not fully comprehend the court's admonishments, and that 'defendant feels that he was coerced into entering the plea of guilty.' To the extent that, upon the conclusion of the *Krankel* inquiry, the court did not allow counsel to argue the merits of the motion, defendant was indeed denied his right to counsel. Thus, remand is warranted so that counsel can argue the merits of the motion." *Id.* ¶¶ 24-25.

So too here. As defendant notes, two motions to withdraw defendant's guilty plea were filed in this case: one by counsel and one by defendant. The trial court never considered counsel's motion and the hearing was limited to defendant's *pro se* motion. When the trial court denied defendant's motion, it effectively denied the motion filed by counsel without allowing counsel to argue the merits.

¶ 17 Moreover, counsel never filed a certificate showing compliance with Rule 604(d). See Ill. S. Ct. R. 604(d) (eff. July 1, 2017) ("The defendant's attorney shall file with the trial court a certificate stating that the attorney has consulted with the defendant either by phone, mail, electronic means or in person to ascertain defendant's contentions of error in the sentence and the entry of the plea of guilty, has examined the trial court file and both the report of proceedings of the plea of guilty and the report of proceedings in the sentencing hearing, and has made any amendments to the motion necessary for adequate presentation of any defects in those proceedings.). "[W]hen defense counsel neglects to file a Rule 604(d) certificate, the appropriate remedy is a remand for (1) the filing of a Rule 604(d) certificate; (2) the opportunity to file a new motion to withdraw the guilty plea and/or reconsider the sentence, if counsel concludes that a

new motion is necessary; and (3) a new motion hearing." *People v. Lindsay*, 239 Ill. 2d 522, 531 (2011).

¶ 18 Based on the foregoing, we affirm the trial court's denial of defendant's *pro se* claims of ineffectiveness, but we vacate the order of August 15, 2016, to the extent that it otherwise operated as a denial of defendant's motion to withdraw his guilty plea. We remand the cause for (1) the filing of a valid Rule 604(d) certificate; (2) the opportunity to file a new motion to withdraw the guilty plea; and (3) a new motion hearing.

¶ 19 Defendant next argues that the $750 public defender fee must be vacated outright, because it was imposed without the requisite hearing. The State agrees.

¶ 20 Although defendant did not raise this issue below, we may consider the issue as forfeiture does not apply. See *People v. Hardman*, 2017 IL 121453, ¶ 49 (the defendant's failure to object to the imposition of the public defender fee at sentencing hearing did not result in forfeiture); *People v. Carreon*, 2011 IL App (2d) 100391, ¶ 11 ("where a trial court imposes this fee without following the appropriate procedural requirements, application of the forfeiture rule is inappropriate").

¶ 21 Section 113-3.1 of the Code of Criminal Procedure of 1963 (725 ILCS 5/113-3.1 (West 2016)) provides that the defendant may be required to pay a "reasonable sum" to defray the cost of an appointed public defender. In order to impose this fee, however, the trial court is required to hold a hearing to determine the defendant's financial circumstances. *Id.* § 113-3.1(a). Where the trial court holds no hearing whatsoever on the fee, the proper remedy is to vacate the fee outright. See *People v. Suggs*, 2016 IL App (2d) 140040, ¶ 94; *People v. Daniels*, 2015 IL App (2d) 130517, ¶¶ 26-30.

¶ 22 Our review of the record confirms that the trial court failed to conduct any hearing at all on the public defender fee. Exhibit A indicates that the trial court imposed the public defender fee, along with other fees, fines, and costs, on May 17, 2016. The only proceeding that took place that day was the plea and sentencing hearing. There was no mention of the public defender fee at any time during the hearing. Given that the fee was assessed without some sort of hearing, it must be vacated outright.

¶ 23 III. CONCLUSION

¶ 24 For the reasons stated, the judgment of the circuit court of Lake County is affirmed in part and vacated in part, and the cause is remanded.

¶ 25 Affirmed in part and vacated in part.

¶ 26 Cause remanded.