2018 IL App (4th) 160232-U

NO. 4-16-0232

FILED
May 7, 2018
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
WILLIE CHAMBERS,	)	No. 14CF791
Defendant-Appellant.	)	
	)	Honorable
	)	Scott D. Drazewski,
	)	Judge Presiding.

JUSTICE CAVANAGH delivered the judgment of the court.
Justices Holder White and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: Because the public defender's office already provided defendant new defense counsel in response to his *pro se* claims of ineffective assistance, his request to remand this case for the appointment of new counsel to argue his *pro se* claims is declined.

¶ 2 Defendant, Willie Chambers, appeals a judgment sentencing him to 42 years' imprisonment for first degree murder (720 ILCS 5/9-1(a)(2) (West 2014)). He requests that we remand this case with directions to appoint new defense counsel, pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984), to argue his *pro se* claims of ineffective assistance of counsel. Because defendant already has received all the relief he possibly could receive under *Krankel*—namely, new, independent defense counsel—we decline his request, and we affirm the trial court's judgment.

¶ 3 I. BACKGROUND

¶ 4 On August 7, 2015, while he was represented by an assistant public defender, Brian McEldowney, defendant pleaded guilty to the first degree murder of Ronald Smith. In return for his guilty plea, the State dismissed other charges.

¶ 5 On October 23, 2015, the trial court sentenced defendant to imprisonment for 42 years.

¶ 6 On November 9, 2015, McEldowney filed a motion to withdraw the guilty plea, arguing the plea was involuntary because defendant's borderline intellectual functioning had prevented him from fully understanding the plea and its consequences. At the same time, McEldowney filed a motion to reduce the sentence.

¶ 7 On November 16, 2015, while he still was represented by McEldowney, defendant filed a *pro se* motion to withdraw his guilty plea. In his *pro se* motion, he complained that McEldowney read nothing to him, refused to allow him to speak with his mother, told him he "ha[d]" to sign the "open plea of 20 to 60," expressed a dislike of him, and deprived him of the opportunity to tell the judge he never intended to kill Smith.

¶ 8 In a hearing on March 22, 2016, defendant was represented by a different assistant public defender, Michael Herzog. Herzog explained to the trial court:

> "[Defendant] filed a motion shortly after sentencing[,] alleging some information about Mr. McEldowney. Our office decided it was prudent for me to step in on representation and move forward. I did consult with [defendant] through a call to [the Illinois Department of Corrections]. We had a conversation about his intention moving forward. This all occurred after I reviewed the plea hearing and the sentencing hearing, and I was able to give him some information as to how I thought we should proceed. We are proceeding on both motions."

¶ 9 After receiving Herzog's certificate pursuant to Illinois Supreme Court Rule 604(d) (eff. Mar. 8, 2016), the trial court heard arguments on McEldowney's previously filed motions to withdraw the guilty plea and to reconsider the sentence (but Herzog was the one who argued the motions). The court then denied the motions.

¶ 10 At no time during the hearing of March 22, 2016, did defendant personally speak. Nor did anyone address the *pro se* allegations he had made against McEldowney.

¶ 11 This appeal followed.

¶ 12 II. ANALYSIS

¶ 13 A. Our Subject-Matter Jurisdiction

¶ 14 The State argues that, under Illinois Supreme Court Rule 606(b) (eff. July 1, 2017), we lack subject-matter jurisdiction over this appeal because (1) defendant filed a *pro se* motion to withdraw his guilty plea and (2) when he filed his notice of appeal, the trial court had not yet ruled on his *pro se* motion.

¶ 15 Rule 606(b) provides: "When a timely posttrial or postsentencing motion directed against the judgment has been filed by counsel *or by defendant, if not represented by counsel*, any notice of appeal filed before the entry of the order disposing of all pending postjudgment motions shall have no effect and shall be stricken by the trial court." (Emphasis added.) Because defendant was represented by McEldowney when he filed his *pro se* motion to withdraw his guilty plea and because the trial court ruled on the posttrial motions filed by defense counsel, Rule 606(b) is, by its terms, inapplicable. See *People v. Bell*, 2018 IL App (4th) 151016, ¶ 32. We adhere to our recent decision in *Bell*, which "reject[ed] the State's application of Rule 606(b) [to] the common-law procedure developed by *Krankel* and its progeny." *Id.* ¶ 32.

¶ 16 On March 22, 2016, the trial court denied McEldowney's motions to withdraw the guilty plea and to reduce the sentence, and defendant filed his notice of appeal on March 24, 2016, which was within the 30-day deadline in Rule 606(b) ("[T]he notice of appeal must be filed with the clerk of the circuit court within 30 days after the entry of the final judgment appealed from or[,] if a motion directed against the judgment is timely filed, within 30 days after the entry of the order disposing of the motion."). We have subject-matter jurisdiction over this appeal.

¶ 17 B. Herzog's Performance as Substitute Defense Counsel

¶ 18 Defendant argues we should remand this case for the appointment of new counsel pursuant to *Krankel* and its progeny. According to that line of cases, whenever a defendant "presents a *pro se* posttrial claim of ineffective assistance of counsel," the trial court must inquire into "the factual basis of the defendant's claim." *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003). Although *Moore* speaks of "a *pro se* posttrial claim of ineffective assistance," the same duty of inquiry arises even if there was no trial (and, thus, no posttrial claim) and the defendant makes a *pro se* claim of ineffective assistance after pleading guilty. *People v. Ayres*, 2017 IL 120071, ¶¶ 1, 26 (addressing claim in an appeal from a guilty plea and postplea motions). In a *Krankel* inquiry, the trial court "ascertain[s] the underlying factual basis for the ineffective assistance claim" (*id.* ¶ 24) by questioning the defense counsel who is the subject of the claim, discussing the claim with the defendant, or reviewing the record. *Id.* ¶ 12. The court thereby makes an adequate record for any claims of ineffective assistance that might be raised on appeal. *Id.* ¶ 13.

¶ 19 The whole point of a *Krankel* inquiry, besides making an adequate record, is to decide whether new counsel is needed. "This procedure serves the narrow purpose of allowing the trial court to decide whether to appoint independent counsel to argue a defendant's *pro se*

posttrial" (or post-plea) "ineffective assistance claims." (Internal quotation marks omitted.) *Id.* ¶ 11. "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." (Internal quotation marks omitted.) *Id.*

¶ 20 Again, the ultimate question in a *Krankel* inquiry is "whether to appoint independent counsel." *Id.* The State argues there would be no point in remanding this case for a *Krankel* hearing, considering that the public defender's office, on its own initiative, already replaced McEldowney with independent counsel, Herzog. According to the State, the *Krankel* issue is moot because defendant already has received all the relief he could possibly receive in a *Krankel* proceeding, namely, the replacement of McEldowney with a new attorney. See *People v. Cunningham*, 376 Ill. App. 3d 298, 306 (2007) (even if the complaint that the defendant filed with the Illinois Attorney Registration and Disciplinary Commission qualified as a *pro se* claim of ineffective assistance, a *Krankel* inquiry would be "irrelevant *** because [the] defendant received new counsel").

¶ 21 Even though Herzog replaced McEldowney as defense counsel, defendant disputes that he actually "received *** *Krankel* counsel." He reasons as follows. If, in a *Krankel* hearing, the trial court had found "possible neglect of the case," the court would have appointed new counsel "to argue [the] defendant's *pro se* posttrial ineffective assistance claims." (Internal quotation marks omitted.) *Ayres*, 2017 IL 120071, ¶ 11. The new counsel would have been obligated to "sift through the defendant's *pro se* allegations to determine if any [were] nonfrivolous" and to "present [the] nonfrivolous claims to the trial court." *People v. Downs*, 2017 IL App (2d) 121156-C, ¶ 50. If, after independently evaluating the defendant's *pro se*

allegations, the new counsel was "unable to discern any nonfrivolous allegations, he or she [would have to] seek permission from the trial court to withdraw from his or her representation of the defendant." *Id.* ¶ 51. Thus, by defendant's understanding, a new defense counsel, appointed in a *Krankel* hearing, would have only two options: either find some nonfrivolous claims among defendant's *pro se* allegations of ineffective assistance and present those claims to the court or—the sole alternative—move to withdraw. Because Herzog did neither of those things and instead argued the posttrial motions that McEldowney had filed, defendant concludes that Herzog failed to function as a *Krankel* counsel.

¶ 22 The adequacy of the new counsel's performance is beyond the scope of the *Krankel* line of cases. Again, the "narrow purpose" of a *Krankel* proceeding is "to decide whether to appoint independent counsel to argue a defendant's *pro se* posttrial ineffective assistance claims." (Internal quotation marks omitted.) *Ayres*, 2017 IL 120071, ¶ 11; see also *Cunningham*, 376 Ill. App. 3d at 304 ("The ultimate purpose of a trial court's initial inquiry into a defendant's ineffective assistance claim is to determine whether new counsel should be appointed."). Therefore, the moment new, independent counsel replaces the prior counsel, the *Krankel* line of cases ceases to be relevant. *Cunningham*, 376 Ill. App. 3d at 306. Once new counsel takes over, his or her performance is evaluated not under *Krankel* and its progeny but, rather, under the sixth amendment (U.S. Const., amend. VI) as interpreted by *Strickland v. Washington*, 466 U.S. 668 (1984). *Downs*, 2017 IL App (2d) 121156-C, ¶ 4.

¶ 23 Under *Strickland*, "[w]hen a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show," first, "that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88. Second, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional

errors, the result of the proceeding would have been different." *Id.* at 694. Defendant fails to make a reasoned argument in support of those two propositions. He does not specify what his *pro se* claims of ineffective assistance were, let alone explain how Herzog "fell below an objective standard of reasonableness" by abandoning them and pursuing instead the claims that McEldowney had raised. *Id.* at 688. We do not understand *Downs* as holding that the new defense counsel is rigidly limited to either arguing *pro se* claims or moving to withdraw. Rather, we understand *Downs* as holding that the new defense counsel has the same obligation as any other posttrial or postplea defense counsel—to render professionally reasonable assistance (*Downs*, 2017 IL App (2d) 121156-C, ¶ 4)—and if it is professionally reasonable to abandon the *pro se* claims of ineffective assistance and to assert other claims, the new counsel may do so.

¶ 24 III. CONCLUSION

¶ 25 For the foregoing reasons, we affirm the trial court's judgment, and we award the State $50 in costs against defendant. See 55 ILCS 5/4-2002(a) (West 2016).

¶ 26 Affirmed.