2018 IL App (4th) 170919-U

NO. 4-17-0919

FILED
December 6, 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.	)	Macon County
DENNIS E. DAVIS,	)	No. 11CF1330
Defendant-Appellant.	)	
	)	Honorable
	)	Jeffrey S. Geisler,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Presiding Justice Harris and Justice Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court erred by failing to conduct a proper *Krankel* hearing, and remand is warranted for an evidentiary hearing on defendant's ineffective assistance of counsel claims.

¶ 2 After a March 2014 trial, a jury found defendant, Dennis E. Davis, guilty of first degree murder (720 ILCS 5/9-1(a)(1) (West 2010)) and three counts of attempt (first degree murder) (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2010)). In May 2014, the Macon County circuit court sentenced defendant to 50 years' imprisonment for first degree murder, to run consecutively to three concurrent 30-year prison terms for attempt (first degree murder). Defendant appealed, and this court affirmed the circuit court's judgment but remanded the cause to that court for an inquiry into defendant's *pro se* claims of ineffective assistance of counsel under *People v. Krankel*, 102 Ill. 2d 181, 464 N.E.2d 1045 (1984). *People v. Davis*, 2016 IL App (4th) 140575-U, ¶ 59.

¶ 3 On remand, the circuit court appointed defendant new counsel and conducted a *Krankel* hearing in April 2017. After hearing statements from defendant and his trial counsel, the court concluded trial counsel was not ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984). The court also amended defendant's sentencing judgment to include the 20-year sentencing enhancement for defendant's three attempt (first degree murder) convictions, resulting in three concurrent 50-year prison terms. Defendant appeals, asserting the circuit court used the wrong standard in evaluating his claims of ineffective assistance of counsel at the *Krankel* hearing. We reverse and remand for further proceedings.

¶ 4 I. BACKGROUND

¶ 5 Defendant's convictions relate to a September 3, 2011, shooting spree at 1502 Church Street in Decatur, Illinois, which resulted in the death of Mishyra Wheeler and injuries to ShaKeia Stewart, John Taylor, and Gregory Lewis. Wheeler received nine gunshot wounds during the shooting spree and died from her injuries.

¶ 6 At defendant's March 2014 jury trial, the State presented the testimony of (1) Christine Hyde, Wheeler's grandmother; (2) Stewart; (3) Taylor; (4) Colten Green, an adopted relative of defendant; (5) Demariel Cunningham, a guest at 1502 Church Street at the time of the shooting spree; (6) Adam Jahraus, a Decatur police officer; (7) Scott Cline, a Decatur police crime scene investigator; (8) Troy Kretsinger, a Decatur police crime scene investigator; (9) Bryan Kaylor, a Decatur police officer; (10) Joe Patton, a Decatur police detective; (11) Gary Havey, a forensic scientist specializing in latent fingerprints; (12) Carolyn Kersting, a forensic scientist specializing in firearm and toolmark identification; and (13) Dr. John Scott Denton, a forensic pathologist. The State also presented numerous stipulations from other witnesses and many exhibits. Defendant presented the testimony of (1) Vickie Reader, a roommate of

defendant in September 2011; (2) Jessie Owens, a Macon County deputy sheriff; and (3) Green. Defendant also presented several exhibits. The trial evidence necessary to establish a background for defendant's ineffective assistance of counsel claims is set forth below.

¶ 7 Stewart testified she and Wheeler went over to Shoulder's residence around 9:30 p.m. on September 3, 2011. When they arrived, Shoulder, Taylor, Lewis, and Freedom Cunningham were at Shoulder's home. After Shoulder got into the shower, everyone went out onto Shoulder's front porch. Stewart sat down on the couch in front of the picture window, and Taylor sat on a fold-up chair next to Stewart. Wheeler sat on the porch's stairs, and Lewis stood next to the stairs. After awhile, one of Freedom's relatives came and picked him up in a Jeep. Stewart did not know the relative and never heard anyone mention Demariel Cunningham's name that evening.

¶ 8 Shortly after Freedom left, two or three men came from the back of Shoulder's house on both sides and started shooting at them. Stewart testified she saw three guns but was unsure whether it was two or three men who were shooting. At first, everyone just stood there until someone mentioned getting shot in the head, and then everyone started running into the house. Lewis was the first one in the home, and Taylor followed him. Stewart went in after Taylor, and Wheeler only made it partially into the home. Stewart tried to get Wheeler into the home, but Shoulder picked Stewart up and moved her to his bedroom. Stewart was shot in the arm and leg.

¶ 9 Stewart testified the men shooting at them were wearing all black but were not wearing face masks. She further testified she did not recognize any of the shooters. On September 4, 2013, Stewart gave a statement to Decatur police officer Joshua Kessinger, in which she said the men started shooting about 30 seconds after Freedom left. She also stated the

shooters were three black men, two of whom were more than six feet tall, thin, and dark complected. The third shooter was around 5 feet 9 inches tall, heavier built, and medium complected.

¶ 10 Officer Jahraus received the dispatch call about the shooting spree at 11:34 p.m. When he arrived at the scene shortly thereafter, Officer Jahraus searched the home and found only the four victims.

¶ 11 Taylor testified that, on September 3, 2011, he went to Shoulder's home on North Church Street with Lewis. There, he suffered a gunshot wound to his leg. Taylor stated he had been standing on Shoulder's front porch for about 15 minutes and was looking at his cellular telephone before being shot. He had not entered Shoulder's home before standing on the porch. Taylor looked and saw someone wearing all black and holding a big gun. He heard a lot of gunshots. Taylor did not realize he had been shot until he was on the ground and unable to get up. After the shooting stopped, he crawled into Shoulder's home and was later taken to the hospital by ambulance. Taylor never saw Demariel at Shoulder's home on September 3, 2011. Taylor believed Freedom may have set up the shooting because he was only gone two minutes before the gunfire started.

¶ 12 Taylor further testified that, at the hospital on September 3, 2011, he gave a statement to police, in which he described the shooter as 6 feet 3 inches tall, 165 pounds, and medium complected with no facial hair. On September 4, 2011, Taylor gave a second statement to police and described the shooter as 6 feet 2 inches tall, 160 pounds, and slender with no facial hair. He also noted the shooter was wearing dark clothing. Additionally, Taylor testified he gave another statement to police on September 4, 2011, in which he said the shooter was 6 feet 3 inches tall, 160 pounds, and dark complected with no facial hair. Taylor again mentioned the

shooter's dark clothing. During one of his statements, Taylor described the shooter as being in his late twenties to mid-thirties. Taylor was eventually arrested at the hospital on unrelated charges and taken to jail.

¶ 13 Moreover, Taylor testified that, on September 8, 2011, the police had him look at a photograph lineup (State's exhibit No. 23). Taylor stated he looked at the lineup before signing the Decatur police department "photo spread advise form" and the officer showed him a picture of the suspect they had in custody before showing him the photograph lineup. Taylor testified he identified defendant and placed a "J" under defendant's photograph because that was the person the police had in custody. Despite Taylor's earlier descriptions of the shooter, defendant had facial hair in the photograph Taylor selected. Taylor testified he had never seen the man in the photograph and did not see the shooter's face because it was dark. Taylor stated he only made the identification in the photograph lineup "out of anger and spite and because they said that they had him." Taylor further testified that, on the same day, he was shown another photograph lineup and did not identify anyone in the second lineup. Taylor further testified that, on September 9, 2011, Officer Patton showed him a third photograph lineup (State's exhibit No. 24). He again identified defendant's photograph as the shooter and gave a written statement, in which Taylor stated he was positive the suspect he identified was the person who shot him. Last, Taylor testified he had convictions for possession of cannabis and possession of weapons by a felon and was currently serving a prison term for aggravated unlawful use of a weapon.

¶ 14 Officer Kaylor testified he conducted the photograph lineup with Taylor at the Macon County jail on September 8, 2011, which was State's exhibit No. 23. The lineup was composed of six photographs of individuals in the same age range with similar characteristics. Officer Kaylor first read to Taylor the "advise form," and they both signed the form. The first

lineup that Officer Kaylor showed Taylor contained defendant's photograph. Officer Kaylor did not give Taylor the names of the people in the photographs. At first, Taylor asked questions about the individuals in the photographs, such as the person's weight or where the person was from. Officer Kaylor told Taylor he did not have the information Taylor was requesting and that Taylor had to look at the lineup and make his determination based on the lineup. Taylor pointed to defendant's photograph and stated that person was the shooter in the incident at North Church Street during which he was shot. Officer Kaylor asked Taylor if he was certain of his identification, and Taylor responded he was certain. Officer Kaylor asked Taylor to circle the photograph and initial the box underneath the photograph, and Taylor circled the box under the photograph and initialed the box. Officer Kaylor testified he did not indicate to Taylor which photograph he should select and did not tell Taylor any of the individuals in the photographs were suspects in the shooting or were in custody for it.

¶ 15 Since the incident involved more than one shooter, Officer Kaylor presented Taylor with a second photograph lineup about an hour after the first one. The name list included in State's exhibit No. 23 for the second lineup does not include defendant's name. Officer Kaylor asked Taylor if he remembered the statements in the "advise form," and Taylor responded he remembered the statements. Taylor looked at the second lineup closely and asked how many people he could identify. Officer Kaylor told Taylor he did not have to identify anyone and could identify multiple people. Officer Kaylor explained the purpose for showing him the lineups was for the police to determine who the suspects were in the case. Taylor identified two people in the lineup who looked similar to the shooter. Taylor stated he was only able to get a look at one of the shooters. Taylor explained he was not a 100% certain with any of the identifications but was going off what he observed of the suspect before he was shot, such as

hairline, body build, ears, facial hair, and other physical characteristics.

¶ 16 Detective Patton testified he met with Taylor at the jail on September 9, 2011, to clear up why Taylor made a positive identification but then later indicated he was not sure. Taylor told Detective Patton that, when he was shown the first photograph lineup, Taylor was positive of the identification he made. When Officer Kaylor presented him with a second photograph lineup, Taylor thought he had made a bad identification and started to doubt himself. Detective Patton presented Taylor with a photograph lineup (State's exhibit No. 24), which included defendant's photograph and five other photographs of the other men with similar physical characteristics. Taylor pulled the photograph lineup closer to him and looked at it more closely. Taylor focused in on the photograph of defendant and described how the person's characteristics, including facial hair, were consistent with what he had witnessed. Taylor identified defendant as the person he saw the night of the shooting. Taylor initialed the box under defendant's photograph. Detective Patton asked Taylor to make a handwritten statement in his own words of what had taken place. Taylor did so, and both he and Detective Patton signed the statement. In the statement, Taylor stated he was positive the photograph he selected was of the person he saw shooting. Detective Patton denied making any suggestion or indication as to whom Taylor should identify and did not give Taylor any direction or suggestion as to what to include in his written statement. On September 9, 2011, the police did not have anyone in custody for Wheeler's murder.

¶ 17 Detective Patton further testified the police had obtained defendant's photograph from his booking at the Macon County jail when he was arrested for a traffic violation shortly after the shooting. Defendant's exhibit No. 2 was defendant's booking photograph, in which he had facial hair, and Detective Patton testified the booking photograph appeared to be the same

photograph used in the photograph lineup he showed Taylor. The police took the photograph on either September 3, 2011, or the early hours of September 4, 2011. At the time of the lineup, Detective Patton was unaware of Taylor's statements about the shooter being clean-shaven and thus did not ask Taylor any questions about his previous statements.

¶ 18 Demariel testified that, on September 3, 2011, he had been hiding out from the police at Shoulder's residence for a week because he was wanted for the murder of Marvin Dickerson. He had been avoiding contact with others by staying in a bedroom. Only his brother, Demarta Cunningham, and Shoulder knew he was there. That evening, he heard male and female voices on the porch, but he did not recognize them. His cousin, Freedom, had come into the house that evening, but the others had not. Demariel was in the living room when Freedom left. Two or three minutes after Freedom left, Demariel, who was sitting in the living room and looking out the front window, saw Roderick Dickerson come around the front of the house from the right and defendant come around the house from the left. He had almost a full view of the front yard. Both Roderick and defendant were shooting guns. Demariel saw the guns in both shooters' hands fire and Roderick had two guns. Demariel knew Roderick but not defendant. Once the shooting started and a bullet came close to his head, Demariel got down on the floor and started crawling for the kitchen. As he was crawling away, Shoulder entered the home from the front porch. Demariel heard "a lot" of shots. A minute after the shooting stopped, Demariel left the house out the back door and went to his brother's apartment. Demariel testified the shooters were in all black and were not wearing masks. Demariel did not tell the police he was present at the shooting spree until November 2012, when he was in custody. On November 12, 2012, Demariel identified defendant in a photograph lineup (State's exhibit No. 25). Demariel also testified he had prior felony convictions for obstructing justice and possession of a

controlled substance with the intent to deliver. He also had a pending probation violation and three pending criminal cases in Macon County.

¶ 19 Officer Kretsinger, one of the crime scene investigators, testified that, when he arrived at the crime scene on September 4, 2011, black curtains were on the living room window. The curtains were hanging straight down, not pulled to the side.

¶ 20 Green testified he was adopted by defendant's grandmother, who was also Roderick's grandmother and the mother of Randy Hubbert. He saw defendant "quite a few times when he was not in jail." Green had a "very good relationship" with the deceased, Wheeler. Green had felony convictions for violating an order of protection with a prior domestic battery and aggravated battery. At the time of trial, Green had a pending armed robbery charge. He did not expect an offer of leniency for his testimony in this case.

¶ 21 On September 3, 2011, Green saw defendant around 8 or 9 p.m. Green sat with defendant, Roderick, and Hubbert in a Pontiac minivan on the driveway of Jacoby Jarrett's girlfriend's home for about 10 to 15 minutes. Green wanted to go into the home and "chill" with Jarrett. He did not want to go with the others because he "knew it was going to be something." Green later testified the three were going "most likely to harm somebody." Green explained his cousin, Marvin, was murdered on August 23, 2011. In his discussions with defendant, Roderick, and Hubbert after Marvin's death, Green learned the other three men believed Demariel was responsible for Marvin's death. Defendant, Roderick, and Hubbert wanted revenge on Demariel, and if they could not find him, "any Cunningham would do." During the conversation on the night of the shooting, the discussion centered around Marvin's death and how they were "going to take care of business." While in the minivan, Green observed a black nine-millimeter handgun with a brown handle and a silver .40-caliber handgun with a black handle. Prior to that

day, Green had seen the nine-millimeter handgun in Hubbert's possession and the .40-caliber handgun in Roderick's possession. When Green got out of the minivan and went into the home, the other three drove away. Green testified it had to be after 9 p.m. when they drove away.

¶ 22 Green further testified he saw defendant again around 5 p.m. on September 4, 2011, at Hubbert's girlfriend's home. Hubbert and Roderick were also present. Defendant, Hubbert, and Roderick were looking at news footage about Wheeler's death on the computer. Green was with them for about 30 to 45 minutes and left with Roderick. While Green was there, it was discussed Roderick needed to get rid of his weapon and people needed to get out of town.

¶ 23 Green first spoke to the police on September 25, 2011. Green testified he believed he told an officer the Pampers box in the minivan contained guns and defendant was in the van the night of the shooting spree. Green also believed he told Detective Patton on December 10, 2013, that defendant was present on September 4, 2011, at Hubbert's home. Green also spoke to Detective Patton about the sale of a nine-millimeter pistol to Lorenzo Davis, which occurred after Wheeler's death. In November 2011, Green wrote a letter stating the statements he made against Roderick and defendant were not true. Green testified he wrote the letter because Hubbert was pressuring him to write it. Hubbert took Green to the currency exchange and had him write the letter in the car. Green went into the currency exchange and had the letter notarized. He then gave the letter to Hubbert, and then Hubbert "dropped [him] back off." Green testified the contents of the letter were not true. He had received a great deal of pressure over the past couple of years for his statements and tried to go into hiding. In late November or December 2013, Green told Ed Culp of the Decatur police department about being pressured into writing the letter.

¶ 24 In defendant's case, Reader testified that, on September 3, 2011, she resided with

her two children and defendant in Macomb, Illinois. Between 8 and 9 p.m. that night, defendant left with his aunt to go to Decatur, which was around a 1 1/2- to 2-hour drive. Defendant did not return home until between 6 and 7 a.m. the next day. Reader also testified that, except for when defendant went to church at around 10:30 a.m., he was at home the rest of the day on September 4, 2011.

¶ 25 Deputy Owens testified that, around 11:47 p.m. on September 3, 2011, he put on his lights to pull over a 1997 Jeep on westbound Eldorado Street for not having its headlights on. He made the stop at 11:50 p.m. Defendant was the driver, and he did not have a valid driver's license. According to Deputy Owens, defendant did not appear nervous or upset during the stop. Deputy Owens arrested defendant for driving with a revoked license and took him to jail after the vehicle was towed at 12:20 a.m. on September 4, 2011. He did not find any weapons or black clothing in defendant's vehicle. Defendant's booking photograph accurately represented what defendant looked like that night. Deputy Owens testified that, at that time of night, it would take less than five minutes to get from Church Street to Eldorado Street. A video of Deputy Owens's stop of defendant's Jeep was played for the jury. In the video, defendant was wearing jeans and an orange plaid shirt.

¶ 26 At the conclusion of the trial on March 28, 2014, the jury found defendant guilty of the first degree murder of Wheeler and three counts of attempt (first degree murder) for Stewart, Taylor, and Lewis. The jury also found "the allegation that the Defendant personally discharged a firearm in committing First Degree Murder and Attempt First Degree Murder was proven." On April 25, 2014, defendant filed a motion for judgment notwithstanding the verdict or, in the alternative, a new trial. At a May 20, 2014, joint hearing, the circuit court denied defendant's posttrial motion and sentenced him to 50 years' imprisonment for first degree

murder to run consecutively to his three concurrent prison terms of 30 years for the three attempt (first degree murder) convictions plus an additional 20 years for personally discharging a firearm.

¶ 27 On May 28, 2014, defendant filed a *pro se* motion and a letter to the court. In the two documents, defendant raised numerous complaints about his trial counsel and argued the State's evidence was insufficient to convict him. At a June 25, 2014, hearing, the circuit court, prosecutor, and defendant's trial counsel discussed defendant's motion. The court noted defense counsel was still of record and defendant could not file a motion on his own. Without addressing the contents of defendant's motion, they agreed a notice of appeal should be filed on defendant's behalf. Thus, the court essentially struck defendant's timely filed *pro se* motion on that date.

¶ 28 Defendant appealed and argued (1) the State's evidence was insufficient to prove him guilty beyond a reasonable doubt, (2) the circuit court erred by failing to inquire into his *pro se* posttrial claims of ineffective assistance of trial counsel as required by *Krankel*, and (3) he was denied effective assistance of counsel. This court found (1) the State's evidence was sufficient, (2) the circuit court erred by failing to conduct a proper *Krankel* hearing, and (3) the record was insufficient to address defendant's appellate claims of ineffective assistance of counsel. *Davis*, 2016 IL App (4th) 140575-U, ¶¶ 43, 47, 52. Accordingly, we affirmed the circuit court's judgment but remanded the cause to circuit court for a *Krankel* hearing. *Davis*, 2016 IL App (4th) 140575-U, ¶ 59.

¶ 29 The trial judge that presided over defendant's trial and sentencing was Judge Timothy J. Steadman, who retired while this case was on appeal. On remand, Judge Jeffrey S. Geisler took over the case and presided over the proceedings. In January 2017, the circuit court appointed the public defender's office to represent defendant.

¶ 30 On April 4, 2017, the circuit court held the *Krankel* hearing. The court began by allowing defendant to explain his claims. Defendant stated trial counsel should have called the following witnesses: (1) Georgeland Johns, a minister; (2) Kenisha Cox, owner of the vehicle defendant was driving when he was stopped by the police; (3) Raquel Buchanan, a person whose home defendant went to on September 4, 2011; (4) Lewis, one of the victims; and (5) Shoulder, who resided at the home where the shooting spree took place. Defendant explained Lewis would have testified defendant did not shoot him. Shoulder would have testified Demariel, who identified defendant as a shooter, was not at his home on the night of the shooting spree. Johns would have testified defendant was at a 30-minute church service on September 4, 2011, and later stopped by Johns's home. Cox would have testified defendant was at her house at 11:30 p.m. and picked up her vehicle, which defendant was driving when he was pulled over by the police. Buchanan would testify that, on September 4, 2011, defendant called her and defendant went from Buchanan's house to the tow lot. Defendant's appointed counsel only assisted defendant in presenting exhibits to the circuit court.

¶ 31 Defendant's trial counsel told the circuit court defendant never gave him Johns's name. He explained he did not call Shoulder and Lewis about their prior statements based on trial strategy. Moreover, trial counsel did not think either Cox's or Buchanan's testimony was necessary because he had presented Reader's testimony. Trial counsel also noted Buchanan was reluctant to testify.

¶ 32 Defendant next discussed his claim trial counsel failed to cross-examine Green with his original statements that he only talked with defendant on the telephone, which was inconsistent with his trial testimony that he was sitting in the house talking with defendant, as well as being in a van with defendant. Trial counsel believed it came out at trial that Green had

given multiple statements that were inconsistent about defendant's involvement in the shooting spree. Additionally, trial counsel admitted that, if Green made hearsay statements, he should have objected to them. Defendant also noted he had an affidavit from Roderick stating Green was lying about defendant being at a friend's house discussing getting away. Trial counsel stated he thought he sufficiently impeached Green's testimony. Additionally, defendant stated trial counsel failed to secure the police report and the dispatch call from when Deputy Owens pulled defendant over on the night of the shooting spree. Trial counsel stated he did obtain the police report and confronted Deputy Owens with the 11:31p.m time listed on the police report for the stop, which differed from the 11:47 p.m. dispatch call.

¶ 33 After hearing defendant and trial counsel's statements, the circuit court explained the *Strickland* two-prong test for establishing ineffective assistance of counsel. The court then stated the following:

> "So I have listened to the evidence in this case. Here on the arguments as to the ineffective assistance of counsel. Of course, some of the things that [trial counsel] talked about in regards to [defendant] relate to trial tactics. It does appear that [trial counsel] made some mistakes as far as objections, the best I can tell from the record that is in front of the court.
>
> Then the issue really becomes as the second prong, that there is a reasonable probability that but for these conduct from defense counsel that the results would be different. As I have listed to the evidence that has been presented here, I cannot find the second prong has been met as far as the ineffective assistance of counsel."

After the *Krankel* hearing, the court also amended defendant's sentencing judgment to include

the 20-year sentencing enhancement for defendant's three attempt (first degree murder) convictions.

¶ 34 On December 13, 2017, defendant filed a late notice of appeal, seeking to appeal the circuit court's April 4, 2017, ruling. That same day, this court dismissed defendant's appeal for lack of jurisdiction based on the untimeliness of the late notice of appeal. On January 23, 2018, the Illinois Supreme Court entered an order, directing this court to accept defendant's December 2017 notice of appeal as a properly perfected appeal from the circuit court's April 4, 2017, order. *People v. Davis*, No. 123129 (Ill. Jan. 23, 2018) (supervisory order). Thus, this court has jurisdiction of defendant's appeal.

¶ 35 II. ANALYSIS

¶ 36 Defendant contends his case should be remanded again to the circuit court for that court to use the correct standards in examining defendant's ineffective assistance of counsel claims. He also asserts that, because he established his attorney possibly neglected his case, he should be appointed an attorney and his case should be advanced to an evidentiary hearing. The State asserts the circuit court held a proper *Krankel* hearing and the court's determination defendant failed to establish ineffective assistance of counsel was not manifestly erroneous. Whether the circuit court properly conducted a *Krankel* hearing raises a legal question, and thus we review the matter *de novo*. *People v. Jolly*, 2014 IL 117142, ¶ 28, 25 N.E.3d 1127.

¶ 37 Under the rule developed from *Krankel* and its progeny, when a defendant presents a *pro se* posttrial claim of ineffective assistance of counsel, the circuit court first examines the factual basis of the defendant's claim. *Jolly*, 2014 IL 117142, ¶ 29. If the circuit court determines the ineffective assistance of counsel claim lacks merit or pertains only to matters of trial strategy, then the court does not need to appoint new counsel and may deny the

pro se claim. However, if the defendant's allegations show possible neglect of the case, the circuit court should appoint the defendant new counsel. *Jolly*, 2014 IL 117142, ¶ 29. If the court appoints new counsel, then the new counsel represents the defendant at an evidentiary hearing on the defendant's *pro se* ineffective assistance of counsel claim. *People v. Moore*, 207 Ill. 2d 68, 78, 797 N.E.2d 631, 637 (2003). "The appointed counsel can independently evaluate the defendant's claim and would avoid the conflict of interest that trial counsel would experience if trial counsel had to justify his or her actions contrary to defendant's position." *Moore*, 207 Ill. 2d at 78, 797 N.E.2d at 638.

¶ 38 During a circuit court's *Krankel* hearing, " 'some interchange between the trial court and trial counsel regarding the facts and circumstances surrounding the allegedly ineffective representation is permissible and usually necessary in assessing what further action, if any, is warranted on a defendant's claim.' " *Jolly*, 2014 IL 117142, ¶ 30 (quoting *Moore*, 207 Ill. 2d at 78, 797 N.E.2d at 638)). Also, a brief discussion between the circuit court and the defendant may be sufficient. *Moore*, 207 Ill. 2d at 78, 797 N.E.2d at 638. Last, the circuit 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. *Jolly*, 2014 IL 117142, ¶ 30. However, the last provision does not apply in this case because the judge conducting the *Krankel* hearing was not the judge at defendant's trial and sentencing. Additionally, we note our supreme court has found a *Krankel* hearing is "a neutral and nonadversarial proceeding." *Jolly*, 2014 IL 117142, ¶ 38. The State's participation at a *Krankel* hearing, if any, should be *de minimis*. *Jolly*, 2014 IL 117142, ¶ 38. Finally, our supreme court has emphasized the goal of any *Krankel* proceeding is to facilitate the circuit 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.

¶ 39 On remand in this case, the circuit court conducted proceedings that were a hybrid of a *Krankel* hearing and an evidentiary hearing with new counsel. The court appointed defendant new counsel, who explained the proceedings to him and assisted him with exhibits. However, defendant was the one who explained his claims to the circuit court. After defendant explained a claim, the court would have trial counsel explain why he handled things the way he did. At the end of the hearing, the court noted the two-prong analysis of ineffective assistance of counsel claims set forth in *Strickland.* To establish ineffective assistance of counsel under *Strickland*, a defendant must prove (1) his counsel's performance failed to meet an objective standard of competence (deficiency prong) and (2) counsel's deficient performance resulted in prejudice to the defendant (prejudice prong). *People v. Evans*, 186 Ill. 2d 83, 93, 708 N.E.2d 1158, 1163-64 (1999). In this case, the court found (1) some of the claims related to trial tactics and (2) it appeared trial counsel "made some mistakes as far as objections." It noted the issue then really became the prejudice prong of the *Strickland* test and concluded defendant had not met the second prong necessary to establish ineffective assistance of counsel. The court never specifically addressed whether trial counsel possibly neglected defendant's case, which is the only matter to be decided at a *Krankel* hearing (see *Jolly*, 2014 IL 117142, ¶ 29).

¶ 40 The State argues the circuit court's utilization of the *Strickland* test at the *Krankel* hearing was not error. In support of its claim, the State cites *People v. Chapman*, 194 Ill. 2d 186, 743 N.E.2d 48 (2000), and *People v. Dickerson*, 393 Ill. App. 3d 531, 913 N.E.2d 610 (2009). In *Chapman*, 194 Ill. 2d at 229, 743 N.E.2d at 74, the defendant argued the circuit court erroneously evaluated his claim under the prejudice prong of *Strickland* rather than first determining whether new counsel should be appointed. Our supreme court found the circuit court adequately inquired

into defendant's claims and the circuit court's reference to the prejudice prong of *Strickland* during that inquiry did not affect the fact the defendant's claims lacked merit and involved a question of trial strategy. *Chapman*, 194 Ill. 2d at 231, 743 N.E.2d at 75. The supreme court concluded the circuit court did not err by failing to appoint counsel to assist the defendant with his *pro se* claims where the defendant's allegations did not show possible neglect of the case. *Chapman*, 194 Ill. 2d at 231, 743 N.E.2d at 75.

¶ 41 The defendant in *Dickerson* also argued the circuit court erroneously evaluated his claim under *Strickland* instead of first determining whether new counsel should be appointed. *Dickerson*, 393 Ill. App. 3d at 533, 913 N.E.2d at 612. The *Dickerson* court noted the circuit court ruled on the first prong of *Strickland* when it found trial counsel's performance exceeded what is required by Illinois law. *Dickerson*, 393 Ill. App. 3d at 535, 913 N.E.2d at 614. It held that, where a circuit court correctly inquires into the defendant's allegation and concludes trial counsel provided effective representation, the circuit court does not err by making a passing reference to *Strickland*. *Dickerson*, 393 Ill. App. 3d at 536, 913 N.E.2d at 614.

¶ 42 Here, the circuit court made more than a passing reference to *Strickland*. It evaluated defendant's *pro se* claims under both prongs of the *Strickland* test. It did so because, unlike in *Chapman* and *Dickerson*, the circuit court found some of defendant's claims of trial counsel's deficient performance may have merit. Our supreme court has stated a circuit court does not have to appoint new counsel if the ineffective assistance of counsel claim lacks merit or pertains only to matters of trials strategy but does have to appoint counsel if the allegations show possible neglect. *Moore*, 207 Ill. 2d at 78, 797 N.E.2d at 637. In this case, the circuit court did not find all of defendant's ineffective assistance of counsel claims were meritless or matters of trial strategy. It found mistakes were made by trial counsel by failing to make some objections.

Thus, under the facts of this case, the circuit court erred by doing a complete *Strickland* analysis and deciding the actual merits of defendant's claims at the *Krankel* hearing, instead of just determining whether possible neglect existed.

¶ 43 Defendant asserts he did demonstrate possible neglect and thus this case should be remanded for the appointment of counsel and an evidentiary hearing instead of a new *Krankel* hearing. In response, the State appears to argue any error by the circuit court was harmless error, as it asserts the circuit court's finding defendant failed to establish ineffective assistance of counsel was not manifestly erroneous. Specifically, the State contends Green's testimony regarding discussions between defendant, Roderick, and Hubert was admissible under the coconspirator exception to the hearsay rule. However, the State fails to explain how that exception applies to the statements in this case. The initial requirement for the exception to apply is proof of the existence of a conspiracy with evidence independent of the coconspirator's hearsay statements. See *People v. Cook*, 352 Ill. App. 3d 108, 125, 815 N.E.2d 879, 894 (2004). The State fails to address that requirement and the other requirements of the hearsay exception. Accordingly, the State's argument is insufficient to establish the circuit court's error was harmless.

¶ 44 Moreover, while this court found the evidence of defendant being one of the shooters was sufficient for a jury to find him guilty (*Davis*, 2016 IL App (4th) 140575-U, ¶ 43), the evidence was not overwhelming. At the *Krankel* hearing, defendant noted Roderick, his codefendant, was found not guilty after a bench trial on the charges brought against him related to the shooting spree. Defendant also presented an alibi defense as to both being involved in the shooting and to Green's statements defendant had discussions with Roderick and Hubert before and after the shooting. Moreover, many of the witnesses changed their story multiple times

about defendant's involvement in the shooting spree. Thus, this case does not present a situation where any argument of prejudice would be clearly meritless. Accordingly, we find the circuit court's error was not harmless.

¶ 45 Given the fact the circuit court found trial counsel did make mistakes with objections, we agree with defendant the proper remedy is to remand the case for an evidentiary hearing on defendant's ineffective assistance of counsel claims. Since the circuit court appointed defendant new counsel on remand, the attorney that assisted defendant during the *Krankel* hearing may continue to represent defendant. The circuit court does not have to appoint another new attorney. Additionally, we note that, while defendant's ineffective assistance of counsel claims that the circuit court found related to trial strategy may not alone have warranted an evidentiary hearing, defendant should be allowed to address those claims at the evidentiary hearing and raise his argument trial counsel's strategy was unsound.

¶ 46 III. CONCLUSION

¶ 47 For the reasons stated, we reverse the Macon County circuit court's judgment and remand the cause for further proceedings.

¶ 48 Reversed; cause remanded.