

No. 1-16-0694

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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|--------------------------------------|---|-------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the   |
|                                      | ) | Circuit Court of  |
| Plaintiff-Appellee,                  | ) | Cook County.      |
|                                      | ) |                   |
| v.                                   | ) | No. 05 CR 15107   |
|                                      | ) |                   |
| DONALD JORDAN,                       | ) | Honorable         |
|                                      | ) | Neera Lall Walsh, |
| Defendant-Appellant.                 | ) | Judge Presiding.  |

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JUSTICE ELLIS delivered the judgment of the court.  
Justices Howse and Cobbs concurred in the judgment.

**ORDER**

¶ 1 *Held:* Reversed and remanded with instructions. Trial court violated mandate by refusing to allow defendant to proceed on motion for new trial following remand. Defendant has no right to have counsel reappointed, because purpose of remand was to remedy denial of defendant's sixth-amendment right to self-representation. Defendant's motion for substitution of judge denied, where no showing has been made that trial judge was biased.

¶ 2 After his conviction for murder and other violent crimes, defendant Donald Jordan told the trial court that, at his post-trial motion and sentencing hearing, he wanted to represent himself. The trial court denied that request. On direct appeal (to a different panel of this court, in an order authored by a now-retired justice), this court found that denial to be in error. To remedy that error and thus afford defendant an opportunity to represent himself, this court remanded for

“new posttrial and sentencing proceedings.” *People v. Jordan*, 2015 IL App (1st) 120583-U, ¶ 132 (March 31, 2015) (“*Jordan I*”).

¶ 3 On remand, the trial court mistakenly believed that the case had been remanded for a new sentencing hearing only, and thus refused to allow defendant to proceed on a motion for new trial. We reverse and remand the case again, for the proceedings ordered in *Jordan I*: a motion for new trial and, if necessary, a new sentencing hearing.

¶ 4 Because the point of the original remand was to remedy the denial of defendant’s right to *self*-representation, he has no right, as he now claims, to have his attorney reappointed. If defendant confirms, on remand, that he no longer wants to represent himself, then the trial court should consider that the end of the matter, and his convictions and sentences will stand.

¶ 5 **BACKGROUND**

¶ 6 A jury convicted defendant of the first-degree murder of Michael Ortiz, the armed robbery of Ortiz and Angelina Jones, and the aggravated kidnapping of Ortiz, Jones, and Edward Sampson. The details of these offenses and defendant’s trial are set forth in *Jordan I*, ¶¶ 3-62.

Here, we summarize the post-trial and remand proceedings that are at issue in this appeal.

¶ 7 **I. Post-Trial Proceedings**

¶ 8 After his conviction, defendant filed a *pro se*, post-trial motion alleging ineffective assistance of trial counsel. The trial court conducted a *Krankel* inquiry and concluded that defendant was not entitled to the appointment of new counsel.

¶ 9 Immediately after the trial court announced that ruling, defendant submitted a “motion to proceed *pro se* and dismiss appointed counsel.” The trial court inquired about defendant’s level of education, warned him of the perils of self-representation, and ultimately denied the motion, finding that “it would be just an absolute miscarriage of [justice] for you not to have an attorney,

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somebody who knows what to argue in a motion for new trial, and to go into sentencing if that is what happens.”

¶ 10 The trial court then proceeded to the motions for new trial. Counsel had filed a motion on defendant’s behalf. Defendant submitted his own *pro se* supplemental motion. Since defendant was represented by counsel, the trial court did not grant defendant leave to file his *pro se* motion. But the court asked counsel to review the *pro se* motion and see whether it raised any issues that counsel would adopt. Counsel said that it did not. The trial court denied counsel’s motion, proceeded immediately to sentencing, and imposed an aggregate sentence of 105 years in prison.

¶ 11 II. Direct Appeal (*Jordan I*)

¶ 12 In *Jordan I*, we affirmed defendant’s convictions over various claims of error and ineffective assistance of counsel. We also affirmed the trial court’s *Krankel* ruling, finding that defendant did not show possible neglect of his case by counsel. *Id.* ¶¶ 129-30. But, as the State conceded on appeal, the trial court deprived defendant of his sixth-amendment right to self-representation by denying his motion to proceed *pro se* at the post-trial motion and sentencing hearing. *Id.* ¶¶ 110-16. We remanded for “new posttrial and sentencing proceedings wherein the defendant shall be afforded the right to proceed *pro se* according to the provisions of Illinois Supreme Court Rule 401.” *Id.* ¶ 132.

¶ 13 III. Proceedings on Remand

¶ 14 When defendant appeared in court on remand, the trial court told him two things right off the bat. First, his case had been remanded for a new sentencing hearing, and nothing more. Second, if he wanted a new sentencing hearing, he had to represent himself at that proceeding.

¶ 15 Defendant objected that he was “supposed to receive new post trial proceedings,” which he understood to include a “motion for retrial.” The trial court disagreed and began reading from

our decision in *Jordan I*. Upon reaching our statement that “we remand this case for new post trial \* \* \*,” the trial court stopped momentarily and said, “maybe that’s where you are getting the post trial idea, okay,” but ultimately stood by its previous statement that the remand was limited to a new sentencing hearing. Defendant continued to press his objection, to no avail.

¶ 16 After making it clear to defendant that he was only entitled to a sentencing hearing, defendant indicated that he “want[ed] an attorney.” The trial court said he was not entitled to one. That was the point of the *Krankel* ruling, which we affirmed on appeal: Because trial counsel was not ineffective, defendant was not entitled to have a new attorney appointed. Defendant clarified that he was not asking the trial court to appoint a *new* attorney, but rather to *reappoint* his *former* trial attorney to represent him in the “new post-trial proceedings,” full stop, that he thought the mandate entitled him to. The trial court reiterated that his only option was “to have another sentencing hearing where you represent yourself and that’s it.” The court continued the case for defendant to decide how he wanted to proceed.

¶ 17 Before the next court date, defendant filed two pleadings in the circuit court—a motion for substitution of judge, and a petition for a writ of mandamus—alleging that Judge Walsh was biased against him, because she refused to follow the terms of our mandate. Defendant’s motion for substitution of judge was heard and denied by Judge Porter. Defendant also filed a motion requesting the appointment of counsel.

¶ 18 When the case returned to Judge Walsh’s call, she asked defendant if he wanted to represent himself at a new sentencing hearing. Defendant answered, “No, I do not.” Based on that answer, the trial court ruled that defendant’s sentence would stand. Defendant filed a motion to reconsider that ruling, which was denied, and then timely appealed.

¶ 19

ANALYSIS

¶ 20 Defendant claims that the trial court violated our mandate in two ways. First, the trial court did not permit him to file another motion for new trial, which, he says, was part of the remand that we ordered in *Jordan I*. Second, the trial court refused to reappoint his trial attorney and instead required him to represent himself in any further proceedings. Whether these rulings complied with our mandate is a question of law we review *de novo*. *People v. Payne*, 2018 IL App (3d) 160105, ¶ 9.

¶ 21

I

¶ 22 We begin with defendant’s claim that the trial court erred in refusing to hear a motion for new trial on remand. Our remand order was clear and unambiguous: We “remand[ed] this case for new posttrial and sentencing proceedings \*\*\*.” *Jordan I*, ¶ 132; see also ¶ 1 (defendant “request[ed] a remand for resentencing and other posttrial proceedings”); ¶ 110 (State conceded “that this case should be remanded for resentencing and new posttrial proceedings”). Interpreting the mandate as only requiring a new sentencing hearing lops off half the order—“posttrial and”—or at least renders it meaningless. And the phrase “posttrial proceedings” is usually understood to include the motion for new trial. Thus, based on its plain language, the remand included a motion for new trial.

¶ 23 The context makes this clear, too. After his trial, defendant filed his “motion to proceed *pro se* and dismiss appointed counsel” *before* the trial court heard counsel’s motion for new trial. Nothing in defendant’s motion or colloquy with the trial court suggested that his request was meant to be limited to sentencing. Defendant asked, quite simply, to represent himself—meaning, from that point forward. And that point forward included a motion for new trial. Indeed, the trial court seemed to grasp this point during those original proceedings, denying

defendant's request to represent himself because "it would be just an absolute miscarriage of [justice] for you not to have an attorney, somebody who knows what to argue *in a motion for new trial*, and to go into sentencing if that is what happens." (Emphases added.) Defendant also submitted a *pro se* supplemental motion for new trial at that time, which the trial court declined to hear (but allowed defense counsel to incorporate if warranted).

¶ 24 It was perfectly clear that, originally following his trial, defendant asked to represent himself on the motion for new trial (and any proceedings to follow). We held that it was error to deny his request. *Jordan I*, ¶¶ 110-16. That error could not be fully remedied unless the remand included a motion for new trial (and any proceedings to follow). And that is exactly what we ordered.

¶ 25 In this respect, the trial court thus misunderstood the mandate on remand. Defendant was entitled to a new hearing on a post-trial motion as well as, if necessary, a new sentencing hearing.

¶ 26

## II

¶ 27 Things got complicated on remand, of course, when defendant stated that he no longer wished to represent himself, that he wanted the trial court to reappoint his attorney. The trial court's reaction to *that* request was absolutely correct—defendant was no longer entitled to a lawyer. He had a lawyer the first time around and complained, on appeal, that he wasn't allowed to proceed *pro se*; we gave him the very remedy he sought (the right to self-representation) but *only* that remedy. As we have emphasized, the basis of our remand order was the denial of defendant's sixth-amendment right to *self*-representation. Reappointing counsel is not a remedy for that deprivation. Thus, it is not a remedy that defendant was entitled to, even if it is the strategy he now prefers.

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¶ 28 We are not convinced by defendant’s arguments to the contrary. Defendant concedes that he is not entitled to a different attorney; the *Krankel* ruling precludes that result. See *Jordan I*, ¶¶ 118-30. But refusing to reappoint his old attorney, he says, would violate the mandate and deny him his right to counsel at critical stages of the proceedings. See, e.g., *People v. Abdullah*, 336 Ill. App. 3d 940, 949 (2002) (motion for new trial is critical stage, with right to counsel); *People v. Williams*, 358 Ill. App. 3d 1098, 1104-05 (2005) (same for sentencing).

¶ 29 Defendant is wrong on both fronts. As for the mandate, we did not order “new posttrial and sentencing proceedings,” full stop; we ordered such proceedings “wherein the defendant shall be afforded the right to proceed *pro se* according to the provisions of Illinois Supreme Court Rule 401.” *Jordan I*, ¶ 132. The reason for that limitation should be clear, in light of what we said above: The right denied was the right to proceed *pro se*; thus, the remedy ordered was an opportunity to proceed *pro se*. Defendant may not want that remedy any more, and he has every right to make that decision for himself. But we never said that he could have his attorney back if he changed his mind. The denial of his right to self-representation does not entitle him to a new round of proceedings *with* counsel.

¶ 30 To reappoint counsel at this juncture would invite the kind of strategic behavior we try to forestall when a defendant purports to invoke his right to self-representation—that is, attempts to “manipulat[e] or abus[e] the system by going back and forth between his request for counsel and his wish to proceed *pro se*.” *People v. Mayo*, 198 Ill. 2d 530, 538 (2002) (one purpose of requiring “clear and unequivocal” waiver of counsel is to avoid such gamesmanship); see also *Cain v. Peters*, 972 F.2d 748, 750 (7th Cir. 1992) (defendant may not waffle between requests for counsel and self-representation in “an effort to sandbag the court and the opposition, to seek

[a favorable outcome] with an ace up the sleeve to be whipped out in the event of [an unfavorable one]”).

¶ 31 As for defendant’s right to counsel, he was already afforded that right in his original post-trial and sentencing proceedings. Granted, defendant did not want an attorney at that time—and thus it was error to force him to have one—but he had one all the same.

¶ 32 Defendant argues that representation by counsel in the original post-trial and sentencing proceedings was not enough to satisfy the constitutional guarantee. Two features of this case, in his view, combine to make that so. First, he asserts that we vacated both the trial court’s ruling on the motion for new trial and his sentence, and thus new post-trial and sentencing proceedings *must* now be held. Second, the trial court never found that he made a knowing and voluntary waiver of his right to counsel, as the sixth amendment requires before self-representation may commence. *Faretta v. California*, 422 U.S. 806, 835 (1975); *Baez*, 241 Ill. 2d at 115. To require defendant to represent himself at those new proceedings, whether he wants to or not, would in defendant’s eyes thus violate his right to counsel.

¶ 33 The flaw in this reasoning is we did not vacate the trial court’s ruling on counsel’s motion for new trial. In fact, we explicitly decided two issues on appeal as preserved error, and they were preserved because *they were raised in counsel’s post-trial motion*. See *Jordan I*, ¶¶ 65, 103. We couldn’t have treated these errors as having been raised below had we vacated the trial court’s ruling on the motion and thus declared the entire post-trial proceeding a nullity.

¶ 34 Instead, we adopted a piecemeal approach to defendant’s appeal. We left the trial court’s ruling in place, thus allowing defendant to raise any issues that counsel had preserved in the motion for new trial. And we allowed defendant to return to the trial court and litigate his own *pro se* motion, raising any (other) issues that he saw fit to raise—and then appeal, if he lost. (The



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one necessary constraint being that he cannot re-raise any issues that we decided in *Jordan I*; our rulings are now law of the case. See *People v. McDonald*, 366 Ill. App. 3d 243, 247 (2006)). If defendant no longer wishes to present a *pro se* motion, that is his choice to make. But that choice renders any further motions for new trial unnecessary.

¶ 35 And while defendant chose not to challenge his sentence in *Jordan I*, the same logic applies to that judgment. If he no longer wishes to represent himself, there is no need for a new sentencing hearing, either.

¶ 36 So we reject defendant's claim that another motion for new trial and a resentencing are both constitutionally mandated, *regardless* of what kind of representation he now prefers. That claim rests on the mistaken premise that we vacated the trial court's ruling on the motion and defendant's sentence in *Jordan I*. And without that premise, defendant's right-to-counsel argument fails. It's true that the trial court has never found a knowing and voluntary waiver of that right, and that defendant can't represent himself until such a waiver is found. *Faretta*, 422 U.S. at 835; *Baez*, 241 Ill. 2d at 115. But so far, defendant *hasn't* represented himself; and there is no ruling, from either this court or the trial court, that "requires" him to do so. Indeed, defendant doesn't have to proceed at all; a final judgment—rendered in proceedings in which he *had* counsel—is in place. If defendant no longer wants the relief we granted him, he is free to let that final judgment stand. If he *does* still want that relief, the trial court will have to determine whether his waiver of counsel is valid, but the court can cross that bridge if the time comes.

¶ 37

### III

¶ 38 In sum, the trial court was wrong to deny defendant the right to another post-trial hearing seeking a new trial. But it was correct that defendant was not allowed to proceed *with counsel* on any of the post-trial proceedings. So where does that leave things?

¶ 39 The trial court first told defendant that he was only entitled to a new sentencing hearing, not a new post-trial hearing. At no time did the trial court entertain the notion that defendant could seek a new post-trial motion for a new trial. Defendant, to be sure, quibbled with the court on that point, but the court never wavered, never gave defendant the option of a new post-trial motion.

¶ 40 It was only *after* the trial court made it clear to defendant that he was not entitled to a new post-trial motion, only to a new sentencing hearing, that defendant indicated that he wanted to be represented by counsel, as opposed to proceeding *pro se*.

¶ 41 In other words, defendant never sought to proceed *on his post-trial motion* with counsel. He was never given the chance to proceed on it either way, with *or* without counsel. He clearly requested counsel later, with regard to sentencing, and surely we can speculate that, if given the chance to file a new post-trial motion, he would have sought counsel at that stage, too—but what he *might* have done is obviously beside the point.

¶ 42 So unfortunately, we are back where we started: Defendant is entitled to a new post-trial motion for new trial, if he elects to proceed *pro se*. That is what we ordered in *Jordan I*, and defendant never received that relief on remand.

¶ 43 IV

¶ 44 Though the mandate on remand was clear enough, in our opinion, to guide the trial court, in fairness to the trial judge, we cannot deny that the state of affairs was out of the ordinary, especially when defendant pulled a switch-up and decided he wanted counsel, after all, for his sentencing hearing.

¶ 45 To prevent any further confusion, or unnecessary appeals, we instruct the trial court to proceed as follows on remand. The court should first inform defendant that his case has been

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remanded for proceedings on a motion for new trial and, if that motion is denied, a new sentencing hearing. The court should then ascertain whether defendant wishes to represent himself at the post-trial motion stage. If the answer is no, he does not, the trial court's work is done; defendant's convictions will stand and so, obviously, will his sentence.

¶ 46 If, on the other hand, defendant's answer is yes, he does wish to proceed *pro se* on his post-trial motion, the trial court should proceed with admonishments under Illinois Supreme Court Rule 401(a) (eff. July 1, 1984) to determine whether defendant has made a knowing and voluntary waiver of his right to counsel. (We so direct the trial court out of an abundance of caution. Even though the whole point of defendant's first appeal is that he was denied the right to proceed *pro se*, the fact remains that the trial court has never made a finding, under Rule 401(a), that defendant has knowingly and voluntarily waived his right to counsel. Such a finding is mandatory before allowing a defendant to represent himself. See *People v. Wright*, 2017 IL 119561, ¶ 41.)

¶ 47 If, after compliance with Illinois Supreme Court Rule 401(a), the trial court determines that defendant has made a knowing and voluntary waiver of his right to counsel, the court must allow defendant to represent himself at the post-trial motion stage. If that post-trial motion for new trial is denied, the court will proceed to a new sentencing hearing with defendant representing himself. If, at that sentencing hearing, defendant indicates that he wishes to be represented by counsel, the court will do as it did on remand last time—deny that request, and allow the previous sentence to stand. Otherwise, the trial court will conduct the sentencing hearing with defendant representing himself.

¶ 48 If, after Rule 401(a) admonishments before the post-trial motion proceedings, the trial court determines that defendant has *not* knowingly and voluntarily waived his right to counsel,

the court shall deny his request for self-representation, and the proceedings on remand will come to an end, convictions and sentence to stand. Defendant will be free to appeal the trial court's ruling under Rule 401(a) in that event.

¶ 49

V

¶ 50 Finally: While his appeal was pending, defendant filed a "motion to submit a *pro se* supplemental brief *instanter*," in which he argues, again, that Judge Walsh demonstrated bias and hostility by refusing to follow our mandate, and that his case should therefore be transferred to a new judge. We took the motion with the case. We deny defendant's *pro se* request for a substitution of judge.

¶ 51 Defendant alleges that Judge Walsh's "failure to abide by [our] mandate" reveals, among other things, "prejudice, animosity, hostility," and "deliberate manipulation of the judicial process." We disagree. Judge Walsh made two rulings on remand. One was correct. The other was error, but it was nothing more than that. We see no evidence whatsoever that Judge Walsh is biased toward defendant or unable to treat him fairly. Judge Walsh will continue to preside over any further proceedings on remand.

¶ 52

#### CONCLUSION

¶ 53 For these reasons, we reverse the circuit court's ruling that our remand order in *Jordan I* did not include a motion for new trial. We remand for proceedings on that post-trial motion and, if necessary, a new sentencing hearing. We hold that defendant is not entitled to have his attorney reappointed and must represent himself if he wishes to proceed at any of these post-trial stages. Judge Walsh will continue to preside over the proceedings on remand, which shall be conducted in accordance with the instructions given above.

¶ 54 Reversed and remanded with instructions. Motion for substitution of judge denied.