2019 IL App (1st) 170987-U

No. 1-17-0987

Order filed on September 17, 2019.

Second Division

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IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 16 CR 1010
	)	
LYLE PARISH,	)	The Honorable
	)	Evelyn B. Clay,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Justices Pucinski and Coghlan concurred in the judgment.

ORDER

¶ 1 *Held*: We remand this matter for further proceedings consistent with *People v. Krankel*, 102 Ill. 2d 181 (1984), because the trial court failed to conduct an adequate inquiry into the factual basis underlying defendant's posttrial claim of ineffective assistance of counsel.

¶ 2 Following a bench trial, the trial court found defendant, Lyle Parish, guilty of armed habitual criminal, unlawful use of weapon by a felon, and aggravated unlawful use of a weapon

and sentenced him to eight years' imprisonment.[1] Defendant appeals, arguing this court should remand the matter pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984), because the trial court failed to make an adequate inquiry into his *pro se* claims of ineffective assistance of counsel. We remand this matter for further proceedings.

¶ 3 The State charged defendant by indictment with two counts of being an armed habitual criminal (720 ILCS 5/24-1.7(a) (West 2014)), six counts of unlawful use or possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2014)), and six counts of aggravated unlawful use of a weapon (720 ILCS 5/24-1.6(a)(1), (3)(A-5), (3)(C), (3)(H) (West 2014)), based on his possession and use of a firearm on December 31, 2015. The matter proceeded to a bench trial, at which the following evidence was presented.

¶ 4 The evidence at trial revealed that on December 31, 2015, defendant drove a Dodge Charger in the 7200 block of South University Avenue and swerved toward Joseph Darden, nearly striking him. Defendant stopped the Charger, pulled a gun on Darden, and asked him, "Do you want to die on New Year[']s Eve." Darden replied, "Naw, I don't want to die," and defendant drove away. Darden and his girlfriend, Kenyatta Johnson, who was sitting in her car only three to four feet away when defendant swerved toward Darden, identified defendant in a photographic lineup that night and at trial.

¶ 5 Less than five minutes later, Officers Balling and Hodgeman were on patrol in a marked squad car and observed a Dodge Charger make a minor traffic violation. Balling and Hodgeman

[1]The record reveals the caption in the trial court and the notice of appeal apparently contains a misnomer, identifying defendant as Lyle Parish. The parties agree defendant's actual name is Parish D. Lyle.

followed the Charger, which led them on a brief chase. The Charger eventually slid on some ice and ran over a curb.

¶ 6 Defendant fled from the driver's side of the Charger and Balling pursued him. Balling's pursuit of defendant ended when defendant slipped and fell on ice. Defendant initially resisted Balling's attempt to place him into custody, but other officers arrived and they were able to place defendant under arrest.

¶ 7 Hodgeman recovered two handguns from the vehicle. One was under the gas pedal and the other under the right rear passenger seat. The handgun recovered from under the gas pedal was a fully-loaded, "Smith and Wesson handgun Model No[.] 469, nine-milimeter, black finish gun, with an approximate barrel length of four inches," which had one round in the chamber.

¶ 8 The State entered into evidence certified copies of defendant's convictions for unlawful use of weapon by a felon in case Nos. 00 CR 24080 and 11 CR 19821. Defendant testified he was not the driver of the car, did not have a gun that day, did not know the other men in the car had guns, and had never seen Darden before.

¶ 9 The trial court found defendant guilty on each of the 14 charged offenses and entered convictions on one count of armed habitual criminal, one count of unlawful use or possession of a weapon by a felon, and one count of aggravated unlawful use of a weapon. The court ordered that a presentence investigation report (PSI) be prepared and continued the matter for hearing on any posttrial motions and sentencing.

¶ 10 Defense counsel filed a motion for new trial on defendant's behalf, arguing the State failed to prove defendant guilty beyond a reasonable doubt. By agreement of the parties, the hearing on defendant's posttrial motion was continued so the parties could obtain a copy of the

trial transcript. While the parties awaited the transcript, defendant prepared a *pro se* motion to dismiss the armed habitual criminal counts of the indictment, in which he extensively argued the public act which adopted the armed habitual criminal statute violated the single-subject rule and the armed habitual criminal statute violated the proportionate-penalties clause. Additionally, defendant's motion stated the State was improperly relying on out-of-state and juvenile convictions as predicate offenses for armed habitual criminal where the legislature never stated its intent that such convictions could be used as predicate offenses. Defendant's attorney filed the motion on defendant's behalf and informed the trial court he needed time to look into defendant's contentions and amend the motion if necessary. The court granted defendant's attorney's request and continued the matter.

¶ 11 During the hearing on defendant's posttrial motions, defendant's attorney argued the motion for new trial and defendant's motion to dismiss. Defendant's attorney told the trial court he had researched the single-subject portion of defendant's motion and determined it did not have any merit but preserved defendant's proportionate-penalties argument for the record. The trial court denied defendant's motion for new trial, and the following exchange occurred between the trial court, defendant, and defense counsel:

> "[Defendant]: Your Honor, please can I speak before – please, please, Ms. Clay. Look, Ms. Clay, could I please just say this, because I ain't like –
>
> THE COURT: [Defendant], there's a procedure –
>
> [Defendant]: I understand that.
>
> THE COURT: – that you must follow and I don't know what it is that you're talking of that you wish to speak about, but this isn't proper, this isn't the appropriate

stage. You can appeal, of course, anything that you believe that would be error, but this is not the appropriate time to speak unless there is some violation of your right by your counsel or any such thing like that.

[Defendant]: Yes.

[Defense counsel]: Judge, I could tell the Court that [defendant] is very dissatisfied with my representation of him.

[Defendant]: I haven't seen my lawyer, like everything –

THE COURT: Just a moment, sir, wait just a moment. Just a moment, [defendant].

[Defendant]: Yes, ma'am.

THE COURT: Is he saying that he wants – dissatisfied with the results primarily I would –

[Defense counsel]: No, he's just dissatisfied with my performance, Judge.

[Defendant]: And I basically wanted to put in a motion for retrial myself. He hasn't even came to speak to me about, not one time through this case that showed me like his trial strategy. Even with this here, you've been giving me continuance after continuance and he's supposed to come and see me to sit down and we go over what I think he should put in.

THE COURT: I'll tell you what, I'm about to rule on your motion for new trial.

[Defendant]: That's what I was saying.

THE COURT: I'm saying to you, sir, that the motion for – let me tell you this, the motion for new trial is denied. I was the person, the judge who presided over that trial evidence.

[Defendant]: Yes, ma'am.

THE COURT: And it was determined – you were determined to be guilty of certain counts, and that has not changed, that has not changed. That's been argued. From your viewpoint, it has been argued as to what allegedly your portion, what you had – your conduct that day was argued, and the Court finds it amounted to being guilty as charged.

Now, I'm going to pass the case, Counsel, for purpose of the defendant discussing with you –

[Defense counsel]: Judge, we have had discussions about – he's raised an issue with me dealing with one of his prior convictions, which I clearly disagree with.

THE COURT: All right.

[Defense counsel]: And I have researched it.

THE COURT: And he doesn't accept your –

[Defense counsel]: He doesn't accept my explanation.

[Defendant]: This is your ruling, Judge Clay, that I'm showing him clearly that when I had a lawyer that, he's your friend and everything, he sent you a letter through him, he never gave you this letter or anything. Christopher Nathan, he sent a letter and everything, but his ruling, I had a case in front of you in 2014, the same reason you threw

the armed habitual out, threw it out about, I'm showing him clearly the reason, but he is talking about it's not in there and I'm showing it to him.[2]

THE COURT: [Defendant], you're playing lawyer.

[Defendant]: No, I'm not.

THE COURT: Yes, you are, sir. If your attorney discussed that with you, he discussed what you were talking about with him, he knows the law and you do not. He knows what would be appropriate motions to make, what would be appropriate point of views to push, and there would be a basis to do that. You can't just determine what an outcome on a prior case applies to this, you cannot do that, [Defendant].

[Defense counsel]: Judge, I can tell the Court [defendant's] position is that the last time he was charged before [Y]our Honor was the same situation, he was charged with armed habitual criminal and aggravated UUW by a felon, he was found not guilty.

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Your Honor found him not guilty of the armed habitual criminal, but guilty of unlawful use of a weapon by a felon is one of the predicate defenses [*sic*].

For some reason, [defendant] does not feel that is an appropriate conviction to underline [*sic*] the armed habitual criminal in this case.

THE COURT: In this case.

[Defense counsel]: And I disagree with him.

[2]The attorney who represented defendant in a previous case, Christopher Nathan, sent the trial court a letter for consideration at sentencing.

THE COURT: And you are wrong. The Court can tell you, you are wrong, your view of that is wrong, [defendant], if you believe that conviction is not a basis, is a predicate, for armed habitual criminal in this case.

[Defendant]: The case number that the Grand Jury indicted me under is two indictment numbers, just like when you threw the armed habitual out.

THE COURT: Did you research any such allegations?

[Defense counsel]: Judge, I think what [defendant] is doing on his sheet is looking at the municipal number as opposed to the indictment number.

THE COURT: It morphs into felony trial number, [defendant], all these cases start out with a municipal number.

[Defendant]: They do.

THE COURT: A much longer number. After the preliminary hearing, then it's given the number that it has at trial. So that's the difference, it's not two different cases, it's the same conduct, two different proceedings that apply.

[Defendant]: So what about me being found guilty, like the name that I'm number [*sic*] is not – I'm not Lyle Parish, my name is Parish D. Lyle, and that's even messed up, that's the same thing that you originally, here is the case number, your ruling on this, you threw the armed habitual out because they used an alias in my indictment to try to convict me, and you threw this out, Judge Clay.

THE COURT: I don't know what you're talking about, that's probably not the reason why it was thrown out, it's lack of evidence. So you're reading rulings wrong, [defendant], it would not be based on the wrong name.

Motion for new trial is denied. Motion to dismiss is denied as well, there's no basis to do so based on the allegations set forth that this is not an appropriate predicate."

¶ 12 The matter proceeded to sentencing the same day, during which defendant gave a statement in allocution maintaining his innocence. Defendant explained he did not possess the gun and he "merely just got into the car to go get some cigarettes from the gas station, and I got caught up in all this." Defendant told the court the "little boy" who had the gun in the backseat would tell the court he had the gun and defendant did not. Additionally, defendant told the court he had pictures of the driver, who looked "almost exactly" like him, on his cell phone. Defendant's statement in allocution did not make any reference to his counsel's representation or the statements in the PSI relating to his counsel's performance.

¶ 13 The trial court merged the counts into the armed habitual criminal charge and sentenced defendant to an eight-year prison term. This appeal followed.

¶ 14 On appeal, defendant argues the trial court failed to conduct an adequate preliminary inquiry into his posttrial claims of ineffective assistance of counsel under *Krankel*, 102 Ill. 2d 181 (1984). As a result, defendant argues we must remand the matter to the trial court so it can conduct the appropriate inquiry. We agree.

¶ 15 The principles set forth in *Krankel* and its progeny are triggered when a defendant makes a *pro se* posttrial claim of ineffective assistance of counsel. *People v. Jolly*, 2014 IL 117142, ¶ 29. When such a claim is raised, the trial court does not automatically appoint new counsel to represent the defendant. *Id.* Rather, the trial court must first make a preliminary inquiry into the factual basis of the defendant's claim. *Id*. If the court determines, after this inquiry, 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. *People v. Moore*, 207 Ill. 2d 68, 78 (2003). But, if the allegations show possible neglect of the case, new counsel should be appointed to represent the defendant at the hearing on the defendant's *pro se* claim of ineffective assistance. *Id.*

¶ 16 To trigger the inquiry, the defendant need do nothing more than bring his or her claim to the trial court's attention. *People v. Ayres*, 2017 IL 120071, ¶ 11. Even a bare assertion of "ineffective assistance of counsel" is sufficient to trigger the inquiry. *Id.* ¶¶ 6, 26. "[A] defendant is not required to file a written motion [citation] but may raise the issue orally [citation] or through a letter or note to the court [citation]." *Id.* ¶ 11. This does not mean any communication is sufficient to trigger the court's duty to inquire under *Krankel*; rather, *Krankel* is limited to posttrial motions. *Id.* ¶ 22. The communication must be made directly to the judge, as "[m]ere awareness by a trial court that a defendant has complained about his counsel's representation imposes no duty on the court to *sua sponte* investigate a defendant's complaint." *People v. Cunningham*, 376 Ill. App. 3d 298, 304 (2007).

¶ 17 In making the inquiry into the factual basis for the defendant's claim, the court may engage in some interchange with trial counsel about the facts and circumstances surrounding the defendant's allegations, and it may briefly discuss the allegations with the defendant. *Jolly*, 2014 IL 117142, ¶ 30. The court is also "permitted to 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." *Id.*

¶ 18 Our concern on appeal is whether the trial court conducted an adequate inquiry into the defendant's allegations of ineffective assistance. *Moore*, 207 Ill. 2d at 78. The goal of the inquiry is to ascertain the factual basis of the defendant's claims and to make a record for review of those

claims on appeal. *Ayres*, 2017 IL 120071, ¶ 13. We review *de novo* whether the court conducted an adequate preliminary inquiry. *Jolly*, 2014 IL 117142, ¶ 28.

¶ 19 In this case, the record shows that, during the hearing on defendant's motion for new trial, when defendant's attorney informed the trial court that defendant was dissatisfied with his performance, defendant explained to the court that his attorney had neglected his case by failing to come to speak to him "about, not one time *** that showed me like his trial strategy."

¶ 20 "The Sixth Amendment requires that defense counsel keep defendant informed of developments in the case and consult with him on all major decisions to be made." *People v. Smith*, 268 Ill. App. 3d 574, 579 (1994). Generally, defense counsel, not defendant, determines the strategy to be used at trial. *People v. Ramey*, 152 Ill. 2d 41, 53-54 (1992). However, counsel's decisions on the matter of strategy must be informed by a consultation with defendant regarding the circumstances of the offense and the evidence which exists to support or refute the offense. See *id.* at 54.

¶ 21 In this case, defendant asserted his attorney had come to see him "not one time *** that showed [him] *like* his trial strategy," which indicates there may have been more to his claim. (Emphasis added.) Perhaps defendant's claim was based only trial strategy, which would have permitted the trial court to deny defendant's claim without appointing new counsel. See *Jolly*, 2014 IL 117142, ¶ 29 (quoting *Moore*, 207 Ill. 2d at 77-78) (" '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.' "). But because the court failed to inquire any further into the facts and circumstances surrounding this assertion or defendant's stated general dissatisfaction with his counsel's performance as required under *Krankel* and its progeny, we are

unable to discern what defendant believes his attorney should have discussed with him. Accordingly, we remand this matter to the trial court so it may conduct an inquiry into defendant's claims of ineffective assistance of counsel consistent with *Krankel* and its progeny.

¶ 22 The State argues remand for a *Krankel* inquiry is unnecessary because "even a cursory review of the record reveals that the trial court *did clearly* engage in an inquiry into defendant's claims" during which the court heard from defense counsel and defendant and used its own knowledge of the proceedings to assess defendant's claims. The State points to the lengthy colloquy quoted above and argues the trial court adequately addressed these claims.

¶ 23 However, the State's arguments pertain to defendant's complaints about counsel's performance in the context of the posttrial motion. The State does not address the trial court's failure to make any inquiry into the facts and circumstances underlying defendant's initial claim that his attorney did not meet with him at any time throughout the pretrial proceedings to discuss his case. Thus, even if we were to view the record as the State suggests, remand for further inquiry would be required. See *People v. Franklin*, 2012 IL App (3d) 100618, ¶¶ 32-33, *abrogated on other grounds by People v. Downs*, 2015 IL 117934 (remand for *Krankel* inquiry required where trial court fails to address one of two bases for claim of ineffective assistance).

¶ 24 The State notes defendant's statement in allocution is devoid of any claim of ineffective assistance of counsel. According to the State, "[i]f defendant desired to pursue his ineffectiveness claim after the trial court addressed it during his post[]trial motion, he had ample opportunity during his allocution remarks," but he "chose not to." Further, the State suggests defendant's failure to raise his claims again demonstrates his satisfaction with the court's explanations.

¶ 25 The State cites no authority in support of its assertion a defendant is required to raise his claims of ineffective assistance of counsel in his allocution after the trial court has implicitly rejected his posttrial assertion of ineffective assistance of counsel. We may reject this argument for this reason alone. See *People v. Pickens*, 354 Ill. App. 3d 904, 916 (2004) (contentions supported by some argument but no authority do not meet the requirements of Illinois Supreme Court Rule 341 and are forfeited). Further, as defendant notes, because the trial court failed to conduct further inquiry into the claim he raised during the hearing on his posttrial motion, we do not know the exact nature of his allegations and whether they relate to what he discussed during his allocution. Thus, we find defendant's failure to pursue his claims during his allocution does not preclude remand for further inquiry.

¶ 26 Finally, the State's contends if the trial court erred, the error was harmless beyond a reasonable doubt. See *Moore*, 207 Ill. 2d at 80 (citing *People v. Nitz*, 143 Ill. 2d 82, 135 (1991) ("A trial court's failure to appoint new counsel to argue a defendant's *pro se* posttrial motion claiming ineffective assistance of counsel can be harmless beyond a reasonable doubt."). However, where, as here, no record is made concerning a defendant's claims of ineffective assistance of counsel, "it is simply not possible to conclude that the trial court's failure to conduct an inquiry into those allegations was harmless beyond a reasonable doubt." *Moore*, 207 Ill. 2d at 81.

¶ 27 In his brief, defendant argues the PSI report, which the court had before it prior to the combined hearing on defendant's posttrial motions and sentencing, and which it presumably reviewed (730 ILCS 5/5-3-1, 5-4-1(a)(2) (West 2016)), contained statements from defendant that his lawyer did not fight for him, asked irrelevant questions at trial, and was not prepared for trial.

According to defendant, the court failed to make any inquiry into the allegations set forth in the PSI report. The parties dispute whether statements in a PSI are, standing alone, sufficient to trigger a *Krankel* inquiry. See *People v. Harris*, 352 Ill. App. 3d 63, 71 (2004). However, as we are remanding this matter to the trial court for further proceedings, we need not address this issue.

¶ 28 For the reasons stated, we remand this matter to the trial court for a preliminary *Krankel* inquiry.

¶ 29 Cause remanded with directions.