2019 IL App (2d) 161092-U
No. 2-16-1092
Order filed February 7, 2019



IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS,<br><br>Plaintiff-Appellee,<br><br>v.<br><br>JONATHON S. CHANEY,<br><br>Defendant-Appellant. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Appeal from the Circuit Court of Kane County.<br><br><br><br>No. 14-CF-2113<br><br>Honorable John A. Barsanti, Judge, Presiding. |

JUSTICE ZENOFF delivered the judgment of the court.
Presiding Justice Birkett and Justice Hutchinson concurred in the judgment.

**ORDER**

¶ 1 *Held*: Because the trial court failed to conduct a preliminary inquiry under *Krankel* to determine whether to appoint new counsel on defendant's claim of ineffective assistance, instead conducting an adversarial hearing on the merits of the claim with defendant representing himself, we remanded for a preliminary inquiry before a different judge.

¶ 2 Defendant, Jonathon S. Chaney, appeals from a judgment of the circuit court of Kane County finding him guilty of burglary (720 ILCS 5/19-1(a) (West 2014)), criminal damage to property (*id.* § 21-1(a)(1)), and resisting a peace officer (*id.* § 31-1(a)). Defendant argues that the trial court erred in failing to implement the procedural safeguards required by *People v.*

*Krankel*, 102 Ill. 2d 181 (1984), when defendant alleged that he received the ineffective assistance of counsel. Defendant asks that we remand with instructions to the trial court to appoint counsel for defendant and conduct an evidentiary hearing before a different judge on defendant's posttrial claim of ineffective assistance of counsel. In the alternative, he asks that we remand for a preliminary hearing under *Krankel*. For the reasons that follow, we remand for a preliminary hearing under *Krankel* before a different judge.

¶ 3 I. BACKGROUND

¶ 4 On March 11, 2015, defendant was indicted on one count of burglary (720 ILCS 5/19-1(a) (West 2014)), one count of criminal damage to property (*id.* § 21-1(a)(1)), two counts of resisting a peace officer (*id.* § 31-1(a)), and one count of criminal trespass to land (*id.* § 21-3(a)(1)).

¶ 5 On April 8, 2016, following a bench trial, defendant was found guilty of burglary, criminal damage to property, and resisting a police officer.[1] That same day, defendant's family filed a series of posttrial motions. One of the motions, entitled "motion to suppress vacate judgment entered on 04/08/2016" (hereinafter referred to as defendant's *pro se* motion to vacate), alleged, *inter alia*, that "defendant was not adequately represented."

¶ 6 On April 27, 2016, defense counsel filed a motion for judgment notwithstanding the verdict or a new trial, arguing that the trial court erred in denying defendant's motion for a directed finding at the close of the State's case and that the evidence was insufficient to sustain the findings of guilt.

[1] The criminal-trespass-to-land charge had been nol-prossed prior to trial.

¶ 7 On May 19, 2016, defense counsel advised the trial court that defendant's family had filed some motions and that she would not be adopting them. Defendant told the trial court that he wished to adopt them. The trial court stated:

> "All right, let's just take this step-by-step. Your lawyer is not required to adopt your motions. Your lawyer, she's an experienced attorney in this building. If your lawyer doesn't wish to adopt those, then that's the way they would not be adopted.
>
> Now, you have a couple choices here. You can do one of two things, you could hire a different lawyer to represent you, which means you'd have to pay somebody some money. I am not appointing you a different public defender. And I don't find this to be a situation where I would appoint anybody else to be your lawyer.
>
> So your options really are, you stay with this lawyer and you do what she thinks is best in this matter. You try to hire another lawyer, which you have to pay to come into this case and represent you, or you can represent yourself. Those are your three options."

Defendant responded: "Your Honor, I want to address that I feel that I wasn't properly represented. And that I want to put on record that she is ineffective counsel in representing me." The trial court stated: "We're not arguing these issues. If you want those issues to be heard, we'll get to that at some point. Right now this is a very limited question, do you want to fire this lawyer." Ultimately, defendant stated that he wanted "[s]ome time to hire a lawyer." The public defender asked for leave to withdraw, and the trial court granted her leave. The matter was continued.

¶ 8 On May 20, 2016, defendant wrote a letter to the chief judge of the circuit court of Kane County (which letter was received on June 24, 2016) that included an allegation that he was

"poorly represented by council [*sic*]" in that she "failed to properly represent [him] during [his] trial by not disputing any of the circumstantial evidence against [him]."

¶ 9 On June 17, 2016, defendant appeared *pro se*. Defendant told the court that he could not afford to hire an attorney and wished to represent himself. The court admonished defendant about representing himself and defendant indicated his continued desire to proceed *pro se*. Defendant told the court that he wished to adopt the motions that had been filed by his family.

¶ 10 On July 20, 2016, the parties appeared for a hearing on defendant's *pro se* motions. At the outset of the hearing, defendant advised the court that he was also adopting and would be arguing the posttrial motion that had been filed by defense counsel before she withdrew. Before defendant began his argument, the State pointed out to the court that defendant's *pro se* motion to vacate alleged the ineffective assistance of counsel. The court stated: "[T]he defendant is representing himself at this point in time. I think he's allowed. I think he can argue—as he's representing himself, he can argue the ineffectiveness of the lawyer who is no longer on this case." Thereafter, defendant proceeded to argue at length the merits of his motions. During the course of his arguments, defendant stated: "I asked for a jury trial but was told that there was—there were no jurors of my peers available in this court. I have an eyewitness of this statement." The State responded to every argument made by defendant except the allegation concerning defense counsel's ineffectiveness.

¶ 11 After hearing argument, the trial court asked defendant if he had any witnesses to call to support his allegation of ineffectiveness. Defendant called his mother, Rosalind Roberson. Roberson testified that she was present when defendant told counsel that he wanted a jury trial. According to Roberson, counsel told defendant that "there were no jurors of [his] peers in this county, in Kane County, available; it would be only old white people." On cross-examination,

she testified that she could not remember the exact date of the conversation but that it was while defendant was free on bond. She further testified that counsel wanted defendant to plead guilty but that she and defendant wanted a jury trial because "it's not the correct charges." She stated that defendant should have been charged with criminal trespass, not burglary or residential burglary, and that they wanted a jury to decide but counsel said that "there would be no jurors available in this Kane County of his peers."

¶ 12 After Roberson finished testifying, the State stated: "[B]ased on what just transpired here, I am seeking in my response to order a transcript, get [defense counsel] here and do some other things now." The trial court responded: "Well, this is—I'm going to do this. We're going to—this is a serious allegation that the defendant makes concerning [defense counsel]." The court decided to continue that matter to the next day for defense counsel to appear and testify.

¶ 13 The next day, the State called defense counsel to testify. Defense counsel testified that, on October 21, 2015, defendant's pretrial date, she spoke with defendant and Roberson in a conference room at the courthouse before defendant's case was called. Roberson told counsel that "they were demanding a jury of his peers." Counsel testified that she asked Roberson to leave so that she could talk to defendant, but Roberson refused. Counsel asked defendant if he had ever had a jury trial. When he told her no, she explained to him "what a jury trial entails as far as the pool of jurors and how it goes about the selecting." She "explained to him that they are registered voters in Kane County, and that in [her] experience with jury trials, the majority of them, the majority of those people are white. There are minorities, making them black, Asian or Hispanic. So with respect to race, yes." She testified that she explains that to any defendant when they are discussing a jury trial. She never told defendant that he would not get a fair trial. After their discussion, defendant still desired a jury trial.

¶ 14 Defense counsel testified that she next met with defendant in the conference room at the courthouse on January 21, 2016, prior to the next pretrial conference. Roberson was not present. Counsel explained to defendant the substance of the motions that were going to be heard and then told him that trial was set for January 25, 2016. Defendant then told her that he wanted a bench trial. Defense counsel was surprised because defendant had never before expressed that. She explained to him the ramifications of waiving a jury trial and asked if he wanted to waive a jury that day or wait until later. She told him that "once you give that up, you give it up forever." She obtained a jury waiver form and read it to him. He did not have any questions. They executed the waiver that day. A copy of the signed waiver form was admitted into evidence.

¶ 15 The State asked the trial court to take judicial notice of the court file and, in addition, offered into evidence the transcript of the January 21, 2016, proceedings during which defendant waived his right to a jury trial.

¶ 16 Defendant recalled Roberson as a witness but much of her testimony was objected to as it was simply repetitive of the prior day's testimony or based on the witness's personal beliefs. Defendant also called Loranda Sharice Chaney to testify, but the majority of her testimony was objected to as well.

¶ 17 Defendant waived closing argument. The State argued that defense counsel properly explained to defendant the juror selection procedure and did not coerce him to waive a jury trial. The State argued extensively that defendant voluntarily waived his right to a jury trial. Defendant made no argument in response.

¶ 18 The trial court then made its ruling "concerning all of the defendant's motions for a new trial or judgment notwithstanding the verdict or any post trial motions that's been filed by the defendant, by the defendant's previous Counsel, any other motions that we went over on the

previous day, yesterday on this matter." The court addressed each argument raised by defendant. With respect to defendant's claim that "he did not properly or validly or voluntarily waive his right to a trial by jury," the court stated as follows:

> "I wanted to hear more about that. That's a serious allegation made at that time, and the defendant also presented testimony from his mother yesterday which indicated that she corroborated to an extent what the defendant was alleging in there, that there was some comment made.
>
> So today we heard from [defense counsel], which was presented to the Court as the State's witness, and [defense counsel] indicated and explained that she did in fact talk about the jury pool and did in fact talk about whether or not he could have a jury of his peers, which is certainly a constitutional right of the defendant. And what that actually means in today's world is probably—was accurately explained by [defense counsel]. Whether or not you have exact people exactly like the defendant on your jury is not really what a jury of your peers means."

The court ultimately concluded that counsel's explanation was not coercive such that defendant's waiver was involuntary. The court further noted that its conclusion was supported by the court's inquiry when defendant entered his waiver and by the written waiver itself. The court thereafter denied all of defendant's posttrial motions.

¶ 19 When the trial court thereafter indicated that the matter would be continued for sentencing, defendant stated that he did not "have the capability to prepare for something like this." He asked the court to appoint "[a] competent attorney" to represent him. The court appointed defendant's prior counsel to represent defendant for sentencing.

¶ 20 At the outset of the sentencing hearing, on December 19, 2016, defense counsel informed the trial court that a sentencing agreement had been reached. After hearing the terms of the agreement and discussing the terms with defendant, the court sentenced defendant in accordance with the agreement to four years in prison for burglary, followed by two years' mandatory supervised release, with 542 days' credit for time spent in presentencing custody.

¶ 21 Defendant timely appealed.

¶ 22 II. ANALYSIS

¶ 23 On appeal, defendant argues that the trial court erred in failing to implement the procedural safeguards required by *Krankel* when defendant raised a *pro se* claim of ineffective assistance of counsel. Defendant asks that we remand with instructions to the trial court to appoint counsel for defendant and conduct an evidentiary hearing before a different judge on his claim. In the alternative, he asks that we remand for a preliminary hearing under *Krankel*.

¶ 24 Pursuant to *Krankel* and its progeny, when a defendant raises a *pro se* posttrial claim of ineffective assistance of counsel, the following procedure (commonly referred to as a preliminary *Krankel* hearing) should be conducted to determine whether new counsel should be appointed:

> " '[W]hen a defendant presents a *pro se* posttrial claim of ineffective assistance of counsel, the trial court should first examine the factual basis of the defendant's claim. If the trial court determines that the claim lacks merit or pertains only to matters of trial strategy, then the court need not appoint new counsel and may deny the *pro se* motion. However, if the allegations show possible neglect of the case, new counsel should be appointed.' " *People v. Jolly*, 2014 IL 117142, ¶ 29 (quoting *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003)).

¶ 25 The only issue to be determined at a preliminary *Krankel* hearing is whether new counsel should be appointed. To determine whether new counsel should be appointed, "some interchange between the trial court and trial counsel regarding the facts and circumstances surrounding the allegedly ineffective representation is permissible and usually necessary." *Moore*, 207 Ill. 2d at 78. As part of that interchange, the trial court may question defense counsel and the defendant about the facts and circumstances surrounding the defendant's allegations. *Id.* However, an interchange with counsel or the defendant is not always necessary, as "the trial court can base its evaluation *** on its knowledge of defense counsel's performance at trial and the insufficiency of the defendant's allegations on their face." *Id.* at 79.

¶ 26 "[T]he State should never be permitted to take an adversarial role against a *pro se* defendant at the preliminary *Krankel* inquiry." *Jolly*, 2014 IL 117142, ¶ 38. Because a defendant is not appointed new counsel for the preliminary *Krankel* hearing, the State's participation, if any, should be *de minimis*. *Id.*

¶ 27 "The operative concern for the reviewing court is whether the trial court conducted an adequate inquiry into the defendant's *pro se* allegations of ineffective assistance of counsel." *Moore*, 207 Ill. 2d at 78. This issue presents a legal question, which we review *de novo*. *Jolly*, 2014 IL 117142, ¶ 28.

¶ 28 The State concedes that the trial court erred in the manner in which it inquired into defendant's *pro se* claim of ineffectiveness. As noted above, the purpose of a preliminary *Krankel* hearing is to determine, in a neutral and nonadversarial proceeding, the factual basis for the defendant's claim and determine whether new counsel should be appointed. That did not occur here. Instead, when defendant raised his *pro se* claim of ineffectiveness, the trial court told him that he had three options: (1) he could hire another attorney; (2) he could keep the attorney

he already had; or (3) he could represent himself. Ultimately, defendant chose to represent himself. Thereafter, the trial court conducted an evidentiary hearing on the merits of defendant's claims, including his allegation that he received the ineffective assistance of counsel, and the State actively participated. There is no dispute that the trial court's failure to conduct a preliminary *Krankel* inquiry to determine whether new counsel should be appointed was error. We agree with the parties that a remand is required.

¶ 29 Nevertheless, the parties do not agree on what should occur on remand. Defendant asks that we direct the trial court to appoint new counsel and conduct an evidentiary hearing before a different judge on his allegation of ineffectiveness. Essentially, defendant wants us to skip the preliminary *Krankel* hearing entirely. Defendant contends that the trial court already "implicitly determined" that defendant stated a "colorable claim of ineffective assistance of counsel" given that it conducted an evidentiary hearing on the merits and also noted that defendant made "a serious allegation." In response, the State argues that we should direct the trial court to conduct a new preliminary *Krankel* hearing before a different judge.

¶ 30 We agree with the State's position. Two factually similar cases support this conclusion. First, in *People v. Jackson*, 2016 IL App (1st) 133741, the defendant told the trial court that he wished to raise claims concerning his trial counsel's ineffectiveness. The trial court told the defendant that he had to "argue" his claims to the court. *Id.* ¶ 70. After hearing the defendant's arguments, the trial court rejected them on the merits. On appeal, the First District found that, where "[t]he trial court moved directly to the merits of the claim and rejected them *** without first attempting to determine whether sufficient facts were alleged to show possible neglect and deciding whether to appoint conflict counsel," a remand for a new preliminary hearing was required. *Id.* ¶ 77. Similarly, in *People v. Cabrales*, 325 Ill. App. 3d 1, 5 (2001), we found that,

where the trial "court proceeded to a full hearing on the merits of defendant's *pro se* motion without any discussion or resolution of the need for a preliminary investigation or appointment of conflict counsel," the appropriate remedy was a remand for a preliminary investigation before a different judge.

¶ 31 Also instructive are cases where the trial court conducted a preliminary *Krankel* hearing but improperly allowed the State to participate. In such cases, a remand for a new preliminary *Krankel* hearing was ordered. For instance, in *Jolly*, 2014 IL 117142, ¶ 41, the supreme court found that the trial court committed reversible error when it permitted the State to participate in an adversarial fashion during the preliminary *Krankel* hearing. The court held that the appropriate remedy was to remand the matter for a proper preliminary *Krankel* inquiry before a different judge. *Id.* ¶ 46. In *People v. Fields*, 2013 IL App (2d) 120945, ¶ 42, this court found that, where "the preliminary inquiry morphed into an adversarial hearing with the State participating and the defendant appearing *pro se*," the appropriate remedy was to remand for a new *Krankel* inquiry before a different judge. In *People v. Boose*, 2014 IL App (2d) 130810, ¶ 37, this court found that, where the trial court conducted an adversarial preliminary *Krankel* hearing, the appropriate remedy was to remand "for a new preliminary inquiry before a different judge."

¶ 32 Nevertheless, relying on *People v. Demus*, 2016 IL App (1st) 140420, defendant argues that we should direct the trial court to skip the preliminary *Krankel* hearing and appoint counsel to represent defendant on his ineffectiveness claim. In *Demus*, following a finding that he violated probation, the defendant raised a claim that counsel was ineffective for failing to subpoena a document that would have impeached an officer who had testified against the

defendant. The trial court conducted a hearing on the merits at which the defendant represented himself. On appeal, the court found:

> "By proceeding directly to a hearing on [the defendant's] substantive claim where he was forced to proceed *pro se*, the trial court deprived [the defendant] of the benefit of new counsel in exploring his claim of ineffective assistance of his trial counsel, which is inconsistent with *Krankel*." *Id.* ¶ 28.

The court found that "the proper remedy is to remand the cause to the trial court to conduct a hearing on [the defendant's] claim of ineffective assistance of counsel with the appointment of new counsel." *Id.* ¶ 31.

¶ 33 To be sure, *Demus* supports defendant's position. However, as noted above, *Demus*'s conclusion is inconsistent with the weight of authority remanding for a new preliminary *Krankel* hearing. We are not bound to follow *Demus*. See *St. Paul Fire & Marine Insurance Co. v. City of Waukegan*, 2017 IL App (2d) 160381, ¶ 29 ("[T]he decision of one district, division, or panel of the Illinois Appellate Court is not binding on other districts, divisions, or panels."). And we decline to do so.

¶ 34 Defendant also cites *Cabrales* in support of his argument that we should order the trial court to appoint new counsel on remand. However, defendant misreads *Cabrales*. In that case, we remanded the matter "for further proceedings in front of a different judge where defendant can proceed with his motion to withdraw his guilty plea pursuant to the guidelines set forth in [*People v.*] *Jackson*, 131 Ill. App. 3d [128,] 139 [(1985)]." *Cabrales*, 325 Ill. App. 3d at 6. The defendant's motion to withdraw his guilty plea was based on counsel's ineffectiveness. The guidelines set forth in *Jackson* are those concerning a preliminary investigation. Thus it is clear that the remand in *Cabrales* was for a preliminary investigation into the ineffectiveness claims

that formed the basis of the defendant's motion to withdraw his plea. It was not a remand for the appointment of new counsel.

¶ 35 Finally, we note that the trial court's statement—that defendant made "a serious allegation" against defense counsel—does not support defendant's argument that the court implicitly found that defendant established the requisite possible neglect to warrant the appointment of counsel. This statement was made prior to hearing from defense counsel. After hearing from defense counsel, the court denied defendant's motions. Thus, when the court made the statement, it had not investigated the factual basis of defendant's claim as contemplated by *Krankel*. See *Moore*, 207 Ill. 2d at 78.

¶ 36 III. CONCLUSION

¶ 37 For the reasons stated, we remand for the limited purpose of allowing a different judge to inquire into the factual basis of defendant's ineffective-assistance claim. If defendant's allegation shows possible neglect of the case, the court should appoint new counsel to argue defendant's claim of ineffective assistance. However, if the court concludes that defendant's claim lacks merit or pertains only to matters of trial strategy, the court may deny the claim.

¶ 38 Remanded with directions.