2019 IL App (2d) 170988-U
No. 2-17-0988
Order filed February 14, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. KEENAN MORGAN, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Lake County. No. 14-CF-2935 Honorable Mark L. Levitt, Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Burke and concurred in the judgment.
Presiding Justice Birkett dissented.

ORDER

¶ 1 *Held*: (1) Because the trial court failed to properly inquire under Krankel into the basis for defendant's claim of ineffective assistance of counsel, we remanded for that inquiry; (2) as the trial court imposed a public defender fee without any discussion in open court, it conducted no "hearing" on the fee, and thus we vacated it outright.

¶ 2 After a jury trial, defendant, Keenan Morgan, was found guilty of unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2014)) and sentenced to seven years in prison. On direct appeal, we found that the trial court did not adequately inquire into the factual basis of defendant's *pro se* claim of ineffective assistance of counsel and we remanded the cause for the

limited purpose of allowing the trial court to inquire. *People v. Morgan*, 2017 IL App (2d) 150463, ¶ 18. Following the proceedings on remand, the trial court denied defendant's claim. Defendant timely appeals. Defendant argues that the trial court erred in denying his motion, because his allegations showed possible neglect of his case. Alternatively, defendant argues that the matter should be remanded because the trial court's inquiry was again inadequate. Defendant also argues that, because a $750 public defender fee was imposed without the requisite hearing, it must be vacated. We find that the trial court again failed to conduct an adequate inquiry into defendant's claim and thus we remand. In addition, we vacate the public defender fee as it was imposed without the requisite hearing.

¶ 3 I. BACKGROUND

¶ 4 Defendant was indicted on two counts of unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2014)), two counts of aggravated unlawful use of a weapon (*id.* § 24-1.6(a)(1), (a)(3)(C), (a)(3)(A-5)), and one count of defacing identification marks on a firearm (*id.* § 24-5(b)).

¶ 5 On December 10, 2014, the parties had a conference pursuant to Illinois Supreme Court Rule 402 (eff. July 1, 2012). Following the conference, the State indicated that it had made an offer and that it was "asking for a week, 12/17 hopefully for a plea." The terms of the offer were not stated on the record. (Later, however, the State informed the trial court that the offer had been for three years.)

¶ 6 On February 17, 2015, the parties had a second Rule 402 conference. Thereafter, the parties appeared before the court. The State indicated that, during the conference, the State "modified [its] offer to four years in [the] DOC at 50 percent." According to the State, the offer had been discussed with defendant and defendant rejected it. The State revoked the offer. The

trial court confirmed with defendant that the State had offered him a four-year prison sentence on a Class 2 felony and that he wished to reject it and proceed to trial.

¶ 7 On February 24, 2015, at the outset of defendant's jury trial, defense counsel stated that she had a *bona fide* doubt as to defendant's fitness to stand trial. After speaking with defendant, the trial court agreed that a fitness evaluation was warranted. Dr. Anthony Latham evaluated defendant that afternoon, and a fitness hearing took place the next day.

¶ 8 On February 25, 2015, at the outset of the fitness hearing, the parties stipulated to Dr. Latham's qualifications and to his fitness evaluation, wherein he recommended that defendant be found fit to stand trial. In the fitness evaluation, Dr. Latham indicated that "[defendant] expressed much dissatisfaction, if not vitriol, when discussing his interactions with his attorney." According to the evaluation, defendant "expressed dissatisfaction that his attorney informed him that there was 'a deal of two years on the table.' [Defendant] stated that he wanted to take this deal but his attorney told him it was possible that he could receive a term of probation. [Defendant] then indicated that he never rejected the deal for two years but his attorney informed him that this deal was no longer available as he wanted a term of probation." In addition, "[defendant] also indicated that his current defense counsel does not listen to him. He indicated that he was offered 4-years which he claimed he wanted to accept."

¶ 9 Defense counsel told the trial court that she did not think that she and defendant could work together. She stated: "I do believe that [defendant] has [a] motion based on that."

¶ 10 In response, the court indicated that it had reviewed the report and found defendant fit to stand trial. Thereafter, the following colloquy occurred:

> "THE COURT: Okay. What's your motion, [defendant]?
>
> THE DEFENDANT: Um, ineffective counsel.

THE COURT: Why?

THE DEFENDANT: I don't feel like [defense counsel] has my best interest.

THE COURT: You disagree with her?

THE DEFENDANT: Right.

THE COURT: Anything else? Anything specifically she didn't do for you?

THE DEFENDANT: Um, she don't—I don't feel that is really putting an effort, you know, reduce—I mean damage that's about to be done.

THE COURT: You mean get you a lower sentence?

THE DEFENDANT: Yes.

THE COURT: Listen, [defendant], I understand that sometimes relationships with attorneys can be strained especially when an attorney tries to be honest with you. I understand your [*sic*] in a position where it's your life and you feel like you want to have good news all the time, but I've got to tell you an attorney's job is not always to give you good news, it's also to give you bad news if it's there.

I observed [defense counsel] throughout these proceedings. I can find nothing to indicate in the record or in my observations of her conduct throughout these proceedings to even suggest that she has done anything other than represent you to the fullest of her abilities.

She happens, in my view, to be one of the best defense lawyers that works in this county that I have seen, [defendant]. You should could [*sic*] yourself lucky to a [*sic*] good lawyer working for you. I know you don't always agree. Take me at my word. Your motion to discharge her for ineffective assistance is denied. What else do you have, [defendant]?

THE DEFENDANT: Nothing else."

The matter proceeded.

¶ 11 Later, the State indicated that it wanted to make a clear record of the prior offers that had been made. The State noted that, on December 10, 2014, the parties had their first Rule 402 conference, at which defendant had been offered three years. According to the State, he had to accept the offer that day, otherwise it would be automatically revoked. Defendant declined the offer and it was revoked. At a second Rule 402 conference, the State offered five years, but it modified the offer to four years. Defendant declined the offer and it was revoked. The next day, defense counsel called the State, indicating that defendant wanted to reopen negotiations. The State offered five years and defendant declined the offer.

¶ 12 Following defendant's jury trial, defendant was found guilty of unlawful possession of a weapon by a felon (*id.* § 24-1.1(a)).

¶ 13 Defendant filed a motion for a new trial, arguing, *inter alia*, that "[t]he Court erred when it did not grant the Defendant's pro se pre-trial motion for alternative counsel to be appointed due to a break down in the attorney client relationship and communication." The trial court denied the motion, ruling as follows: "I reviewed your motion for a new trial. It largely deals with matters that were dealt with at the time the case was—at or before the time the case was tried. I stand by my rulings."

¶ 14 On April 21, 2015, following a sentencing hearing, the trial court sentenced defendant to seven years in prison. Attached to the judgment was Exhibit A, also filed on April 21, 2015, showing that defendant was assessed a $750 public defender fee.

¶ 15 Defendant appealed. On appeal, defendant argued that the trial court erred in failing to adequately inquire into his *pro se* claim of ineffective assistance of counsel as required under

People v. Krankel, 102 Ill. 2d 181 (1984). We agreed. See *Morgan*, 2017 IL App (2d) 150463, ¶ 18. We stated:

> "[A]lthough the trial court inquired into defendant's *pro se* claim of ineffectiveness, the inquiry was inadequate as it did not address the factual basis of defendant's claim. To be sure, when defendant alleged that defense counsel was ineffective, the court asked defendant if there was anything specific that counsel failed to do. And, although defendant's response was less than articulate, the court confirmed with defendant that his claim concerned counsel's failure to 'get [him] a lower sentence.' But the court stopped its inquiry too soon. In the fitness evaluation (which counsel specifically cited when alerting the court to defendant's *pro se* motion), defendant complained that the State had made various plea offers that he had wanted to accept, that counsel did not listen to him, and that he was only following counsel's lead. Yet when the court questioned defendant, it did not ask defendant about his discussions with counsel or how counsel failed to obtain a lower sentence. Nor did it ask counsel any questions about defendant's claim. Instead, the court's evaluation of defendant's claim was based on its knowledge of counsel's performance. However, the court could not rely on its observations of counsel because defendant's claim was not based on counsel's in-court performance. See *People v. Vargas*, 409 Ill. App. 3d 790, 803 (2011) ("While the trial judge had the opportunity to observe counsel's performance, the claims asserted by defendant related to matters *de hors* the record and not readily ascertainable by a trial judge."). Because the court failed to inquire into the specifics of defendant's claim, the court could not fully evaluate it. Thus, a remand is necessary for the limited purpose of conducting a proper inquiry under *Krankel*." *Id.*

¶ 16 On remand, the following colloquy occurred:

"THE COURT: ***

*** What is it that you believe that counsel did or didn't do that you think makes her ineffective?

THE DEFENDANT: Um, well, when she would come to see me she would tell me like this deal was on the table. This deal was on the table. One instance she told me it was two years on the table. I would—I told her I would like to take two years, but then she added like, well, we can shoot for probation so I said okay. I know I will not get probation, but I would take two years when I come to court. Next time I come to court I come to court with two years was off the table.

THE COURT: Okay.

THE DEFENDANT: And another incident she kind of got a little aggressive and asked me, are you take the 'F-in time?' What the 'F' do you want to do this time? I just—like I said, I could not agree with it.

THE COURT: You just didn't agree with her?

THE DEFENDANT: I mean, not that I did not agree, but the way she talked to me. I just, you know, don't want her to represent me at the time.

THE COURT: Okay. Anything else she did or didn't do?

THE DEFENDANT: Um, that's basically, you know, what was the problem.

THE COURT: If I understand you correctly, it was the way she was negotiating your case and conveying the results of the negotiation to you?

THE DEFENDANT: Yeah.

THE COURT: Okay. All right. [Defense counsel], were there pretrial negotiations in this case?

[DEFENSE COUNSEL]: There were, Judge[.]

THE COURT: Did you convey the offers such as they were to [defendant]?

[DEFENSE COUNSEL]: Yes, Judge.

THE COURT: Okay. All right. Is there anything else?

THE DEFENDANT: That's it, sir.

THE COURT: All right. [Defendant], what you stated to me does not amount to any kind of ineffective assistance of counsel. In fact, it is in my view effective assistance of counsel that before your trial she engaged in pretrial negotiations attempting to resolve your case short of trial.

Those deal with her strategy in trying to resolve your case, not with any type of lack of professional assistance that needed to be rendered towards you.

I also gave you the opportunity to raise any other issues that you have, and you said that there were none.

Regarding your belief she was aggressive toward you, she may have been. Different people handle different situations differently, but merely trying to be aggressive or even taking you at your word that she said the 'F' word to you during her conversations with you does not render her ineffective. She may not be very nice sometimes, but I think the best lawyers sometimes are not nice. Sometimes the message that they are trying to deliver is the message that somebody might not want to hear, and so that makes it difficult to convey sometimes.

> Nothing you have said here to me today arises to the level that would, in my belief, require me to appoint counsel to investigate any further so your request is and shall be denied."

¶ 17 Defendant timely appealed.

¶ 18 II. ANALYSIS

¶ 19 Defendant first argues that the trial court erred in denying his *pro se* motion, because defendant's allegations showed possible neglect of his case. Alternatively, defendant argues that the matter should be remanded because the trial court's inquiry into the factual basis of his claim was inadequate.

¶ 20 Pursuant to *Krankel* and its progeny, when a defendant raises a *pro se* posttrial claim of ineffective assistance of counsel, the following procedure should be followed 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)).

¶ 21 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. In every case, the court must "conduct some type of inquiry into the underlying factual basis, if any, of a defendant's *pro se* posttrial claim of ineffective assistance of counsel." *Id.*

¶ 22 "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.

¶ 23 We agree with defendant that the trial court's inquiry on remand was inadequate. Defendant alleged that counsel presented him with an offer of two years and that he told counsel that he wanted to take the offer. However, defendant alleged counsel induced him to try for probation, which even defendant knew he would not get. Defendant's claim involved off-the-record conversations between him and counsel. However, once again, the trial court failed to ask counsel any questions to determine the validity of defendant's claim. Rather than ask counsel whether she communicated a two-year offer to defendant, whether defendant told her that he wanted to accept the two-year offer, and whether she suggested otherwise and why, the trial court asked counsel only if she engaged in plea negotiations and if she conveyed all offers to defendant. These general questions did not provide any insight into the facts and circumstances surrounding her communications with defendant concerning those negotiations and offers.

¶ 24 The State maintains that these questions were sufficient to determine that defendant was not being truthful, because there was never a two-year offer on the table and because probation

was never an option. We disagree. First, although the record does not indicate that the State made an offer of two years, the record does indicate that, on February 17, 2015, the State made an offer of "four years in the DOC at 50 percent." Thus, given that the time to be spent in prison amounted to two years, it is likely that defendant referred to this offer as "two years on the table." Moreover, if, as the State contends, probation was never an option, then it was all the more important that the trial court inquire with counsel about defendant's claim that counsel suggested that they "can shoot for probation." The trial court did not address that point at all.

¶ 25 Here, as with the first *Krankel* inquiry, the trial court stopped its inquiry too soon, as its two questions to counsel did not flush out the facts regarding defendant's allegations and thus we are unable to establish whether they show possible neglect of the case.

¶ 26 Defendant next argues that the $750 public defender fee must be vacated outright, because it was imposed without the requisite hearing. The State agrees.

¶ 27 Although defendant did not raise this issue below, we may consider the issue as forfeiture does not apply. See *People v. Hardman*, 2017 IL 121453, ¶ 49 (the defendant's failure to object to the imposition of the public defender fee at sentencing hearing did not result in forfeiture); *People v. Carreon*, 2011 IL App (2d) 100391, ¶ 11 ("where a trial court imposes this fee without following the appropriate procedural requirements, application of the forfeiture rule is inappropriate").

¶ 28 Section 113-3.1 of the Code of Criminal Procedure of 1963 (725 ILCS 5/113-3.1 (West 2016)) provides that the defendant may be required to pay a "reasonable sum" to defray the cost of an appointed public defender. In order to impose this fee, however, the trial court is required to hold a hearing to determine the defendant's financial circumstances. *Id.* § 113-3.1(a). Where the trial court holds no hearing whatsoever on the fee, the proper remedy is to vacate the fee

outright. See *People v. Suggs*, 2016 IL App (2d) 140040, ¶ 94; *People v. Daniels*, 2015 IL App (2d) 130517, ¶¶ 26-30.

¶ 29 Our review of the record confirms that the trial court failed to conduct any hearing at all on the public defender fee. Exhibit A indicates that the trial court imposed the public defender fee, along with other fees, fines, and costs, on April 21, 2015. The only proceeding that took place that day was the sentencing hearing. There was no mention of the public defender fee at any time during the sentencing hearing. Given that the fee was assessed without some sort of hearing, it must be vacated outright.

¶ 30 III. CONCLUSION

¶ 31 For the reasons stated, we vacate the public defender fee and we remand for the limited purpose of allowing the trial court to inquire into the factual basis of defendant's ineffective-assistance claim. If defendant's allegations show 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.

¶ 32 Vacated in part and remanded.

¶ 33 PRESIDING JUSTICE BIRKETT, dissenting:

¶ 34 I strongly disagree with my colleagues that "the trial court again failed to conduct an adequate inquiry into defendant's claim" of ineffective assistance of trial counsel. *Supra* ¶ 2. In fact, I am confident that had the parties presented all of the facts relevant to our consideration in *Morgan I*, this court would have affirmed the trial court in that case. Supreme Court Rule 341 (h)(6) (eff. May 25, 2018) requires that appellate counsel's statement of facts "contain the facts necessary to an understanding of the case, stated accurately and fairly ***." In defendant's

opening briefs in both *Morgan I* and this appeal, counsel set forth a proffer given by the prosecutor to the trial court, just before jury selection, regarding the "prior offers in this case." However, counsel's presentation of the proffer is incomplete and it also omits the discussion between the trial court, defense counsel and defendant regarding their understanding of the plea discussions. In *Morgan I*, defendant's opening brief quotes the following passage from the report of proceedings:

> "MR. KOEHL [(ASSISTANT STATE'S ATTORNEY)]: I want to make a clear record as to prior offers in this case. I know the court made some references to that. Just so it's clear to [*sic*] that December 10th we had our first 402 conference where a disposition was discussed, and after that conference the State offered three years in the Department of Corrections. The defendant had to take it that day otherwise it was revoked. The defendant declined to take that offer at that time so that offer was automatically revoked, and that was communicated to the defendant. Then last week we had a 402 conference at which time my offer at that point was for five years. The court indicated it would accept four years. I then that same day offered four years in DOC. The defendant declined. The court mentioned that on the record. I noted on the record the four year offer was revoked.
>
> I was called by Miss Hatch a day later and the defendant wanted to reopen negotiations. I said fine, but that offer would be five years DOC. That was conveyed to Miss Hatch and that was discussed with defendant as I understand it, and the defendant declined to accept five years in the Department of Corrections at which time I indicated that the offer was revoked immediately ***[.]"

¶ 35 However, the record shows the prosecutor's proffer did not end with the word "immediately." The prosecutor continued, and when he concluded the trial court questioned both trial counsel and defendant. The following passage was omitted from defendant's briefs in *Morgan I* and this appeal.

> "ASSISTANT STATE'S ATTORNEY: *** and now we are in this point with a trial posture at which time as of this week for trial there is no offer other than if the defendant wanted to do an open plea to a class two.
>
> THE COURT: That's your understanding as well?
>
> MS. HATCH: [(ASSISTANT PUBLIC DEFENDER)]: Yes.
>
> THE COURT: And yours as well, Mr. Morgan?
>
> DEFENDANT: Yes.
>
> THE COURT: Okay."

¶ 36 In *Morgan I*, defendant argued in his reply brief that the record "did not refute" defendants' claims. The State's brief in *Morgan I* makes no mention of the exchange where defendant confirmed that the State's account of "prior offers" was accurate. In this appeal the State is represented by a different attorney from the State's Attorney Appellate Prosecutor's office. The State in this appeal points out that neither defendant nor defense counsel disagreed with the prosecutor's recitation. Given their agreement, the State argues, "[t]herefore, it is clear that there was never a two year offer that defendant wanted to accept."

¶ 37 There is a long line of precedent that supports the State's position. When a defendant's claims of ineffective assistance of counsel are contradicted by the record they are considered to be without merit. *People v. Skillom*, 2017 IL App (2d) 150681, ¶ 29 (citing *People v. Valdez*, 2016 IL 119860, ¶ 31). "An example of an indisputably meritless legal theory is one which is

completely contradicted by the record." *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). As the supreme court said in *People v. Jocko*, 239 Ill. 2d 87 (2010), "we cannot fault the circuit court for not pursuing defendant's *pro se* claims further" when his claim was refuted by the record. *Id.* at 93. Our supreme court has consistently upheld the dismissal of postconviction claims of ineffective assistance of counsel when the record contradicts the defendant's allegations. *People v. Rogers*, 197 Ill. 2d 216, 222 (2001).

¶ 38 In reply to the State's argument that the record refutes his claim, defendant argues that "this information was in the record in [his] first appeal" and that "[i]f the prosecutor's pre-trial statements demonstrated that Mr. Morgan's first complaint was meritless, this court could have found that the failure to conduct an adequate inquiry was harmless in his first appeal." Our opinion in *Morgan I* makes no mention whatsoever of the exchange where defendant agreed that the State's proffer was accurate. Defense counsel forgets that reviewing courts rely upon the parties to present a fair and accurate statement of facts. In this case the State apparently accepted defendant's version of facts in *Morgan I*. Given the parties' agreement on the facts, this court had no reason to mine the record to determine whether defendant's claim was contradicted by the record. In his reply brief defendant argues that since "this court has already ruled on the merits of whether the record refutes Mr. Morgan's claim," the "law-of-the-case doctrine" precludes the State from arguing that the record refutes defendant's claim.

¶ 39 At oral argument I asked defense counsel why he did not include the exchange between the trial court, defense counsel and defendant in either of his briefs in this case. Counsel first apologized and then said that he felt the important part of the exchange was the State's offer. As he argued in his brief, defense counsel stated that the exchange does not refute defendant's claim that there was a two year offer. I completely disagree. The purpose of making a record is to

"help ensure against late, frivolous, or fabricated claims." *Lafler v. Cooper*, 566 U.S. 156, 172 (2012). See *Putting Plea Bargains in the Record*, 162 U. Pa L. Rev. 683, 709 (2014) ("The record would provide an evidentiary basis for quickly disposing of ineffective assistance of counsel claims.")

¶ 40 The United States Supreme Court and state reviewing courts have recommended that trial courts as well as attorneys adopt a practice of making a record of the plea bargaining process in order to protect defendant's sixth amendment rights as well as to insulate a valid conviction from post-trial challenges based upon clams of ineffective assistance of trial counsel. In *Missouri v. Frye*, 566 U.S. 134 (2012), the Supreme Court commented, "[t]he prosecutor and trial courts may adopt some measure to help ensure late, frivolous or fabricated claims after a later, less advantageous plea offer has been accepted or after a trial leading to a conviction with resulting harsh consequences." *Id.* at 146. The court also noted that "formal offers can be made part of the record at any subsequent plea proceeding before a trial on the merits, all to ensure that a defendant has been fully advised before those further proceedings commence." *Id*. As our Supreme Court also made clear, making a record "will help ensure against meritless claims." *Lafler v. Cooper*, 566 U.S. 156, 172 (2012). Our colleagues in the Fourth District recently recommended that trial courts make a record of plea negotiations "at a pretrial hearing so that if problems arise, corrective action can be taken prior to the scheduled trial." *People v. Williams*, 2016 IL App (4th) 140502, ¶ 36. By creating such a record trial courts can prevent "reversal of a judgment for an otherwise error-free trial" and "allow for efficient adjudication of postconviction proceedings." *Id.* The *Williams* court cited this court's decision in *People v. Hernandez*, 2014 IL App (2d) 131082, as an example. In *Hernandez* the defendant claimed in his postconviction petition that "counsel failed to communicate to [him] the State's plea offer." *Id.* ¶ 11. The

record rebutted the defendant's claim that the State's offer had not been communicated and this court held that the trial court "properly dismissed this ineffective assistance allegation." *Id.* ¶ 17.

¶ 41 The record in this case clearly demonstrates that trial counsel fulfilled her obligation to communicate all plea offers to defendant. On remand from *Morgan I*, the trial court asked counsel whether "there were pretrial negotiations in this case" and whether counsel conveyed "the offers such as they were to Mr. Morgan?" Defense counsel responded "yes" to both questions. After the trial court conducted this inquiry, the court asked defendant, "[o]kay. All right. Is there anything else?" and defendant responded "[t]hat's it, sir." The trial court accurately recalled the pretrial proceedings, noting that defense counsel "engaged in pretrial negotiations attempting to resolve [defendant's] case short of trial." Given the record in this case the trial court made an adequate inquiry into defendant's claim, especially in light of the fact that defendant did not challenge counsel's statement that she had conveyed all offers.

¶ 42 The "trial court is 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." *People v. Jolly*, 2014 IL 117142, ¶ 30. Obviously, when the allegations pertain to pre-trial or plea proceedings, the trial court can base its evaluation on counsel's performance in those proceedings. In this case the record shows that trial counsel aggressively pursued a favorable plea offer from shortly after defendant's arrest until trial. Defendant was on mandatory supervised release for aggravated robbery when he was arrested in this case and charged with three class two nonprobationable felonies related to his possession of a fully loaded .40 caliber handgun. Defendant confessed in writing, stating "I never shot this gun. I was holding it for a friend." In addition to the gun charges, defendant was also charged with domestic battery in two separate cases. At oral argument defense counsel conceded that trial counsel pursued a plea offer

from the State and the case was continued several times for defendant to consider the State's offers. The record reflects that on November 24, 2014, defendant was arraigned and the State conveyed its first plea offer. The case was continued and defendant requested that he be allowed to call his mother. On December 12, 2014, a conference was conducted pursuant to Supreme Court Rule 402 (eff. July 1, 2012) at the request of both defendant and the State. The trial court admonished defendant pursuant to Rule 402(d) and being fully advised, defendant agreed that the trial court could participate in plea discussions. After the conference the State announced that an offer had been conveyed and the case was continued to December 17, 2014, "hopefully for a plea." Defense counsel remarked, "[t]hat's correct. The defendant needs a phone call to his mom." The trial court said it could not allow that "anymore, not this year." The case was continued to January 14, 2015, for defendant to consider the State's offer. On January 14, 2015, the assigned assistant state's attorney was unavailable. The case was on the trial call for January 20, 2015. On that date, the case was continued by agreement to February 4, 2015, for pre-trial and to February 25, 2015, for trial call.

¶ 43 On February 4th, the assistant state's attorney informed the court, "[w]e did have a 402 previously. We're still trying to resolve the case." Defense counsel said, "[t]hat is correct, judge, and place it on the 17th." On February 17, 2015, the parties requested yet another Rule 402 conference. Defendant was admonished again and agreed to have the court participate. After the conference the assistant state's attorney stated for the record, "[w]e did have the 402 conference, judge. Based upon what we discovered at the 402, I modified my offer to 4 years DOC at 50 percent. I understand that that has been discussed with defendant that that offer has been rejected. The State also, then, at this time, revokes that offer. There is no offer going forward, and so we will ask to proceed to trial this coming Monday." The trial court asked

defense counsel if the State was correct, and she responded, "[t]hat is correct, judge." The trial court then asked defendant if that was his understanding and he responded "yeah." The trial court admonished defendant that by rejecting the State's offer, if he were to lose at trial, given his background, he could get 3 to 14 years in prison. Defendant again confirmed that he was rejecting the State's offer and would proceed to trial.

¶ 44 On February 24, 2015, when the case was called for trial, defense counsel raised the question of defendant's fitness, explaining that she had spoken to defendant's mother and that there was a problem with defendant's reasoning. The court then questioned defendant (this exchange is also omitted from defendant's briefs in *Morgan I* and this appeal). The court confirmed with defendant that he had discussions with defense counsel about "what she expects to happen during the trial" as well as the fact that "she told you that the State's Attorney made an offer to you about resolving this case, right?" Defendant responded "yes." Defendant was questioned regarding the roles of the parties, the court, and what a trial was. Defendant confirmed that his attorney and the State had been involved in plea discussions. The court told defendant that the State had offered five years. The court then asked, "[a]nd your attorney told me you were not interested in that negotiation, is that right?" Defendant answered "yes" and said that his attorney told him that if he went to trial he could "get more than that." The court then asked, "[w]hat's your opinion, do you want to accept that offer or do you want to not accept that offer?" Defendant responded, "[d]on't want to accept that offer." The court then said, "[y]ou want to go to trial on this case?" Defendant replied, "[u]m, I don't want lesser [*sic*] time." The court clarified and said, "[y]ou want lesser time?" and explained defendant's options to him: a jury trial; a bench trial; take the State's offer of five years with "eligibility for day-for-day credit;" or an open plea where the court would likely sentence him to between 3 and 14

years. Defendant said he understood his options and the case was passed so he could confer with defense counsel. After conferring with defendant, defense counsel repeated her concerns about defendant's fitness and told the court that defendant was on psychotropic medication. The trial court ordered a fitness evaluation. As the majority explains, the parties stipulated to Dr. Latham's report and defendant was found fit. During the evaluation, defendant made claims about defense counsel. The case proceeded to trial and defendant was convicted. At his sentencing hearing defendant never complained that his trial attorney was ineffective. He apologized to his mother and expressed regret for getting physical with his former girlfriend, stating that he would apologize "if she was here." Like in *People v. Ramirez*, 162 Ill. 2d 235, 242 (1994), "[a]t no point during his sentencing hearing did defendant object to his sentence."

¶ 45 My colleagues speculate that defendant's reference to a two year offer in the fitness evaluation was likely a reference to the "four years in DOC at 50 percent that was made on February 17, 2015 after a 402 conference." *Supra* ¶ 24. The record reflects that defendant rejected that offer that same day with full knowledge of the consequences. Rank speculation cannot trump a clear record. Defendant made clear that the decision to reject each of the State's offers were his and his alone. Defendant had several opportunities to speak up when being admonished on the consequences of rejecting the State's plea offers. The trial court's admonishments, even though they were not required by rule, cannot be disregarded as mere formality. See *People v. Hall*, 217 Ill. 2d 324, 337 (2005).

¶ 46 Our supreme court has repeatedly held that we may dispose of an ineffective assistance of counsel claim by proceeding to the prejudice prong without addressing counsel's performance. *People v. Hale*, 2013 IL 113140, ¶ 16. Here, there can be no showing of prejudice. A showing of prejudice must encompass more than a defendant's own "subjective, self-serving" testimony.

Id. ¶ 18. The record shows that all offers were conveyed. Even if trial counsel had at some point said "let's shoot for probation," defendant acknowledged that he knew probation was not an option. Hence, defendant cannot show that he held out for a better offer due to counsel's deficient advice. *Id.* ¶ 23-24. As this court said in *Skillom*, "[g]iven the court's exhaustive admonishments and defendant's expressed understanding of same, any prejudice resulting from counsel's alleged incorrect advice was cured." *Skillom*, 2017 IL App (2d) 150681, ¶ 29. Defendant's complaint is similar to the postconviction complaint in *People v. Mujica*, 2016 IL App (2d) 140435, where the defendant claimed that his trial attorney failed to communicate defendant's desire to accept the State's offer. *Id.* ¶ 16. We said that:

> "The record establishes that defendant did not express a desire to plead guilty and accept the State's offer and that defendant repeatedly acquiesced in [defense counsel's] movement of the case to trial. Had defendant wished to accept a four-year offer—again assuming that any such offer was viable—he certainly would have said so on the record. Instead, he is bound by his acquiescence." *Id.* ¶ 19.

The same is true here. Even after defendant complained to Dr. Latham that he was unhappy with defense counsel, he confirmed on the record that he personally rejected the State's plea offers.

¶ 47 The majority ignores the record exchanges between the trial court and defendant in reaching its conclusion that the court's *Krankel* inquiry was inadequate. The issue of whether the trial court conducted a proper preliminary *Krankel* inquiry presents a legal question, which we review *de novo*. *Jolly*, 2014 IL 117142, ¶ 28. In making our determination we are not permitted to cherry pick from the record only those facts that support a particular outcome. "*Krankel* is limited to posttrial motions." *People v. Ayres*, 2017 IL 120071, ¶ 22. As such, we

must review the entire record, including the sentencing hearing. The trial court's initial inquiry, together with the post-remand inquiry, fully demonstrates that defendant's claim lacks merit.

¶ 48 In this appeal, defendant argues that the law-of-the-case doctrine requires a remand. Contrary to defendant's argument, the law-of-the-case doctrine "merely expresses the practice of courts generally to refuse to reopen what has been decided; it is not a limit on their power." *People v. Patterson*, 154 Ill. 2d 414, 468-69 (1992). As the court explained in *Patterson*, under the doctrine "a rule established as controlling in a particular case will continue to be the law of the case, *as long as the facts remain the same*." (Emphasis added.) *Id.* at 468. The court noted that a "court is bound by views of law in its previous opinion in a case, *unless the facts presented require a different interpretation*." (Emphasis added.) *Id.* (citing 14 Ill. L. & Prac. Law of the Case § 74, at 233 (1968); see *PSL Realty Co. v. Granite Investment Co.*, 86 Ill. 2d 291, 312 (1981); *Bradley v. Howard Hembrough Volkswagen, Inc.*, 89 Ill. App. 3d 121, 124 (1980)). Here, the facts presented in the instant appeal require a different interpretation. I would affirm the trial court's determination that there was no showing of possible neglect. As the United States Supreme Court recommended in *Missouri v. Frye*, 566 U.S. 134 (2012), in this case the State made a record that demonstrates that defendant's decisions were not "the result of inadequate advice." *Id.* at 142. I also note that defendant could never establish prejudice because there is no available remedy. The prosecution could not be ordered to convey an offer that was never made (probation) or a four year offer that defendant rejected. As Justice Ginsburg noted in her concurrence in *Burt v. Titlow*, 571 U.S. 12 (2013) "[a]bsent an extant bargain, there was nothing to renew." *Id.* at 19-20.

¶ 49 Finally, as our supreme court observed many years ago, "[a] court appointment to represent an indigent defendant does not endow an attorney with the ability to perform miracles,

nor is he to be branded as incompetent because the defendant he represented was not permitted to plead guilty to a lesser charge." *People v. Williams*, 47 Ill. 2d 239, 241 (1970). In my view, defense counsel in this case did an excellent job with a difficult client who suffered from wishful thinking.