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2019 IL App (4th) 160728-U

NO. 4-16-0728

FILED
February 15, 2019
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. LEMONDA M. SHEPARD, Defendant-Appellant.	))))))))	Appeal from the Circuit Court of Sangamon County No. 15CF806 Honorable John P. Schmidt, Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Presiding Justice Holder White and Justice DeArmond concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court failed to provide an adequate preliminary *Krankel* hearing upon defendant's *pro se* posttrial claims of ineffective assistance of counsel.

¶ 2 After defendant, Lemonda M. Shepard, was convicted by a jury of home invasion (720 ILCS 5/19-6(a)(1) (West 2014)), armed robbery (720 ILCS 5/18-2(a)(2) (West 2014)), and aggravated battery (720 ILCS 5/12-3.05(f)(1) (West 2014)), defendant filed a *pro se* motion alleging he was denied the effective assistance of counsel before and during trial. Before sentencing defendant, the trial court found defendant's ineffective-assistance-of-counsel claims lacked merit and determined further action on those claims was not required.

¶ 3 Defendant appeals, arguing (1) the trial court abused its discretion by denying his request for a continuance to permit him to hire counsel and (2) the court's *Krankel* inquiry into

his ineffectiveness claims was inadequate. We agree with defendant's latter argument, reverse the ruling on defendant's *pro se* motion, and remand to allow the court to conduct a proper *Krankel* inquiry.

¶ 4 I. BACKGROUND

¶ 5 The State's charges against defendant stem from events on July 17, 2015, at and near the residence of Herbert Washington. After defendant's arrest, the trial court appointed public defender Robert J. Scherschligt to represent defendant and set trial for September 14, 2015. Between September 2015 and May 2016, defendant filed six motions to continue. On three of those motions, defendant was represented by counsel other than Scherschligt. Scherschligt, however, represented defendant on the other continuance motions and through trial and sentencing.

¶ 6 On July 22, 2016, defendant sought a continuance on the basis of hiring new counsel:

> "[DEFENSE COUNSEL]: [Defendant], after speaking with him yesterday, indicated to me he was attempting to hire private attorney William Vig. Mr. Vig texted me late yesterday evening informing me that he would not be able to enter his appearance in this case because of a potential conflict. [Defendant] informed me this morning that he has spoken or members of his family have spoken with attorney Bruce Locher. He is requesting continuance of the trial setting to give him an opportunity to retain Mr. Locher in this case. So that would be my motion on his behalf."

¶ 7 The State contested the continuance. The trial court agreed with the State, calling the case "one of our older cases," and denied the motion. The court informed defendant he was free to hire counsel but the trial would start on August 1, 2016. Defendant and the trial court had the following exchange regarding whether defendant would hire private counsel or proceed *pro se*:

> "THE DEFENDANT: I don't have a chance to say anything?
>
> THE COURT: You have an attorney.
>
> THE DEFENDANT: I tried to talk to him already. He said he just shot me down again trying to talk to him.
>
> THE COURT: Mr. Scherschligt—shooting you down and telling you candid advice is probably one of the same thing.
>
> THE DEFENDANT: This is all I'm saying, right. I got three papers right here to show you. I've been trying to get my paperwork –
>
> THE COURT: I'm not listening to you. You have an attorney. I can't listen to you.
>
> THE DEFENDANT: I told him this. He ain't listening to me.
>
> [DEFENSE COUNSEL]: Judge, he's asked me to withdraw from this case. I told him I'm not going to withdraw from his case.
>
> THE DEFENDANT: I would like to go *pro se*.

THE COURT: You understand if you go *pro se* we're not continuing the case? Do you understand that?

THE DEFENDANT: I need to hire me a lawyer.

THE COURT: Well, you should have thought of that a long time ago.

THE DEFENDANT: I just got my paper. He just came and read me, what you call it, someone that wrote something on me ten days ago. I've been here 11 months. I never heard not one piece of evidence against me until last week.

THE COURT: So, you had 11 months to hire an attorney.

THE DEFENDANT: I never had not one person to tell me anything.

THE COURT: [Defendant], I'm not going to argue with you. You have two options.

THE DEFENDANT: If I hire a lawyer, he can't step in and do nothing for me?

THE COURT: He certainly can but we're going to trial August the 1st. You can hire anyone you want.

THE DEFENDANT: He don't get no time to represent me properly?

THE COURT: You've had since the beginning of this case to hire a lawyer.

THE DEFENDANT: You gave me three lawyers. First I had Jason—

THE COURT: There you go. If you want to go *pro se*, I'm going to admonish you to go *pro se*. I'll excuse Mr. Scherschligt and thank him. So, do you want to go *pro se*?

THE DEFENDANT: I still got to be ready myself on the 1st?

THE COURT: Yes.

THE DEFENDANT: How is this?"

¶ 8 Defendant asked if he could have some time to think about his answer. The trial court responded affirmatively and asked how long defendant wanted. Defendant responded, "Ten, fifteen minutes or something." The court granted defendant's request and ordered a short recess. After the recess, defense counsel supplemented the motion to continue by arguing he was about to receive deoxyribonucleic acid (DNA) evidence from the State. Defense counsel further disputed the State's argument he would not need much time to review the DNA results and the fingerprint reports and urged the trial court "to err on the side of caution" to give defendant the opportunity to hire counsel of his choice. The court refused to change its ruling.

¶ 9 At defendant's August 2016 trial, the State's evidence established, on July 16, 2015, Daimione Champion, Michael Turner, and Dominick McKinney went to defendant's house. There, defendant asked if the three wanted to go with him to commit a robbery. Defendant gave Champion and Turner guns, a fact Turner disputed. Defendant carried a gun. The group went to a location near Washington's house. Washington was sitting in his vehicle in

his driveway during the early morning hours of July 17, 2015, when the men approached. Defendant opened Washington's door and pointed a gun at him. Defendant told Washington to exit the vehicle and ordered the others to take what was in Washington's pockets. Defendant struck Washington in the head multiple times and ordered Washington to open the house door so they could enter. As Washington walked into his home, he tried to slam the door behind him. Defendant kicked the door open, stating, "Don't make me kill you."

¶ 10 Washington's house was dark. Before the lights were turned on, Washington went to another room and retrieved his gun. After hearing the group discussing who would shoot Washington, Washington saw "four or five guys" approaching him. Washington began shooting. The individuals exchanged fire. Everyone began running from the house. Washington went to his vehicle to retrieve his phone and call the police. Washington saw Champion, who had been shot in the back, on the ground. Champion told Washington he was only 16 years old and asked him not to kill him. Champion reported he was forced to go to Washington's house with defendant. Washington called 9-1-1 and repeated Champion's statements to the dispatcher. Turner returned to the house. He and McKinney picked up defendant, who had been shot. They took defendant to the hospital.

¶ 11 Defendant did not present evidence in defense, but counsel cross-examined the State's witnesses and moved for a directed verdict at the close of the State's case. Cross-examination of the State's witnesses shows Washington did not remember telling the dispatcher he did not know any of the individuals in his home. Champion was not charged with any offense arising from the events at Washington's home. Turner was charged with armed robbery, attempt (armed robbery), and aggravated robbery, facing a term of 21 to 45 years in prison. The State,

however, assured Turner if he testified the State would consider impact incarceration and Turner could serve only four to six months in prison. In addition, fingerprints on the magazine of a handgun recovered near Washington's home were inconclusive. The DNA testing on the weapon was inconclusive, indicating at least two individuals had contact with the weapon.

¶ 12 The jury found defendant guilty of all charges.

¶ 13 On September 12, 2016, defendant filed a *pro se* motion alleging he was denied the effective assistance of counsel at trial. Defendant alleged defense counsel's performance was below the professional standard due to the failure to investigate or "perform pretrial functions." Defendant alleged counsel refused his requests to investigate or "obtain certain evidence," including defendant's request counsel interview a specific witness. Moreover, defendant maintained counsel failed to move to exclude defendant's prior criminal offenses and to suppress codefendant's statements. Defendant concludes counsel failed to prepare for trial in a timely manner, forcing defendant to proceed without a plausible defense.

¶ 14 A hearing was held on defendant's *pro se* motion in October 2016. The trial court, citing *People v. Crane*, 145 Ill. 2d 520, 585 N.E.2d 99 (1991), stated it was to inquire into the underlying claims and if those claims were deemed without merit, new counsel need not be appointed. The court asked defendant why he believed counsel was ineffective. Defendant stated the following:

> "I never saw [defense counsel] the seven—six days before my trial date. I tried everything to get a bond reduction. Didn't even see him or anything. And when it came down to seeing him—I even wrote the freedom of information and asked them could

they give me my paperwork just so I could know what was against me. I never had no statements against me. No nothing. That's what I was trying to show you in court that day. I done wrote them three, four times. I even sent them a letter afterwards. I didn't even know what I'm—I didn't know what I was sitting here, what I was facing, anything.

Then, he came told me when I came to court 35 to 85. Then a week before that, before the trial, he tell[s] me that I'm not facing that. You know what I'm saying. I don't know. Still I'm still kind of misled on that, I guess, the sentencing part. I found out it didn't carry that, or whatever.

It was—I don't know exactly what the numbers was but I know it was a gun-enhancement was, I think, 20, or something like that."

¶ 15 The trial court, noting its familiarity with the standards of *Strickland v. Washington*, 466 U.S. 668 (1984), stated defendant "fails miserably or woefully on the first prong." The trial court found nothing substandard in defense counsel's performance in the case. The court observed defense counsel filed and argued motions *in limine*, including one regarding the 9-1-1 call, objected to continuances, and thoroughly cross-examined witnesses when necessary. The court stated there were no facts alleged leading the court to believe defense counsel's "performance was anything but top-notch in this case." The court denied defendant's *pro se* motion.

¶ 16 At the same hearing, the trial court sentenced defendant. Defendant received concurrent prison sentences of 45 years for home invasion, 40 years for armed robbery, and 5 years for aggravated battery.

¶ 17 This appeal followed.

¶ 18 II. ANALYSIS

¶ 19 We begin with defendant's second argument: the trial court conducted an inadequate *Krankel* hearing. Defendant argues the trial court failed to inquire into the factual basis of defendant's ineffectiveness claims and applied an inappropriate standard during the inquiry.

¶ 20 When a defendant makes a bare posttrial claim of "ineffective assistance of counsel," a hearing under *People v. Krankel*, 102 Ill. 2d 181, 464 N.E.2d 1045 (1984), is necessary to ascertain whether new counsel should be appointed to represent defendant on that claim. *People v. Roddis*, 2018 IL App (4th) 170605, ¶¶ 2, 55. A defendant's entitlement to appointed counsel is not automatic upon such an assertion. *Id.* ¶ 58. Instead, the trial court must conduct a *Krankel* inquiry into the factual basis of the claim. *Id.* In this inquiry, the court may (1) question defense counsel regarding the facts and circumstances of the claim, (2) discuss the matter with the defendant, or (3) consider the claim based on the court's own knowledge of counsel's performance as well as the sufficiency of the allegations on their face. *People v. Moore*, 207 Ill. 2d 68, 77-78, 797 N.E.2d 631, 637 (2003). Counsel need not be appointed if the court finds the claim of ineffective assistance to be conclusory, misleading, legally immaterial, or pertaining solely to issues of trial strategy. *Roddis*, 2018 IL App (4th) 170605, ¶ 65.

¶ 21 The purpose of the *Krankel* inquiry is to gather facts. See *id.* ¶ 81 (citing *People v.*

Cabrales, 325 Ill. App. 3d 1, 5-6, 756 N.E.2d 461, 465 (2001)). When the trial court expands its consideration during the inquiry from this fact-gathering role to concluding on the merits counsel provided effective assistance, reversible error occurs. *Roddis*, 2018 IL App (4th) 170605, ¶ 81. The question of whether the court conducted an adequate inquiry into *pro se* ineffective-assistance-of-counsel allegations is reviewed *de novo. Id.* ¶ 79.

¶ 22 The *Krankel* inquiry in this case was inadequate. The trial court asked one question of defendant: why defendant believed counsel was ineffective. Defendant's response to the one open-ended question did not, however, clarify defendant's existing claims. Instead, it raised new allegations of ineffectiveness. The court did not investigate further, but ruled on the merits of defendant's claims, finding defendant failed to establish the first prong of the ineffective-assistance-of-counsel test in *Strickland*. The court thus concluded defense counsel's performance was not objectively unreasonable. See *Strickland*, 466 U.S. at 687-88. As we found in *Roddis*, the court's consideration of the merits of the ineffective-assistance claims during a *Krankel* hearing is reversible error.

¶ 23 Remand is necessary for an adequate *Krankel* inquiry, so we need not address defendant's other claim on appeal. See *People v. Bell*, 2018 IL App (4th) 151016, ¶ 37, 100 N.E.3d 177. To assist the trial court on remand, we note our recent decision in *Roddis* provides a thorough discussion of the means by which *Krankel* hearings should be conducted. See *Roddis*, 2018 IL app (4th) 170605, ¶ 43.

¶ 24 III. CONCLUSION

¶ 25 We reverse the trial court's judgment and remand for the trial court to conduct an inquiry into defendant's *pro se* posttrial claims of ineffective assistance of counsel.

¶ 26 Reversed and remanded.