

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2019 IL App (4th) 160946-U

NO. 4-16-0946

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

August 7, 2019
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
v.
AVERY T. BERRY,
Defendant-Appellant.

) Appeal from
) Circuit Court of
) Morgan County
) No. 14CF117
)
) Honorable
) Peter C. Cavanagh,
) Judge Presiding.

PRESIDING JUSTICE HOLDER WHITE delivered the judgment of the court. Justices Knecht and Turner concurred in the judgment.

ORDER

- ¶ 1 *Held:* The appellate court remanded for the trial court to conduct an inquiry into defendant’s *pro se* posttrial claim of ineffective assistance of counsel.
- ¶ 2 In October 2014, the State charged defendant, Avery T. Berry, with three counts of first degree murder. In July 2016, a jury found defendant guilty of first degree murder. In October 2016, the trial court sentenced defendant to a term of 50 years’ imprisonment.
- ¶ 3 Defendant appeals, arguing (1) he was denied his constitutional right to present a defense to first degree murder; (2) the trial court erred by refusing to tender a jury instruction on second degree murder based on serious provocation; (3) this court should reduce his conviction to second degree murder; (4) the cumulative effect of the prosecutor’s improper comments denied him a fair trial; (5) the trial court failed to make any inquiry into his *pro se* posttrial allegations of ineffective assistance of counsel; and (6) his 50-year sentence violated the eighth

amendment because it constituted a *de facto* life sentence, violated the proportionate penalties clause of the Illinois constitution, and was excessive. For the following reasons, we remand to the trial court for further proceedings pursuant to *People v. Krankel*, 102 Ill. 2d 181, 464 N.E.2d 1045 (1984). As a result, we decline to address defendant's other claims. We retain jurisdiction.

¶ 4

I. BACKGROUND

¶ 5 Because we conclude this case must be remanded for the trial court to conduct an inquiry into defendant's *pro se* posttrial claim of ineffective assistance of counsel, we summarize only the facts necessary for the resolution of this issue.

¶ 6 In October 2014, the State charged defendant with three counts of first degree murder. On July 15, 2016, a jury found defendant guilty of first degree murder and found the State proved the allegation that during the commission of the offense, defendant personally discharged a firearm that proximately caused death to another person.

¶ 7 On July 26, 2016, defendant filed a *pro se* posttrial motion. The motion alleged defendant had a history of mental-health issues, including (1) diagnoses for oppositional defiant disorder and attention-deficit/hyperactivity disorder (ADHD), and (2) prior hospitalizations for suicidal ideations. The motion stated "The failure of defense counsel to investigate apparent problems with defendant's mental health may be deficient performance as defined by the first prong of [*Strickland v. Washington*, 466 U.S. 668 (1984)]." The motion further alleged, "Defense counsel was objectively unreasonable and provided deficient performance by not investigating the defendant[']s 'mental history' (or) by failing to seek a fitness hearing based on the evidence which suggest that the defendant's adolescent maturity was 'severely under-developed' based on the prior diagnosis."

¶ 8 On August 15, 2016, defense counsel filed a motion for a new trial. On August 30, 2016, the trial court held a hearing on defendant's *pro se* posttrial motion. That same day, defense counsel filed a response to defendant's *pro se* posttrial motion. In part, the response indicated defendant informed defense counsel of his ADHD diagnosis. Counsel stated he had many conferences with defendant, who expressed an interest in assisting in his own defense and provided counsel with notes regarding the shooting. Counsel further stated he discussed the discovery materials with defendant. Finally, the response stated, "counsel for [d]efendant has no objection to the appointment of a psychiatrist by the [c]ourt and requests that he be relieved of any further responsibilities as counsel for [d]efendant."

¶ 9 At the hearing on defendant's *pro se* posttrial motion, the State asserted that it provided the trial court and defense counsel "with some authority that *** governs *pro se* motions when an individual is represented by an attorney." The court noted defense counsel represented defendant since December 2014 and defendant's psychiatric condition had not been raised at any time. The judge stated, "I've reviewed the authority provided by the State and am familiar with the authority. It's a *pro se* motion brought by an entity of some type. Whether or not it's the [d]efendant's signature or not, I'm unaware, but it is a *pro se* motion in a—arguably a *pro se* motion in a matter in which the [d]efendant has counsel. Therefore, we will proceed to sentencing, and I'll take no action on that motion."

¶ 10 In October 2016, the trial court held a sentencing hearing. The court sentenced defendant to a 25-year term of imprisonment with an additional 25-year firearm enhancement for an aggregate sentence of 50 years' imprisonment. In November 2016, defendant filed a motion to reconsider the sentence. In December 2016, the court denied the motion to reconsider the sentence.

¶ 11 This appeal followed.

¶ 12 II. ANALYSIS

¶ 13 On appeal, defendant argues (1) he was denied his constitutional right to present a defense to first degree murder; (2) the trial court erred by refusing to tender a jury instruction on second degree murder based on serious provocation; (3) this court should reduce his conviction to second degree murder; (4) the cumulative effect of the prosecutor's improper comments denied him a fair trial; (5) the trial court failed to make any inquiry into his *pro se* posttrial allegations of ineffective assistance of counsel; and (6) his 50-year sentence violated the eighth amendment because it constituted a *de facto* life sentence, violated the proportionate penalties clause of the Illinois constitution, and was excessive. We turn first to defendant's claim that the court failed to make any inquiry into his *pro se* posttrial allegations of ineffective assistance of counsel.

¶ 14 Defendant contends his *pro se* posttrial motion alleged ineffective assistance of counsel and the trial court failed to make any inquiry into defendant's claims. Accordingly, defendant asks this court to remand for the trial court to conduct an inquiry into these claims pursuant to *Krankel*, 102 Ill. 2d 181. The State concedes the court failed to conduct the required inquiry into defendant's *pro se* posttrial claim of ineffective assistance of counsel. The State asserts this court should retain jurisdiction over this appeal and remand for the limited purpose of conducting such an inquiry.

¶ 15 "The issue of whether the circuit court properly conducted a preliminary *Krankel* inquiry presents a legal question that we review *de novo*." *People v. Jolly*, 2014 IL 117142, ¶ 28, 25 N.E.3d 1127. Under *Krankel* and its progeny, when a defendant raises a *pro se* posttrial claim of ineffective assistance of counsel, new counsel is not automatically appointed. *Id.* ¶ 29.

Rather, the trial court should first examine the factual basis of the defendant's claims. *People v. Moore*, 207 Ill. 2d 68, 77-78, 797 N.E.2d 631, 637 (2003). "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." *Id.* at 78. Newly appointed counsel would represent the defendant at the hearing on the *pro se* claim of ineffective assistance of trial counsel. *Id.* "The [(newly)] appointed counsel can independently evaluate the defendant's claim and would avoid the conflict of interest that trial counsel would experience if trial counsel had to justify his or her actions contrary to defendant's position." *Id.*

¶ 16 The supreme court has consistently recognized "the goal of any *Krankel* proceeding is to facilitate the trial court's full consideration of a defendant's *pro se* claims of ineffective assistance of trial counsel and thereby potentially limit issues on appeal." *Jolly*, 2014 IL 117142, ¶ 29. The concern for reviewing courts is whether the trial court's inquiry into the defendant's *pro se* allegations of ineffective assistance of trial counsel was adequate. *Moore*, 207 Ill. 2d at 78. During the preliminary inquiry, "some interchange between the trial court and trial counsel regarding the facts and circumstances surrounding the allegedly ineffective representation is permissible and usually necessary ***." *Id.* A trial court's brief discussion with the defendant may be sufficient. *Id.*

¶ 17 Here, the record shows the trial court failed to inquire into defendant's allegations of ineffective assistance of counsel. The court noted the posttrial motion was *pro se* and defendant was represented by counsel. Accordingly, the court stated it would "take no action" on the motion. The law requires the court to conduct some type of inquiry into the underlying factual basis, if any, of defendant's *pro se* posttrial allegations of ineffective assistance of

counsel. No such inquiry occurred in this case. Accordingly, we must remand the case to the trial court for that limited purpose.

¶ 18 The State asserts this court must retain jurisdiction over the appeal because this court lacks the supervisory authority to issue remand instructions “that would preemptively excuse defendant from a need to comply with the Supreme Court Rules governing appeals.” The State makes this argument in response to defendant’s suggestion that he may “file another appeal” if the trial court finds his claims lack merit on remand. We do not read the language in defendant’s brief to suggest an appeal following remand would afford him the latitude to expand the scope of the issues raised beyond those raised in the present appeal, which it would not. Nor do we think remanding for the limited purpose of a *Krankel* inquiry operates to deprive this court of jurisdiction over the remaining issues should defendant appeal following remand.

¶ 19 This court recently addressed a similar jurisdictional argument raised by the State in *People v. Wilson*, 2019 IL App (4th) 180214. In *Wilson*, this court remanded the matter for the trial court to conduct an inquiry into the defendant’s *pro se* posttrial allegation of ineffective assistance of counsel. *Id.* ¶ 2. This court declined to address the other issues raised by the defendant in his first appeal, “noting the result from the proceedings on remand could render those claims moot.” *Id.* Following remand, the defendant again appealed and raised (1) an identical issue this court declined to review in the first appeal, and (2) claims regarding the handling of his claim of ineffective assistance of counsel on remand. *Id.* ¶¶ 2, 4. In the second appeal, the State argued this court did not have jurisdiction to entertain the defendant’s other claims because the “prior order did not explicitly retain jurisdiction or vacate the trial court’s denial of defendant’s posttrial motion to reconsider his sentence.” *Id.* ¶ 25. This court rejected this jurisdictional argument as follows:

“While our prior order did not *explicitly* indicate we were retaining jurisdiction, the substance of the order—that we were declining to address defendant’s other claims on appeal because the result from a preliminary *Krankel* inquiry on remand could render those claims moot—makes abundantly clear we were retaining jurisdiction. [Citation.] The State’s cited authority, *People v. Garrett*, 139 Ill. 2d 189, 564 N.E.2d 784 (1990), does not support its position that a court loses jurisdiction by failing to *explicitly* retain jurisdiction. Instead, *Garrett* holds this court is empowered under Illinois Supreme Court Rule 615(b) (eff. Jan. 1, 1967) to remand a cause for a hearing on a particular matter while retaining jurisdiction. [Citation.]” (Emphasis in original.) *Wilson*, 2019 Il App (4th) 180214, ¶ 25.

¶ 20 The State does not cite any authority to support the proposition that the appellate court must explicitly retain jurisdiction over the appeal when it remands a matter to the trial court for the limited purpose of conducting a *Krankel* inquiry. Nonetheless, to avoid any future confusion, we are remanding for further proceedings on defendant’s *pro se* posttrial claim of ineffective assistance of counsel while retaining jurisdiction. If defendant is unsatisfied with the outcome of the proceedings on remand, he may again appeal and raise any supplementary claims relating to the remand proceedings, and the State may have an opportunity to respond to those claims. The parties should also address the impact, if any, the proceedings on remand had on defendant’s remaining claims.

¶ 21

III. CONCLUSION

¶ 22 For the reasons stated, we remand the cause with directions to conduct a preliminary *Krankel* inquiry on defendant's claim of ineffective assistance of counsel.

¶ 23 Cause remanded with directions.