2019 IL App (4th) 170008-U

NO. 4-17-0008

FILED
May 28, 2019
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee v. MICHAEL D. WILHELM, Defendant-Appellant.	)	Appeal from the Circuit Court of Macon County No. 15CF981 Honorable Jeffrey S. Geisler, Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Steigmann and Turner concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court committed reversible error when it conducted a *Krankel* inquiry and concluded counsel provided effective assistance, instead of deciding whether the *pro se* claim of ineffective assistance of counsel showed possible neglect.

¶ 2 In September 2016, a jury found defendant, Michael D. Wilhelm, guilty of four counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2008)) and six counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(1)(i), (d) (West 2008)). The trial court sentenced defendant to life imprisonment on the predatory-sexual-assault convictions and six years' imprisonment on the aggravated-sexual-abuse convictions.

¶ 3 Defendant appeals, arguing (1) the State failed to prove him guilty of committing predatory criminal sexual assault against one of the victims, (2) the trial court erroneously allowed the State to introduce evidence of acts allegedly committed by defendant when he was a minor and almost 20 years before the charged offenses, (3) the trial court improperly ruled on the

merits of defendant's ineffective-assistance-of-counsel claim instead of determining whether the appointment of new counsel was necessary, and (4) section 11-1.40(b)(1) of the Criminal Code of 2012 (720 ILCS 5/11-1.40(b)(1.2) (West 2012)) is facially unconstitutional as it mandates a sentence of life without parole for a non-homicide offense. We agree with defendant's third argument and find this case must be remanded for an adequate inquiry into defendant's *pro se* claims of ineffective assistance of counsel pursuant to *People v. Krankel*, 102 Ill. 2d 181, 464 N.E.2d 1045 (1984).

¶ 4 I. BACKGROUND

¶ 5 After defendant was convicted and sentenced, he filed multiple post-sentencing motions. Defendant's counsel, Scott Rueter, filed a motion to reconsider sentence on defendant's behalf. Defendant filed two motions *pro se*: a motion to withdraw guilty plea and vacate sentence and a motion for the reduction of sentence. In both *pro se* motions, defendant asserted he was denied the effective assistance of counsel.

¶ 6 In December 2016, the trial court held a hearing on defendant's motion to reconsider sentence. At the beginning of the hearing, the court noted defendant raised the issue of counsel's ineffectiveness. The following discussion between defendant, Rueter, and the court occurred:

> "THE COURT: *** I am going to give you the opportunity at this time to address the court and let me know why you think Mr. Rueter was ineffective.
>
> THE DEFENDANT: *** The only problem that I had was I had two witnesses that should have been subpoenaed to court that didn't get subpoenaed because they lived in the household at the

time that all of this was said to have been done, and I was not living in the household at the time. Other than that, there [were] no other complaints about Mr. Rueter.

THE COURT: Mr. Rueter, would you like to address what [defendant] has said?

MR. RUETER: I don't remember offhand the two he is talking about. I know that some of the witnesses I talked to, I determined from a tactical standpoint that they wouldn't be beneficial. I remember talking in the car one day with our investigators with one [of] the young men that [defendant] gave me[.] I don't recall the name offhand, but what he had to say wasn't anywhere near what [defendant] was hoping he would have to add for us. I think he is talking about his two cousins perhaps[.] [I]s that right?

[DEFENDANT]: No, my nephew and my son.

MR. RUETER: I do recall there [were] some witnesses we had trouble tracking down. So other than that, I think we did the best we could with the information we had.

THE COURT: Well, [defendant], at this stage as far as the ineffective assistance of counsel, I am going to find that Mr. Rueter was not ineffective. I certainly was at the trial. I did see Mr. Rueter's performance. I certainly think that he did a good job for you as I look at objective standard of reasonableness. I certainly

think his performance was not prejudicial in any way to you. Of course, his trial strategies that are involved [*sic*]. So at this stage, I am going to find that Mr. Rueter was effective."

¶ 7 At the close of the hearing, the trial court ordered stricken the two *pro se* motions and denied the motion to reconsider sentence. This appeal followed.

¶ 8 II. ANALYSIS

¶ 9 Defendant's third argument on appeal begins with his assertion the case should be remanded for further proceedings on his *pro se* allegation of ineffective assistance of trial counsel. Relying on this court's decision in *People v. Roddis*, 2018 IL App (4th) 170605, 119 N.E.3d 52, defendant argues the trial court improperly addressed the merits of his claim when the court should have simply determined whether the appointment of new counsel was necessary. Defendant further asserts his claims demonstrate possible neglect of his case, necessitating the appointment of new counsel.

¶ 10 The State counters by arguing *Roddis* should be applied prospectively and not retroactively to this case. According to the State, *Roddis* is a distinct departure from established case law that permitted trial courts to consider the merits of a defendant's posttrial *pro se* ineffective-assistance-of-counsel claim. The State further contends, even if *Roddis* applies, the court's inquiry was adequate in that it found defendant's claim pertained to trial strategy.

¶ 11 A defendant's posttrial claim of ineffective assistance of counsel triggers the trial court's responsibility to follow the common-law procedure in *Krankel*. *People v. Ayres*, 2017 IL 120071, ¶ 11, 88 N.E.3d 732. The key question to be resolved in a *Krankel* inquiry is whether to appoint independent counsel to represent the defendant on his ineffective-assistance claim. *Roddis*, 2018 IL App (4th) 170605, ¶ 47. To determine whether a defendant is entitled to the

appointment of counsel, the court must ascertain the factual basis of the defendant's ineffectiveness claim. *Id.* ¶ 58. The court may (1) question defense counsel regarding the facts and circumstances of the claim, (2) discuss the issue with the defendant, or (3) consider the claim based on its own knowledge of the performance of counsel and the sufficiency of the allegations. *People v. Moore*, 207 Ill. 2d 68, 77-78, 797 N.E.2d 631, 637 (2003). Counsel should not be appointed if the defendant's claim is conclusory, is misleading, is legally immaterial, or pertains only to matters of strategy. See *Roddis*, 2018 IL App (4th) 170605, ¶ 65. If the court expands its consideration to conclude on the merits counsel provided effective assistance, reversible error occurs. *Id.* ¶ 81. Our review of the adequacy of the trial court's inquiry into a defendant's *pro se* claim of ineffective assistance of counsel is *de novo*. *Id.* ¶ 79.

¶ 12 We begin with the State's argument regarding the prospective application of *Roddis* and find *Roddis* is not a distinct departure from established case law. In *Roddis*, this court recognized the Supreme Court of Illinois had used the term "lacks merit" when addressing the trial court's role in a *Krankel* inquiry: "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." (Internal quotation marks omitted.) *Id.* ¶ 63 (quoting *Ayres*, 2017 IL 120071, ¶ 11). We observed, however, the term "lacks merit" had not been clearly defined in reference to *Krankel* inquiries. *Id.* ¶ 65. This court then indicated it reviewed the case law that developed since *People v. Johnson*, 159 Ill. 2d 97, 126, 636 N.E.2d 485, 498 (1994), and found "four primary ways a trial court, when conducting a *Krankel* inquiry, may conclude that an ineffective[-]assistance claim 'lacks merit.' " *Roddis*, 2018 IL App (4th) 170605, ¶ 65. This language shows the *Roddis* court did not create new law. Instead, we summarized existing law. *Roddis*'s holding is thus not a departure, and we are not bound to apply it only prospectively.

¶ 13 Following *Roddis*, we find the *Krankel* inquiry in this case inadequate. The trial court failed to determine whether defendant's *pro se* allegations of ineffectiveness showed possible neglect. Rather, the court found defense counsel provided effective assistance. This is reversible error. See *id.* ¶ 81 (holding "a trial court commits reversible error when it conducts a *Krankel* hearing and concludes—on the merits—that there was no ineffective assistance").

¶ 14 We disagree with the State's conclusion the inquiry was adequate, as the trial court found defendant's claim pertained to a matter of trial strategy. Before the trial court, defense counsel did not explain any strategy for not issuing a subpoena for defendant's nephew or son. Counsel did not state he spoke to either potential witness. As defendant emphasizes on appeal, the exercise of trial strategy that is unsound or objectively unreasonable does not foreclose an ineffective-assistance-of-counsel claim. See *People v. Makiel*, 358 Ill. App. 3d 102, 107, 830 N.E.2d 731, 738-39 (2005) ("An attorney who fails to conduct reasonable investigation, fails to interview witnesses, and fails to subpoena witnesses cannot be found to have made decisions based on valid trial strategy."). Given defendant's allegations and the absence of any contradictory facts provided by defense counsel or the record, there is no basis for concluding counsel used sound strategy.

¶ 15 Defendant next argues we should, on remand, order the trial court to appoint counsel to investigate his claim. We believe this to be premature. Instead, we follow the recommendation in *Roddis* to remand for an adequate *Krankel* inquiry (*Roddis*, 2018 IL App (4th) 170605, ¶ 93), at which the trial court shall inquire into the factual basis of defendant's claim to decide whether defendant's *pro se* allegations show possible neglect of the case (*id.* ¶¶ 58, 63). If possible neglect is shown, " 'new counsel should be appointed.' " *Id.* ¶ 63 (quoting *Ayres*, 2017 IL 120071, ¶ 11). If not, defendant's claim may be denied. *Ayres*, 2017 IL 120071,

¶ 11. On remand, we encourage the court to review *Roddis* for a detailed discussion on how to proceed. See *People v. Rhodes*, 2019 IL App (4th) 160917, ¶ 20.

¶ 16 Because we conclude a new *Krankel* inquiry is required, we need not consider defendant's other arguments on appeal. See *People v. Bell*, 2018 IL App (4th) 151016, ¶ 37, 100 N.E.3d 177 ("Depending on the result of the *** *Krankel* inquiry, defendant's other claims may become moot."). While we are "remanding for further proceedings on defendant's *pro se* claim of ineffective assistance of counsel," we retain jurisdiction over defendant's other claims. *People v. Wilson*, 2019 IL App (4th) 180214, ¶ 26. If "defendant is not satisfied 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." *Id.*

¶ 17 III. CONCLUSION

¶ 18 For the reasons stated, we remand for the trial court to conduct an inquiry into defendant's *pro se* posttrial claim of ineffective assistance of counsel.

¶ 19 Remanded with directions.