2019 IL App (4th) 180705-U

NO. 4-18-0705

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
September 20, 2019
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
NELSON OMAR LUCERO-MOLINA,	)	No. 15CF478
Defendant-Appellant.	)	
	)	Honorable
	)	Paul G. Lawrence,
	)	Judge Presiding.

PRESIDING JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Steigmann and DeArmond concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, concluding the trial court conducted a proper *Krankel* inquiry.

¶ 2 In March 2016, defendant, Nelson Omar Lucero-Molina, pleaded guilty to three counts of criminal sexual assault (720 ILCS 5/11-1.20(a)(3) (West 2012)). The trial court sentenced him to three consecutive terms of 12 years in prison. In May 2016, defendant filed motions to withdraw his guilty plea and to reconsider the sentence. At the hearing on defendant's motions, defendant testified he misunderstood the consequences of the plea and that his attorneys pressured him to plead guilty. The trial court denied the motions.

¶ 3 On appeal, defendant argued the trial court erred by failing to conduct a preliminary inquiry into the factual bases for defendant's allegations of ineffective assistance of

counsel. *People v. Lucero-Molina*, 2018 IL App (4th) 160467-U, ¶ 2. This court agreed and remanded for a preliminary inquiry pursuant to *People v. Krankel*, 102 Ill. 2d 181, 464 N.E.2d 1045 (1984). *Id.*

¶ 4 Following an October 2018 preliminary *Krankel* hearing, the trial court concluded defendant's allegations did not necessitate the appointment of new counsel because they either related to (1) matters of defense counsel's strategy of encouraging defendant to plead guilty "if, in fact, that might result in a better outcome," or (2) "whether or not the defendant understood the plea," which the trial court determined he did. Defendant appeals, arguing the trial court failed to conduct a proper preliminary *Krankel* inquiry. We disagree and affirm.

¶ 5 I. BACKGROUND

¶ 6 A. Defendant's Guilty Plea

¶ 7 In April 2015, the State charged defendant with 30 counts of criminal sexual assault, a Class 1 felony (720 ILCS 5/11-1.20(a)(3) (West 2012)), alleging that from October 1, 2013, through April 4, 2015, defendant knowingly committed acts of sexual penetration against M.C., who was under 18 years of age and a family member.

¶ 8 In March 2016, defendant pleaded guilty to counts I, XI, and XXI in exchange for the dismissal of the other 27 counts. A Spanish-speaking interpreter assisted defendant throughout the proceedings because defendant is not fluent in English. On May 3, 2016, the trial court sentenced defendant to three consecutive terms of 12 years in prison on counts I, XI, and XXI.

¶ 9 On May 10, 2016, defendant filed a motion to withdraw his plea and a motion to reconsider the sentence. During the hearing on his motions, defendant testified to the difficulty he encountered understanding counsel during discussions of the plea deal, despite the use of an

interpreter. According to defendant, he understood the interpreter's words but a misunderstanding occurred and it affected his decision to plead guilty.

¶ 10 Defendant relayed that when discussing his plea offer with counsel, he first asked his counsel whether he "could appeal. He said [']yes,[’] and then I found out that only the judge could accept the appeal after I signed the paperwork. He didn't tell me that before I signed." Defendant stated that he would not have pleaded guilty had he known only the judge could accept the "appeal" after defendant signed the paperwork. Defendant believed he could later withdraw his guilty plea as a matter of right.

¶ 11 Defendant also complained that he had no one to "defend him" because his counsel insisted he was guilty. According to defendant, his counsel pressured him into pleading guilty rather than going to trial. When testifying about a time when plea counsel and another attorney visited him, defendant explained, "Many times they told me that I was guilty and that that was the best option to sign, that then I wouldn't have such a high sentence. And that's what they said all the time that I was with them."

¶ 12 Arguing in favor of the motion to withdraw defendant's plea of guilty, defense counsel said, "Proper procedure was followed, but the defendant did not fully understand." Defense counsel added, "It's unclear what precisely the defendant did understand, but I think it's clear he did have a misunderstanding."

¶ 13 When ruling on the motion to withdraw the plea of guilty, the trial court stated, "The issue seems to be whether or not the defendant thought he—would he have pled guilty if he knew the appeal had to be approved by the Judge. I'm not even really sure what exactly that means. [T]he Judge doesn't have to approve an appeal so far as I know, so I don't particularly understand his confusion." The court denied both of defendant's motions.

¶ 14 B. Initial Appeal and Remand

¶ 15 Defendant appealed, arguing the trial court erred when it failed to conduct a preliminary inquiry into his *pro se* allegations of ineffective assistance of counsel as required by *Krankel*, 102 Ill. 2d at 189. *Lucero-Molina*, 2018 IL App (4th) 160467-U, ¶ 2. Specifically, defendant argued his unfamiliarity with the legal system and his need for an interpreter caused miscommunication and confusion between the trial court, defense counsel, and himself. *Id.* ¶ 17. The State conceded the trial court failed to inquire into the factual basis for defendant's *pro se* claims of ineffective assistance of counsel. *Id.* ¶ 18. This court accepted the State's concession and remanded for a preliminary *Krankel* inquiry. *Id.* ¶ 20.

¶ 16 On October 23, 2018, the trial court conducted a preliminary *Krankel* inquiry pursuant to this court's mandate. A Spanish language interpreter assisted defendant throughout the proceeding. The court began by asking defense counsel, Brian McEldowney, to explain his understanding of defendant's allegations. McEldowney stated:

> "Judge, as I understand it, the defendant believes that he was misled by his right to appeal. And I would state affirmatively that we did not—neither myself nor Mr. Herzog, who's now present, misled the defendant in any respect about his right to appeal. He asked in the course of discussing plea negotiations whether he could appeal, and we confirmed. And my recollection is, there was some discussion about that.
>
> I think he apparently was under the impression that he could withdraw his plea of guilty at any time, unilaterally, for any reason, and that is something that he was not told. I guess I'm not entirely sure what his understanding was, but he

was not misled, and he didn't ask questions that would further clarify if he didn't understand the explanation he was given.

I believe we did file a motion to withdraw his guilty plea at his request, and the Court heard that. And we argued that he didn't understand, and his plea was involuntarily made. So I believe we preserved his right to appeal. And that's why we're here today, because the case did go up on appeal. Beyond that, I'm not sure how else to respond."

¶ 17 The court then asked McEldowney to explain defendant's statements that there was "no one to defend him," that both his attorneys told him he was guilty, and that no one explained to him who would determine his appeal. McEldowney responded that he believed the evidence against defendant was "very strong" and that defendant likely would have been convicted on all counts had he proceeded to trial. He stated that defendant understood "because of the consecutive nature of these offenses, that he would be sentenced to many more years than he ultimately received."

¶ 18 The court additionally asked McEldowney about defendant's comment that when he asked his attorneys about "medical proof" in his case, they stated it was not necessary. McEldowney responded, "[D]efendant made admissions which, combined with the testimony of the victim in this case, I believe would have constituted beyond a reasonable doubt without medical proof."

¶ 19 Finally, the court asked McEldowney about defendant's statements that McEldowney and Herzog pressured defendant to plead guilty, told him he was guilty, and that "the best option" was to sign the guilty plea so he "wouldn't have such a high sentence." McEldowney responded:

"Judge, I don't believe that the defendant was pressured. We did explain to him what we believe the outcome of the trial would be, and the case was set for trial on the day that he entered his plea of guilty. We certainly didn't deny him his right to a trial. I think he made an informed decision. And 27 of the 30 counts against him were dismissed as part of the plea agreement. It's true that we told him that it was in his best interest to plead guilty, and I still believe that's true, but we never told him that he couldn't proceed to trial, or that we wouldn't do our best for him if that was his decision."

¶ 20 The court turned its inquiry to defendant. The following colloquy ensued:

"THE COURT: *** I didn't understand what you said the last time we were here in court. On page six of the transcript you said: ['']The first thing I asked him was if I could appeal. He said, yes, and then I found out that only the judge could accept the appeal, after I had signed the paperwork. He didn't tell me that before I had signed.['']

Can you explain what you mean by that?

THE DEFENDANT: Right before I took the agreement, or the offer, I asked to be—to have a different attorney—to change the attorney. I asked the judge that was on my case at the time. I didn't have any answer at the time. When we got to that point, and I went to take up that and when I did my appeal, I would have a different judge, and I would have a different attorney. That's why I say that. When I ask him all those questions about the appeal rights, the only thing I didn't know at the time, who was going to be the judge in turn and the public defender that would help me in this. That's the only part I didn't know."

¶ 21 Defendant then stated the first thing he asked his attorney after he signed the plea agreement was how long he had to appeal and that "until that moment in time [he] didn't know if the judge was the one who [would] decide if [he] could do the appeal or not." McEldowney responded that he explained to defendant he had 30 days to petition to withdraw his plea of guilty, and that he and Herzog filed such a petition in a timely manner. McEldowney added, "But I also think it was incumbent upon [defendant] to ask additional questions if he didn't understand. Because he was not misled."

¶ 22 The following colloquy ensued between defendant and the court:

> "THE DEFENDANT: The logic that day, my part, I'm not important to all these. Because it's a logic, I didn't know nothing about this.
>
> THE COURT: What do you mean? I don't understand. Can you explain again.
>
> THE DEFENDANT: There's a logic that I was the one that didn't know anything about it. I didn't know anything. I believe there was not—I was the only person who didn't know anything about this."

¶ 23 The court then stated that "[t]here did appear to be some confusion" on defendant's part. However, it concluded that "there really doesn't appear to be any allegations of ineffective assistance of counsel," except defendant's statement that "he didn't feel that they were defending him properly." The court also stated that "oftentimes it is the job of the defense attorney to encourage a defendant to plead guilty if, in fact, that might result in a better outcome," and that was "certainly [a] strategy that Mr. McEldowney and Mr. Herzog used." The court noted defendant's confusion about his appeal rights, but that defendant had clearly

exercised those rights and that any issue regarding whether his plea was voluntary had been addressed at the hearing on his motion to withdraw his guilty plea. Finally, the court stated:

> "[The court] does not feel that there would be a need now to appoint new counsel, because the court finds that there really isn't a true claim of ineffective assistance of counsel. It's more of a—whether or not the defendant understood the plea. And Court has already gone through that and determined that he did understand the plea. So the court will not today appoint new counsel to represent the defendant."

¶ 24 This appeal followed.

¶ 25 II. ANALYSIS

¶ 26 Defendant argues the trial court erred because it (1) applied the wrong legal standard at the *Krankel* inquiry, (2) allowed the inquiry to become adversarial, and (3) conducted an inadequate inquiry into whether an interpreter was utilized during attorney-client conversations. We find no error and affirm the trial court's judgment.

¶ 27 A. Standard of Review

¶ 28 When confronted with a defendant's posttrial allegations of ineffective assistance of counsel, our supreme court set out the procedural steps to follow in *People v. Moore*, 207 Ill. 2d 68, 77-78, 797 N.E.2d 631, 637 (2003) (noting the rule that had developed since *Krankel*):

> "New counsel is not automatically required in every case in which a defendant presents a *pro se* posttrial motion alleging ineffective assistance of counsel. Rather, when 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."

¶ 29 A court can conduct an inquiry into allegations counsel was ineffective by doing one or more of the following: "(1) questioning the trial counsel, (2) questioning the defendant, and (3) relying on its own knowledge of the defense counsel's performance in the trial." *People v. Peacock*, 359 Ill. App. 3d 326, 339, 833 N.E.2d 396, 407 (2005). "[A] preliminary *Krankel* inquiry should operate as a neutral and nonadversarial proceeding." *People v. Jolly*, 2014 IL 117142, ¶ 38, 25 N.E.3d 1127. Accordingly, "the State should never be permitted to take an adversarial role against a *pro se* defendant at the preliminary *Krankel* inquiry." *Id.* "Where a defendant's claims are conclusory, misleading, or legally immaterial, or do not bring to the trial court's attention a colorable claim of ineffective assistance of counsel, the trial court may be excused from further inquiry." *People v. Bobo*, 375 Ill. App. 3d 966, 985, 874 N.E.2d 297, 315 (2007). Whether a trial court properly conducted a *Krankel* inquiry is a matter of law we review *de novo*. *Jolly*, 2014 IL 117142, ¶ 28.

¶ 30 B. This Case

¶ 31 Defendant first argues the trial court applied the wrong standard at its preliminary *Krankel* inquiry because it "did not consider whether possible neglect of the case had been shown." We disagree. While the trial court did not expressly state that it was considering whether defendant's allegations showed "possible neglect," it clearly indicated that its focus was to determine whether it was necessary to appoint new counsel—the essential purpose of the preliminary *Krankel* inquiry. The court's extensive dialogue with both counsel and defendant showed the court's intention to glean any facts relevant to a claim of ineffective assistance and its determination as to whether new counsel should be appointed. We agree with the court's

conclusion that defendant's only "true" claim of ineffective assistance—that his attorneys were not "defending him properly"—related to the attorneys' trial strategy of advising defendant to plead guilty in exchange for a lesser sentence where they believed the State's case was strong and could be proven beyond a reasonable doubt. (We note that defendant does not allege that counsel usurped his right to a jury trial, and defense counsel represented he (1) was prepared to go to trial on the date defendant pleaded guilty and (2) informed defendant he would represent defendant at trial to the best of his ability.) Although we agree with defendant that a claim of ineffective assistance can be predicated upon a defendant not understanding the consequences of pleading guilty due to counsel's misrepresentations, defendant in this case presented no evidence he was misled by counsel, and McEldowney testified the same. Accordingly, we find the court applied the correct standard.

¶ 32 Neither did the court allow the proceedings to become improperly adversarial. Defendant, relying on *Jolly*, 2014 IL 117142, ¶ 38, asserts that the inquiry became adversarial because counsel argued he did not provide ineffective assistance and stated it was defendant's burden to ask questions if he did not understand the plea agreement or his appeal rights. First, defendant's reliance on *Jolly* is inapposite here. The supreme court's decision in *Jolly* addressed the issue of the State's adversarial participation in a *Krankel* inquiry—not defense counsel's. *Jolly*, 2014 IL 117142, ¶ 38. Defendant cites no other precedent applying the rule in *Jolly* to instances of alleged adversarial participation by defense counsel. As stated above, the trial court was permitted to address defense counsel and provide him an opportunity to relay any facts he may have had related to defendant's complaints. See *Peacock*, 359 Ill. App. 3d at 339. The court limited its dialogue with McEldowney to the factual bases for defendant's allegations of ineffective assistance. Furthermore, McEldowney's statement that "it was incumbent upon

defendant to ask additional questions if he didn't understand" was not a legal conclusion regarding the ultimate question of whether he provided ineffective assistance. Rather, it shows he was not aware that defendant misunderstood anything about the plea agreement until after defendant accepted it. Accordingly, we find the trial court's inquiry was not improperly adversarial.

¶ 33 Finally, we find that the trial court's inquiry was adequate. Although it is true the court did not specifically ask McEldowney whether an interpreter was present when he and defendant discussed defendant's appeal rights, the trial court systematically addressed each of defendant's statements alleging ineffective assistance of counsel. Furthermore, the record shows that an interpreter was present when defendant signed the plea agreement and he testified at that hearing that he had no trouble understanding her. The record also shows an interpreter was present during the court's admonishments regarding defendant's appeal rights, and that when asked whether defendant understood those rights, defendant responded that he did. Defendant's claim here that there *could have* been possible neglect of the case *if* defendant's attorneys did not use an interpreter during off-the-record discussions with defendant is speculative and does not render the diligent inquiry inadequate.

¶ 34 Accordingly, we find the trial court's preliminary *Krankel* inquiry proper and affirm the trial court's judgment.

¶ 35 III. CONCLUSION

¶ 36 For the reasons stated, we affirm the trial court's judgment.

¶ 37 Affirmed.