2019 IL App (5th) 160097-U

NO. 5-16-0097

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Johnson County.
	)	
v.	)	No. 12-CF-57
	)	
JOHN CUNNINGHAM,	)	Honorable
	)	James R. Williamson,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE BOIE delivered the judgment of the court.
Presiding Justice Overstreet and Justice Moore concurred in the judgment.

ORDER

¶ 1 *Held*: We find the State failed to present sufficient evidence to prove defendant guilty of the offense of aggravated fleeing or attempting to elude a peace officer. We further find that defendant did not receive Rule 605(b) admonitions and that the circuit court failed to conduct a sufficient inquiry into defendant's claims of ineffective assistance of counsel. We lack jurisdiction in this appeal to review the circuit clerk's clerical data entries made outside of the court proceedings.

¶ 2 The defendant, John Cunningham, was charged with several offenses stemming from a police chase, including two counts of possession of a weapon by a felon, one count of aggravated vehicular hijacking, and one count of aggravated fleeing to elude a

peace officer. Prior to the defendant's bench trial, he pled guilty to the two counts of unlawful possession of a weapon by a felon. After the bench trial, the circuit court found him guilty of aggravated vehicular hijacking and aggravated fleeing to elude a peace officer.

¶ 3 On a direct appeal from his convictions and sentences, the defendant argues that the State failed to prove beyond a reasonable doubt that he committed the offense of aggravated fleeing or attempting to elude a peace officer; that the circuit court failed to conduct a proper *Krankel* hearing on his *pro se* claims of ineffective assistance of counsel alleged in his motion to reduce his sentence; that the circuit court failed to give him the admonishments required by Illinois Supreme Court Rule 605(b) when he pled guilty to the two counts of unlawful possession of a weapon by a felon; that his attorney failed to file the certificate required by Illinois Supreme Court Rule 604(d); and that the circuit court clerk improperly imposed a certain fine following his conviction and failed to give him *per diem* credit. For the following reasons, we affirm in part, modify in part, reverse in part, and remand for further proceedings consistent with this decision.

¶ 4 I. BACKGROUND

¶ 5 On December 3, 2012, Officer Trenton Harrison of the Goreville Police Department and Trooper Brian Graff of the Illinois State Police responded to an altercation between the defendant and his wife's cousin, Jacob Witherall. When the officers arrived, Mr. Witherall was sitting on the front porch stating that he had been shot. Mr. Witherall further informed the officers that the individual who had shot him was

driving a vehicle approaching from the east. Officer Harrison, who was in uniform, gave verbal commands, drew his handgun, and shined his flashlight into the driver's face in an attempt to get the driver to stop the vehicle. Trooper Graff also attempted to get the driver to stop the vehicle with verbal commands and shining a flashlight, but the vehicle continued past the officers and proceeded through a stop sign. The officers noted a female passenger in the vehicle. Officer Harrison and Trooper Graff later identified the driver of the vehicle as the defendant and the female passenger as the defendant's wife, Janet Cunningham.

¶ 6 Officer Harrison and Trooper Graff returned to their cars and engaged in a pursuit of the vehicle. Trooper Graff was directly behind the defendant's vehicle and Officer Harrison was behind Trooper Graff's vehicle. Trooper Graff described the road as "windy" and "bumpy," and testified that the speed limit on that road was 55 miles per hour. He further testified that he believed he was traveling over 60 miles per hour and that his flashing lights and siren were on during the pursuit of the defendant's vehicle.

¶ 7 Officer Harrison described the road they were traveling on as "a back road, oil and chip type" and that there was no posted speed limit. However, Officer Harrison went on to testify that the speed limit on a road with no posted speed limit was 55 miles per hour. Officer Harrison testified that "at one point I looked down and I was over a hundred miles per hour trying to catch up to the vehicle." He further testified that he could not catch up with the defendant's vehicle during the approximately two-mile chase.

¶ 8 The pursuit came to an end when the defendant's vehicle crashed into a utility pole, crossed the roadway, and came to rest in front of a residence. Trooper Graff was able to pull off to the side of the road and avoid the downed utility pole; however, Officer Harrison's vehicle struck the pole and became disabled.

¶ 9 Trooper Graff ensured that Officer Harrison was not injured and then the officers went to the defendant's vehicle to check for injuries. They found no one in the vehicle but observed a firearm on the floorboard of the driver's side of the vehicle. Officer Harrison and Trooper Graff immediately searched the area and were unsuccessful in locating the defendant or his wife.

¶ 10 Teresa Gibbs, who lived near the crash site, testified that she was coming out of her residence when she heard a car horn in the distance and observed a couple coming from the back of her house. She testified that the individuals were hunched over and that the male individual had a double barrel shotgun with a wooden butt pointing down at the ground. She further testified that when the male individual saw her, he brought up the gun and stated, "Give me the keys to your car or I'm going to shoot you." Ms. Gibbs gave the male individual the key to her vehicle and the couple left in her vehicle heading east. Ms. Gibbs called 9-1-1 and later identified the male individual as the defendant and the female individual as the defendant's wife. Ms. Gibbs' vehicle was later found abandoned on the side of the road in Coles County, Illinois.

¶ 11 Defendant was charged with aggravated vehicular hijacking, aggravated battery, armed violence, attempted first degree murder, two counts of unlawful possession of a

weapon by a felon, and two counts of aggravated fleeing or attempting to elude a peace officer.

¶ 12 On August 11, 2015, defendant entered a plea of guilty on the two counts of unlawful possession of a weapon by a felon at the beginning of his bench trial. Upon completion of the bench trial, defendant was found guilty of one count of aggravated vehicular hijacking and one count of aggravated fleeing to elude a peace officer. The court entered verdicts of not guilty on the counts of aggravated battery, armed violence, attempted murder, and one count of aggravated fleeing to elude a peace officer.

¶ 13 The trial court subsequently sentenced the defendant to 45 years' confinement and the following assessments: (1) $205 court costs; (2) $2 state's attorney records automation fund; (3) $10 probation and court services department operations; (4) $400 Violent Crime Victims Assistance fine (VCVA); (5) $30 juvenile records expungement; (6) $15 state police operations assistance; (7) $10 medical costs; (8) $100 unlawful use of weapon trauma fund; (9) $30 state's attorney *per diem*; and (10) $80 sheriff's fee. The trial court further awarded defendant $5525 in monetary *per diem* credit for time served.

¶ 14 On December 28, 2015, defendant filed a timely *pro se* motion for reduction of sentence. In his motion, defendant moved for a reduction of his sentence arguing that, *inter alia*, defendant would have "greatly considered the plea more" if he had been aware that the charge of aggravated vehicular hijacking carried a minimum sentence of 21 years' imprisonment and that he believed if witnesses had been called at his sentencing

hearing to testify about his good conduct while incarcerated, the "Judge could of seen me in a completely different way."

¶ 15 The State's response to defendant's *pro se* motion for reduction of sentence noted that it appeared defendant was making an ineffective assistance of counsel claim in the two issues above and asserted that the circuit court should conduct an initial *Krankel* hearing. *People v. Krankel*, 102 Ill. 2d 181, 189 (1984) (held that 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). The circuit court conducted a hearing on defendant's motion for reduction of sentence but declined to appoint defendant independent counsel or conduct a separate *Krankel* hearing. On March 3, 2016, the circuit court issued a written order denying defendant's motion for reduction of sentence. Defendant now appeals his conviction and sentence, raising four issues for this court's review.

¶ 16 II. ANALYSIS

¶ 17 A. Sufficiency of the Evidence

¶ 18 The first issue on appeal is whether the State failed to prove beyond a reasonable doubt that defendant committed the offense of aggravated feeing or attempting to elude a peace officer where the State did not present evidence that defendant was traveling 21 miles per hour over the legal speed limit.

¶ 19 When presented with a challenge to the sufficiency of the evidence, it is not the function of the reviewing court to retry a defendant. *People v. Collins*, 106 Ill. 2d 237,

261 (1985). Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.* Under this standard, it is the trier of fact's responsibility to determine witness credibility, the weight to be given to their testimony, and the reasonable inferences to be drawn from the evidence. *People v. Emerson*, 189 Ill. 2d 436, 475 (2000). "However, although determinations by the trier of fact are entitled to great deference, they are not conclusive. Rather, we will reverse a conviction where the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt." *People v. Ortiz*, 196 Ill. 2d 236, 259 (2001).

¶ 20 A person commits the offense of aggravated fleeing or attempting to elude a peace officer when any driver or operator of a motor vehicle flees or attempts to elude a peace officer, after being given a visual or audible signal by a peace officer, and such flight or attempt to elude is at a rate of speed at least 21 miles per hour over the legal speed limit. 625 ILCS 5/11-204.1 (West 2016).

¶ 21 Having reviewed the record of defendant's bench trial, we find the evidence sufficient for any rational trier of fact to have found that defendant was the driver of the vehicle in question. The defendant was identified by both Trooper Graff and Officer Harrison as the driver of the vehicle they were pursuing. The evidence was also sufficient for any rational trier of fact to find that defendant was given visual and audible signals by Trooper Graff and Officer Harrison. Both officers testified that they were in uniform,

shined their flashlights at the defendant, and gave the defendant verbal commands to stop the vehicle. Further, Trooper Graff testified that his siren and oscillating lights were engaged during the pursuit. Finally, the evidence was sufficient for any rational trier of fact to find that the defendant was attempting to flee or elude Trooper Graff and Officer Harrison. The testimony at trial demonstrated that the defendant failed to obey the officers' orders to stop the vehicle, failed to pull to the side of the road and stop when there was an official police vehicle with siren and oscillating lights engaged behind him, and left the accident site before the officers could approach his vehicle.

¶ 22 However, we find the evidence insufficient to establish defendant was traveling at a rate of speed at least 21 miles per hour over the 55 miles per hour legal speed limit. Trooper Graff testified that he was directly behind the defendant's vehicle during the pursuit, and when asked how fast he was traveling, he testified, "Offhand, over 60, *** I went over 60 to try to catch up." He further testified that, other than brief periods of time where he could not see the taillights, he was able to maintain sight of the defendant's vehicle. Although Officer Harrison testified that "at one point I looked down and I was over a hundred miles per hour trying to catch up to the vehicle," there is no evidence as to the period of time he drove at this speed or whether it was simply the speed he accelerated in order to catch up to defendant's vehicle. Further, Officer Harrison was behind Trooper Graff and Trooper Graff was able to keep the defendant's vehicle in sight other than a few brief periods, which would reasonably tend to indicate the speed of defendant's vehicle was close to the speed of Trooper Graff's vehicle which was

traveling over 60 miles per hour. The only other evidence concerning the speed of the defendant's vehicle presented at trial was the testimony of defendant's wife, Janet Cunningham, who testified defendant "sped up" and was going "fast."

¶ 23 The State was required to prove defendant was traveling at least 21 miles per hour over the 55 miles per hour legal speed limit, which required some evidence that the defendant's vehicle was traveling at a speed of 76 miles per hour or greater. At best, the evidence would reasonably tend to indicate the defendant's vehicle speed was close to that of Trooper Graff−over 60 miles per hour. Without evidence that would reasonably tend to indicate the speed of defendant's vehicle reached or exceeded 76 miles per hour, the State did not prove beyond a reasonable doubt that defendant was traveling at a speed of 76 miles per hour or greater during the pursuit.

¶ 24 Based upon that finding, we find the State failed to present sufficient evidence to establish the defendant's guilt as to the offense of aggravated fleeing or attempting to elude a peace officer.

¶ 25 The defendant requests that this court reverse his conviction for the offense of aggravated fleeing or attempting to elude a peace officer if we determine insufficient evidence of the charge, or in the alternative, reduce his conviction to misdemeanor fleeing or attempting to elude a peace officer, pursuant to our authority under Illinois Supreme Court Rule 615(b)(3) (eff. Jan. 1, 1967). We elect the latter course of action.

¶ 26 Rule 615(b)(3) provides that "[o]n appeal the reviewing court may *** reduce the degree of the offense of which the appellant was convicted." Ill. S. Ct. R. 615(b)(3) (eff.

Jan. 1, 1967). Under Rule 615(b)(3), "[a] reviewing court has the authority to reduce the degree of the offense of which a defendant was convicted when the evidence fails to prove beyond a reasonable doubt an element of the greater offense." (Internal quotation marks omitted.) *People v. Kennebrew*, 2013 IL 113998, ¶ 21. "[S]tate and federal appellate courts have long exercised the power to reverse a conviction while at the same time ordering the entry of a judgment on a lesser-included offense." (Internal quotation marks omitted.) *Id*. Furthermore, "[t]he authority to order the entry of judgment on the lesser-included offense is both statutory and based on the common law; the constitutionality of the practice has never been seriously questioned." *People v. Knaff*, 196 Ill. 2d 460, 478 (2001).

¶ 27 A lesser included offense is one that "[i]s established by proof of the same or less than all of the facts or a less culpable mental state (or both), than that which is required to establish the commission of the offense charged." 720 ILCS 5/2-9(a) (West 2016). "There are three methods for determining whether an offense is a lesser-included offense of another: (1) the abstract elements approach; (2) the charging instrument approach; and (3) the 'factual' or 'evidence' adduced at trial approach." *Kennebrew*, 2013 IL 113998, ¶ 28. The charging instrument approach applies where the appellate court convicts a defendant of an uncharged offense through the exercise of its authority under Rule 615(b)(3). *Id.* ¶ 53. "There are two steps to the charging instrument approach. First, the court determines whether the offense is a lesser-included offense. Next, the court

examines the evidence at trial to determine whether the evidence was sufficient to uphold a conviction on the lesser offense." *Id.* ¶ 30.

¶ 28 In this matter, the parties agree that the lesser included offense to aggravated fleeing to elude a peace officer (625 ILCS 5/11-204.1 (West 2016)) is the Class A misdemeanor charge of fleeing or attempting to elude a peace officer (*id.* § 11-204). This court also agrees. Fleeing or attempting to elude a police officer has the same elements of aggravated fleeing or attempting to elude a peace officer less the element requiring proof that a defendant was traveling at a rate of speed at least 21 miles per hour over the legal speed limit.

¶ 29 As discussed above, the evidence in this matter was sufficient for any rational trier of fact to have found that defendant was the operator of the vehicle, was given visual and audible signals by peace officers who were in uniform to stop the vehicle, and that fled or attempted to elude a peace officer by failing to stop when given those commands, failing to stop when there was an official police vehicle with siren and oscillating lights engaged behind him, and leaving the accident site before the officers could approach his vehicle. As such, we find the evidence sufficient to uphold a conviction on fleeing or attempting to elude a peace officer.

¶ 30 Having found the Class A misdemeanor charge of fleeing or attempting to elude a peace officer to be the lesser included offense of aggravated fleeing or attempting to elude a peace officer and the evidence at trial sufficient to uphold a conviction on the lesser offense, we exercise our authority under Illinois Supreme Court Rule 615(b)(3) and

vacate defendant's conviction on aggravated fleeing or attempting to elude a police officer (625 ILCS 5/11-204.1 (West 2016)), reduce the degree of the offense of conviction, and enter judgment against defendant on the lesser included offense of fleeing or attempting to elude a police officer, a Class A misdemeanor (*id.* § 11-204).

¶ 31 Based on the reduced charge, we further exercise our authority under Illinois Supreme Court Rule 615(b)(4) to reduce defendant's sentence to 365 days' incarceration, to be served concurrently with his sentences for aggravated vehicular hijacking and unlawful possession of a weapon by a felon.

¶ 32 B. Posttrial Allegations of Ineffective Assistance of Trial Counsel

¶ 33 The next issue on appeal is whether the circuit court either erred in failing to appoint new counsel, or alternatively, failed to conduct an inquiry when defendant made *pro se* posttrial allegations that trial counsel provided ineffective assistance of counsel.

¶ 34 Defendant filed a timely *pro se* motion for reduction of sentence asserting eight issues for the circuit court's consideration. Relevant to this appeal are defendant's allegations in issues one and eight. Issue one states:

> "(1.) In the Bill of Indictment on Ct [count] 1 the charge I was convicted of. It is classified as a class X (6-30) unlike count 3 and Ct [count] 6. Ct [count] 3 states class X with a min [minimum] 15 yrs. Ct [count] 6 states class X plus 20 yrs [years]. Where as the other counts is [*sic*] just the class. Ct [count] 2 also class X ct [count] 4 & 5 class 3 and ct [count] 7 & 8 class 4. If I would of known this

charge carries a min [minimum] of 21 yrs [years] instead of 6 yrs [years] I would of greatly considered the plea more."

¶ 35 Issue eight alleges:

"(8.) The state said nothing about my conduct in D.O.C. [Department of Correction] or county jail because I have helped older inmates and been in no trouble however if I had a bad record she would of pointed it out quickly. I was under the impression that the defense would be calling witnesses[.] [I]f this was done I believe the judge could of seen me in a completely different way."

¶ 36 The State's response to defendant's *pro se* motion for reduction of sentence noted that it appeared defendant was making ineffective assistance of counsel claims in issues one and eight. The State further asserted that the circuit court should conduct an initial *Krankel* hearing.

¶ 37 "Through *People v. Krankel* [citation] and its progeny, our supreme court has developed a procedural framework for the resolution of *pro se* posttrial claims of ineffective assistance of counsel. Importantly, a mere claim of ineffectiveness does not automatically warrant the appointment of new counsel to proceed with the claim. [Citation.] Instead, the circuit court must first make a preliminary inquiry into the claim, and if those claims show a " 'possible neglect of the case,' appoint new counsel to pursue the claim at a full hearing. [Citation.] A court's determination that a defendant's claim does not demonstrate a possible neglect of the case will be reversed where that decision is

manifestly erroneous. [Citation.] ‘ “Manifest error” is error that which is plain, evident, and indisputable.’ [Citation.]” *People v. Murray*, 2017 IL App (3d) 150586, ¶ 21.

¶ 38 “In conducting its inquiry, the court may (1) ask defense counsel to ‘answer questions and explain the facts and circumstances’ relating to the claim, (2) briefly discuss the claim with the defendant, or (3) evaluate the claim based on ‘its knowledge of defense counsel’s performance at trial’ as well as ‘the insufficiency of the defendant’s allegations on their face.’ [Citation.]” *People v. Bell*, 2018 IL App (4th) 151016, ¶ 35.

¶ 39 On February 10, 2016, the circuit court conducted a hearing on defendant’s motion for reduction of sentence. At the hearing, the State again noted to the circuit court that it appeared issues one and eight had arguments stemming from alleged ineffective assistance of counsel. The State requested those issues be bifurcated from the other issues and a *Krankel* hearing be conducted. The circuit court directed the parties to proceed with arguments on the other issues and reserved issues one and eight. Towards the end of the hearing, the circuit court returned to issues one and eight.

¶ 40 On issue one, the circuit court addressed defendant and defendant’s counsel concerning the sentencing range for aggravated vehicular hijacking along with the penalty enhancement. Defendant’s counsel stated that, “I’ll tell you right now that the Court absolutely advised him of the 15 year add on.” The circuit court discussed the sentence imposed and the rationale behind it. The circuit court also had the State produce the written document from which the court had advised the defendant on the potential penalties of aggravated vehicular hijacking. The circuit court then read the document:

"THE COURT: All right. Here's what it reads, 'Count I, Aggravated Vehicular Hijacking, Class X, minimum, maximum, 21 to 45.' And in parenthesis it says 6 to 30, plus 15. 6 to 30, plus 15. Class X felony range is not less than 6 nor more than 30 years."

¶ 41 The circuit court stated "[b]ut I see nothing here—it's very clear. I advised you. You had counsel here. I see nothing here to show that Mr. McIntyre didn't adequately represent you on this. *** I'm finding that the defendant was apprised, informed of the possible penalties, and he was sentenced within the range of the possible penalties."

¶ 42 On issue eight, the circuit court asked the defendant two questions:

"THE COURT: Now, Paragraph 8, Paragraph 8 reads '[t]he State said nothing about my conduct in D.O.C. or county jail.' I assume that's at the sentencing hearing, correct?

DEFENDANT CUNNINGHAM: Yes, Your Honor.

THE COURT: All right. 'Because I helped (inaudible) and been in no trouble. However if I had a bad record, she would have pointed it out quicker. I was under the impression that the defense would be calling witnesses,' meaning, I take it, witnesses of your good conduct while in county jail and or the penitentiary?

DEFENDANT CUNNINGHAM: Yes, Your Honor."

¶ 43 The circuit court then stated "I'm taking the position that Paragraph 8, that it is non-meritorious. I made my ruling. I based my ruling on the evidence in the case. Had witnesses come forward and said your conduct would help a lot of prisoners and helped a lot of people in the institution and—I haven't heard the evidence, but feel strongly that

the evidence at the sentencing wouldn't change because I based the sentence on the evidence as I heard it and had it down, and had it my head, the evidence of these crimes."

¶ 44 On March 3, 2016, the circuit court issued a written order denying defendant's motion for reduction of sentence. Specifically, the circuit court held as to issue one of defendant's motion for reduction of sentence "alleging a misunderstanding as to the possible penalties on the Count of Aggravated Vehicular Hijacking, State asserts that the Court should conduct an initial Krankel review and abstained from involvement. The Court [f]inds, based upon the record, no need for appointment of independent counsel as to this allegation, and it is DENIED."

¶ 45 The circuit court also held as to issue eight "alleging that his [defendant's] Counsel did not call witnesses. State asserted that the Court should conduct an initial Krankel review and abstained from involvement. The Court having considered the arguments of [d]efense and [c]ourt's file, the Court finds that there is no need for appointment of independent counsel as to this allegation, and it is DENIED."

¶ 46 Concerning issue one, the circuit court addressed defendant and his counsel and also produced a copy of the written document from which the circuit court had advised the defendant on the potential penalties of aggravated vehicular hijacking. The circuit court made a specific finding that defendant's counsel had advised him on the potential penalties and that there was "nothing here to show" that defendant's counsel had not adequately represented defendant concerning the potential penalties. The circuit court did not conduct a separate *Krankel* hearing, but this court is not aware any requirement

requiring a separate hearing. Therefore, we find the circuit court made a preliminary inquiry into defendant's issue one sufficient to determine whether there existed a possible neglect of the case concerning defendant's advisement of the potential penalties of aggravated vehicular hijacking.

¶ 47 However, concerning issue eight, the circuit court's only inquiry was to ask the defendant if the claim was in relation to the sentencing hearing and to clarify it would be witnesses of defendant's good conduct while in the county jail or the penitentiary. Without any additional inquiry, the circuit court took the position that issue eight was nonmeritorious.

¶ 48 "We have consistently held the goal of any *Krankel* proceeding is to facilitate the trial court's full consideration of a defendant's *pro se* claim and thereby potentially limit issues on appeal." *People v. Ayres*, 2017 IL 120071, ¶ 13. In this matter, there is no indication of the identities of the witnesses, their positions, or what testimony they were expected to offer other than a general "good conduct" while incarcerated. Although defendant's counsel was there, the circuit court did not inquire whether counsel was aware of these witnesses, and if he was, whether there was a strategic basis for not calling them at the sentencing hearing. The circuit court stated that "I haven't heard the evidence, but feel strongly that the evidence at the sentencing wouldn't change because I based the sentence on the evidence *** of these crimes." However, without some indication of what that evidence would be, there cannot be a determination that it would not have altered defendant's sentence. As such, we find the circuit court's inquiry into defendant's

issue eight was insufficient to determine whether there existed a possible neglect of the case concerning whether witnesses should have been called during defendant's sentencing hearing.

¶ 49 We note that the State argues that issues one and eight did not clearly allege ineffective assistance of counsel and as such, a *Krankel* hearing was not required. However, since the State's response indicated potential claims of ineffective assistance of counsel, ineffective assistance of counsel was before the circuit court and the circuit court was required to conduct some type of inquiry. *People v. Moore*, 207 Ill. 2d 68, 79 (2003). The circuit court could have directed defendant to file a reply to the State's response or it could have simply asked at the beginning of the hearing whether defendant was alleging ineffective assistance of counsel. It did neither.

¶ 50 Accordingly, we vacate the circuit court's preliminary denial of defendant's eighth issue within his motion for reduction of sentence and remand the matter with instructions that new counsel be appointed to represent defendant in a full *Krankel* hearing on the single claim of ineffective assistance of counsel concerning the lack of witnesses called at defendant's sentencing hearing.

¶ 51 Defendant requests that if this court remands and directs a *Krankel* hearing, we also direct that the hearing be conducted by a different judge "[b]ecause it is doubtful that the same judge will reach a different result upon remand." We decline to do so.

¶ 52 In conducting its inquiry, the circuit court may evaluate the claim based on its knowledge of defense counsel's performance at trial. Directing the hearing to be

conducted by a different judge on remand eliminates the experience and knowledge that the trial judge brings in the evaluation of defendant's claim. Without some evidence that the trial judge could not serve as the neutral trier of fact, other than the initial denial of defendant's claims, this court declines to direct a change of judge.

¶ 53 C. Supreme Court Rules 604(d) and 605(b)

¶ 54 Defendant next raises the issue of whether this matter should be remanded for strict compliance with Illinois Supreme Court Rules 604(d) and 605(b) where the trial court failed to provide Rule 605(b) admonitions to the defendant after he pleaded guilty to two counts of unlawful possession of a weapon by a felon.

¶ 55 Defendant asserts that the trial court failed to provide him Rule 605(b) admonitions after he pled guilty at the beginning of his bench trial to two counts of unlawful possession of a weapon by a felon. The State concedes this error and we agree.

¶ 56 Illinois Supreme Court Rule 604(d) (eff. Jul. 1, 2017) sets forth the requirements a defendant must satisfy in order to appeal a judgment entered on a guilty plea. "Compliance with Rule 604(d) is a condition precedent to a defendant's appeal." *People v. Jamison*, 181 Ill. 2d 24, 28 (1998). Rule 604(d) states that "[n]o appeal from a judgment entered upon a plea of guilty shall be taken unless the defendant, within 30 days of the date on which sentence is imposed, files in the trial court a motion to reconsider the sentence, if only the sentence is being challenged, or, if the plea is being challenged, a motion to withdraw his plea of guilty and vacate the judgment." Ill. S. Ct. R. 604(d) (eff. Jul. 1, 2017).

¶ 57 Illinois Supreme Court Rule 605(b) (eff. Oct. 1, 2001) mandates the admonitions a trial judge must give when imposing sentence on a defendant who has pleaded guilty and those admonitions advise a defendant of the requirements of Rule 604(b). "Rule 605(b) complements Rule 604(d) and serves as a corollary to the requirements of Rule 604(d)." *Jamison*, 181 Ill. 2d at 27.

¶ 58 Rule 605(b) provides, in relevant part:

> "In all cases in which a judgment is entered upon a plea of guilty, other than a negotiated plea of guilty, at the time of imposing sentence, the trial court shall advise the defendant substantially as follows:
>
> (1) that the defendant has a right to appeal;
>
> (2) that prior to taking an appeal the defendant must file in the trial court, within 30 days of the date on which sentence is imposed, a written motion asking to have the trial court reconsider the sentence or to have the judgment vacated and for leave to withdraw the plea of guilty, setting forth the grounds for the motion;
>
> (3) that if the motion is allowed, the sentence will be modified or the plea of guilty, sentence and judgment will be vacated and a trial date will be set on the charges to which the plea of guilty was made;
>
> (4) that upon the request of the State any charges that may have been dismissed as a part of a plea agreement will be reinstated and will also be set for trial;
>
> (5) that if the defendant is indigent, a copy of the transcript of the proceedings at the time of the defendant's plea of guilty and sentence will be provided without cost to the defendant and counsel will be appointed to assist the defendant with the preparation of the motions; and
>
> (6) that in any appeal taken from the judgment on the plea of guilty any issue or claim of error not raised in the motion to reconsider the sentence or to vacate the judgment and to withdraw the plea of guilty shall be deemed waived." Ill. S. Ct. R. 605(b) (eff. Oct. 1, 2001).

¶ 59 "The supreme court's rules are not aspirational; rather, they have the force of law. [Citation.] Trial courts must strictly comply with the admonition requirements of Rule 605. [Citation.] A trial court's compliance with the admonition requirements of Supreme Court Rule 605 is reviewed *de novo*." *People v. Young*, 387 Ill. App. 3d 1126, 1127 (2009).

¶ 60 In this matter, the trial court gave the defendant the following admonitions at the sentencing hearing:

> "THE COURT: Appeal right: Pursuant to Supreme Court Rule 605(a), on a Judgment and Sentence after a plea of not guilty. In any case in which the Defendant is found guilty and sentenced to imprisonment, the Trial Court shall at the time of imposing sentence, advise the Defendant of the right to appeal, of the right to request the Clerk to prepare and file a Notice of Appeal, and of the right, if indigent, to be furnished without costs to the Defendant for the transcript of proceedings at the trial or hearing. In addition to the foregoing rights, in cases in which a Defendant has been guilty of a felony and sentenced to imprisonment, the Trial Court shall advise the Defendant of the right to have counsel appointed on appeal. At the time of imposing sentence, the Trial Court shall also advise the Defendant of as follows. That the right to appeal the judgment of conviction, excluding the sentence imposed, will be preserved only if a Notice of Appeal is filed in the Trial Court within thirty days of the date on which sentence is imposed. Prior to taking an appeal, if the Defendant seeks to challenge the correctness of the sentence or any aspect of the sentencing hearing, the Defendant must file in the trial court within thirty days of the date on which sentence is imposed a written motion asking to have the Trial Court reconsider the sentences imposed, setting forth in the motion all issues or claims of error regarding the sentence or sentences imposed at the sentencing hearing. Any issue or claim of error regarding the sentences imposed or any aspect of the sentencing hearing not raised in the written motion shall be deemed waived. In order to have preserved the right to appeal following the disposition of the Motion to Reconsider Sentence or any challenges regarding the sentencing hearing, the Defendant must file a Notice of Appeal in the trial court within thirty days from the entry of the Order disposing of the Defendant's Motion to Reconsider Sentence or Order disposing any of the challenges to the sentencing hearing."

¶ 61 As the above quote clearly demonstrates, defendant received admonitions pursuant to Rule 605(a), which is advice to defendant on judgment and sentence *after a plea of not guilty*. Ill. S. Ct. R. 605(a) (eff. Oct. 1, 2001). The trial court failed to give admonitions pursuant to Rule 605(b), which is advice to defendant on judgment and sentence *entered on a plea of guilty*. Ill. S. Ct. R. 605(b) (eff. Oct. 1, 2001).

¶ 62 Defendant filed a timely *pro se* motion for reduction of sentence but did not file a motion to withdraw his pleas of guilty to the two counts of unlawful possession of a weapon by a felon as required by Rule 604(d). However, the Illinois Supreme Court has held that "[s]trict compliance with Rule 605(b) is required. When a defendant is not given Rule 605(b) admonitions and subsequently fails to file a motion to withdraw his plea of guilty, the cause should be remanded for further proceedings." *Jamison*, 181 Ill. 2d at 31.

¶ 63 Defendant also states that the record on appeal does not contain a Rule 604(d) certificate. Along with setting forth the requirements to appeal a judgment entered on a guilty plea, Rule 604(d) requires that "[t]he defendant's attorney shall file with the trial court a certificate stating that the attorney has consulted with the defendant either by phone, mail, electronic means or in person to ascertain defendant's contentions of error in the sentence and the entry of the plea of guilty, has examined the trial court file and both the report of proceedings of the plea of guilty and the report of proceedings in the sentencing hearing, and has made any amendments to the motion necessary for adequate presentation of any defects in those proceedings." Ill. S. Ct. R. 604(d) (eff. Jul. 1, 2017).

¶ 64 The State does not contest that defendant's attorney failed to file a Rule 604(d) certificate, and this court has not been directed to a Rule 604(d) certificate in the record. "Strict compliance with the certification requirements of Rule 604(d) is mandatory; the remedy for a failure to strictly comply is remand for new postplea proceedings." *Murray*, 2017 IL App (3d) 150586, ¶ 27.

¶ 65 Therefore, based on defendant not receiving Rule 605(b) admonitions and defense counsel's failure to file a Rule 604(d) certificate, we remand this case to the circuit court for new postplea proceedings consistent with Illinois Supreme Court Rules 604(d) and 605(b).

¶ 66 D. Circuit Clerk's Clerical Data Entries

¶ 67 The final issue on appeal is whether the circuit clerk improperly imposed a $50 court finance assessment and failed to apply the $5525 monetary *per diem* credit awarded by the trial court against eligible fines. On December 18, 2015, the trial court ordered the defendant to pay the following assessments: (1) $205 court costs; (2) $2 state's attorney records automation fund; (3) $10 probation and court services department operations; (4) $400 VCVA; (5) $30 juvenile records expungement; (6) $15 state police operations assistance; (7) $10 medical costs; (8) $100 unlawful use of weapon trauma fund; (9) $30 state's attorney *per diem*; and (10) $80 sheriff's fee. The trial court further awarded defendant $5525 in monetary *per diem* credit for time served. A copy of defendant's circuit court fines/fees summary indicates an additional $50 court finance fee and that the monetary *per diem* credit has not yet been applied to defendant's eligible fees/fines.

¶ 68 During the pendency of this appeal, the Illinois Supreme Court issued its opinion in *People v. Vara*, 2018 IL 121823, holding that on review of a judgment of a criminal conviction, the reviewing court did not have jurisdiction to review a circuit clerk's assessment of improper fines. *Id*. ¶ 23. The supreme court found that the circuit clerk's "payment status information sheet" was a clerical document created outside the record of the trial court proceedings and was "not part of the common-law record or the report of proceedings of defendant's criminal prosecution." *Id*. ¶ 22. Further, although the clerk was obligated to record the ruling of the court and had no authority to levy fines against the defendant that were not issued by the court's judgment, the clerk improperly doing so was in the nature of a clerical function that was not part of the circuit court's judgment. *Id.* ¶ 23. The supreme court concluded that "the improper recording of a fine is not subject to direct review by the appellate court." *Id*. "Any questions as to the accuracy of the data entries included in the payment status information must be resolved through the cooperation of the parties and the circuit clerk or by the circuit court in a *mandamus* proceeding." *Id.* ¶ 31.

¶ 69 If the issue on appeal had been whether the circuit court complied with section 110-14(a) of the Code of Criminal Procedure of 1963 (725 ILCS 5/110-14(a) (West 2012)), which mandates the time served credit, this court would have jurisdiction, but the imposition of a $50 court finance assessment and the failure to apply the monetary *per diem* credit are clearly the circuit clerk's data entries. Accordingly, we lack jurisdiction in this appeal to review the circuit clerk's clerical data entries made outside

of the court proceedings including the $50 court finance assessment and the failure of the circuit clerk to apply the monetary *per diem* credit.

¶ 70 However, we note that in *Vara*, the Illinois Supreme Court admonished the circuit clerks "that they may not, on their own initiative, assess any criminal fines or fees that must be imposed by a court." *Vara*, 2018 IL 121823, ¶ 31. We also note that the trial court awarded defendant a pretrial credit of $5525 and that both parties agree defendant is entitled to the credit. As such, we would encourage the circuit clerk to apply the credit without the necessity of a *mandamus* action.

¶ 71 III. CONCLUSION

¶ 72 For the foregoing reasons, we find the evidence unsatisfactory as to justify a reasonable doubt of defendant's guilt as to the offense of aggravated fleeing or attempting to elude a peace officer. We exercise our authority under Illinois Supreme Court Rule 615(b)(3) and vacate defendant's conviction on aggravated fleeing or attempting to elude a police officer (625 ILCS 5/11-204.1 (West 2016)), reduce the degree of the offense of conviction, and enter judgment against defendant on the lesser included offense of fleeing or attempting to elude a police officer, a Class A misdemeanor (*id.* § 11-204). Based on the reduced charge, we further exercise our authority under Illinois Supreme Court Rule 615(b)(4) to reduce defendant's sentence to 365 days in jail, to be served concurrently with his sentences for aggravated vehicular hijacking and unlawful possession of a weapon by a felon. We also find defendant did not receive Rule 605(b) admonitions, defendant's counsel failed to file a Rule 604(d)

certificate, and the circuit court failed to properly inquire into defendant's claims of ineffective assistance of counsel. Therefore, this case is remanded to the circuit court for new postplea proceedings consistent with Illinois Supreme Court Rules 604(d) and 605(b) and that new counsel be appointed to represent defendant in a full *Krankel* hearing on the single claim of ineffective assistance of counsel concerning the lack of witnesses called at defendant's sentencing hearing. We lack jurisdiction in this appeal to review the circuit clerk's clerical data entries made outside of the court proceedings including the $50 court finance assessment and the failure of the circuit clerk to apply the monetary *per diem* credit.

¶ 73 Affirmed in part, modified in part, reversed in part, and remanded with directions.