2015 IL App (1st) 123287-U

SECOND DIVISION
March 31, 2015

No. 1-12-3287

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 11 CR 5469
	)	
MARK LEA,	)	Honorable
	)	Vincent M. Gaughan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Simon and Justice Liu concurred in the judgment.

O R D E R

¶ 1 *Held*: Counsel was not ineffective for failing to pursue motion to quash arrest and suppress evidence; mittimus corrected; case remanded for preliminary inquiry under *Krankel*.

¶ 2 Following a bench trial, defendant Mark Lea was found guilty of aggravated battery with a firearm and sentenced to 10 years in prison. On appeal, defendant contends that the trial court failed to adequately inquire into his *pro se* post-trial claims of ineffective assistance of counsel pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984), and requests this court to remand his case

for a preliminary inquiry. He further contends that counsel was ineffective for failing to pursue his motion to quash arrest and suppress evidence of his lineup identification, and requests that his mittimus be corrected to reflect his entitlement to credit for 556 days of presentence custody.

¶ 3 The record shows that defendant was arrested in connection with the January 1, 2011, shooting of Michael Terry on the south side of Chicago. He was indentified in a lineup by the victim and his girlfriend, Erica Boone, who was a witness to the crime. Defendant was then charged with five counts of attempted first degree murder, two counts of aggravated battery with a firearm, and two counts of aggravated battery.

¶ 4 Defendant subsequently retained private counsel, who filed a motion to quash arrest and suppress evidence, and a separate motion to suppress identification. In his motion to quash arrest, defendant alleged, *inter alia*, that he was not violating any city, state, or federal statutes when he was arrested; there were no arrest warrants in existence for him; and that he was identified in a lineup after his arrest, for which there was no probable cause. In his motion to suppress identification, defendant alleged that the lineup procedure used to identify him was unduly suggestive because he was much taller than the other participants. When the motions were called for hearing, defense counsel asked the court for leave to withdraw the motion to quash arrest and suppress evidence, indicating that he had consulted with his client. The court confirmed with defendant that he wished to withdraw that motion after discussing it with his counsel, and defendant agreed that was the case. The court then considered and denied the motion to suppress identification, finding that the height discrepancy between defendant and the others in the lineup was not unduly suggestive to deny defendant his due process rights.

¶ 5 On August 2, 2012, defendant waived his right to a jury trial and requested a bench trial. Michael Terry testified that he knew defendant, who was a friend of Boone's father. On January 1, 2011, he helped defendant and two other people move scrap metal from the front of Boone's house to the side. About 5:50 p.m. that day, he was eating in a bedroom in Boone's house when he heard a loud knock on the back door. He walked to the bathroom, set his plate down in the sink, and when he exited, defendant, who had entered the house, approached him in the hallway and asked, "Where is my shit[?]" Terry responded that he did not have it. Defendant then reached into his coat pocket, pulled out a black gun, and pointed it at Terry's forehead. Terry grabbed the barrel of the gun, and as they started wrestling, defendant fired the gun, injuring Terry's left hand. Terry let go of the barrel of the gun, which was still in defendant's hand, and Terry heard four or five more shots go off. He then pushed past defendant, escaped out the back door of the house to the street, where a friend saw him, and took him to Trinity Hospital.

¶ 6 At the hospital, Terry discovered that he had been shot in his left hand, left forearm, left tricep, and the left side of his stomach. While he was hospitalized, Terry spoke with Chicago police detectives William Meador and Marc Delfavero, and he told them who had shot him. On March 11, 2011, Terry was called to the police station by Detective Delfavero, where he identified defendant in a lineup. On cross-examination, Terry denied stealing scrap metal from the railroad tracks and bringing it to the house, and said that when defendant entered the house, he stated, "[W]here's Mike, who's Mike?"

¶ 7 Boone testified that she lived on the south side of Chicago with Terry and some family members, and that she had known defendant, her father's friend, all her life. On the evening of the incident, Boone was in her bedroom with Terry, her daughter, and her godmother, when she

heard loud knocking on the back door. From her bedroom, she saw defendant enter the house, and approach Terry in the hallway between the bathroom and the bedroom. He came face to face with Terry and asked him "Where's my shit?" When Terry responded, defendant reached inside his coat pocket and pulled out a black handgun, pointed it at Terry's forehead, and repeatedly asked him, "Where's my shit?" Terry then grabbed the gun, the duo started wrestling, and at one point, the gun went off, injuring Terry's hand. Defendant, who still had the gun, fired about five or six more shots at Terry, who then pushed past defendant and ran out the back door. Defendant pointed the gun towards several of Boone's family members who were in the house before he went out the back door. Boone exited the house and saw defendant in the alley by the garbage cans shaking his head. Boone told him that "Mike didn't do that shit[,]" and defendant ran in the opposite direction from Terry. Boone left the house to search for Terry, and when she returned, police had arrived on the scene. She was interviewed by Detectives Meador and Delfavero, and she told them who shot Terry.

¶ 8 Boone further testified that defendant telephoned her several times after the shooting. He apologized and stated that he would not have shot Terry if he had not grabbed the gun, and offered Boone a television, a car, money, and an opportunity to beat him up if she and Terry did not reveal his identity to the police. On March 11, 2011, Boone was called to the police station, where she identified defendant in a lineup. Boone also testified that she was in the deferred prosecution program for a pending charge of possession of a controlled substance.

¶ 9 Chicago police detective Delfavero testified that he and his partner, Detective Meador, were assigned to the shooting. They went to Trinity hospital and interviewed Terry, then went to the crime scene, and interviewed witnesses. While at Boone's house, Detective Delfavero noticed

steel scrap metal inside a garbage can on the side of the house, and blood in the hallway. The detectives went to Christ Hospital, then headed back to the police station, and at 9:22 p.m., Detective Delfavero issued an investigative alert for defendant.

¶ 10 Detective Delfavero testified that on March 11, 2011, he was informed that defendant had been arrested and brought to the Area 2 police station. He contacted Terry and Boone to view a lineup and separated them when they arrived at the station. On cross-examination Detective Delfavero testified that Terry told him that he had helped defendant and some other individuals bring scrap metal from the railroad tracks to the house.

¶ 11 Chicago police officer Ronald Jones testified that about 8:20 p.m. on March 11, 2011, he was patrolling the 5700 block of South Racine Avenue with his partner when he saw a Chevy Caprice without operating taillights traveling southbound. Officer Jones effectuated a traffic stop of the car, approached the vehicle, and defendant, who was the only occupant, was unable to produce a driver's license. Officer Jones took him into custody and obtained his name and date of birth. In the subsequent search, Officer Jones learned about the investigative alert issued by Detective Delfavero, and transported defendant to the Area 2 police station.

¶ 12 Following argument, the trial court found defendant not guilty of attempt first-degree murder and guilty of aggravated battery with a firearm. On September 5, 2012, defense counsel requested, and was granted a continuance in order to secure letters from defendant's family members. At that time, the following exchange took place between the court and defendant:

> "THE DEFENDANT: Your Honor, can I waive my 6th Amendment right to Counsel?

THE COURT: Not right now. I have to admonish you about this. I don't know what's going on. We'll take a look at this on Monday. You'd better talk to him.

[DEFENSE COUNSEL]: I will."

¶ 13 At the sentencing hearing, defense counsel indicated that he had "taken care of" post-trial motions, however, the record contains no evidence of any. The following exchange then took place between defendant and the court:

"THE COURT: * * * I see you raised your hand. Does that mean you want to say something?

THE DEFENDANT: Yes, sir.

* * *

THE COURT: What do you want to say?

THE DEFENDANT: I feel I was not properly represented in any way.

THE COURT: Okay, thank you for that. State, proceed."

¶ 14 Following arguments in aggravation and mitigation, defendant exercised his right to allocution, and stated:

"Also, me myself, my lawyer never came and asked me where I was on that day or what happened on that day. He just saying I went out there and shot somebody. He went off the State's record. I would have done better by representing myself."

Defendant also apologized for the victim getting hurt. The court then noted that it had reviewed the presentence investigation, the factors in mitigation and aggravation, and the facts of the case, and found that a sentence of ten years in prison with three years mandatory supervised release was appropriate.

¶ 15 In this appeal from that judgment, defendant does not challenge the sufficiency of the evidence to sustain his conviction, or the length of his sentence. Rather, he presents a *Krankel* claim, contending that the trial court failed to adequately inquire into his *pro se* allegations of counsel's ineffective representation.

¶ 16 Under *Krankel,* and its progeny, where a defendant makes a *pro se* post-trial allegation of ineffective assistance of counsel, the trial court must conduct an adequate inquiry into the factual basis of the claim. *People v. Moore,* 207 Ill. 2d 68, 78-79 (2003). A trial court may conduct this preliminary inquiry by: (1) questioning trial counsel about the facts and circumstances surrounding defendant's allegations; (2) requesting more specific information from defendant; and (3) relying on its own knowledge of defense counsel's performance at trial and the insufficiency of defendant's allegations on their face. *Moore*, 207 Ill. 2d at 78–79. If, following an inquiry, the court finds possible neglect of the case, new counsel should be appointed; however, if the court determines that the claim lacks merit, or pertains solely to trial strategy, it need not appoint counsel and may deny defendant's motion. *Moore*, 207 Ill. 2d at 78. If a trial court fails to conduct an inquiry or make a ruling, the reviewing court may remand for the limited purpose of allowing the trial court to do so. *People v. Willis*, 2013 IL App (1st) 110233, ¶ 74. The adequacy of the trial court's *Krankel* inquiry into the defendant's allegations of ineffective assistance of counsel presents a question of law, and our review is *de novo. People v. Vargas*, 409 Ill. App. 3d 790, 801 (2011).

¶ 17 In this case, defendant's complaints were directed at his privately retained counsel. In *People v. Pecoraro*, 144 Ill. 2d 1, 15 (1991), the supreme court held that *Krankel* was not applicable where defendant retained his own private counsel and did not request that he be

represented by other counsel. This court recently noted the contradictory conclusions reached by the appellate court in interpreting *Pecoraro*, and found that under the circumstances presented, the trial court had failed to meet the requirements of *Krankel* and its progeny, and remanded for that purpose. *Willis*, 2013 IL App (1st) 110233 at ¶¶ 66, 73, 74. We reach the same conclusion here.

¶ 18 Prior to sentencing, defendant indicated that he wished to waive his right to counsel, and that he felt that he was not properly represented by his attorney. During sentencing, defendant stated in allocution that counsel did not ask him "where [he] was on that day or what happened on that day," he said that defendant "went out there and shot somebody," and he "went off the State's record." Defendant stated that he felt he would have fared better by representing himself. The trial court thanked the defendant, but failed to inquire into his allegations, and thus failed to determine whether the alleged error showed possible neglect of defendant's case such that appointment of additional counsel was necessary. *Willis*, 2013 IL App (1st) 110233 at ¶ 73. Where, as here, the trial court ignored and failed to address defendant's claim of ineffective assistance of counsel, we remand for the limited purpose of allowing it to do so. *Id.* at ¶¶ 72-74.

¶ 19 The State contends, nevertheless, that defendant's statements regarding counsel's inadequate representation are bald allegations without supporting facts or specific claims, and therefore are insufficient to trigger the requirement for a preliminary hearing under *Krankel*. We agree that a trial court is not required to investigate bald allegations of ineffective assistance unsupported by specific facts (*People v. Ward*, 371 Ill. App. 3d 382, 432 (2007)), and that here, defendant's attempts to alert the court to counsel's ineffectiveness prior to, and during sentencing did not contain a great deal of detail. However, we find the defendant provided sufficient

information to support a preliminary inquiry which could have resolved any lingering doubt or established the necessity of further inquiry consistent with *Krankel*. *Vargas*, 409 Ill. App. 3d at 802.

¶ 20 The State further contends that defendant is not entitled to a preliminary *Krankel* hearing because his claim is without merit. We note, however, that irrespective of the ultimate merits of defendant's claim, the trial court is not absolved from its duty to conduct an adequate preliminary investigation into the claim, and should have afforded defendant an opportunity to explain and provide support for his allegations. *Moore*, 207 Ill. 2d at 79. Because the trial court failed to conduct any inquiry into defendant's claim, we remand the case for the limited purpose of allowing it to do so. *Moore,* 207 Ill. 2d at 79; *Willis*, 2013 IL App (1st) 110233, ¶ 74.

¶ 21 Defendant next contends that counsel was ineffective for failing to pursue his motion to quash his arrest and suppress evidence of the lineup identification. To establish a claim of ineffective assistance, defendant must show that 1) counsel's representation fell below an objective standard of reasonableness; and 2) there is a reasonable probability that but for counsel's deficient performance, the outcome of the proceeding would have been different. *People v. Hall*, 217 Ill. 2d 324, 335 (2005), citing *Strickland v. Washington,* 466 U.S. 668, 687 (1984). The question of whether to file or pursue a motion to quash arrest or to suppress a statement is usually a matter of trial strategy, best left to the discretionary judgment of trial counsel, and therefore a reviewing court will not engage in hindsight analysis to determine whether counsel's decision was reasonably adequate under the circumstances. *People v. Velez,* 388 Ill. App. 3d 493, 504 (2009). Furthermore, in order to prevail on a claim of ineffective assistance for failing to file a motion to quash and suppress, defendant must show that the motion

would have been granted and that the trial outcome would have been different if the evidence had been suppressed. *People v. Rodriguez*, 312 Ill. App. 3d 920, 925 (2000).

¶ 22 Here, the record reveals that defense counsel filed both a motion to quash the arrest and suppress evidence, including the lineup identification, and a separate motion to suppress the lineup identification as unduly suggestive. On the day set for hearing, counsel requested leave to withdraw the former motion after consulting with defendant, and defendant acknowledged his agreement of that strategy to the court. Counsel then argued, albeit unsuccessfully, that the lineup was unduly suggestive based on height discrepancy alone. We observe that defendant may not request to proceed in one manner at trial, and then later contend on appeal that the course of action was in error. *People v. Harvey*, 211 Ill. 2d 368, 385 (2004). Moreover, given the evidence adduced at trial, the motion would not have been granted. *People v. Reppa*, 104 Ill. App. 3d 1123, 1126-27 (1982). The record shows that defendant was seen driving without operable taillights, and could not produce a valid driver's license, thereby providing probable cause for his arrest. *People v. Ramsey*, 77 Ill. App. 3d 294, 296 (1979). Accordingly, the fact that defense counsel subsequently withdrew the motion to quash the arrest and suppress evidence does not support defendant's contention that he provided ineffective assistance. *Reppa*, 104 Ill. App. 3d at 1126-27.

¶ 23 Defendant contends, nevertheless, that counsel should have pursued the motion to quash arrest and suppress evidence of the lineup because he had a reasonable chance of prevailing on that motion under the theory that the investigative alert issued by Detective Delfavero lacked probable cause, and the outcome of the trial would have been different if the lineup identification had been suppressed. In light of the fact there was probable cause for the defendant's arrest, we

need not reach the arguments regarding the propriety of the investigative alert. Moreover, the outcome of the trial would have been no different if the lineup identification had been suppressed. Defendant was known to the victim and the witness who was present when the offense occurred, they immediately named him as the offender, identified him in-court, testified credibly and consistently as to his involvement in the incident, and the court found their testimony implicating defendant as the shooter credible. As such, the lineup identifications were merely cumulative, and even if suppressed, they could not reasonably have made a substantial difference in the outcome of the trial. *People v. Robinson*, 299 Ill. App. 3d 426, 435 (1998). Accordingly, we find that defendant has failed to prove counsel was ineffective based on his decision not to pursue the motion to quash arrest and suppress evidence. *Rodriguez*, 312 Ill. App. 3d at 925.

¶ 24 Defendant finally contends, the State concedes, and we agree, that his mittimus should be corrected to reflect his entitlement to 556 days of pre-sentence custody credit, rather than 555 days as currently reflected therein. Pursuant to our authority under Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), we direct the clerk of the circuit court to correct his mittimus to that effect.

¶ 25 Affirmed in part, remanded with directions in part; mittimus corrected.