2017 IL App (1st) 153550-U

No. 1-15-3550

Order filed July 28, 2017

Sixth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 11 CR 5151
	)	
RENE DOMINGUEZ,	)	Honorable
	)	James Michael Obbish,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

ORDER

¶ 1 ***Held:*** After a limited remand for a proper preliminary inquiry into defendant's *pro se* posttrial allegations of ineffective assistance of trial counsel, the trial court did not err in declining to appoint new counsel to further pursue defendant's claims of ineffective assistance.

¶ 2 Defendant, Rene Dominguez, appeals from a judgment following our vacating of the trial court's denial of his *pro se* motion for a new trial. The motion alleged ineffective assistance of trial counsel. We ordered a limited remand to the circuit court for the purpose of conducting a

preliminary inquiry into his *pro se* claim of ineffective assistance pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984). See *People v. Dominguez*, 2014 IL App (1st) 122565-U, ¶ 16. On remand, the court denied defendant's *pro se* motion for a new trial, finding that his claims lacked merit and, thus, he was not entitled to the appointment of new counsel to pursue the claims under *Krankel*.

¶ 3 Defendant appeals, arguing that the trial court erred in not appointing independent counsel and conducting a full *Krankel* hearing. Defendant contends that counsel failed to inform him during plea negotiations that he would be subject to mandatory Class X sentencing if he was convicted of the two Class 2 offenses with which he was charged. Defendant argues that he was prejudiced by counsel's deficient performance because, had counsel informed him of the possible sentencing consequences, he would have accepted the State's plea offer of five years' imprisonment instead of proceeding to trial. Defendant also contends that we should correct his mittimus to reflect the 493 days he spent in presentence custody. We affirm the judgment of the circuit court and correct defendant's mittimus.

¶ 4 Following a 2012 bench trial, defendant was convicted of aggravated domestic battery (720 ILCS 5/12-3.3(a-5) (West 2010)), kidnapping (720 ILCS 5/10-1(a)(1) (West 2010)), and domestic battery (720 ILCS 5/12-3.2(a)(1) (West 2010)). Based on his criminal background, he was sentenced as a Class X offender to concurrent terms of imprisonment of 3 years for domestic battery, and 15 years each for aggravated domestic battery and kidnapping.

¶ 5 Since we have already set forth at length the evidence presented at defendant's trial in our order following defendant's direct appeal (*Dominguez*, 2014 IL App (1st) 1122565-U, ¶¶ 3-5), we summarize here only certain facts relevant to the specific issue raised in this appeal.

¶ 6 At trial, Doctor Shilpa Raju testified that, on March 11, 2011, she examined the victim, Melissa Castanon, in the emergency room of Mercy Hospital. At the hospital, Castanon reported that she was beaten with fists and an extension cord. Doctor Raju's examination revealed that Castanon had multiple bruises on both her upper and lower extremities, and a bruise around her right eye.

¶ 7 Officer John O'Connor testified that, on March 11, 2011, at about 8:30 a.m., he responded to an assignment at Nightingale School on the 5200 block of South Talman Avenue. There, O'Connor spoke with Castanon, who related that she had been a victim of a domestic battery. O'Connor stated that he saw bruises on Castanon's forehead and neck. After Castanon lifted up her sweatshirt, O'Connor saw additional bruises on her body and arms. O'Connor and another officer then relocated to Castanon's apartment where they saw defendant fleeing through the back door. After a brief foot chase, defendant was arrested.

¶ 8 Castanon, defendant's then-girlfriend testified, that from March 8 to 11, 2011, defendant confined her to her apartment. There, he committed acts of domestic violence against her, such as choking her, punching her, shoving her head into a wall, binding her wrists and ankles with duct tape, and hitting her with an extension cord. Castanon identified photographs of herself, showing bruising around her arms, legs, and right eye. Castanon eventually escaped and called the police, who escorted her back to her apartment where the officers observed defendant fleeing out the side door. Defendant was arrested about a block away from the apartment.

¶ 9 On cross-examination, Castanon stated that in July 2011 she married defendant. She acknowledged that she spoke to defendant's prior attorney, Public Defender Kevin Ochalla, and informed him that she had lied about the incident. Castanon identified a letter she sent to the trial judge on May 8, 2011. She also identified two signed affidavits dated June 16, 2011, and

November 30, 2011. The defense introduced the letter and affidavits into evidence. In the letter, Castanon expressed her desire to "drop all charges" against defendant because he was the father of her son. She also asked the trial judge that defendant receive help for his anger problems. In the June 16, 2011, affidavit, Castanon averred that "she had lied on [*sic*]" defendant because she was mad and that this "was just a misunderstanding." In the November 30, 2011, affidavit, Castanon similarly averred that defendant did not hit her with an extension cord or kidnap her and that she was "just angry." She also averred that she was sorry for any trouble that her allegations may have caused and that she decided to come forward with this information "because it is the truth."

¶ 10 On redirect examination, Castanon acknowledged that, sometime in the summer of 2011, she received a letter bearing what she recognized as defendant's handwriting. The letter essentially instructed Castanon to state that she fabricated the accusations against defendant because she was angry. At trial, Castanon read portions of the letter in open court. In the letter, defendant instructed Castanon to copy a sample affidavit as written and send copies, along with the couple's "marriage papers," to the trial judge, the State, and the Public Defender. Defendant concluded the letter by stating, "I need it done just in case they want to take it to trial[, so] we will win."

¶ 11 Based on this evidence, the trial court found defendant guilty of aggravated domestic battery, kidnapping, domestic battery, and unlawful restraint. The court merged the unlawful restraint count into the kidnapping count and sentenced defendant, as a Class X offender, to concurrent terms of 3 years' imprisonment for domestic battery and 15 years' imprisonment each for kidnapping and aggravated domestic battery.

¶ 12 Defendant filed a *pro se* motion for a new trial, arguing that his trial counsel was ineffective for: (1) failing to call two witnesses, "Guadalupe Mendoza and Bety [*sic*]" to testify that he was living with Castanon when he was arrested; (2) failing to object to Class X sentencing; (3) misleading him into trial by telling him that the State "did not have evidence on him" and not showing him the discovery; and (4) not calling his original attorney to testify that Castanon told him that defendant was innocent of sexual assault, kidnapping, and unlawful restraint. Defendant also alleged that his trial counsel failed to investigate claims that the State threatened Castanon for claiming that defendant was innocent.

¶ 13 Due to a clerical error, defendant's motion was not properly placed on the trial court's call. See *Dominguez*, 2014 IL App (1st) 1122565-U, ¶ 8. As a result, the trial court denied the motion outside of the presence of defendant and defense counsel. In doing so, the court noted that it would have addressed the motion with defendant and his trial counsel in a *Krankel* hearing, had the motion "been appropriately placed on call." *Id.*

¶ 14 On direct appeal, defendant solely argued that the trial court failed to inquire into his *pro se* posttrial claim of ineffective assistance of counsel pursuant to *Krankel*. This court vacated the denial of defendant's *pro se* motion for a new trial and remanded the case so that the trial court could conduct a preliminary inquiry into the factual basis of defendant's claims as required by *Krankel*. See *Dominguez*, 2014 IL App (1st) 1122565-U, ¶ 16.

¶ 15 Defendant and his former counsel were present at the post-remand hearing and defendant was given an opportunity to argue his claims. Defendant informed the trial court that he "was never advised of any kind of enhancement" to Class X sentencing. After the trial court explained to defendant that he was Class X mandatory because of his criminal background, and that any objection from trial counsel would have been a "futile gesture," defendant again stated "I was

never advised of any kind of enhancements until after trial. Shouldn't I be notified on [*sic*] that? I felt if I would have been notified, I would have taken the five years that were offered to me." The court informed defendant that the State was not required to notify him that he was subject to mandatory Class X sentencing and reiterated that his trial counsel could not have done anything to prevent Class X sentencing. When the trial court asked defendant about the five-year offer tendered by the State, the following exchange took place:

> "DEFENDANT: I turned it down. I figured I was facing three to seven. I felt we had a good chance going to trial, and after that when I got found guilty, then I was advised of the enhancement, and it was like a big shock, and I didn't know I was facing that because I would have took [*sic*] the time.
>
> THE COURT: Ms. Gonzalez [trial counsel], do you have any comment on whether or not he was advised that he could possibly be Class X mandatory?
>
> [TRIAL COUNSEL]: I don't recall if I advised him. I don't recall that, your honor.
>
> THE COURT: But you did inform him of the offer of five years?
>
> COUNSEL: Yes."

¶ 16 Apart from this colloquy, the details of the State's offer are not found in the record. In hearing defendant's next claim of ineffectiveness, the court noted that it was aware that the complaining witness in this case had signed an affidavit essentially recanting her previous

statements. The court then recounted the evidence presented at trial and the evidence it considered in finding defendant guilty.

¶ 17 After hearing all of defendant's other claims of ineffectiveness, and allowing counsel to respond in turn, the trial court denied defendant's *pro se* motion for a new trial, finding his claims "lacking in merit." Defendant appeals.

¶ 18 When a trial court has properly conducted a *Krankel* inquiry and reached a determination on the merits, we will not reverse unless the trial court's action was manifestly erroneous. *People v. Robinson*, 2015 IL App (1st) 130837, ¶ 72.

¶ 19 In this court, defendant does not dispute that the trial court properly conducted the preliminary *Krankel* inquiry regarding his initial *pro se* posttrial claims of ineffective assistance, nor that the court erred in finding that those claims lacked merit. Rather, he contends that "the trial court failed to recognize and consider a completely different allegation of ineffectiveness that he orally raised" on remand during the preliminary inquiry. This additional claim was based on trial counsel's failure to inform him, during plea negotiations with the State, that, if he was convicted of the two Class 2 offenses with which he was charged, he would be subject to mandatory Class X sentencing. Defendant maintains that the trial court failed to properly inquire into this claim of ineffective assistance pursuant to *Krankel* and that this court should remand the matter for further proceedings with the appointment of new counsel.

¶ 20 Pursuant to *Krankel* and its progeny, when a defendant presents a colorable *pro se* posttrial claim of ineffective assistance of counsel, the trial court is not required to automatically appoint new counsel. *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003). Rather, the trial court must first conduct an adequate preliminary inquiry into the factual basis for defendant's claims to determine whether appointment of new counsel is warranted. *Id.* If the trial court determines

that the claim lacks merit or pertains only to matters of trial strategy, the court need not appoint independent counsel to argue defendant's claim. *Id.* at 78. If, however, the examination reveals possible neglect of the case, independent counsel must be appointed, and a full evidentiary hearing of defendant's claim should be conducted. *Id.*

¶ 21 "The operative concern for the reviewing court is whether the trial court conducted an adequate inquiry into defendant's *pro se* allegations of ineffective assistance of counsel." *Id.* In conducting its inquiry, the trial court may: "(i) ask defense counsel to 'answer questions and explain the facts and circumstances' relating to the claim; (ii) briefly discuss the claim with the defendant; or (iii) evaluate the claim based on its observation of defense counsel's performance at trial 'and the insufficiency of the defendant's allegations on their face.' " *People v. Willis*, 2016 IL App (1st) 142346, ¶ 17 (quoting *Moore*, 207 Ill. 2d at 78-79). If the trial court's probe reveals that defendant's claim lacks merit because it is " 'conclusory, misleading, or legally immaterial' or do[es] '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. Tolefree*, 2011 IL App (1st) 100689, ¶ 22 (quoting *People v. Burks*, 343 Ill. App. 3d 765, 774 (2003)); see also *People v. Ford*, 368 Ill. App. 3d 271, 276 (2006).

¶ 22 Here, the record shows that the court properly inquired into defendant's pertinent claim of ineffective assistance and determined, in essence, that he did not bring forth a colorable claim of ineffectiveness. After defendant orally raised his pertinent claim of ineffective assistance, the court asked counsel whether she advised defendant that he could be Class X mandatory. Counsel responded that she could not recall. The court also asked counsel whether she informed defendant of the State's plea offer to which counsel responded that she did. Defendant stated that he rejected the State's offer because he felt that he "had a good chance going to trial." This

conclusory allegation was facially insufficient to bring to the court's attention a colorable claim of ineffectiveness, as defendant failed to allege that he rejected the State's offer as a result of counsel's performance.

¶ 23 The right to the effective assistance of counsel applies to the plea-bargaining process. *People v. Hale*, 2013 IL 113140, ¶ 15. Claims of ineffective assistance of counsel in the plea-bargain context are analyzed under the two-prong standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Id.* (citing *Hill v. Lockhart*, 474 U.S. 52, 57 (1985)). Under *Strickland*, to prove ineffective assistance of counsel, a defendant must show that: (1) trial counsel's performance was objectively deficient; and (2) defendant was prejudiced, meaning "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. The failure to establish either prong of the *Strickland* test defeats a claim of ineffectiveness. *People v. Henderson*, 2013 IL 114040, ¶ 11.

¶ 24 Counsel's performance can be objectively deficient for failing to inform a defendant that he is subject to mandatory Class X sentencing if convicted. See *Hale*, 2013 IL 113140, ¶ 16. However, even assuming that counsel's performance was deficient, defendant failed to sufficiently allege any prejudice resulting from counsel's performance and, thus, did not bring to the court's attention a colorable claim of ineffectiveness.

¶ 25 In *Missouri v. Frye*, 566 U.S. 133 (2012), the United States Supreme Court addressed issues of ineffective assistance of counsel raised in a similar context to those here. The *Frye* Court stated that defendants:

> "must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded

> effective assistance of counsel. Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law. To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." *Id.*

Our supreme court has adopted this reasoning. See *Hale*, 2013 IL 113140, ¶ 20.

¶ 26 Here, defendant cannot demonstrate *Frye*'s initial requirement to establish prejudice, *i.e.*, that he would have accepted the State's plea offer had counsel informed him that he would be subject to mandatory Class X sentencing if he was convicted of the charged Class 2 offenses. See *id.* ¶ 21. The only evidence defendant offered regarding why he chose not to plead guilty was his own self-serving testimony that, if he had known that he was facing Class X sentencing he "would have took the time" offered by the State. However, a showing of prejudice must encompass more than a defendant's own "subjective, self-serving" testimony. *Id.* ¶ 18 (quoting *Turner v. Tennessee*, 858 F.2d 1201, 1206 (6th Cir. 1988) *vacated on other grounds*, 492 U.S. 902 (1989)). Moreover, defendant also stated that he rejected the State's offer because he "felt [h]e had a good chance going to trial." As such, defendant has not demonstrated a reasonable probability that he would have accepted the State's plea offer had counsel informed him that he would be subject to mandatory Class X sentencing. Rather, by his own admission, defendant elected to go to trial because he felt he had a "good chance."

¶ 27 The record provides insight into defendant's trial tactics and supports this conclusion. Before trial, defendant obtained the assistance of Castanon, his wife and the State's primary witness, to twice state that she lied about the incident and to recant her earlier statement implicating defendant. See *id.* ¶ 27. The State's evidence showed that defendant wrote Castanon a letter instructing her what to say in her recantation affidavit. Defendant concluded the letter by stating "I need it done just in case they want to take it to trial[, so] we will win." This further supports the proposition that defendant did not reject the State's offer because of counsel's performance, but rather because he believed that Castanon's recantation undermined the State's case. See *id.*

¶ 28 Given defendant's failure to demonstrate the initial *Frye* factor, that he would have accepted the State's plea offer had he been afforded effective assistance of counsel, he cannot show prejudice and there is no need for us to address the additional factors set forth in *Frye*. *Hale*, 2013 IL 113140, ¶ 21. Accordingly, because defendant's ineffectiveness claim lacked merit, the trial court was excused from further inquiry. See *Burks*, 343 Ill. App. 3d at 777.

¶ 29 In reaching this conclusion, we are not persuaded by defendant's argument that the disparity between the Class 2 (3 to 7 years) and Class X (6 to 30) sentencing ranges supports his claim that he would have accepted the offer if he knew that he was Class X mandatory on his two Class 2 charges. We acknowledge this disparity arguably supports defendant's prejudice claim. However, we cannot say that this sole argument is sufficient to demonstrate prejudice in light of the trial record and defendant's own admission that he felt he had a good chance at trial. Moreover, the record shows that, given defendant's criminal history and other factors in aggravation, the court ultimately imposed two 15-year sentences on his two Class 2 convictions. That said, the disparity between the State's offer and the sentence actually imposed by the court

supports the contention that defendant would not be able to demonstrate *Frye*'s second requirement to establish prejudice, *i.e.*, that there is a reasonable probability that the plea would have been entered without the trial court refusing to accept it. See *People v. Brown*, 2015 IL App (1st) 122940, ¶ 71.

¶ 30 We are likewise not persuaded by defendant's reliance on *People v. Barkes*, 399 Ill. App. 3d 980, 986 (2010), *People v. Paleologos* 345 Ill. App. 3d 700, 706 (2003), and *People v. Bargouti*, 2013 IL App (1st) 112373. These cases address the prejudice prong of ineffective assistance of counsel in the context of the Post-Conviction Hearing Act, which invokes different evidentiary burdens and standards of review than the case before us. See 725 ILCS 5/122-1 *et seq.* (West 2014). Furthermore, both *Barkes* and *Paleologos* were decided before the Supreme Court's decision in *Frye* and are therefore of questionable value to the issue presented.

¶ 31 Defendant next argues, and the State correctly agrees, that his mittimus should be corrected to reflect credit for the 493 days he spent in presentence custody. Although defendant failed to raise this issue in his initial appeal, an amended mittimus may be issued at any time. *People v. Carlisle*, 2015 IL App (1st) 131144, ¶ 86.

¶ 32 Whether a mittimus should be corrected is a question of law we review *de novo*. *People v. Anderson*, 2012 IL App (1st) 103288, ¶ 35. A defendant is entitled to credit for any part of a day he spends in presentence custody, excluding the day of sentencing. 730 ILCS 5/5-4.5-100 (West 2010); *People v. Williams*, 239 Ill. 2d 503, 509 (2011). Defendant was arrested on March 11, 2011, and was sentenced on July 16, 2012. Counting the day of his arrest, and excluding his sentencing date, defendant spent 493 days in presentence custody.

¶ 33 Pursuant to Illinois Supreme Court Rule 615(b)(1) (Ill. S. Ct. R.615(b)(1) (eff. Jan. 1, 1967)), we order the clerk to correct defendant's mittimus to reflect 493 days of presentence custody credit. We affirm the judgment in all other respects.

¶ 34 Affirmed as modified.