

No. 1-08-2603

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

FIFTH DIVISION
January 7, 2011

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. 06 CR 18840
)	
DARNELL ALLEN,)	Honorable
)	Marcus R. Salone,
Defendant-Appellant.)	Judge Presiding.

JUDGE EPSTEIN delivered the judgment of the court.
Justices Fitzgerald Smith and Joseph Gordon concurred in the judgment.

O R D E R

HELD: Where defense counsel invited the prosecution's statement in rebuttal closing argument that evidence of close range firing would not occur if the weapon was more than 18 inches from the victim, the prosecutor's statement did not constitute error, but where the trial court did not conduct an adequate *Krankel* inquiry into defendant's *pro se* claims of his counsel's ineffectiveness, the case is remanded to allow the court to conduct that inquiry.

Following a bench trial, defendant Darnell Allen was convicted of first degree murder and two counts of aggravated discharge of a firearm and was sentenced to 56 years in prison. On appeal, defendant contends he was denied a fair trial because the prosecution, in closing argument, stated facts not in evidence and the trial court relied on those facts in determining his guilt. Defendant also asserts the trial court failed to fully inquire into his claims of the ineffectiveness of his trial counsel.

At trial, the State presented evidence that defendant shot Julius Birdine at about 4 a.m. on June 25, 2006, in the 7800 block of South Ada Street in Chicago. Birdine was sitting on the porch of his home with his pit bull, and defendant and Birdine spoke about the dog. Defendant left, and another man, Orlando Ray, arrived and spoke to Birdine. The men argued about dogfighting and at one point, Ray struck the dog.

Birdine's wife, Brandi, testified that defendant returned and joined in the argument between Birdine and Ray. Brandi knew both defendant and Ray. Brandi called a friend, Phillip Kizer, to come to the house to help her husband. Kizer arrived in his car and tried to persuade Birdine to leave with him. A shot was fired at Kizer's car while Birdine stood near the passenger door. Birdine was shot in the back and fell to the ground. Defendant walked to where Birdine was lying, stood over his head and fired

a shot at his head. Defendant also fired a shot at Brandi. Her mother, Annette Thomas, who lived with the Birdines, was also present and testified that defendant shot Birdine.

The parties stipulated that a medical examiner would testify Birdine had been shot in the head and the back. Neither wound displayed evidence of close-range firing.

Defendant presented a theory of self-defense. He admitted carrying a gun and shooting Birdine but testified he shot after Birdine told Kizer to shoot him and Kizer aimed a pistol at him. Defendant said he fired his revolver at the back of Kizer's car "as a warning shot." Defendant said he continued to shoot while running from the scene and that Kizer shot at him three or four times. Defendant denied approaching Birdine on the ground, standing over him and firing at his head.

Defendant was convicted of the first degree murder of Birdine and was sentenced to 50 years in prison. The trial court also imposed concurrent 6-year sentences for aggravated discharge of a firearm against Brandi and Kizer, to be served consecutive to the 50-year sentence.

On appeal, defendant first contends he was denied a fair trial because in the State's closing argument, the prosecutor presented facts not in evidence on which the trial court later relied in finding him guilty. Defendant asserts the prosecutor's reference to the close range firing of a weapon and his

approximation of the distance between the weapon and the victim was a scientific conclusion unsupported by the evidence.

Defendant acknowledges this argument can be reviewed only as plain error because counsel did not object to the prosecutor's remarks. Because, in deciding whether the plain error rule applies, we must consider the substance of defendant's argument to determine whether any error occurred, we address the merits of his claim. See *People v. McKinney*, 399 Ill. App. 3d 77, 79 (2010).

After trial, the State waived its initial closing argument. In the defense's closing, counsel emphasized the medical examiner's testimony that no evidence of close range firing was found. Defense counsel argued that if defendant stood over Birdine and shot him, as the State's witnesses testified, "chances are that the distance between the firearm itself and the person getting shot" would have resulted in stippling.

Defense counsel continued:

"That leads me to believe my client's version of the event is the truthful one. Because nowhere in his testimony or statement to the police does he say there was close range firing, where evidence of such close range firing would have been easily obtainable by or noticed by the office of the medical examiner. That didn't happen here."

Defense counsel repeated twice more in closing argument that there was no evidence of close range firing.

In rebuttal closing argument, the prosecution asserted the absence of evidence of close range firing did not necessarily negate the version of events presented by the State. The prosecutor argued:

"[Defense counsel] talks about the close range firing, stippling. *** [S]tippling can occur when the gun is within a distance [of] 16 to 18 inches, but wouldn't normally occur beyond that.

If you stand over a person [on the ground with an outstretched hand], it is well within the realm of probability that you are beyond 16 inches.

If I stand with my hands over the floor, I know I am not the same size and that kind of thing, but when you take into account a person's hands to the ground, if it is beyond 16 inches, you are not going to get close range firing, but you will get a bullet shot in the back of the head."

In issuing its ruling, the court stated:

"During the demonstration, I noted [the assistant State's Attorney] and the defendant are of similar height. Standing over a person who is on the

ground, I think still takes you beyond the 18 inches that will qualify for close range firing."

Defendant contends on appeal that the prosecution fabricated scientific evidence that a weapon must be between 16 and 18 inches from its target for stippling to occur, and the court relied on that representation in accepting the State's version of events and finding defendant guilty.

A prosecutor is allowed wide latitude during closing arguments. *People v. Willis*, 402 Ill. App. 3d 47, 57 (2010). Remarks made during closing arguments must be examined in the context of those by both the defense and the prosecution and be based upon the evidence presented or reasonable inferences drawn therefrom. *Willis*, 402 Ill. App. 3d at 57. However, an attorney may not argue facts or assumptions not based in evidence or, in effect, testify to the trier of fact. *People v. Miller*, 302 Ill. App. 3d 487, 496 (1998); *People v. Wicks*, 236 Ill. App. 3d 97, 108 (1992).

In the defense's closing, counsel emphasized the lack of evidence of close range firing and raised the issue of the distance between the weapon and the victim on the ground. Defense counsel argued that if the State's version of the shooting was to be accepted, there would be evidence of the shooting, such as blood stippling, due to "the distance between the firearm itself and the person getting shot." The defense

therefore argued the State's version of events was not credible absent any evidence of close range firing.

If defense counsel's closing argument provokes a response, the defendant cannot complain that the State's reply in rebuttal argument denied him a fair trial. *People v. Robinson*, 391 Ill. App. 3d 822, 841 (2009). Defense counsel mentioned the lack of scientific evidence of the shooting and argued that such evidence was to be expected if the victim was shot at close range. The prosecutor responded that by arguing the absence of physical evidence did not necessarily contradict the State's version of the shooting, in which defendant stood above the victim lying on the ground, because stippling would not occur if the weapon was 16 to 18 inches from the victim. Given the defense's argument, the State was free to argue the absence of stippling did not necessarily cast doubt on its version of the shooting. Moreover, the prosecutor's statement that stippling occurs when a gun is fired between 16 and 18 inches from the victim's body appears to be correct. See, e.g., *People v. Walker*, 392 Ill. App. 3d 277, 282-83 (2009) (forensic pathologist testified stippling is created when weapon is fired between 18 and 24 inches away); *People v. Hernandez*, 332 Ill. App. 3d 343, 345 (2002) (stippling "usually occurs when the weapon is fired from 18 inches away or closer").

We do not find the prosecutor's statements in this case analogous to the remarks found prejudicial in *People v. Linscott*, 142 Ill. 2d 22 (1991), and *People v. Giangrande*, 101 Ill. App. 3d 397 (1981), on which defendant relies. In those cases, the prosecutor argued that hairs found at the crime scene belonged to the defendant; however, experts in those cases testified only that the hairs were "consistent with" the defendant's hair (*Linscott*, 142 Ill. 2d at 29-30) or "could have originated" from the defendant (*Giangrande*, 101 Ill. App. 3d at 402-03). Here, in contrast, the prosecutor does not tie defendant to the offense but, rather, correctly states it was "well within the realm of probability" that no sign of close range firing would result from its version of the shooting, thus countering defense counsel's argument that the lack of such evidence fully negated the State's account.

Defendant alternatively argues that should we not find plain error, his counsel was ineffective in failing to object to the State's closing argument. Since the actions did not constitute plain error, the failure of defense counsel to object to the argument did not prejudice defendant under *Strickland v. Washington*, 466 U.S. 668 (1984). See *People v. Easley*, 192 Ill. 2d 307, 332 (2000).

Defendant next contends on appeal that the trial court failed to conduct an adequate investigation into defense

counsel's performance pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984). When a defendant has made a post-trial claim of the ineffectiveness of his trial counsel, *Krankel* allows a hearing at which newly appointed counsel appears for the defendant. *Krankel*, 102 Ill. 2d at 189.

Here, the record establishes that after trial, the court heard argument on post-trial motions. The court denied defense counsel's motion for a new trial. Defendant also prepared a *pro se* motion for a new trial, which was filed the day before the hearing and which defendant also apparently mailed to the trial judge's chambers. Defendant alleged, among other points, his trial counsel would not visit him or let him read the indictment in his case until counsel was paid and, furthermore, counsel asked certain witnesses to remain outside the courtroom and did not call them to testify.

After denying defense counsel's post-trial motion, the court proceeded to sentencing. After counsel argued in mitigation of defendant's sentence, the court asked defendant if he would like to speak. Defendant noted that his counsel's motion for a new trial had been denied and asked the court if it had received his own *pro se* motion. The judge told defendant that he did not read *ex parte* communications. The court asked defense counsel if he adopted defendant's motion. Counsel said he had reviewed defendant's motion and would stand on his own motion (which had

already been denied). Counsel stated that if defendant wished to present a *pro se* motion, it would be proper for him to withdraw from representing defendant.

The court then reviewed defendant's *pro se* motion and addressed defendant's claim of counsel's treatment of witnesses. The following exchange occurred between the court and defendant:

THE COURT: "Now, in this motion you bring up a number of issues, some of which go directly to [defense counsel]. If you want to pursue this motion, sir, I will excuse [defense counsel] now and you may argue this motion, if you care to do so."

DEFENDANT: I have written by counsel *pro se* [sic]. Your Honor, I'm alone here.

THE COURT: I can't hear you.

DEFENDANT: [Defense counsel] has his motion. Withdraw that motion.

THE COURT: You want to withdraw your motion, is that what you are saying?

DEFENDANT: Yes."

On appeal, defendant does not dispute that he withdrew his motion; rather, he contends the trial court did not adequately inquire into his claims of the ineffectiveness of trial counsel. Defendant argues the court gave him an improper ultimatum,

requiring him to choose between being represented by defense counsel or presenting his claims of ineffectiveness himself.

New counsel for a defendant is not automatically required in every case where a defendant has presented a *pro se* post-trial motion of ineffectiveness of trial counsel. *People v. Moore*, 207 Ill. 2d 68, 77 (2003); see also *People v. Taylor*, 237 Ill. 2d 68, 75 (2010). Rather, when such a motion is made, the trial court should first examine the factual basis of the defendant's claim. *Moore*, 207 Ill. 2d at 77-78; see also *People v. Banks*, 237 Ill. 2d 154, 213 (2010).

The record establishes that when presented with defendant's motion, the court stated it would excuse defense counsel if defendant wanted to pursue his ineffectiveness claims. At that point, the court was required to consider the factual basis of defendant's claims and determine whether they warranted the appointment of new counsel for defendant. See *Moore*, 207 Ill. 2d at 77-78. If the trial court determined that the claims lacked merit or pertained only to matters of trial strategy, the court could deny defendant's motion without appointing new counsel. See *Moore*, 207 Ill. 2d at 78.

"The operative concern for the reviewing court is whether the trial court conducted an adequate inquiry into the defendant's *pro se* allegations of ineffective assistance of counsel." *Moore*, 207 Ill. 2d at 78. Although counsel is not

expected to argue claims of his or her own ineffectiveness, in order for the trial court to inquire into a defendant's claims, "some interchange between the trial court and trial counsel regarding the facts and circumstances surrounding the alleged ineffective representation is permissible and usually necessary in assessing what further action, if any, is warranted on a defendant's claim." *Moore*, 207 Ill. 2d at 78.

The State argues defendant withdrew his claim before it could be considered by the court. However, the colloquy we have quoted earlier indicates the court told defendant that his counsel would be excused if defendant wished to pursue his motion.¹ A *pro se* defendant is not required to do anything more than bring his or her claim to the trial court's attention (*Moore*, 207 Ill. 2d at 79), and at that point, counsel can still represent a defendant. See *People v. Young*, 382 Ill. App. 3d 205, 207 (2008) (an adequate *Krankel* inquiry can be conducted in "one or more" of three ways: questioning trial counsel,

¹ Although the State has not raised this issue, we note that defendant in this case was represented by private counsel, not an appointed public defender. Our supreme court has refused to apply *Krankel* where the defendant was represented by private counsel. See *People v. Pecoraro*, 144 Ill. 2d 1, 15 (1991) (trial judge cannot interfere with a defendant's selection of counsel). But see *People v. Taylor*, 237 Ill. 2d 68, 78 (2010) (Burke, J., specially concurring) (noting appellate court split on the interpretation of *Pecoraro* and the need for clarification of its holding).

questioning the defendant, or relying on the court's own knowledge of counsel's performance in the trial).

We also reject the State's contention that the trial court did not need to examine defendant's claims further because the claims were conclusory and not specific. In the present case, the trial court never reached the point of inquiring into all of defendant's *pro se* claims. The court examined defendant's claim regarding witnesses and stated it was counsel's trial strategy. The court did not inquire into defendant's claim that his counsel did not visit him and share information with him because counsel had not been paid.

In sum, the trial court erred in not examining the factual basis of all of defendant's *pro se* allegations of ineffectiveness of his trial counsel and not rendering an express determination of the validity of those claims. This case is remanded for the limited purpose of allowing the court to inquire into the factual basis of defendant's claims. If the court determines that defendant's claims of ineffectiveness pertain to trial strategy or are otherwise meritless, the court may deny defendant's post-trial motion, and defendant's convictions and sentence would remain standing. If defendant's allegations demonstrate possible neglect of his case, new counsel should be appointed to represent defendant at an evidentiary hearing on his ineffectiveness claims. See *Moore*, 207 Ill. 2d at 78.

1-08-2603

Remanded with directions.