

No. 1-09-2143

**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).

SECOND DIVISION  
May 24, 2011

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the         |
|                                      | ) | Circuit Court of        |
| Plaintiff-Appellee,                  | ) | Cook County.            |
|                                      | ) |                         |
| v.                                   | ) | No. 08 MC6 012520       |
|                                      | ) |                         |
| JESSICA JORDAN,                      | ) | Honorable               |
|                                      | ) | Daniel Patrick Brennan, |
| Defendant-Appellant.                 | ) | Judge Presiding.        |

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JUSTICE KARNEZIS delivered the judgment of the court.  
Presiding Justice Cunningham and Justice Harris concurred in the judgment.

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**O R D E R**

*HELD:* Trial attorney's statement in argument on motion for a new trial, that defendant's mother, an eyewitness, should have been called to testify did not establish a *per se* conflict of interest with defendant. But this statement by counsel was sufficient to require a preliminary *Krankel* hearing.

Following a bench trial, defendant Jessica Jordan was found guilty of resisting a peace officer. She was sentenced to six

months of conditional discharge and ordered to perform 100 hours of community service. Defendant contends on appeal that her trial attorney revealed a *per se* conflict of interest by arguing at the hearing on the motion for new trial that defendant's mother, an eyewitness to these events, should have been called to testify. Because this represented a conflict of interest between defense counsel and defendant, defendant contends that she is entitled to a remand for the appointment of new counsel to argue her motion for a new trial. Alternatively, defendant contends that the cause must be remanded for a *Krankel* hearing where the court can further investigate whether trial counsel was ineffective.

At trial, Posen police officer Kevin Hammond testified that on the evening of August 29, 2008, he went to the home of defendant's mother to investigate a complaint that defendant had caused a disturbance at a local gas station and had threatened to beat up the gas station clerk. The first time Hammond went to the house, defendant's mother told him defendant was not home but gave him defendant's cell phone number, which turned out to be disconnected. Several hours later Hammond returned to the home where, through the front window, he could see defendant sitting in the front room. Defendant jumped up and ran to the back of the house. Hammond spoke to defendant's mother, who first denied that defendant was there. When Hammond told her he had seen

defendant there, defendant's mother went to the back of the house and returned with defendant. The two women were yelling at each other and when the argument became physical, Hammond called for backup officers. Defendant's mother pulled defendant away from the front door and Hammond entered the house in an attempt to handcuff and arrest defendant. Defendant refused to cooperate and kept pulling away, trying to go to the back of the house. Hammond was finally able to place defendant in handcuffs with the aid of three other police officers. None of those officers testified at trial, nor did defendant's mother.

Defendant denied that she had threatened the gas station clerk and said she "probably" did not swear at her. She did call the clerk a "loser" and told her to mind her own business. The clerk told defendant to "shut up" and to mind her own business. After another clerk rang up defendant's items, defendant and her sister left the store.

Later that evening Officer Hammond came to the home of defendant's mother, where defendant was visiting. Defendant's mother told defendant, who was in the bathroom, that the police were there. She was upset that the police were there because of defendant and told defendant she had her own home and she should send the police there. Defendant testified that they "exchanged words" about this. Defendant testified that she only exchanged a few words with Hammond and denied that he ever tried to arrest or

handcuff her. She had told the officers that she was four and one-half months pregnant, but one of the officers tackled her to the couch and attempted to handcuff her. Defendant asked why the officers were doing this, but they said they did not know and she would find out at the police station. She denied resisting the officers, although she said that she and her mother were both screaming.

Defense counsel filed a written post-trial motion which did not mention defendant's mother. In argument on the motion she stated that defendant's mother was present during the occurrence but was not called as a witness. She then requested that defendant receive a new trial so that defendant's mother could testify as to what happened that day. Counsel made no offer of proof as to what that testimony would be, nor did counsel explain why she had not called defendant's mother as a witness in the original trial. This contention appears to have been made to somehow parallel counsel's argument that the prosecution should have called the other police witnesses who were at the scene of defendant's arrest. But that is speculation on our part, just as defendant is speculating on appeal that defense counsel was arguing her own ineffectiveness. The defense then terms this a *per se* conflict of interest which requires remand for the appointment of independent counsel to represent defendant on the motion for a new trial. We note that our supreme court has

listed only three types of *per se* conflict of interest between a defendant and his counsel: counsel's prior or current association with the victim, the prosecution, or the prosecution's assistant; counsel's current representation of a prosecution witness; and counsel's prior personal involvement as a former prosecutor in prosecuting the defendant. *People v. Hernandez*, 231 Ill. 2d 134, 143-144 (2008). Thus any other claim of defense counsel's ineffectiveness by defendant or defense counsel does not create a *per se* conflict of interest requiring reversal and remand for the automatic appointment of independent counsel to represent defendant on the claim.

In our view, this potential conflict of interest is best resolved by using the methodology devised in *People v. Krankel*, 102 Ill. 2d 181 (1984), *People v. Nitz*, 143 Ill. 2d 82 (1991), and *People v. Moore*, 207 Ill. 2d 68 (2003). In *Krankel*, defendant filed a *pro se* posttrial challenge to his trial attorney's competence because counsel failed to raise an alibi defense or even contact an alibi witness. The trial court failed to investigate this claim and the *Krankel* court remanded for the appointment of new counsel to represent defendant at a hearing on this claim. *Krankel*, 102 Ill. 2d at 188. In *Nitz*, the court held that it agreed with the growing case law which held that new counsel did not automatically have to be appointed. The trial court must first conduct a preliminary examination. If the court

concluded that there was no merit to defendant's claims or they were a matter of trial strategy, no new counsel should be appointed. But if the allegations indicated that counsel had neglected defendant's case, then new counsel should be appointed. *Nitz*, 143 Ill. 2d at 134-135. The *Nitz* court found that in its case new counsel should have been appointed, but the error was harmless beyond a reasonable doubt. *Nitz*, 143 Ill. 2d at 135. By contrast, in *Moore*, the reviewing court held that it could not determine whether the trial court's failure to inquire further into the defendant's claim of ineffective counsel was harmless beyond a reasonable doubt because the trial court had failed to develop any record on this issue. *Moore*, 207 Ill. 2d at 80-81. Therefore the cause was remanded for appointment of independent counsel to represent defendant on his motion for a new trial. *Moore*, 207 Ill. 2d at 81-82.

We are faced here with an ambiguous record as to whether defendant's mother would have been a favorable witness for defendant. The evidence established that defendant's mother was the sole eyewitness to the alleged acts of resisting arrest, other than defendant and a number of police officers. Only one police officer testified for the prosecution and only defendant testified on her own behalf. When defense counsel then alleged in argument on her motion for a new trial that defendant's mother should have been called to testify, this could be construed as an

admission by counsel that she had been ineffective for failing to call this witness. Defendant's mother initially lied to the police by saying defendant was not home. She also tried to pull defendant away from the officers. On the other hand there was evidence in the record of hostility between defendant and her mother at the time of the incident. Defendant's mother was angry that defendant's actions had caused the police to come to her home. She and defendant argued about this and according to Officer Hammond that argument became physical.

Defense counsel never made an offer of proof as to what defendant's mother's testimony would have been. More critical for our purposes is that the trial court never made such an inquiry. The only question the court asked was designed to clarify for the record that the court had never prevented defense counsel from calling this witness. Without further information we cannot determine whether defense counsel was ineffective for not calling this witness, and the cases we have cited establish that it was the trial court's responsibility to make such an inquiry. This is particularly true when each party's case came down to the testimony of a single eyewitness, Officer Hammond for the prosecution and defendant for the defense.

Under these facts, we find it necessary to remand the cause so the trial court can conduct a preliminary investigation into the issue of whether the failure to call defendant's mother as a

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witness constituted ineffective assistance of counsel. The court may question defendant and trial counsel, determine that the allegations are insufficient on their face, or base its decision on how defense counsel conducted the case. If the court determines that there is merit to the motion for a new trial based on the information it develops, it shall appoint new independent counsel to represent defendant on the motion and hold a full evidentiary hearing. If the court determines that no neglect of defendant's case has occurred, then defendant's conviction and sentence shall stand. *Moore*, 207 Ill. 2d at 78-79.

Accordingly, this case is remanded to the circuit court for further proceedings in accord with our directions.

Remanded with directions.