

THIRD DIVISION
September 30, 2011

No. 1-10-0709

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	APPEAL FROM THE
Plaintiff-Appellee,)	CIRCUIT COURT OF
)	COOK COUNTY
)	
v.)	No. 07 CR 17339
)	
)	HONORABLE
DWIGHT THOMAS,)	THOMAS JOSEPH
Defendant-Appellant.)	HENNELLY,
)	JUDGE PRESIDING.

PRESIDING JUSTICE STEELE delivered the judgment of the court.
Justices Neville and Salone concurred in the judgment.

ORDER

HELD: The circuit court erred by not properly informing the defendant that he could file a *pro se* claim of ineffective assistance of trial counsel without the withdrawal of appointed counsel for consideration in the manner contemplated by *People v. Krankel*, 102 Ill. 2d 181 (1984), and its progeny. The case is remanded for the limited purpose of allowing defendant to file a posttrial motion alleging the ineffective assistance of counsel and for a hearing on the motion, with appointed counsel other than his originally appointed counsel if the allegations of incompetence require such counsel.

¶ 1 Defendant Dwight Thomas was charged (along with Kenyata Brown¹) with first degree murder, attempted first degree murder, and aggravated battery with a firearm in connection with the shooting of Frank Lucas and Gloria Patterson. Following a jury trial in the circuit court of Cook County, Thomas was found guilty of all three charges. Thomas was sentenced by the trial court to consecutive terms of 54 and 27 years in prison on the murder and attempted murder charges, respectively, with a concurrent term of 15 years for the aggravated battery with a firearm.

¶ 2 Thomas now appeals, contending: (1) his right to have the jury clearly instructed was violated because the attempted murder instructions did not expressly refer to Patterson; (2) the trial court misinformed him about his options for lodging a *pro se* posttrial claim of ineffective assistance of trial counsel; (3) he received ineffective assistance of trial counsel, with regard to both the jury instructions and a failure to object when the State introduced a prior consistent statement from a police witness; and (4) the trial court failed to properly ascertain that the jury pool understood and accepted certain fundamental principles of law. We conclude the circuit court erred by not properly informing Thomas that he could file a *pro se* claim of ineffective assistance of trial counsel without the withdrawal of appointed counsel for consideration in the manner contemplated by case law and remand the case for further proceedings consistent with this order.

¹ Brown was tried separately and is not a party to this appeal.

¶ 3

BACKGROUND

¶ 4 The record discloses the following facts relevant to the disposition of this appeal.

Thomas was charged, tried and found guilty of first degree murder, attempted first degree murder, and aggravated battery with a firearm. Thomas's counsel filed a posttrial motion for a new trial. While the trial court considered a date for a hearing on the posttrial motion, Thomas told the trial judge he had *pro se* motions he wanted to file. The trial judge responded that as long as Thomas had counsel, counsel would file any motions. Thomas asked, "But what if... if I want to file motions like ineffective assistance of counsel?" The trial judge replied:

"You want to do that then you're on your own or you can hire another lawyer and as [*sic*] me to allow that new attorney to file the appearance and I'll have [appointed counsel] withdraw from the case if that's what you want to do but we can't do both.

Okay. We can't have it both ways. So either she represents you, you represent yourself or we get a new lawyer to represent you. Those are the three options you have."

Thomas stated he had no way of obtaining a new lawyer. The trial judge asked Thomas whether he wanted to speak with counsel and decide how to proceed. After conferring with counsel, Thomas told the trial judge counsel would represent him regarding the posttrial motion.

¶ 5 Following a hearing, the trial court denied Thomas's posttrial motion and sentenced Thomas to consecutive terms of 54 and 27 years in prison on the murder and attempted murder charges, respectively, with a concurrent term of 15 years for the aggravated battery with a firearm. Counsel filed a motion to reconsider the sentence, which the trial court also denied. Thomas then filed a timely notice of appeal to this court.

¶ 6

DISCUSSION

¶ 7 Thomas raises several issues for review. One claim is that the circuit court failed to conduct any inquiry into his *pro se* allegations of ineffective assistance of trial counsel, as required by *People v. Krankel*, 102 Ill. 2d 181 (1984). Thomas requests that the matter be remanded to the circuit court for an inquiry into his ineffective assistance claims. We address only this issue, which is meritorious and dispositive. See, e.g., *People v. Moore*, 207 Ill. 2d 68, 75 (2003).

¶ 8 In *Krankel*, the defendant's trial counsel did not contact an alibi witness or present an affirmative alibi defense at trial. The defendant raised a *pro se* posttrial challenge to his attorney's competence at trial. Our supreme court held that the trial court should have appointed alternative counsel to represent the defendant at the posttrial hearing regarding his claim of ineffective assistance of trial counsel. The court remanded the matter for a new hearing on the defendant's motion with newly appointed counsel. *Krankel*, 102 Ill. 2d at 187-89.

¶ 9 In *Moore*, our supreme court further explained the trial court is not required to automatically appoint new counsel in every such case; rather, the trial court should evaluate the factual basis of the defendant's claim. *Moore*, 207 Ill. 2d at 77-78. The 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. *Id.* at 78. This inquiry can be accomplished in several ways. *Id.* at 78-79. If the trial court determines that the claim is meritless or pertains only to matters of trial strategy, then the court need not appoint new counsel and may deny the

pro se motion. *Id.* at 78. However, if the allegations show possible neglect of the case, new counsel should be appointed. *Id.*

¶ 10 Here, the State maintains the *Krankel* claim must be rejected because Thomas ultimately chose not to file a *pro se* motion alleging ineffective assistance of counsel for the trial court to evaluate. Thomas responds that the problem in this case is the trial judge misinformed him about his options for pursuing a posttrial claim of ineffective assistance of trial counsel. We agree with Thomas.

¶ 11 When a defendant is represented by counsel, he generally has no authority to file *pro se* motions and the court should not consider them. *People v. Rucker*, 346 Ill. App. 3d 873, 882 (2003). An accused has the right either to have counsel represent him or to represent himself; a defendant has no right to both self-representation and the assistance of counsel. *Id.* Generally, a defendant is not entitled to "hybrid representation, whereby he would receive the services of counsel and still be permitted to file *pro se* motions." *Id.* (quoting *People v. Handy*, 278 Ill. App. 3d 829, 836 (1996)). However, represented defendants may raise *pro se* claims of ineffective assistance of counsel if they include supporting facts and specific claims. *Rucker*, 346 Ill. App. 3d at 883.

¶ 12 In this case, the trial judge informed Thomas of the general rule against hybrid representation, but he failed to inform Thomas of the exception at the heart of *Krankel* and its progeny. This situation is unusual, but this court's opinion in *People v. Bell*, 197 Ill. App. 3d 613 (1990), is instructive. *Bell* involved what this court deemed a classic "Catch-22" situation:

"Defendant thought he could not file his *pro se* motion until his counsel moved to withdraw, which he believed counsel intended to do. Defendant's counsel, on the other hand, thought that he could not move to withdraw until defendant filed his *pro se* motion and also thought he was obliged to file a written post-trial motion so long as he remained counsel of record. The trial court complicated matters by denying defendant's counsel's post-trial motion and then ruling that once the motion was denied defendant could not file nor could it consider another post-trial motion.

It is clear, under these circumstances, that defendant was improperly denied an opportunity to present his *pro se* motion in the first instance. Because defendant was prohibited from even presenting a motion, he was denied an opportunity to raise specific allegations of ineffective assistance of counsel and to seek substitute counsel to assist him with the motion. Neither the trial court, nor this court, can give proper consideration to defendant's claim absent the opportunity for defendant fully to present his claim." *Bell*, 197 Ill. App. 3d at 618.

The *Bell* court remanded the case for the limited purpose of allowing Bell to file a posttrial motion alleging the ineffective assistance of counsel and for a hearing on the motion, with appointed counsel other than his originally appointed counsel if the allegations of incompetence are such to require counsel, in accordance with *Krankel* and its progeny. *Id.* at 618-19.

¶ 13 In the record before us, Thomas told the trial judge he had *pro se* motions he wanted to file. When the trial judge responded that counsel would file any motions, Thomas specifically asked about filing a motion alleging ineffective assistance of counsel. As in *Bell*, Thomas was

1-10-0709

wrongly informed that he could not file a *pro se* motion alleging ineffective assistance of trial counsel unless appointed counsel withdrew. Indeed, this case is arguably worse than the facts in *Bell* because the information came from the trial judge, not defense counsel. The result is the same as in *Bell*: Thomas was improperly denied an opportunity to present his *pro se* motion in the manner contemplated by *Krankel* and its progeny.

¶ 14

CONCLUSION

¶ 15 In sum, the circuit court erred by not properly informing Thomas that he could file a *pro se* claim of ineffective assistance of trial counsel without the withdrawal of appointed counsel for consideration in the manner contemplated by *Krankel* and its progeny. Accordingly, we remand this cause for the limited purpose of allowing defendant to file a posttrial motion alleging the ineffective assistance of counsel and for a hearing on the motion, with appointed counsel other than his originally appointed counsel if the allegations of incompetence require different counsel. If, after the hearing, the trial judge finds Thomas received ineffective assistance of counsel, the judge shall order a new trial. However, if the judge determines Thomas received effective assistance of counsel, the judge shall deny a new trial and uphold Thomas's conviction and sentence. If the circuit court denies Thomas a new trial, defendant can still appeal to this court based on his assertion of ineffective assistance of counsel, as well as the other issues Thomas raised in this appeal, but which were unnecessary for this court to decide at this time.

¶ 16 Remanded with directions.