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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Lake County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 08—CF—2459
)	
TIMOTHY M. GERSCH,)	Honorable
)	Victoria A. Rossetti,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Zenoff and Hudson concurred in the judgment.

ORDER

Held: (1) The trial court adequately inquired into defendant's *pro se* claims of ineffective assistance, engaging in a colloquy with defendant and counsel, and properly found, based on that inquiry and its own knowledge of the case, that the claims lacked merit; (2) the trial court erred in imposing a public defender reimbursement fee when the court had not provided the required notice and hearing on defendant's ability to pay; we vacated the fee and remanded for the notice and hearing, despite the expiration of the 90-day period in which such hearing could be held.

Defendant, Timothy M. Gersch, appeals his conviction of aggravated criminal sexual abuse (720 ILCS 5/12—16(d) (West 2006)). He contends that the trial court failed to conduct a proper inquiry into his claims of ineffective assistance of counsel and that the court improperly imposed a

public defender fee without a hearing. We affirm the conviction, but remand for a hearing on defendant's ability to pay the public defender fee.

On July 16, 2008, defendant was indicted for the offense of Class X predatory criminal sexual assault of a child (720 ILCS 5/12—14.1(a)(1) (West 2006)) in connection with a consensual sexual relationship that he had with a girl who was 10 when the relationship began and defendant was 15. At the time of the last sexual contact, defendant was 18. The relationship resulted in the birth of a child. Defendant retained attorney Robert Ritacca to represent him.

On November 10, 2008, Ritacca informed the trial court that the parties had reached a plea agreement, under which defendant would plead guilty and the State would dismiss the original charge and enter a charge of Class 2 aggravated criminal sexual abuse. The agreement did not include any sentencing recommendations. The court asked defendant if he had reviewed the agreement with Ritacca, and defendant replied that he had. However, when the court asked if he needed more time to discuss it, defendant said that he did. Ritacca told the court that defendant was unsure about the effect of the plea on his relationships with the victim and the child and that Ritacca and defendant needed to discuss that further. The matter was then continued so that Ritacca could meet with defendant further at the jail. At a hearing on November 21, 2008, Ritacca informed the court that he had explained the matter to defendant, including that the sentence would be determined by the court. Because there was still some uncertainty about sex offender registration, the matter was continued for Ritacca to also cover that issue with defendant.

On November 24, 2008, the parties informed the trial court that they were requesting a Rule 402 conference. Ill. S. Ct. R.402(d)(2) (eff. July 1, 1997). The court explained the nature of such a conference to defendant, who stated that he had no objection. On December 3, 2008, the trial court

conducted another hearing, and Ritacca informed the court that he had explained to defendant what had happened at the conference. The court also stated the matters that were discussed, including the possibility of probation with periodic imprisonment. However, the court noted that, during any probationary period, defendant would not be allowed contact with the victim and that defendant would have to register as a sex offender. The potential for supervised visitation with the child was also discussed. Ritacca then told the court that he believed that defendant did not want to enter the plea agreement. Ritacca also stated that he had “worked a lot” on the case, but that defendant did not want to take his advice. Ritacca indicated that he might not continue to be retained for the next hearing.

On December 16, 2008, defendant accepted the plea agreement. In response to questions from the trial court, defendant stated that he had gone over the agreement, the facts of the case, and the legal issues with Ritacca. He said that he had no other issues or questions to discuss with Ritacca and that he understood that there was no agreement as to sentencing. The court informed defendant that he could be sentenced to probation or periodic imprisonment but that he also could be sentenced to three to seven years’ incarceration followed by mandatory supervised release of three years to life and that he would be required to register as a sex offender. Defendant stated that he had gone over that with Ritacca and that he understood. When asked if anyone had threatened or forced him to plead guilty, defendant replied, “no.” A factual basis was given, and the court accepted defendant’s guilty plea.

After the plea, a sentencing hearing was held, and neither party offered evidence other than the contents of a pre-plea presentence investigation report. When asked if he wanted to say anything, defendant replied, “no.” The presentence investigator found that defendant had attempted to avoid

responsibility and had indicated that he did not see a problem with continuing to have a relationship with the victim. The investigator also stated that defendant did not believe treatment was necessary and had stated that he did not tend to do well on probation. Defendant told the investigator that he preferred prison to work release because he would not have to conform to rules such as being on time and being subjected to drug testing. The investigator found that defendant was not a good candidate for community treatment and that he presented a high risk to reoffend. Based on the report, the State requested five years' incarceration, stating that it was concerned about keeping defendant away from the victim until she was an adult and that incarceration was the only way to do that. Ritacca requested that the court consider probation, stating that the victim's family was amenable to that. Ritacca suggested that a guardian be appointed for the victim and that supervised visitation with the child might be possible. The court stated that it could not order probation when there was no evidence that defendant was amenable to treatment, but also said that, by pleading guilty, he had taken some responsibility for his actions. The court continued the matter so that defendant could be reevaluated, stating, "without that recommendation, I cannot give probation."

In January 2009, an updated evaluation was done, and the investigator found that there was no clear change in defendant's level of accountability, his openness to treatment, or his risk of reoffending. On February 18, 2009, the parties met again, and Ritacca stated that he would probably file a motion to withdraw the plea. The court allowed time for Ritacca to file such a motion.

On February 23, 2009, defendant moved to withdraw the plea. He alleged that he entered the plea based on the belief that he would be sentenced to probation. Between that date and early April 2009, the record indicates, Ritacca attempted to have defendant reevaluated based on the change in the class of the offense.

On April 8, 2009, defendant told the trial court that he wanted to discharge Ritacca and be appointed a public defender. The court continued the matter and told defendant to put any concerns in writing. Defendant then wrote a letter to the court, stating that Ritacca did not seriously consider his requests or opinions, Ritacca communicated with him only twice, and Ritacca failed to explain the proceedings or file motions that defendant requested. Defendant also expressed disagreement with the investigator for the presentence report. Defendant said that Ritacca was ineffective and asked the court to order Ritacca to return part of the retainer that was paid.

At an April 22, 2009, hearing on the matter, the trial court asked defendant to elaborate on his allegations. Defendant stated that Ritacca saw him in jail only twice and told him to take the plea offer because he had no chance of winning at trial and could be facing eight years in prison. The court then asked Ritacca to respond. Ritacca detailed various investigative work that he had performed on the case. He stated that he visited defendant five to seven times and said that visiting defendant in jail was difficult because defendant “was in max” at the time. Ritacca said that defendant disagreed with him on actions that Ritacca felt were in defendant’s best interest, in particular that defendant be amenable to treatment and willing to stay away from the victim. The court found that Ritacca did “everything an effective, experienced attorney should do in a case like this.” The court allowed defendant to discharge Ritacca and it appointed a public defender, Rhonda Bruno.

Defendant later wrote an additional letter restating his concerns about Ritacca. The letter included various allegations, including that Ritacca rejected requests to file motions, did not provide defendant with copies of motions, failed to update defendant on the case, and failed to visit him in jail. Defendant also alleged that Ritacca “railroaded” him into accepting the plea and that defendant

said at the plea hearing that he understood everything only because he thought that, if he did so, he could go home on probation that day. Defendant attached a copy of his earlier letter to the court about Ritacca.

Defendant also filed a motion for appointment of new counsel, stating that Bruno was ineffective. On June 1, 2009, the trial court conducted a hearing on the motion. Defendant expressed concern that Bruno was formerly a prosecutor. He also alleged that Bruno refused to communicate with him and that she would not file a motion to withdraw his guilty plea. Bruno discussed her previous employment as a prosecutor with the court and said that, based on her review of the transcript of the guilty plea hearing, she did not believe that a motion to withdraw the plea would be effective. She said that she explained to defendant that she had an ethical duty not to file frivolous motions. The court found that Bruno acted appropriately and denied the motion for a new attorney.

The court next addressed the second letter. Bruno stated that defendant wished to withdraw the plea, and the court considered the letter as a *pro se* motion to withdraw the plea. Defendant told the court that Ritacca had told him that he would get probation if he pleaded guilty and would get no less than 10 or 12 years' incarceration if he did not plead guilty.

Bruno stated that she was not able to address previous discussions between defendant and Ritacca, though "there were certainly some issues with Mr. Ritacca." But Bruno also stated that she discussed with defendant that his guilty plea to the lower class charge provided his only chance at obtaining probation, that there would be a probable finding of guilt at trial, and that trial would not be in his best interests. Defendant, however, insisted that he wanted to withdraw his plea, even

though he knew that he would then face a mandatory prison term under the original Class X felony charge.

The trial court determined that defendant knowingly entered his plea and that it was voluntary. The court then sentenced defendant to four years' incarceration and denied a motion to reconsider the sentence. A \$750 public defender fee was also imposed, without notice and a hearing on defendant's ability to pay the fee. Defendant timely appeals.

Defendant first contends that the trial court failed to conduct an adequate inquiry into his claims of ineffective assistance of counsel as required by *People v. Krankel*, 102 Ill. 2d 181, 189 (1984). The State counters that the trial court's inquiry was adequate and that the court properly determined that counsel was effective so that new counsel was not required to be appointed to further investigate the matter.

“It is well established that when a defendant raises posttrial claims of ineffective assistance of counsel, the trial court is not obligated to appoint new counsel to represent defendant on those claims. The Illinois Supreme Court's decision in *Krankel* did not establish a *per se* rule that all *pro se* motions for a new trial alleging ineffective assistance of counsel must result in the appointment of new counsel.” *People v. Bomar*, 405 Ill. App. 3d 139, 147 (2010). Instead, when a defendant brings a *pro se* posttrial claim of ineffective assistance of counsel, the trial court should make a preliminary inquiry into the factual basis of the defendant's claim. *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003). “If the trial court determines that the claim lacks merit 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 who would then represent the defendant at the hearing on the defendant's *pro se* claim of ineffective

assistance. *Id.* “The appointed counsel can independently evaluate the defendant’s claim and would avoid the conflict of interest that trial counsel would experience if trial counsel had to justify his or her actions contrary to defendant’s position.” *Id.*

“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.” *Id.* During the evaluation, some interchange between the trial court and counsel regarding the facts and circumstances surrounding the representation is permissible and usually is necessary to assess what further action, if any, is warranted on the defendant’s claim. *Id.* Trial counsel may simply answer questions and explain the facts and circumstances surrounding the defendant’s allegations, and a brief discussion between the trial court and the defendant may be sufficient. *Id.* at 78-79. “Also, the trial court can base its evaluation of the defendant’s *pro se* allegations of ineffective assistance on its knowledge of defense counsel’s performance at trial and the insufficiency of the defendant’s allegations on their face.” *Id.* at 79.

The parties dispute the standard of review, with defendant stating that the standard is *de novo*, and the State arguing that a more deferential standard applies. “[W]e review *de novo* the question of whether the trial court erred in the manner in which it addressed defendant’s posttrial claims of ineffective assistance of counsel.” *Bomar*, 405 Ill. App. 3d at 147. However, when the trial court has made an adequate inquiry into the matter, its ultimate determination is reviewed for manifest error. *People v. Walker*, 403 Ill. App. 3d 68, 79 (2010).

Here, the trial court adequately investigated defendant’s claims. When defendant first raised issues about Ritacca, the court engaged in a colloquy with defendant in which he was able to explain his claim. Ritacca was then allowed to respond. See *Moore*, 207 Ill. 2d at 78-79 (approving of such

colloquy). Based on this preliminary investigation, along with its own knowledge of the case, the court could properly conclude that defendant's claim of ineffective assistance lacked merit. Indeed, the court specifically found so. Regardless, the court also allowed Ritacca to withdraw from the case and appointed Bruno.

In regard to Bruno, the trial court again conducted an adequate inquiry into defendant's claim of ineffective assistance of counsel. The court listened to defendant's concerns, allowed Bruno to respond, and found that Bruno acted appropriately. Thus, the court denied defendant's motion for new counsel. That determination was not manifestly erroneous.

Defendant argues that Bruno should have raised issues of ineffective assistance by Ritacca. But the record gives no indication that Bruno was appointed for the purpose of further addressing the ineffective-assistance claim against Ritacca. Instead, that issue had already been appropriately addressed by the trial court, which determined that Ritacca was effective. Bruno was then appointed because defendant wanted to discharge Ritacca and be appointed a public defender for the remainder of the proceedings.

Defendant also contends that the trial court did not make an adequate inquiry because it was primarily concerned with treating his allegations as a motion to withdraw the plea. But the record shows that the court inquired into the claims of ineffective assistance of counsel and then, in addressing the second letter, took the further step of addressing defendant's desire to withdraw his plea, which was the primary thrust behind his ineffective-assistance claims. And the trial court's finding that he could not withdraw his plea further supported its determination that appointing new counsel was not necessary to address defendant's claims of ineffective representation.

Finally, defendant relies on a number of cases that he asserts reversed denials of claims that were similar to his. *People v. Pence*, 387 Ill. App. 3d 989 (2009); *People v. Friend*, 341 Ill. App. 3d 139 (2003); *People v. Sanchez*, 329 Ill. App. 3d 59 (2002); *People v. Cabrales*, 325 Ill. App. 3d 1 (2001). But in those cases, the trial court failed to conduct any inquiry at all into the ineffective-assistance claims. Thus, a remand was warranted for an inquiry to occur. Here, the court made an adequate inquiry and appropriately found that new counsel need not be appointed to further investigate the claims.

Defendant next argues that the public defender fee must be vacated because it was imposed under section 113—3.1(a) of the Code of Criminal Procedure of 1963 (725 ILCS 5/113—3.1(a) (West 2006)) without consideration of his ability to pay. The State agrees that the fee was wrongly imposed without a hearing but requests a remand to determine defendant’s ability to pay.

Section 113—3.1(a) provides:

“Whenever under either Section 113—3 of this Code or Rule 607 of the Illinois Supreme Court the court appoints counsel to represent a defendant, the court may order the defendant to pay to the Clerk of the Circuit Court a reasonable sum to reimburse either the county or the State for such representation. In a hearing to determine the amount of the payment, the court shall consider the affidavit prepared by the defendant under Section 113—3 of this Code and any other information pertaining to the defendant’s financial circumstances which may be submitted by the parties. Such hearing shall be conducted on the court’s own motion or on motion of the State’s Attorney at any time after the appointment of counsel but no later than 90 days after the entry of a final order disposing of the case at the trial level.” 725 ILCS 5/113—3.1(a) (West 2006).

“Section 113—3.1 requires the trial court to conduct a hearing into a defendant’s financial circumstances and find an ability to pay before it may order the defendant to pay reimbursement for appointed counsel.” *People v. Love*, 177 Ill. 2d 550, 563 (1997). The hearing is required even where a cash bail bond has been posted, because the existence of a bond is not conclusive evidence of an ability to pay. *Id.* at 560-63. “The hearing must focus on the foreseeable ability of the defendant to pay reimbursement as well as the costs of the representation provided.” *Id.* at 563.

“The hearing must, at a minimum, provide defendant with notice that the trial court is considering imposing a payment order and give defendant an opportunity to present evidence of his ability to pay and other relevant circumstances.” *People v. Spotts*, 305 Ill. App. 3d 702, 703-04 (1999). “Notice” includes informing the defendant of the court’s intention to hold such a hearing, the action the court may take as a result of the hearing, and the opportunity the defendant will have to present evidence and be heard. *Id.* at 704. “Such a hearing is necessary to assure that an order entered under section 113—3.1 complies with due process.” *Id.* Rules of forfeiture do not apply. *Love*, 177 Ill. 2d at 564.

Here, the fee could not be imposed without notice and a hearing before the trial court. Defendant argues that the remedy is to vacate the fee without a remand. However, in *Love*, despite the passage of 90 days, our supreme court remanded the matter for a hearing. *Id.* at 565. We have followed suit. See, e.g., *People v. Schneider*, 403 Ill. App. 3d 301, 304 (2010); *Spotts*, 305 Ill. App. 3d at 705. “We view the supreme court’s practice to remand such cases as binding.” *Schneider*, 403 Ill. App. 3d at 304. Thus, we vacate the public defender fee and remand for notice and a hearing on the matter.

The trial court adequately inquired into defendant's claims of ineffective assistance of counsel. However, the court erred when it imposed a public defender fee without notice and a hearing on defendant's ability to pay. Accordingly, the judgment of the circuit court of Lake County is affirmed in part and vacated in part, and the cause is remanded for further proceedings.

Affirmed in part and vacated in part; cause remanded.