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2011 IL App (3d) 091057-U

Order filed August 3, 2011

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of the 12th Judicial Circuit,
)	Will County, Illinois,
Plaintiff-Appellee,)	
)	Appeal No. 3--09--1057
v.)	Circuit No. 09--CF--334
)	
NEIL ACKERMAN,)	Honorable
)	Daniel J. Rozak,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices CARTER and WRIGHT concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court did not violate its duty to inquire into defendant's claims of ineffective assistance of counsel where the court continued the matter for three days and, after reviewing the issue, rejected defendant's meritless claims.
- ¶ 2 *Held:* The trial court erred in assessing a DNA analysis fee where defendant's DNA had already been submitted in a prior case.
- ¶ 3 Defendant Neil Ackerman was convicted of solicitation of murder for hire (720 ILCS 5/8-1.2

(West 2008)) and sentenced to 30 years in prison. On appeal, he argues that the trial court (1) failed to conduct an adequate inquiry into his posttrial claims of ineffective assistance of counsel and (2) improperly assessed a \$200 DNA analysis fee. We affirm defendant's conviction and sentence, but vacate the \$200 analysis fee.

¶ 4 In January 2009, defendant and Milton Bass shared a two-person cell in the Will County jail. While sharing the cell, Bass and defendant had a conversation in which defendant asked Bass to kill his ex-girlfriend, Deanna Musilek. Defendant was arrested and charged with solicitation of murder.

¶ 5 At trial, Sergeant Bridget Graham testified that, on January 25, 2009, she received the first of two reports from Bass which detailed the murder for hire conversation. The next day, she spoke with Bass in her office and then contacted Detective Jack Ellingham.

¶ 6 Detective Ellingham testified that Bass showed him a piece of paper containing addresses that defendant gave him. The addresses were for locations where the intended victim, Musilek, might be found. Based on that information, Ellingham obtained a court order allowing him to record Bass's conversations with defendant. Two weeks later, detectives wired Bass with a recording device and recorded a conversation in which defendant asked Bass to find Musilek and kill her. Defendant also stated that he would pay Bass for his services.

¶ 7 Before agreeing to wear the wire, Bass requested a reduction in his sentence. Ellingham told him that his sentence would be reduced. After the conversation was recorded, Bass was immediately released from jail.

¶ 8 Bass testified that he was defendant's cellmate in January and February of 2009. He was in jail because he turned himself in on domestic battery charges. He had previously been in prison for possession of a controlled substance and robbery. While in jail together, Bass and defendant got

along well. They had many conversations and discovered that they were both carpenters. Defendant told Bass that he was upset that he was in jail and blamed his situation on his child's mother, Musilek. Defendant said he hated Musilek and called her a "crack whore." Bass told defendant that he was known as "Killer" because he had shot people. Defendant then asked Bass to kill Musilek. Bass told him that he would be getting out of jail soon and could take care of her.

¶ 9 Defendant gave Bass a list of locations and phone numbers where he could find Musilek. He also gave Bass a description of Musilek, including her weight, height and hair color. Defendant agreed to pay Bass \$20,000 for the murder with profits from a construction project that defendant and Bass would work on together.

¶ 10 Bass testified that defendant never told him not to kill Musilek. But defendant did discuss the option of getting Musilek high the night before trial in an attempt to destroy her credibility. Defendant said that if Bass would not kill Musilek, he would find someone that would.

¶ 11 Bass reported the conversations to Detective Ellingham who then asked Bass to wear a recording device. Bass agreed to wear the wire after an assistant State's Attorney agreed to recommend that Bass's 200-day sentence be reduced to time served.

¶ 12 At the conclusion of Bass's testimony, an edited version of his six and a-half hour conversation with defendant was played for the jury. During the conversation, defendant told Bass how to apply a substance to Musilek's mouth to render her unconscious, how to give her an overdose of heroin, how to make the shooting look gang-related and how to find Musilek at various times and locations. Defendant told Bass to shoot Musilek in the head and then destroy the list of addresses. He also instructed Bass on how to destroy and plant evidence at the crime scene.

¶ 13 Musilek testified that she had problems with drugs and alcohol. She and defendant dated for

three years and had one child together. Musilek testified that she had obtained numerous orders of protection against defendant and had also filed domestic battery charges against him. In January 2009, she filed a police report against defendant after he cut a chunk of hair out of her scalp and beat her with a belt.

¶ 14 Defendant testified on his own behalf. He claimed that Bass asked him if he could kill Musilek. Defendant further testified that Bass told him that if he did not let Bass kill her, Bass would kill defendant's daughter and the rest of his family. Defendant stated that he had previously worked undercover with Detective Ken Simonich as an informant in drug cases. When Bass approached him with the idea of killing Musilek, defendant sent a letter to Simonich and included a carbon copy report describing the incident. Defendant admitted giving Bass the information on locating Musilek, but stated that Bass needed it to find Musilek so that he could get her high to discredit her testimony.

¶ 15 Detective Simonich testified that defendant had worked as a confidential informant with him on prior cases. He received a letter from defendant in June of 2009, which included a prison report completed by defendant. The report contained the signatures of Jason Rowe and Renee Hall, two sheriff's department employees. In rebuttal, both Rowe and Hall testified that they had not seen the form before and that they did not sign it.

¶ 16 The jury found defendant guilty of solicitation of murder for hire. At sentencing, defense counsel presented several character witnesses who testified on defendant's behalf. In closing arguments, counsel stated "there's a lot of good left in [defendant.]" Counsel noted that defendant was sorry for what he had done and asked for a reduced sentence.

¶ 17 Defendant was then given the opportunity to address the court. He complained that defense

counsel rushed into the trial unprepared. Specifically, he stated:

"I'm not putting down Mr. Knight here. There's things that should have been brought up to the jury. I don't know, someone asked me in jail a few days ago, they said how much justice can you afford. None. I don't have money for a real lawyer."

Defendant also claimed that he was not taking his psychiatric medications at the time of his conversation with Bass. He stated that the lack of medication played "a major role in anything I had said that day." Finally, defendant asserted that he was not given the chance to listen to the entire recording of his jail cell conversation before deciding whether to accept the State's earlier plea agreement.

¶ 18 At the conclusion of closing arguments, the trial court asked defense counsel to refresh its memory on the issue of the recording:

"The court: I gave you the opportunity to go over there and make sure that he heard everything.

Counsel: That's correct. For the record, me and Mr. Lenzie, we went over there. We played about two hours of the tape. We asked him if he wanted to hear more of the tape. He said he did not. We told him he had – based off listening to the tape, he had the opportunity to take the State's offer still. I believe it was still open.

Counsel: Plus he also had the transcripts with him. We told him that. We asked him to make a decision based off of what we went over whether he wanted to go forward with trial or plead guilty. He wanted to go forward with the trial."

The trial court took the matter under advisement and continued the hearing for three days to "review

everything" and "take [the] arguments into consideration."

¶ 19 When the cause resumed, the court concluded that defense counsel "did an admirable job in this case and there's no fault to him whatsoever in spite of what the defendant has to say." The court then sentenced defendant to 30 years in prison and ordered him to provide a DNA sample and pay a \$200 analysis fee.

¶ 20

I

¶ 21 Defendant argues that the trial court failed to properly investigate his complaints of ineffective assistance of counsel. He therefore requests that we remand the case for the trial court to conduct a properly inquiry under *People v. Krankel*, 102 Ill. 2d 181 (1984).

¶ 22 In *Krankel*, the Illinois Supreme Court held that when a defendant files a *pro se* posttrial motion alleging ineffective assistance of counsel, the trial court should appoint new counsel. *Krankel*, 102 Ill. 2d 181. Since *Krankel*, the supreme court has developed a modified rule which states that counsel need not be appointed in every case where a defendant presents a *pro se* claim of ineffectiveness. *People v. Moore*, 207 Ill. 2d 68 (2003). Rather, the trial court must conduct a preliminary inquiry to examine the factual basis of the defendant's claim. *Moore*, 207 Ill. 2d at 77. If the *pro se* claim is without merit, or if it solely concerns matters of trial strategy, the court may deny the motion without appointing new counsel. *Id.* 207 Ill. 2d at 77-78. However, if the allegations demonstrate the possibility of neglect, then new counsel must be appointed. *Id.* 207 Ill. 2d at 78.

¶ 23 In determining whether the trial court met its burden under *Krankel*, the reviewing court must consider whether the trial court conducted an adequate inquiry. *Moore*, 207 Ill. 2d at 78. In most instances, a discussion between counsel and trial counsel is necessary. *People v. McCarter*, 385 Ill.

App. 3d 919 (2008). However, the trial court may evaluate defendant's claims based on its observation of defense counsel's performance at trial or the insufficiency of defendant's allegations on their face. *Moore*, 207 Ill. 2d at 79. Where the trial court's inquiry reveals that defendant's claims are "conclusory, misleading, or legally immaterial" or "[do] not bring to the trial court's attention a colorable claim of ineffective assistance of counsel," the trial court need not conduct any further investigation. *People v. Burks*, 343 Ill. App. 3d 765 (2003). We review the trial court's inquiry into defendant's *pro se* claims of ineffective assistance *de novo*. *Moore*, 207 Ill. 2d at 75.

¶ 24 Here, unlike *Krankel* and *Moore*, defendant's allegations were oral. Nevertheless, the trial court allowed defendant to present his complaints and properly responded to them in open court.

¶ 25 The record shows that defendant's allegations were facially insufficient. Defendant's stated lack of confidence in defense counsel and counsel's failure to present evidence were set forth in a general and conclusory manner (see *People v. Rucker*, 346 Ill. App. 3d 873 (2004)) and his claim that he was not given the opportunity to review Bass's recorded conversation was contradicted by counsel's discussion with the court. In addition, the trial transcript refutes defendant's allegation that counsel was unprepared. Defense counsel clearly demonstrated competence and diligence in preserving objections, presenting a plausible and reasonable defense, cross-examining the State's witnesses and arguing mitigating factors for a reduced sentence.

¶ 26 We therefore find no cause for a remand. See *Burks*, 343 Ill. App. 3d at 777. The trial court's observations of counsel's performance throughout the proceedings would have satisfied any inquiry which may have been required. After continuing the matter and reviewing defendant's allegations of ineffective assistance of counsel, the trial court properly determined that defendant did not bring forth a colorable claim of ineffective assistance of counsel.

¶ 27

II

¶ 28 Defendant also claims that the trial court exceeded its statutory authority by ordering him to pay a DNA fee because he submitted a DNA sample and paid the fee in a prior case.

¶ 29 This issue was recently addressed by our supreme court in *People v. Marshall*, No. 110765 (May 19, 2011). In that case, the court held that section 5-4-3 of the Unified Code of Corrections (730 ILCS 5/5-4-3 (West 2008)) authorizes a trial court to order the taking, analysis and payment of the analysis fee of a qualifying offender's DNA only where the defendant is not currently registered in the DNA database. *Marshall*, No. 110765, slip op. at 15. In this case, the defendant's DNA is already on file. We therefore reverse the trial court's judgment and vacate that portion of the court's order requiring additional testing and ordering defendant to pay the \$200 analysis fee.

¶ 30

CONCLUSION

¶ 31 The \$200 DNA analysis fee is vacated. The judgment of the circuit court of Will County is otherwise affirmed.

¶ 32 Affirmed in part; vacated in part.