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No. 3-10-0025

Order filed January 4, 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 10 th Judicial Circuit
)	Peoria County, Illinois,
Plaintiff-Appellee,)	
)	No. 07-CF-988
v.)	
)	
LORENZO MITCHELL,)	The Honorable
)	Michael Brandt,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Justices Wright and Lytton concurred in the judgment.

ORDER

Held: Where this matter had previously been remanded with directions to the trial court to conduct a proper inquiry into defendant's two claims of ineffective assistance of counsel and where, on remand, the trial court declined to follow that direction asserting it had already done so; we find the trial court's consideration was still inadequate and remand the matter with more explicit directions to conduct an adequate inquiry.

Defendant, Lorenzo Mitchell, was convicted of unlawful possession of a controlled

substance (720 ILCS 570/402(c) (West 2006)). On appeal, defendant contends that the trial court failed to conduct an adequate inquiry into defendant's post trial claim that trial counsel was ineffective for failing to file a motion to suppress. We reverse and remand.

FACTS

Defendant was indicted for unlawful possession of a controlled substance in that he knowingly and unlawfully possessed less than 15.0 grams of a substance containing cocaine. Prior to trial, defendant requested that he be allowed to represent himself. Defendant also filed a *pro se* motion to suppress evidence alleging that he was arrested and searched without probable cause. Defendant subsequently reconsidered and was appointed counsel. Counsel never filed a motion to suppress and the case proceeded to a jury trial.

The evidence at trial established that the police had received information from an informant, during a telephone call, which included a description and location of a particular individual who turned out to be defendant. The police went to the given location where they observed defendant talking to two women. Defendant was arrested, searched, and a baggie of cocaine was found in his pocket.

Defendant testified on his own behalf that he had been harassed by the police earlier on the day in question and that he had inquired about filing a formal complaint against the police. Later that day, the police arrested and searched him, but defendant denied that he had any drugs on his person.

Defendant was found guilty of possession of a controlled substance. Defendant subsequently wrote a letter to the trial court stating that he had previously filed a *pro se* motion to suppress evidence that was never heard. The letter requested a hearing on the matter and also

stated that defendant asked counsel to file such a motion, but he never got a response from counsel.

Defendant also filed a *pro se* motion for new trial alleging that he was denied access to the informant utilized by the police and that trial counsel was ineffective for failing to seek disclosure of the informant's identity. Trial counsel also filed a motion for a new trial on defendant's behalf.

At defendant's sentencing hearing, the trial court asked trial counsel if he had been given a copy of defendant's *pro se* motion for new trial. Upon responding that he did not have a copy of the motion, counsel was afforded one. The court stated that it did not intend to address the *pro se* motion in any manner or fashion and instead was simply pointing out its existence. The court noted that it did not believe that the motion raised anything with regard to trial counsel. Trial counsel then stated that he had discussed the informant issue with defendant in the past and that he did not believe that Illinois law required disclosure. The trial court denied trial counsel's motion for new trial.

Defendant appealed and argued that the matter must be remanded for further post trial proceedings because he had filed a *pro se* post trial motion alleging ineffective assistance of counsel and the trial court never conducted an inquiry regarding his claims. We agreed, noting that defendant, in his post trial letter and his *pro se* motion for new trial, raised two claims of ineffective assistance regarding (1) the failure of trial counsel to file a motion to suppress and (2) the failure of trial counsel to file a motion to disclose the confidential informant. *People v. Mitchell*, No. 3-08-0107 (2009) (unpublished order under Supreme Court Rule 23). We remanded the matter so that the trial court could conduct an inquiry into defendant's claims.

People v. Mitchell, No. 3-08-0107 (2009) (unpublished order under Supreme Court Rule 23).

Upon remand, the trial court referred to our directive that an inquiry be conducted, but declined to do so, stating that it had actually done so before. Specifically, the court explained that when it previously stated that defendant's *pro se* motion did not appear to raise anything with regard to defense counsel, it was finding "no cognizable claim of ineffective assistance of counsel, no viable claim of ineffective assistance of counsel, no blatant claim of ineffective assistance of counsel." The court noted that defendant's motion had concerned trial counsel's failure to file a motion to disclose the identity of the confidential informant.

The court then asked the prosecutor if she wanted to be heard. The prosecutor stated that there was no confidential informant to be disclosed. Thus, a motion to disclose would have been irrelevant and trial counsel was not ineffective for not having filed one. The court then asked trial counsel if he had any input. Counsel stated that there was a confidential informant, but he did not file a motion to disclose because he did not believe such a motion would be successful given the status of the law.

The trial court then noted that, as far as any other motions in the case were concerned, there was nothing seized from defendant, but instead something was found in the vicinity of defendant. Thus, the court found that the preliminary investigation into defendant's claim of ineffective assistance of counsel had been concluded. At the request of trial counsel, the court directed the clerk to file a notice of appeal on defendant's behalf and appointed the appellate defender to represent him.

After a recess, the court noted that the appellate court had stated that there was a claim about a motion to suppress. The court then asked trial counsel if he wanted to address the

“viability” of a motion to suppress. Counsel stated that he probably needed to be released from the attorney-client privilege in order for him to recount his recollection of “that conversation.” The court stated the it did not want to do that and instead asked counsel whether it was a matter of trial strategy not to file a motion to suppress. Counsel responded that it was, in part. The trial court recessed to allow trial counsel time to refresh his memory with the trial transcript.

When the hearing reconvened, the court noted that the facts of the case were different than what he had stated earlier. The court explained that cocaine was found on defendant’s person and not in the vicinity of defendant as the court stated earlier. The court stated that it had already adequately addressed any claim of ineffective assistance regarding disclosure of the informant.

The court then asked trial counsel if his failure to file a motion to suppress had been part of his trial strategy. Trial counsel responded that he thought he could address the matter without disclosing any confidential communications. Counsel stated that he had just read the police report and did not think that a motion to suppress would have been successful. He noted, however, that the prospect of success did not, by itself, deter him from filing a motion to suppress. Instead, counsel explained that defendant would likely have had to testify at trial. Thus, counsel was concerned that defendant’s testimony during a suppression hearing would have allowed the State to prepare for his testimony at trial.

Trial counsel requested that the police report be made part of the record. The trial court declined counsel’s request. Instead, the court stated that a complete inquiry had now been conducted regarding both claims of ineffective assistance of counsel and that no further action would be taken. Defendant filed a timely notice of appeal.

ANALYSIS

The sole issue before this court is whether the trial court conducted an adequate inquiry into defendant's post trial claim that trial counsel was ineffective for failing to file a motion to suppress.¹ Defendant, in his initial brief, summarizes the court's inquiry as follows:

“The extent of the judge's inquiry *** was whether trial strategy played a part in [counsel's] decision not to file a motion to suppress. [Counsel] simply answered that he did not believe that a suppression motion would have been successful and that strategy had also been involved since, if the defendant had testified at both the suppression hearing and at trial, it would have given the prosecution an advantage in its preparation for the defendant's testimony at trial.”

We find the trial court's inquiry was insufficient to satisfy the standard set out and explained in *People v. Krankel*, 102 Ill. 2d 181, 464 N.E.2d 1045 (1984) and *People v. Moore*, 207 Ill. 2d 68, 797 N.E.2d 631 (2003).

We note at the outset our standard of review. The State contends that the trial court “properly exercised [its] discretion at the hearing on the defendant's post trial motion.” However, defendant calls our attention to the fact that the issue before us “involves the application of law to undisputed facts.” “Where the facts are undisputed and the parties ask a reviewing court to determine the correctness of the trial court's application of the law to the

¹ Defendant does not raise any issue here on appeal regarding his previous claim that counsel was ineffective for failing to file a motion to disclose the confidential informant.

undisputed facts, review proceeds *de novo*.” *Wills v. Foster*, 229 Ill. 2d 393, 399, 892 N.E.2d 1018, 1022 (2008); see also *People v. Boar*, 2010 Ill. App. LEXIS 1106 (holding *de novo* is appropriate where the sole issue presented on appeal is whether the trial court erred in the manner in which it addressed defendant’s post trial claims of ineffective assistance of counsel).

In *Krankel*, the defendant’s trial counsel failed to contact an alibi witness or to present an alibi defense at trial. The defendant filed a *pro se* post trial motion alleging he was deprived of effective assistance of counsel. The parties agreed that the trial court should have appointed counsel, other than his originally appointed counsel, to represent the defendant at the post trial hearing on his motion. Thus, 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, 464 N.E.2d at 1048-49.

The *Moore* court explained the rule that has developed as a result of the *Krankel* holding. Specifically, the court stated:

New counsel is not automatically required in every case in which a defendant presents a *pro se* posttrial motion alleging ineffective assistance of counsel. Rather, when a defendant presents a *pro se* posttrial claim of ineffective assistance of counsel, the trial court should first examine the factual basis of the defendant's claim. 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. However, if the allegations show possible neglect of the case, new counsel should be appointed. [Citations.] The new counsel would

then represent the defendant at the hearing on the defendant's *pro se* claim of ineffective assistance. [Citations.] 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. [Citations.]

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. [Citation.] During this evaluation, some interchange between the trial court and trial counsel regarding the facts and circumstances surrounding the allegedly ineffective representation is permissible and usually necessary in assessing what further action, if any, is warranted on a defendant's claim. Trial counsel may simply answer questions and explain the facts and circumstances surrounding the defendant's allegations. [Citations.] A brief discussion between the trial court and the defendant may be sufficient. [Citations.] 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. [Citations.] *Moore*, 207 Ill. 2d at 77-79, 797 N.E.2d at 637-38.

Here, the record reveals that the trial court failed to conduct an adequate inquiry into defendant's claims. We note that the trial court was initially mistaken as to the evidence introduced at trial facts and issues before it on remand. Ultimately, the court asked trial counsel if his failure to file a motion to suppress had been a matter of trial strategy. After reviewing the police report, counsel merely responded that he did not believe that a motion to suppress would have been successful. Counsel did not explain the basis for his belief. Instead, counsel stated that he still might have filed a motion to suppress if not for serious concerns that defendant might have been needed to testify at a suppression hearing in order for the suppression motion to have any merit. Counsel reasoned that this would have been detrimental to defendant's case due to the fact it would have allowed the State the opportunity to prepare for defendant's testimony at trial.

The record, as it currently exists, does not reveal what the officers' basis of knowledge had been and whether there had been probable cause to arrest and search defendant.² Instead, the record only discloses that the police claimed to have received a telephone call from an informant giving a physical description and location of an individual, which turned out to be defendant. Officers drove to the location and arrested defendant. We do not know what the police were told during the telephone call, nor do we know why the officers arrested defendant. The officer did not testify at trial about the information provided by the informant, the police report was denied admission, and counsel did not make an offer of proof concerning facts included in the report. Absent some discussion with counsel about the facts, the court had no basis for assessing whether the "trial strategy was effective or ineffective." With these facts in mind, we find the

² The trial court declined trial counsel's request to make the police report a part of the record.

trial court erred in simply accepting trial counsel's conclusory statement that a motion to suppress would not have been successful.

While the State calls our attention to trial counsel's belief that defendant's testimony during a suppression hearing would allow the State to prepare for his testimony at trial, it ignores the fact that there would be no case to prosecute if trial counsel had filed a motion to suppress and it was granted. Stated another way, if the trial court found that the officers lacked probable cause to arrest defendant, there is no valid strategy that would justify any reasonably competent attorney forgoing filing a motion to suppress. We also note that trial counsel always faces the possibility that the State may be able to prepare for an individual's testimony at trial if that individual is called during a pre-trial hearing. This alone, however, is insufficient to justify the failure to file a possibly meritorious pre-trial motion. Acceptance of such reasoning would allow deficient performance to be excused where counsel simply attests that he or she feared the individual's testimony would give the State an advantage at trial.

Accordingly, we conclude that the trial court failed to conduct an adequate inquiry into defendant's claim that trial counsel was ineffective for failing to file a motion to suppress. We emphasize that we are not remanding for a full evidentiary hearing and appointment of counsel on the issue of trial counsel's assistance. See *Moore*, 207 Ill. 2d at 81, 797 N.E.2d at 639. Instead, we remand the cause for the limited purpose of allowing the trial court to conduct an adequate preliminary investigation. See *Moore*, 207 Ill. 2d at 81, 797 N.E.2d at 639.

Reversed and remanded with directions.