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No. 3–09–0994

Order filed June 22, 2011

IN THE
APPELLATE COURT OF ILLINOIS
THIRD JUDICIAL DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 14th Judicial Circuit
Plaintiff-Appellee,)	Rock Island County, Illinois
)	
v.)	No. 08–CF–910
)	
DALEVONTE D. HEARN,)	Honorable
)	Raymond J. Conklin
Defendant-Appellant.)	Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justices Schmidt and O’Brien concurred in the judgment.

ORDER

¶ 1 *Held:* The record does not establish a *bona fide* doubt as to defendant’s fitness to stand trial or be sentenced. Therefore, defense counsel was not ineffective for failing to request a fitness examination, and the court did not err by failing to *sua sponte* order a fitness examination. The trial court did not err by failing to conduct an inquiry regarding defendant’s general but non-specific criticisms of defense counsel but instead directing defendant to submit his specific contentions regarding ineffectiveness to the court within 30 days. We affirm defendant’s conviction and sentence.

¶ 2 Following a trial, a jury found defendant guilty of attempt first degree murder and aggravated domestic battery. The trial court sentenced defendant to concurrent terms of imprisonment of 30 years and 14 years, respectively. Defendant appeals claiming that the trial court should have *sua sponte* ordered a fitness examination. Alternatively, defendant claims that he received ineffective assistance of counsel because defense counsel did not request the court to order a fitness examination. Defendant also argues on appeal that the trial court erred by failing to conduct an immediate inquiry regarding ineffective assistance counsel. We affirm defendant's conviction and sentence.

¶ 3 **FACTS**

¶ 4 The State filed a two-count criminal complaint against defendant. Count I, as amended, charged defendant with the offense of attempt first degree murder in that on September 18, 2008, with the intent to commit first degree murder, defendant repeatedly kicked Octavia McGowan in the head with the intent to kill Octavia McGowan in violation of section 8-4(a) of the Criminal Code of 1961 (720 ILCS 5/8-4(a) (West 2008)). Count II charged defendant with the offense of aggravated domestic battery in that on September 18, 2008, defendant, in committing the offense of domestic battery, knowingly caused great bodily harm to Octavia McGowan, a family or household member, in that he repeatedly kicked Octavia McGowan in the head in violation of section 12-3.3(a) of the Criminal Code of 1961 (720 ILCS 5/12-3.3(a) (West 2008)).

¶ 5 During an appearance before the court on July 10, 2009, the parties discussed whether defendant was eligible for extended sentences due to his Iowa conviction, and defendant responded appropriately to the trial court's questions. When the court discussed continuing the cause for two weeks, defense counsel raised a concern about the delay. While the court was

calculating the number of days which defendant had been in custody to date, defendant interrupted the judge and stated, “August 1st will be my 120.” Based upon defendant’s statement, the court scheduled defendant’s trial for an earlier date.

¶ 6 Defendant’s jury trial began on July 27, 2009. During a conference outside the presence of the jury, defense counsel indicated to the court that her strategy involved contesting the element of defendant’s intent to kill in relation to the attempt murder charge. On the third day of trial, defense counsel advised the court that defendant “just made some comments to me regarding – regarding a potential shift” in the defense theory which would now require expert testimony and requested a continuance to allow defendant to be examined by a psychologist or a psychiatrist. Counsel stated the exam “could potentially combat the mental state component.”

¶ 7 The State objected. After the court denied the motion for continuance, defense counsel stated that “it’s just been stated to me that he [defendant] wants to fire me as his attorney.” The trial court responded, “That also is denied. We are in the ninth inning of the game and I haven’t found anything that Ms. Gardner has done that’s wrong or ineffective, so the trial continues.”

¶ 8 Later that day, the State rested. Defense counsel made a motion for directed verdict as to count I which the trial court denied. The court asked defense counsel if defendant was going to testify. She stated that they discussed the issue, but she did not know defendant’s position. The court inquired of defendant, and defendant stated that he had decided to testify. Defense counsel then stated that defendant was testifying against her advice.

¶ 9 After the jury was brought back into the courtroom, defense counsel presented evidence from two witnesses, and defendant testified on his own behalf. Defendant testified that on September 18, 2008, he lived with Octavia McGowan and had been dating her for the prior 10

months. Later on that date, defendant saw Octavia walking with another male and became upset. He stated that he walked around a little bit, thinking, and when he returned home, he did not find Octavia. Subsequently, defendant located Octavia at her friend's house. Defendant told Octavia to come home with him, but she did not want to go.

¶ 10 When asked what happened next, defendant said that he did not remember and that he then “just like woke back up and seen like I was damaging the person that I loved. I tried to go run around.” Defendant said that he had an anger problem and that he suffered from “bipolar and schizophrenic” and that “sometimes I do stuff without even reacting – I mean thinking.” On cross-examination, defendant denied being mad, jealous or upset with Octavia, only heartbroken. Defendant said that he did not remember stomping on Octavia's head. He only remembered seeing Octavia on the floor of her friend's house.

¶ 11 At the conclusion of defendant's testimony, defense rested. The State offered certified convictions into evidence in rebuttal. Following deliberations, the jury found defendant guilty of attempt first degree murder and aggravated domestic battery on July 29, 2009. The trial court ordered a pre-sentence investigation report and set the cause for sentencing.

¶ 12 After the verdict, defense counsel advised the court that she asked defendant if he still wished “to continue on with his request from this morning, obviously issues regarding a post-trial motion if the issue is my performance, there is a complete conflict of interest, I would not be able to properly attack myself.” Defense counsel went on to say that “if he wanted to fire me this morning, it might be something maybe he wants to have a different attorney for sentencing, I'm not for sure if you want to take a specific request from him at this time.”

¶ 13 The court responded:

“[n]umber one, Ms. Gardner [defense counsel], obviously you can’t attack yourself but you can file appropriate post-trial notions [*sic*] on whatever issues you want. Mr. Hearn, you’re upset with your attorney for whatever reason and I’m not just saying tough, I’m not doing that. You know how to write and you put in writing the reasons why you no longer wish to be represented by Ms. Gardner or the Public Defender’s Office and I’m going to consider that.”

The court told defendant to file the written motion regarding counsel’s representation within the next 30 days. The court said that if defendant wrote the judge as to his reasons why he did not want his attorney anymore, then “we’ll probably have a hearing on that.”

¶ 14 On October 23, 2009, the Rock Island County adult probation filed a pre-sentence investigation report with the court. Defendant reported that he worked for three weeks at Rock Island Display prior to his arrest in this case. Defendant was not under a doctor’s care and not currently taking any prescribed medication. Defendant did not report any major illness, injuries, surgeries or diseases.

¶ 15 In regard to mental health, the report listed a diagnosis of attention-deficit hyperactivity disorder from the Robert Young Mental Health Center (Robert Young) on October 2, 1996. Defendant was placed on Ritalin and referred to an ADHD group. On November 19, 1999, Robert Young diagnosed defendant with oppositional defiant disorder. According to the assessment, mother was having behavioral problems with defendant and that defendant had “been off his meds for two years.” Defendant was referred for a psychiatric evaluation and

possible medication at mother's request.

¶ 16 In 2002, Robert Young again diagnosed defendant with attention-deficit hyperactivity disorder and recommended defendant attend anger management group. On February 25, 2008, Robert Young diagnosed defendant with "Bipolar disorder NOS," attention-deficit hyperactivity disorder and cannabis dependence. According to the assessment, probation referred defendant to Robert Young for an anger management evaluation. Defendant had been placed on probation for battery and was ordered to complete intensive outpatient treatment, anger management group, counseling and a psychiatric evaluation.

¶ 17 Defendant described his mental health as "Messed up." According to the report, defendant was not currently under a mental health physician's care and was not currently taking any prescribed medication. Defendant stated that he would like to be placed back on medication that he was prescribed in the past. Defendant also stated that he was "supposed to be taking Seroquel, Prozac and Trazadone."

¶ 18 Defendant wrote a letter to the trial judge dated October 8, 2009. In the letter, defendant stated that he was writing because he had "a sentencing day coming shortly." He stated that he was not a bad person but made poor judgments that lead to mistakes. He stated:

"Although I didn't try or have intentions to kill & never would hurt Octavia. When you are in love & someone hurts you w/ another member of your family, most people just react to the pain they are feeling. Most people don't think about the harm that can be caused by just reacting to situations when they are hurt."

Defendant went on to say that he never meant to hurt Octavia and definitely did not want her to

be dead. Defendant apologized to Octavia, her family, to God and everyone else. He asked the court and the State to give him a chance to make the situation right.

¶ 19 On October 29, 2009, defense counsel filed a posttrial motion alleging defendant was severely prejudiced by the court's denial of his request for a "mental health evaluation."

Defense counsel also claimed that the trial court denied defendant his right to have counsel of his choice by denying defendant's request to "fire" appointed counsel during the trial. Defense counsel asked for a verdict of not guilty on the offense of attempt first degree murder or alternatively a new trial on both counts.

¶ 20 On November 20, 2009, the parties appeared before the court for a hearing on posttrial motions and sentencing. Regarding the mid-trial request for a continuance for an evaluation and the request for new counsel, the trial court stated that there was 60 minutes of trial left when defendant made these requests. The court went on to say that it:

"had seen nothing at that point, absolutely nothing, that would indicate any sort of subpar performance by Ms. Gardner. And of course, my observations were limited to the courtroom. ***

Nothing that shows that her performance was beneath an objective standard. In my opinion, the evidence was overwhelming, so I'm not sure that would have made a difference."

¶ 21 The court noted that it attempted to address defendant's posttrial request to "fire" appointed counsel by asking defendant to let him know "what the problems are." However, the court did not receive anything in writing from defendant. The court "could only conclude that it was an issue at that time, probably frustration, because the case wasn't going perhaps as Mr.

Hearn would like.”

¶ 22 The court said that the presentence investigation report showed that defendant suffered from some issues but that there was “[n]othing in that PSI indicating anything by way of either his competency to stand trial or a – a mental health issue that would in some way mitigate from the crime of which he was accused.” The court denied the posttrial motion and proceeded to sentencing.

¶ 23 Defendant’s mother testified in mitigation at the sentencing hearing. She testified that she took defendant to the doctor as a child and that he was prescribed medication for ADHD. She stated that defendant needed more medication but she did not have a chance “to actually have it took [*sic*] care of.” She stated that defendant needed a “mental evaluation,” needed to see a doctor, and needed therapy. Defendant’s mother wanted defendant to have a mental health evaluation done instead of going to prison.

¶ 24 Defendant made an unsworn statement to the court. He apologized to the court, to his family, to the victim and to the victim’s family. He stated that he realized he “had done wrong.” Defendant said that he was prepared to make better choices for himself. Defendant also said that if he could take it back, he would because he loved Octavia. He explained to the court that when he started educating himself, “it became clear that I needed a separate space to give the full impact that I needed to change my life.” Defendant “came to knowledge of God and self. Knowledge – Knowledge frees you from fear.” He said that he accepted his consequences, but hoped it would be reasonable. Following arguments from counsel, the trial court sentenced defendant to 30 years imprisonment for the offense of attempt first degree murder and 14 years imprisonment for the offense of aggravated domestic battery to run concurrent.

¶ 25 On December 3, 2009, defense counsel filed a motion to reconsider sentence. On that same day, the trial court denied defendant's motion. Defendant appealed.

¶ 26 ANALYSIS

¶ 27 On appeal, defendant raises three claims of error. First, defendant claims that the trial court failed to *sua sponte* order a fitness evaluation because the evidence known to the court established a *bona fide* doubt as to defendant's fitness, and therefore, the court erroneously tried and convicted defendant. Second, defendant claims that he received ineffective assistance of counsel because counsel failed to specifically request a hearing on defendant's fitness to stand trial and be sentenced. The State responds that the record does not establish a *bona fide* doubt as to defendant's fitness, and therefore, the court was not required to conduct a fitness hearing. Likewise, the State argues that there is nothing in the record to support defendant's contention that counsel acted ineffectively in not requesting a fitness examination.

¶ 28 Lastly, defendant claims that the trial court failed to conduct an inquiry into defendant's claims of ineffective assistance of counsel, and therefore, this cause should be remanded in order for the court to conduct the proper inquiry. The State argues that defendant did not personally allege that defense counsel was ineffective or submit claims of ineffectiveness to the court and that defense counsel's statements to the court were insufficient to require the court to conduct an inquiry.

¶ 29 A. Fitness Examination

¶ 30 Fitness to stand trial requires that a defendant understand the nature and purpose of the proceedings against him and be able to assist in his defense. 725 ILCS 5/104-10 (West 2008). Although a defendant's fitness is presumed by statute (725 ILCS 5/104-10 (West 2008)), the

circuit court has a duty to order a fitness hearing, *sua sponte*, any time a *bona fide* doubt arises regarding a defendant's ability to understand the nature and purpose of the proceedings or assist in his defense. Whether a *bona fide* doubt as to a defendant's fitness has arisen is generally a matter within the discretion of the trial court. *People v. Sandham*, 174 Ill. 2d 379, 382 (1996); *People v. Murphy*, 72 Ill. 2d 421, 431 (1978); *People v. Meyers*, 367 Ill. App. 3d 402, 409 (2006).

¶ 31 Some doubt as to a defendant's fitness is not enough to warrant a fitness hearing. *People v. Sandham*, 174 Ill. 2d at 388-89 (citing *People v. Eddmonds*, 143 Ill. 2d 501, 513, 519 (1991)). A defendant may be competent to stand trial even though his mind is otherwise unsound. *Id.* The mere fact that a defendant suffers from a mental illness or requires psychiatric treatment does not necessarily raise a *bona fide* doubt as to his or her fitness. *People v. Murphy*, 72 Ill. 2d at 431; *People v. Balfour*, 148 Ill. App. 3d 215, 226 (1986). Fitness addresses only a defendant's ability to function within the context of a trial and does not consider competence in other areas. *People v. Eddmonds*, 143 Ill. 2d at 519-20 (1991); *People v. Balfour*, 148 Ill. App. 3d at 226.

¶ 32 In determining whether a *bona fide* doubt of fitness exists, a trial court should consider a defendant's "irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial." *Drope v. Missouri*, 420 U.S. 162, 180 (1975). While not conclusive on the issue, defense counsel's representations are another important factor to consider. *Drope v. Missouri*, 420 U.S. at 177 n. 13. However, it is well established that there are "no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated." *Drope v. Missouri*, 420 U.S. at 180; *People v. Eddmonds*, 143 Ill. 2d at

518.

¶ 33 Before trial began, defendant answered the trial court's questions appropriately during pretrial proceedings. Defendant knew the significance of being tried within 120 days of his arrest, knew the date on which the 120 days expired, and without prompting, informed the judge of the date his speedy trial should take place causing the judge to act accordingly when scheduling the jury trial.

¶ 34 Once the trial began, the transcript reveals defendant did not seem confused, did not display any bizarre behavior or have any inappropriate outbursts. Defendant's testimony was coherent, and defendant remained calm during rigorous cross-examination.

¶ 35 Defendant first contends that defense counsel's mid-trial request for a continuance in order to obtain a psychological or psychiatric examination of defendant should have alerted the court to the issue of defendant's unfitness. However, defense counsel requested the continuance and advised the court that this exam "could potentially combat the mental state component." The record shows defense counsel was not requesting a continuance of the trial to obtain a fitness examination. For example, on the day the jury trial began, defense counsel indicated to the court that her strategy involved contesting the element of defendant's intent to kill in relation to the attempt murder charge.

¶ 36 On the third day of trial, defense counsel advised the court of "a potential shift" in the defense theory which required defendant to be examined by a psychologist or a psychiatrist. The record suggests defense counsel requested the continuance in order to develop a defense based on the lack of the requisite mental state required for a conviction. Therefore, we conclude this request and the facts known to the trial court both before and during trial should not have

required the trial judge to suspect defendant was unfit to stand trial or be sentenced.

¶ 37 Defendant also argues that after receiving the pre-sentence investigation report and after hearing the testimony of defendant's mother, during the sentencing hearing, who indicated defendant needed mental health treatment in lieu of prison, the court should have *sua sponte* ordered a fitness examination. We disagree.

¶ 38 After trial, defendant submitted a letter to the court which revealed he understood that he was awaiting sentencing by the court. This letter and defendant's verbal statement during sentencing made a logical request for mercy, forgiveness and a reasonable sentence. We note the pre-sentence investigation report documented defendant's diagnosis for attention-deficit hyperactivity disorder in both 1996 and 2002, his 1999 diagnosis for oppositional defiant disorder, and a 2008 diagnosis including "Bipolar disorder NOS," attention-deficit hyperactivity disorder and cannabis dependence. However, the report did not indicate that defendant had been previously found unfit to stand trial. At sentencing, defendant's mother said that defendant needed to see a doctor and needed therapy but did not testify that defendant was unable to understand the trial or sentencing proceedings.

¶ 39 In this case, defendant's personal conduct before, during, and after the trial did not give rise for any justifiable concerns by the court regarding defendant's fitness. Neither defense counsel's request for a continuance to consider obtaining a psychiatric or psychological evaluation as a matter of defense nor the contents of the presentence report created a *bona fide* doubt as to defendant's fitness to stand trial in this case. For the same reasons, we also conclude that defense counsel was not required to request a fitness examination based on this record and should not be considered ineffective for failing to do so.

¶ 40

B. Court's Inquiry into Ineffective Assistance Claims

¶ 41 It is well established that when a defendant raises posttrial claims of ineffective assistance of counsel, the trial court is not automatically obligated to appoint new counsel to represent defendant on those claims. The Illinois Supreme Court's decision in *People v. Krankel*, 102 Ill. 2d 181 (1984), did not establish a *per se* rule that all *pro se* motions for a new trial alleging the ineffective assistance of counsel must result in the appointment of new counsel. *People v. Munson*, 171 Ill. 2d 158, 199 (1996); *People v. Crane*, 145 Ill. 2d 520, 533 (1991). Instead, when a defendant presents a *pro se* posttrial claim of ineffective assistance of counsel, the trial court should then examine the factual basis of a defendant's claim. *People v. Moore*, 207 Ill. 2d 68, 77 (2003) (citing *People v. Chapman*, 194 Ill. 2d 186 (2000); *People v. Bull*, 185 Ill. 2d 179 (1998); *People v. Munson*, 171 Ill. 2d 158; *People v. Nitz*, 143 Ill. 2d 82 (1991)).

¶ 42 The parties agree the trial court did not conduct a *Krankel* hearing in this case. The parties also agree that we review *de novo* the issue regarding whether the trial court erred by failing to conduct this hearing. *People v. Moore*, 207 Ill. 2d at 75. If a defendant raises *pro se* posttrial claims of ineffective assistance of counsel and the trial court fails to conduct an inquiry into those claims, error occurs, and the cause must be remanded to the trial court for a proper inquiry. *People v. Moore*, 207 Ill. 2d at 79. Therefore, the issue in this case is whether defendant sufficiently presented a *pro se* claim of ineffective assistance of counsel which warranted the trial court to inquire and then evaluate defendant's claim pursuant to *Krankel*.

¶ 43 Since *Krankel*, Illinois courts have considered whether an unsworn or unsupported *pro se* statement triggers further inquiry from the trial judge. See *People v. Carini*, 357 Ill. App. 3d 103, 120 (2005); *People v. Brandon*, 157 Ill. App. 3d 835, 844 (1987). “[W]here a trial court

simply becomes aware that a defendant has criticized counsel's performance, the court has no duty to investigate defendant's claims if they are patently without merit or unsupported by specific factual allegations.” *People v. Pope*, 284 Ill. App. 3d 330, 334 (1996). “A bald allegation that counsel rendered inadequate representation is insufficient for the trial court to consider.” *People v. Radford*, 359 Ill. App. 3d 411, 418 (2005) (citing *People v. Milton*, 354 Ill. App. 3d 283, 292 (2004)). However, a defendant is not required to do any more than bring his or her claim to the trial court's attention. *People v. Moore*, 207 Ill. 2d at 79 (citing *People v. Giles*, 261 Ill. App. 3d 833, 846-47 (1994); *People v. Finley*, 222 Ill. App. 3d 571, 576 (1991)).

¶ 44 In this case, the first instant the court became aware of defendant’s dissatisfaction with defense counsel’s performance arose after the trial court denied a continuance requested by defense counsel on the third day of trial. Upon denial of the request for a continuance, defense counsel informed the court that defendant wanted to fire her. Since defendant did not address the court or express his concern that his attorney was not performing appropriately, we do not consider defense counsel’s discussion with the court to qualify as a *pro se* assertion of ineffective assistance of counsel.

¶ 45 Following the verdict, defense counsel advised the court that she asked defendant if he still wished “to continue on with his request from this morning [to fire her].” Defense counsel also stated that “regarding a post-trial motion if the issue is my performance, there is a complete conflict of interest, I would not be able to properly attack myself.” Defense counsel went on to say that “if he wanted to fire me this morning, it *might* be something maybe he wants to have a different attorney for sentencing.” (Emphasis added). In fact, counsel’s statement to the court indicates that defendant had not informed her as to the reasons why he wanted to “fire” counsel.

¶ 46 Rather than asking defendant to outline the reasons why he wanted to fire counsel immediately following the jury’s verdict, the court advised that he would allow defendant 30 days to provide a *pro se* written response that outlined the areas of concerns regarding counsel’s deficient performance during trial or the posttrial proceedings. Although defendant sent a letter to the trial court regarding his impending sentencing hearing, defendant did not make any claims of ineffectiveness by defense counsel in his letter and did not request new counsel for the sentencing hearing. Further at sentencing, defendant made a lengthy statement to the court, but did not tell the court he was unhappy with his attorney at that point or at any previous point during trial.

¶ 47 Based upon these facts, we conclude that defendant did not make a sufficient *pro se* claim to warrant the court to conduct a *Krankel* hearing. Therefore, the court did not err in failing to inquiry into defense counsel's statements to the court that defendant wanted to “fire” his appointed counsel on the third day of trial.

¶ 48 CONCLUSION

¶ 49 The judgment of the circuit court of Rock Island County is affirmed.

¶ 50 Affirmed.