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No. 2011 IL App (3d) 090115-U

Order filed September 16, 2011

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the Twelfth Judicial Circuit Will County, Illinois,
Plaintiff-Appellee,)	
v.)	Appeal No. 3-09-0115 No. 08-CF-2045
CARLUIS MAETHIS,)	The Honorable Robert Livas,
Defendant-Appellant.)	Judge Presiding.

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

ORDER

¶ 1 *Held:* Where the trial court failed to conduct an inquiry into defendant's *pro se* motion alleging ineffective assistance of counsel to determine whether to appoint counsel to argue the motion, and sentenced defendant for a felony without a presentence investigation report, the defendant's convictions for burglary and theft were affirmed but the cause was remanded for new posttrial proceedings.

¶ 2 The original decision in this case was filed as a Rule 23 order on April 13, 2011.

Pursuant to the petition of the defendant and the resulting supervisory order issued by the supreme court on July 27, 2011, that order was vacated on July 29, 2011, and this new decision

issued.

¶ 3 The State indicted defendant, Carluis Maethis, for one count of burglary and one count of theft. Following a bench trial, the circuit court of Will County found defendant guilty of both counts. Defendant filed *pro se* posttrial motions for a new trial on, *inter alia*, grounds of ineffective assistance of counsel. The trial court granted defense counsel's motion to withdraw, held a hearing on defendant's motions, in which defendant proceeded *pro se*, and ultimately denied the motions. For the reasons that follow, we reverse defendant's sentence and remand for new posttrial proceedings.

¶ 4 BACKGROUND

¶ 5 The State indicted defendant for one count of burglary and one count of theft alleging that defendant knowingly entered Joan Buechel's motor vehicle with the intent to commit a theft therein, and knowingly obtained control over Buechel's debit card with the intent to permanently deprive her of its use and benefit.

¶ 6 Joliet police officer James Kilgore responded to a report of a man on a bicycle harassing customers at the Crown Inn Motel on Jefferson in Joliet. Officer Kilgore saw a man riding a bicycle east on Jefferson in the vicinity of the hotel matching the description of the man harassing customers. Kilgore ordered the man to stop, but the bicyclist accelerated away. Following a brief pursuit, Kilgore stopped the man and detained him. Kilgore identified defendant, Carluis Maethis, as the man he stopped.

¶ 7 Kilgore placed defendant under arrest for resisting a peace officer and searched him. Defendant does not challenge the initial seizure following the pursuit, the arrest, or the search incident to arrest. Police seized keys, a gold ring, lottery tickets, credit cards, and a debit card

bearing the name "Joan Buechel" from defendant as a result of the search. Defendant told police the items were his.

¶ 8 Police contacted Joan Buechel. When police asked whether she had lost her debit card, she realized that she had left her purse containing the debit card and other items, and her car keys, in her vehicle the previous night. When Buechel went to her vehicle, she discovered the glove compartment open, a CD holder she kept attached to the visor laying on the car seat, various items on the floor of the car, and that her purse and keys were no longer in the car. Buechel testified that when she last had the purse, it contained a checkbook, medications, an Eddie Bauer card, a Sears card, \$20 cash, a coin bag with various coins, her debit card, her mother's ring, and lottery tickets. She testified that she inadvertently left her keys in the ignition. After police spoke to Buechel, an officer took the items seized from defendant to her home and showed them to her. Buechel identified the items seized from defendant as the items that had been in her purse in her vehicle.

¶ 9 Police later recovered an unzipped purse from a street located southeast of Buechel's residence. Police telephoned Buechel and informed her they found her purse a couple of blocks from her home. Police returned Buechel's purse, medications, and checkbook to her. Buechel testified that she did not know defendant, did not give him or anyone else permission to enter her car, or to take her purse or any other property. Defendant lives northwest of Buechel's residence. Buechel lives east of defendant and west of the motel. The motel is east of Buechel's residence.

¶ 10 Defendant did not present any evidence. The trial court found defendant guilty of burglary and theft and continued proceedings for the preparation of a presentence investigation report and for sentencing. Before sentencing, defendant filed *pro se* motions for a new trial

alleging, *inter alia*, ineffective assistance of counsel at trial. Defense counsel filed a separate motion for a new trial, and defendant filed a second motion alleging ineffective assistance of trial counsel. At a subsequent hearing, defense counsel informed the trial court that defendant wished to proceed *pro se* on his *pro se* posttrial motions.

¶ 11 The trial court informed defendant that if he chose to proceed *pro se* on his posttrial motions, he would also have to proceed *pro se* at his sentencing hearing. The trial court admonished defendant as to the applicable sentencing range and asked if he still desired to proceed *pro se*. Defendant responded that he only wanted counsel to represent him if his counsel would argue defendant's own motions. Defense counsel informed the court that he could not adopt defendant's motions. Defendant reasserted his desire, in that case, to proceed *pro se*, and the court discharged counsel and the Public Defender's office. The trial court then noted that defendant had not submitted to an interview with the probation department in connection with the preparation of a presentence investigation report. The court informed defendant that it was his right not to submit to the interview, but warned defendant that his refusal to be interviewed would restrict the court from understanding defendant's full background when imposing sentence.

¶ 12 The trial court held a hearing on defendant's *pro se* motions for a new trial. Defendant asked about his second motion alleging ineffective assistance of counsel and the court responded it would rule on the motions for a new trial first. The court again asked defendant if he wished to participate with the preparation of the presentence investigation report. The court informed defendant that he had a right not to participate and that preparation of the report would delay proceedings. Defendant declined participation in the preparation of a presentence investigation

report.

¶ 13 The trial court denied defendant's *pro se* motions for a new trial. Defendant inquired as to his second motion alleging ineffective assistance of counsel. The trial court responded it denied them all. Defendant again confirmed his agreement to proceed with sentencing absent a presentence investigation report. During the sentencing hearing, the court inquired of the State as to defendant's criminal background. Following the hearing, the court ruled that, based on prior convictions, defendant was eligible receive a sentence for a Class X felony for his Class 2 burglary conviction. The court sentenced defendant to 11 years for burglary and 3 years for theft to be served concurrently.

¶ 14 This appeal followed.

¶ 15 ANALYSIS

¶ 16 A. Challenge to the sufficiency of evidence of burglary

¶ 17 Defendant argues that the evidence produced at trial is insufficient to prove him guilty beyond a reasonable doubt of burglary. Defendant asserts that the only evidence which connects him to the burglary of Buechel's motor vehicle is his possession of the proceeds of that burglary. Defendant concedes the sufficiency of the evidence to sustain his conviction for theft, but argues that his conviction for burglary can only be based on speculation and, therefore, must be reversed. Defendant relies on our supreme court's decision in *People v. Housby*, 84 Ill. 2d 415 (1981), in which the court held as follows:

"To the extent that past Illinois decisions have held that exclusive and unexplained possession of recently stolen property is sufficient, standing alone and without corroborating evidence of

guilt, for conviction of burglary, those decisions *** can no longer be applied, even when the inference is regarded as permissive. The presumption standing alone does not prove burglary beyond a reasonable doubt. The person in exclusive possession may be the burglar, to be sure, but he might also be a receiver of stolen property, guilty of theft but not burglary, an innocent purchaser without knowledge that the item is stolen, or even an innocent victim of circumstances. [Citations.]" *Housby*, 84 Ill. 2d at 424.

¶ 18 The State agrees that, under *Housby*, defendant's possession of recently stolen property, standing alone, is not sufficient to sustain his burglary conviction.

The *Housby* court held as follows:

"[T]he presumption *** may *** still be used in conjunction with other circumstantial evidence of guilt provided it is a permissive presumption which leaves the fact finder free *** to accept or reject the inference. *** [T]he inference used here did not infringe upon Housby's due process rights if: (i) there was a rational connection between his recent possession of property stolen in the burglary and his participation in the burglary; (ii) his guilt of burglary is more likely than not to flow from his recent, unexplained and exclusive possession of burglary proceeds; and (iii) there was evidence corroborating Housby's guilt." *Housby*, 84 Ill. 2d at 424.

The State argues, the circumstantial evidence in this case, combined with defendant's unexplained possession of recently stolen property, is sufficient to prove defendant guilty of burglary beyond a reasonable doubt under *Housby*. See *People v. Span*, 156 Ill. App. 3d 1046, 1052 (1987) ("The evidence in the record before us having satisfied the *Housby* test, the permissive inference of defendant's guilt from his exclusive possession of recently stolen property was proper and the burden shifted to the defendant to provide a reasonable explanation of his possession of the proceeds").

¶ 19 In *People v. Gonzales*, 292 Ill. App. 3d 280, 288-89 (1997), the court held that "[i]n construing the first prong of the *Housby* test, this court has held that a rational connection exists between recent possession of stolen property and participation in the burglary if the inference that defendant obtained the items by burglary is not unreasonable. [Citation.]" *Gonzales*, 292 Ill. App. 3d at 288. The court noted that "[o]f paramount concern in determining whether the inference is reasonable is whether defendant's possession of the stolen property is proximate to both the time and place of the burglary." *Gonzales*, 292 Ill. App. 3d at 288-89. Defendant concedes that the evidence is sufficient to satisfy the first *Housby* factor because there is a rational connection between his recent possession of property stolen in the burglary and his alleged participation in the burglary.

¶ 20 Defendant argues that the evidence is insufficient to establish that his guilt of burglary is more likely than not to flow from his recent, unexplained, and exclusive possession of the proceeds of the burglary, and that there is no evidence corroborating his guilt of burglary. The State argues that the trial court properly inferred from the evidence that defendant did more than possess the proceeds of the burglary and that his conviction should be affirmed.

¶ 21 The evidence proved that defendant had exclusive possession of the proceeds of the burglary. The trial court noted that the items in defendant's exclusive possession were taken within a narrow time frame, between the time Buechel returned home the night before and approximately 4:00 a.m. the following day. This court has held that exclusive possession of burglary proceeds, a short time after the burglary occurred, without explanation, is sufficient to satisfy the second *Housby* factor. *People v. McGee*, 373 Ill. App. 3d 824, 833 (2007). See also *People v. Mallette*, 131 Ill. App. 3d 67, 72 (1985) ("defendant had exclusive possession of the burglary proceeds for the purpose of satisfying the second prong of *Housby*."). *Cf.* *People v. Ross*, 103 Ill. App. 3d 883, 887 (1981) (finding second prong not satisfied where the crime could have occurred at any time during the previous nine hours and where the defendant's possession was not entirely unexplained).

¶ 22 The inference that defendant was in possession of property taken by him in a burglary, rather than stolen property defendant may have found after the burglary occurred, is bolstered by the fact that defendant was found in possession of Buechel's keys. Buechel testified that she left her keys in the ignition of the car and not in her purse. Thus, while there is a possibility defendant found the proceeds of a burglary committed by another, it is reasonable to infer that defendant took the keys and other proceeds of the burglary himself, as opposed to having retrieved keys discarded on the ground. Moreover, defendant did not testify that he "found" the keys or any of the property in his possession. The only evidence of any explanation for defendant's possession of the property was his claim to police that it was his property.

¶ 23 In *People v. Ross*, 103 Ill. App. 3d 883, 887 (1981), the court held that the trier of fact may rely on the falsity of a defendant's explanation for possession of stolen goods as evidence of

guilt when coupled with other corroborating evidence. The evidence produced at trial corroborates defendant's guilt of burglary. The trial court, in finding the evidence sufficient to prove defendant guilty beyond a reasonable doubt of burglary, relied on the logical geographic progression from defendant's residence, past Buechel's home, past the area where police recovered the purse taken in the burglary, to the motel where a man fitting defendant's description was reported harassing customers, to the place where police encountered defendant with property taken in the burglary. Defendant was arrested a short distance from the scene of the crime with the proceeds of the crime. Given the circumstantial evidence, the trier of fact could reasonably infer that defendant took the property from Buechel's motor vehicle.

¶ 24 We find that the evidence is sufficient to satisfy the second and third *Housby* factors. Accordingly, the trial court could presume defendant's guilt of burglary based on his exclusive, unexplained possession of the proceeds of the burglary. The presumption shifts the burden of production to defendant to offer a "reasonable explanation of possession." *Housby*, Ill. 2d at 431. Because defendant did not offer any evidence of a reasonable explanation for his possession of property recently taken in the burglary, the trial court's judgment finding defendant guilty of burglary is affirmed.

¶ 25 B. Theft as lesser included offense of burglary

¶ 26 Defendant also asked this court to vacate his conviction for theft as a lesser included offense of the burglary. We may not. This court had already rejected defendant's argument that theft is a lesser included offense of burglary under the charging-instrument approach. This court held that "[t]heft is simply not an included offense of burglary in a one-act, one-crime analysis." *People v. Poe*, 385 Ill. App. 3d 763, 766 (2008). Our supreme court has recently expressly

agreed with the analysis in *Poe*, and held that the abstract-elements approach is the proper analysis to employ to determine whether theft is a lesser-included offense of burglary. *People v. Miller*, 238 Ill. 2d 161, 175 (2010).

¶ 27 Applying the abstract-elements approach the court unequivocally held that "theft is not a lesser-included offense of burglary." *Miller*, 238 Ill. 2d at 176. Defendant has not challenged his conviction for theft and, for the reasons already discussed, we find the trial court properly convicted defendant of burglary. Under *Miller*, we must reject defendant's request to vacate his conviction for theft as a lesser-included offense of burglary. Accordingly, defendant's conviction for theft is also affirmed.

¶ 28 C. Failure of trial court to consider appointment of new counsel for posttrial proceedings

¶ 29 Next, defendant argues that the trial court erred in failing to determine whether to appoint new counsel to argue his *pro se* allegations of ineffective assistance of counsel, and erroneously informed him that his claims of ineffective assistance of counsel could only be considered if defendant proceeded *pro se* for posttrial proceedings. Defendant further asserts that he did not know of—and the trial court did not consider—the possibility that the court would appoint new counsel to argue those claims. Thus, because the trial court erroneously forced defendant to choose between proceeding *pro se* on his allegations of ineffective assistance and not having those allegations considered at all, he contends his waiver of counsel for posttrial proceedings was not voluntary, knowing and intelligent.

¶ 30 The supreme court has provided guidance for determining when new counsel is provided in a situation such as this, as follows:

"In interpreting *People v. Krankel*, 102 Ill. 2d 181 (1984), the following

rule developed. 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." *People v. Moore*, 207 Ill. 2d 68, 77 (2003).

¶ 31 Defendant argues that, had the trial court followed proper procedure when faced with defendant's *pro se* allegations of ineffective assistance of trial counsel, defendant would have known whether or not the court would appoint new counsel to argue those claims, and he could have then decided to proceed with new counsel, proceed on those claims *pro se*, or abandon the claims of ineffective assistance and proceed on other posttrial motions with his original counsel. The State responds the trial court is not required to engage in some interchange with trial counsel or the defendant to ascertain whether allegations of ineffective assistance of counsel lack merit or pertain only to trial strategy in every case, and that no such inquiry was required in this case.

¶ 32 The State insists that the trial court did not prejudice defendant by failing to engage in some exchange with counsel or defendant to determine whether it needed to appoint new counsel to argue defendant's initial claims of ineffective assistance because defendant argued all of those claims during his argument on his first two motions for a new trial. The State claims that the trial court did not have to engage in a preliminary inquiry with regard to defendant's second motion alleging ineffective assistance because it contained matters raised and argued, by

defendant *pro se*, in his initial two motions for a new trial.

¶ 33 The State's argument fails to address the central concern that the rule from *Krankel* is meant to address.

"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." *Moore*, 207 Ill. 2d at 77.

¶ 34 We cannot rely on the fact that defendant actually argued all of the grounds on which he claimed to have received ineffective assistance but ignore the fact that, due to the trial court's neglect, defendant had to make those arguments without the assistance of counsel while further action may have been warranted on defendant's *pro se* claims. When defense counsel informed the trial court that he would refuse to adopt defendant's *pro se* motions, which contained defendant's allegations of ineffective assistance, the trial court stated that counsel's decision left defendant "in the position, *** of rejecting his continued representation *** or deciding from this point on, to represent yourself."

¶ 35 Prior to excusing defendant's counsel, the court never engaged in any exchange, either with defendant's counsel or defendant himself, to assess what further action, if any, was warranted on defendant's claims of ineffective assistance, including whether to appoint new

counsel to argue those claims. Rather, the court merely stated that it had "examined [defendant's motions] on a cursory manner (sic)." The court concluded that defendant's motions were "intelligible, it is knowledgeable, and certainly understand (sic) your own prior record." The court did not discuss the facts and circumstances surrounding the allegedly ineffective representation.

¶ 36 Instead, after discharging defendant's counsel, the court merely stated as follows:

"And based on your experience in the criminal justice system, the motions that you have now filed on your own behalf, being aware of the sentencing potential and being cognizant, obviously, of the fact that you have compared your prior attorney's motion to your motion and have rejected his position, decided to adopt your own, I am going to allow you to proceed in representing yourself."

¶ 37 We reject the State's argument that the preceding language "implies" the trial court considered defendant's arguments that he received ineffective assistance of counsel and determined that new counsel need not be appointed. The court's finding that defendant's *pro se* motions are intelligible and knowledgeable implies, if anything, that defendant's allegations were sufficient to show possible neglect of his case.

"[I]f 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.]" (Emphasis added.) *Moore*, 207 Ill. 2d at 77.

¶ 38 We are not convinced that the trial court conducted an adequate inquiry into defendant's *pro se* allegations of ineffective assistance of counsel. *Cf. People v. McCarter*, 385 Ill. App. 3d 919, 941 (2008) ("there are instances where a brief discussion between the trial court and the defendant is sufficient for the trial court to properly deny an ineffective assistance claim of this sort"). The trial court never discussed the allegations with defendant and did not make a finding that the allegations in defendant's *pro se* motions pertained only to matters of trial strategy. Moreover, the trial court's error was compounded when it forced defendant to choose between proceeding with counsel and having his ineffective assistance claims heard. Therefore, we remand this cause for the purpose of conducting an inquiry into defendant's *pro se* claims of ineffectiveness and any further proceedings necessitated thereby. *People v. Vargas*, 396 Ill. App. 3d 465, 479 (2009), citing *Moore*, 207 Ill. 2d at 79.

¶ 39 D. Challenge to sentencing without presentence investigation report

¶ 40 Finally, defendant argues that the cause must be remanded for resentencing because the trial court sentenced him without the benefit of a presentence investigation report and without an agreement between the prosecution and the defense to a specific sentence. The State agrees that this case must be remanded for resentencing. In *People v. Jennings*, 364 Ill. App. 3d 473, 484 (2005), the court held as follows:

"Under the Unified Code of Corrections, a defendant may not be sentenced for a felony before a written presentence investigation is presented and the court considers the report. This requirement may only be waived where both parties agree to the imposition of a specific sentence and where there is a finding in the record as to the defendant's history of criminality. 730 ILCS 5/5-3-1 (West 2002). Our supreme court has held that the requirements of the statute are mandatory and that the defendant's right to a written presentence investigation report is not a personal right and cannot be waived unless both the State and the defendant agree to the imposition of a specific sentence." *Jennings*, 364 Ill. App. 3d at 484, citing *People v. Harris*, 105 Ill. 2d 290, 303 (1985).

Accordingly, under *Jennings* and *Harris*, defendant's sentence is vacated, and the cause remanded for resentencing.

¶ 41 CONCLUSION

¶ 42 The judgment of the circuit court of Will County is affirmed in part, reversed in part, and the cause remanded for further proceedings consistent with this court's judgment and order.

¶ 43 Affirmed in part, reversed in part, and remanded.