

NOTICE

Decision filed 08/18/11. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2011 IL App (5th) 090615-U  
NO. 5-09-0615  
IN THE  
APPELLATE COURT OF ILLINOIS  
FIFTH DISTRICT

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the   |
|                                      | ) | Circuit Court of  |
| Plaintiff-Appellee,                  | ) | St. Clair County. |
|                                      | ) |                   |
| v.                                   | ) | No. 08-CF-365     |
|                                      | ) |                   |
| ART McCRAY,                          | ) | Honorable         |
|                                      | ) | John Baricevic,   |
| Defendant-Appellant.                 | ) | Judge, presiding. |

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JUSTICE STEWART delivered the judgment of the court.  
Justices Goldenhersh and Spomer concurred in the judgment.

**ORDER**

- ¶ 1           *Held:* The trial court adequately inquired into the defendant's *pro se* allegations of ineffective assistance of counsel and did not err in opting not to appoint new counsel.
- ¶ 2           On September 2, 2009, following a jury trial in the circuit court of St. Clair County, the defendant, Art McCray, was convicted of first-degree murder against a person 60 years of age or older. On September 25, 2009, the defendant filed a *pro se* posttrial motion alleging ineffective assistance of counsel. On October 6, 2009, the defendant, through his attorney, filed another posttrial motion alleging that the guilty verdict was against the manifest weight of the evidence and various trial court errors. On October 26, 2009, the trial court held a hearing on the defendant's posttrial motions and to impose sentence. The court denied both of the defendant's posttrial motions. The defendant was sentenced to 58 years' imprisonment in the Department of Corrections. He filed a timely notice of appeal. We affirm.

¶ 3

## BACKGROUND

¶ 4

On January 10, 2007, 96-year-old Ruby Coney was stabbed and killed in her Centreville, Illinois, home. On March 13, 2008, the defendant was arrested and charged with her murder.

¶ 5

On August 24, 2009, the trial court held a status conference on the defendant's case. At that time, the State informed the judge that there were numerous videotaped statements made by the defendant to the police and that it was the State's understanding that the defense did not wish to file any type of motion to suppress the statements. Defense counsel confirmed that the defendant did not wish to file a motion to suppress. The trial court then inquired if counsel had discussed this with the defendant. Defense counsel responded in the affirmative. The trial court asked the defendant if he had "any issues about Motions to Suppress" and the defendant responded "no sir." The trial court finally asked, "So again, not to change your opinion just to make I'm—sure I'm clear, understanding all these issues, do you wish to preside—proceed to trial Monday?" The defendant answered yes.

¶ 6

At the trial, James Coney testified that he lived with his mother, Ruby Coney. He stated that at the time of the murder, his mother was 96 years old and was in poor health. Mrs. Coney could not care for herself, so Mr. Coney, his sister, Lorene Ghani, or a caregiver stayed with her at all times.

¶ 7

On January 10, 2007, Mr. Coney left for work at approximately 8:45 a.m. His mother was awake and in the kitchen when he left. The house was clean and neat. Mr. Coney said he locked the front door. The back door had a padlock on it, but the padlock was not locked. He stated that his mother would not normally let people in the house when he was not there. Everything appeared normal when he left.

¶ 8

Lorene Ghani testified that on the morning of January 10, 2007, she ran some

errands before going to her mother's house. When she arrived after 10 a.m., she noticed that the front door was slightly ajar. She testified that she was surprised and shocked. The house had been ransacked. As she walked around the house, she kept saying "Oh, my God!" When she got to her mother's bedroom, she saw her mother lying in the middle of the floor with blood all around her. As soon as she located her mother, she grabbed the phone and ran from the house because she was afraid the perpetrator was still there. Once out of the house Mrs. Ghani telephoned 9-1-1 and her nephew LeRoy Witherspoon.

¶ 9 Jeron Phillips testified that on the morning of January 10, 2007, he was taking out the trash and he heard "a lot of sirens." He saw the defendant running. The defendant asked Mr. Phillips, "Can I come in your house[;] I'm hiding?" The defendant was perspiring, twitchy, and nervous. Mr. Phillips told the defendant he could not come in because there were too many sirens. He asked the defendant why he was running, but the defendant refused to tell him. As he was going back into his house, he saw the defendant throw a coat with fur on it in the trash.

¶ 10 Sergeant Barry Foster of the Centreville police department testified that on January 10, 2007, at approximately 10:37 a.m. he responded to a 9-1-1 call. When he arrived at the residence, it appeared to be ransacked. In the northeast bedroom, he found an elderly female lying motionless on the floor. She appeared to be deceased and there was blood on the floor and bed. He then searched for an intruder, and finding none, he secured the premises and awaited additional law enforcement officials. After securing the scene, Sergeant Foster found coins and a bloody knife with a black handle in a field behind the house.

¶ 11 Mr. Coney testified that he kept a small football-shaped bank, approximately half full of coins, on top of the television set in his house. The bank was there in the

morning when he left the house but was missing when he returned to the house after his mother's murder.

¶ 12 State police officer Christie White testified that she worked as a crime scene investigator at the time of the murder. She arrived at the murder scene at approximately 11:18 a.m. Before entering the bedroom where Mrs. Coney was murdered, Ms. White examined the floor to look for footwear impressions. She made gel lifts of the shoeprints. She also collected the knife and \$7.06 in coins as evidence. She found a padlock in the yard.

¶ 13 Forensic pathologist Dr. Raj Nanduri testified that she performed the autopsy on Mrs. Coney. Mrs. Coney had three stab wounds to the back of her neck and one to the back of her chest. Dr. Nanduri removed some bone from the cervical vertebra that had knife tracking through it.

¶ 14 Ronald Locke, of the forensic services division of the Illinois State Police, testified that he specializes in tool mark identification. He compared the bone sample from Mrs. Coney to the mark made by the knife recovered outside Mrs. Coney's house and found that the knife made the cut in Mrs. Coney's cervical material.

¶ 15 Derrick Branch testified that, during part of January 2007, the defendant lived with him. Sometime in early January, Armondis Story came to the residence and brought a Smith and Wesson knife. Mr. Story left the knife and his blue coat with fur on the hood at the house. Later in January, Mr. Branch came home and found the defendant gone. A PlayStation 2, the knife, the coat, and some marijuana were missing.

¶ 16 Deputy Kiwan Guyton testified that he was the lead investigator for the Centreville police department assigned to the murder of Mrs. Coney. He first interviewed the defendant on January 17, 2007. At that time, the defendant denied

being in the Centreville area on the date Mrs. Coney was murdered. He was interviewed again on January 18, 2007, and he admitted being in the area on the date of the murder but denied any involvement. He was interviewed on January 19, 2007, and he again admitted being in the area but denied any involvement. On March 13, 2008, the defendant was arrested and charged with Mrs. Coney's murder. Deputy Guyton interviewed him again after his arrest. The interrogation was videotaped and played to the jury.

¶ 17 During the videotaped interview, the defendant stated that he had been planning to burglarize the mayor's house but that he saw the mayor's wife at home and changed his plan. Instead, he decided to burglarize Mrs. Coney's house because he walked by it and thought no one was home. He accurately described the floor plan of the house. Once inside the house, he was startled by Mrs. Coney, who said she had a gun. He stated that he saw her reach for something by her bed and that he stabbed her. He did not remember how many times he stabbed her, but knew that it was more than once. The defendant demonstrated how he stabbed Mrs. Coney. The defendant stated he searched the house for the gun but did not find it. As he searched the house, he heard a lady say "Oh my God!" and he ran out of the back door. He said he took a plastic bubble with change in it but dropped it when running from the house. The defendant stated that, while running, he came upon Jeron Phillips and that he asked Mr. Phillips to hide him. Mr. Phillips refused. He then took off the coat with fur on the hood that he had taken from Mr. Branch's house and put it in the trash.

¶ 18 The defendant stated that he was not coerced into making the admissions and that no specific promises were made to him. He indicated that, prior to being arrested, he had smoked marijuana. He stated that, when confessing, he knew what he was doing.

¶ 19 Mr. Coney testified that his mother kept a small gun in the house. He did not know where it was kept. After Mrs. Coney's death, his sisters found it in the bottom drawer of a dresser.

¶ 20 Donna Rees testified that she is a forensic scientist for the Illinois State Police working in the forensic biology DNA section. She tested DNA taken from the knife and compared it to DNA from the defendant and Mrs. Coney. One of the DNA samples was incomplete. The points of comparison on the incomplete DNA sample matched the defendant. However, because it was a minimal profile, the profile would occur in 1 of 940 black individuals. The other two samples she was given matched Mrs. Coney and that profile was very rare.

¶ 21 Thomas Gamboe, Jr., testified that he is a forensic scientist with the Illinois State Police specializing in footwear identification. He examined the gel lifts of the shoeprints found in Mrs. Coney's home. He compared it to a shoe the defendant owned. One of the gel lifts displayed class characteristics similar to those of the defendant's shoe. He looked for accidental characteristics made on the shoes, such as scratches, cuts, and gouges. There were not enough individual identifying characteristics to make a positive identification.

¶ 22 The State presented no further evidence. The defendant did not testify. The trial court questioned the defendant and he indicated that he understood it was his decision whether to testify and that he opted not to testify. The defense rested without presenting any witnesses. The jury found the defendant guilty of first-degree murder of a person over 60 years of age.

¶ 23 On September 25, 2009, the defendant filed a *pro se* posttrial motion alleging the following: (1) his right to a speedy trial had been violated, (2) he was on psychotropic medication during the trial and there should have been a fitness hearing,

(3) he had not seen important documents provided in discovery that would have aided him in his defense, (4) while appearing as a witness, Deputy Guyton consulted with the prosecution during a recess, and (5) his trial counsel was ineffective. He alleged his attorney was ineffective for failing to seek a fitness hearing, failing to move to suppress his confession, encouraging him to waive his right to a speedy trial, advising him not to testify, failing to impeach Mr. Branch and Mr. Phillips with evidence of their inconsistent stories, and not allowing him input in the jury selection decisions. His attorney filed a posttrial motion on October 6, 2009, alleging that the guilty verdict was against the manifest weight of the evidence, that the trial court erred in admitting the testimony of Tom Gamboe, and that the trial court erred in denying the defendant's objections to the State's proposed jury instructions.

¶ 24 On October 26, 2009, the trial court held a posttrial motion hearing and a sentencing hearing. At the start of the hearing, the trial court addressed the defendant's *pro se* posttrial motion and asked the defendant why his motion should be granted. The defendant stated that the motion should be granted because his counsel was ineffective for failing to file a motion to suppress his statements. The defendant went on to say that he believed that the motion would have been successful because he was under the influence of marijuana when he made the statement and because there were "threats on the video statement." The trial court asked if there were any other reasons why the defendant believed his counsel was ineffective, and he responded "that's it." Defense counsel was given the opportunity to address the issue of the failure to file a motion to suppress. The trial court stated that, in reviewing the record, it thought that the issue had been addressed, that the *pro se* motion was on file, and that the issues were preserved. The trial court then heard argument on counsel's posttrial motion and denied both posttrial motions. The trial

court imposed a sentence of 58 years' imprisonment in the Department of Corrections. The defendant filed a timely notice of appeal.

¶ 25

#### ANALYSIS

¶ 26

The defendant argues that the trial court failed to conduct an adequate inquiry to determine whether his posttrial motion alleging ineffective assistance of counsel required the appointment of new counsel. The question of whether the trial court adequately inquired into the defendant's claim of ineffective assistance of counsel is a question of law that is reviewed *de novo*. *People v. Bomar*, 405 Ill. App. 3d 139, 147 (2010).

¶ 27

In *People v. Krankel*, 102 Ill. 2d 181 (1984), the defendant's trial counsel failed to contact an alibi witness or present an affirmative alibi defense at the trial. The defendant presented a *pro se* posttrial motion alleging ineffective assistance of counsel for these failures. At a hearing on the posttrial motion, defense counsel requested a continuance so that new counsel could be appointed to represent the defendant on his posttrial motion for ineffective assistance of counsel. The trial court refused, and the defendant argued the motion. The trial court denied the motion. On appeal, the State conceded that new counsel should have been appointed for the defendant. The supreme court held that the trial court should have appointed alternate counsel to represent the defendant at the posttrial hearing regarding his claim of ineffective assistance of counsel. *Krankel*, 102 Ill. 2d at 189. The court remanded the matter for a new hearing on the defendant's motion with newly appointed counsel.

¶ 28

"New counsel is not automatically required in every case in which a defendant presents a *pro se* posttrial motion alleging ineffective assistance of counsel." *People v. Moore*, 207 Ill. 2d 68, 77 (2003). When a defendant presents such a motion, the trial court should first examine the factual basis of the claim. *Moore*, 207 Ill. 2d at

77-78. "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." *Moore*, 207 Ill. 2d at 78. New counsel should be appointed if the allegations show possible neglect of the case. *Moore*, 207 Ill. 2d at 78.

¶ 29 There are several methods the trial court can employ to evaluate a defendant's *pro se* allegations of ineffective assistance of counsel. *People v. Bobo*, 375 Ill. App. 3d 966, 981 (2007). The trial court may simply ask trial counsel questions about the facts and circumstances surrounding the defendant's allegations. *Moore*, 207 Ill. 2d at 78. The trial court can engage in a brief discussion with the defendant. *Moore*, 207 Ill. 2d at 78. Alternatively, the trial court can base its evaluation on its personal knowledge of defense counsel's performance at the trial and the insufficiency of the defendant's allegations on their face. *Moore*, 207 Ill. 2d at 79.

¶ 30 In the instant case, at the sentencing hearing, the trial court commenced by asking the defendant to tell the court why he thought the court should grant the *pro se* posttrial motion. The following discussion took place:

THE DEFENDANT: I feel that I wasn't given a fair trial due to ineffective counsel. I feel that I never got a motion to suppress inadmissible statement that I knew would have gotten thrown out if I would have.

THE COURT: Why do you think you would have been successful if that would have been filed?

THE DEFENDANT: I was under the influence of marijuana, and the threats are on the video statement.

THE COURT: Are there any other reasons why you believe that you had ineffective assistance of counsel?

THE DEFENDANT: That's it, sir.

THE COURT: Mr. Cueto [defense attorney], do you wish to respond to those?

MR. CUETO: Only, Your Honor, that I think we did put on the record the issue about a motion to suppress a couple of times before trial, and I think it was—the defense wishes to now proceed with the motion to suppress. So I think that was covered.

THE COURT: In my review of the record, I think those—that issue was certainly addressed. However Mr. McCray, your motion is on file. Those issues that you have raised will be preserved."

¶ 31 Mr. Cueto went on to argue the posttrial motion he prepared. In arguing that the trial court's decision was against the manifest weight of the evidence, he specifically mentioned that, at the end of the videotaped confession, the defendant alerted the police to the fact that he was under the influence of marijuana. The trial court denied both the defendant's posttrial motion and defense counsel's posttrial motion.

¶ 32 The same trial judge heard pretrial motions, conducted the jury trial, and heard the posttrial motions. As a result, the trial court had personal knowledge of defense counsel's performance at the trial and the sufficiency of the defendant's allegations on their face. Following the analysis set out in *Krankel* and its progeny, the trial court reviewed the defendant's motion, reviewed the record, and specifically gave the defendant the opportunity to argue, explain, and support his allegations. The record reflects that the trial court's actions were appropriate and demonstrated an adequate review and inquiry into the defendant's allegations of ineffective assistance of counsel. Accordingly, we reject the defendant's argument that the case should be remanded to the trial court to conduct further proceedings in connection with his *pro se* claims of ineffective assistance of counsel.

## CONCLUSION

¶ 33 For the foregoing reasons, the judgment of the circuit court of St. Clair County is affirmed.

¶ 34 Affirmed.