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2012 IL App (3d) 110813-U

Order filed December 20, 2012

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
Plaintiff-Appellee,	)	Peoria County, Illinois,
	)	
v.	)	Appeal No. 3-11-0813
	)	Circuit No. 10-CF-967
	)	
MIGALE FENDERSON,	)	Honorable
	)	Glenn H. Collier,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE O'BRIEN delivered the judgment of the court.  
Justices Wright and McDade concurred in the judgment.

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**ORDER**

¶ 1 *Held:* The trial court erred by failing to conduct a preliminary inquiry into defendant's *pro se* claims of ineffective assistance of counsel.

¶ 2 Defendant, Migale Fenderson, was convicted of residential burglary (720 ILCS 5/19-3(a) (West 2010)) and was sentenced to 13 years' imprisonment. Defendant appeals, arguing that the cause should be remanded for further proceedings because the trial court failed to conduct an inquiry into defendant's posttrial allegations of ineffective assistance of counsel. We remand.

¶ 3

## FACTS

¶ 4 On September 28, 2010, defendant was charged by indictment with residential burglary and attempted residential burglary. 720 ILCS 5/19-3(a), 8-4(a) (West 2010). At defendant's jury trial, the State's evidence indicated that Matthew Bennett's home was broken into by defendant. On the day of the incident, Bennett was at work when he received a telephone call from his security system, alerting him that his back door security alarm had triggered. Bennett's security system also notified the police. Bennett recalled locking the back door before leaving for work.

¶ 5 Officers Chad Batterham and Logan McCarrell arrived at the scene. The officers observed that the back door was closed, but heard noises coming from inside the house. McCarrell then saw the back door swing open, and defendant emerged. Defendant was then arrested. When defendant asked why he was being arrested, Batterham told him it was for residential burglary. Defendant told the officers that it was only an attempt because he was not inside the house and he had not taken anything yet. Following defendant's arrest, the officers observed pry marks next to the doorknob on the back door and also found a screwdriver and a pair of gloves on the ground near the back door.

¶ 6 When Bennett arrived at his home, he saw defendant in handcuffs. Bennett told the officers that he did not know defendant and did not give him permission to be inside his house. Bennett was shown the pry marks located on the back door and stated that they were not there when he left for work that morning. Bennett also denied ownership of the screwdriver and gloves that were found near the back door.

¶ 7 Defense counsel moved for a directed verdict, which the trial court denied. The defense rested without presenting any evidence. The jury subsequently found defendant guilty of both

residential burglary and attempt.

¶ 8 After trial, but before sentencing, the trial court issued a written order acknowledging that the court received an *ex parte* letter from defendant. The court forwarded defendant's letter to the State's Attorney's office and the attorney of record. Defendant's letter set out the reasons he was entitled to a new trial and included several claims of ineffective assistance of trial counsel. Defendant alleged that trial counsel failed to call witnesses and present evidence defendant wished to present at trial, obtain evidence defendant made counsel aware of prior to trial, question police as to why they believed defendant was responsible for all the burglaries in the neighborhood, inform defendant of statements that could be used against him, inform defendant of a motion to suppress his statements, inform defendant that his *Miranda* rights needed to be read to him by the arresting officers, and inform defendant that he had a right to be advised of the reason for his arrest. Defendant further alleged that counsel held back portions of discovery from him and changed statements in the police reports.

¶ 9 Without indicating its reason, the trial court subsequently allowed defense counsel to withdraw and appointed a new public defender, Sean Donahue, to represent defendant. Donahue filed a motion for new trial on defendant's behalf, but no claims of ineffective assistance of counsel were included. At the hearing on the motion and for sentencing, Donahue explained to the court that this case was originally assigned to another public defender, but that he was assigned to the case to present the motion for new trial and for sentencing.

¶ 10 Donahue informed the court that defendant wished to withdraw his motion for new trial. Defendant explained that he was now taking medication, and he would like to admit his guilt and be sentenced. The trial court allowed defendant to withdraw the motion. No mention was ever

made regarding defendant's *pro se* claims of ineffective assistance. The trial court entered a conviction for residential burglary and sentenced defendant to 13 years' imprisonment.

Defendant appeals.

¶ 11

#### ANALYSIS

¶ 12 On appeal, defendant argues that the cause should be remanded for further proceedings because the trial court did not conduct a preliminary inquiry into his *pro se* posttrial allegations of ineffective assistance of counsel.

¶ 13 When a defendant presents a *pro se* posttrial claim of ineffective assistance of counsel, the trial court must conduct some type of inquiry into the factual basis of defendant's claim. *People v. Moore*, 207 Ill. 2d 68 (2003). A trial court may conduct a preliminary investigation by: (1) questioning trial counsel about the facts and circumstances surrounding defendant's allegations; (2) requesting more specific information from defendant; or (3) relying on its own knowledge of defense counsel's performance at trial and the insufficiency of defendant's allegations on their face. *Moore*, 207 Ill. 2d 68.

¶ 14 If, after a preliminary investigation into the allegations, the 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 motion. *Id.* However, if the allegations show possible neglect of the case, the trial court should appoint new counsel to argue defendant's ineffective assistance claims. *Id.* The operative concern for the reviewing court is whether the trial court conducted an adequate inquiry into defendant's *pro se* allegations of ineffective assistance of counsel. *Id.*

¶ 15 In this case, the record does not indicate that the trial court made any inquiry into the defendant's ineffective assistance claims. Our supreme court has held that to raise an ineffective

assistance of counsel claim, a *pro se* defendant is not required to do any more than bring his or her claim to the trial court's attention. *Moore*, 207 Ill. 2d 68. Here, defendant's posttrial letter raised multiple claims of ineffective assistance of counsel. Other than notifying the parties of defendant's *ex parte* communication, neither the trial court nor the parties ever mentioned or addressed defendant's *pro se* claims of ineffective assistance of counsel.

¶ 16 The State claims that the trial court could have conducted an adequate inquiry by relying on its own knowledge of counsel's performance. However, some of defendant's claims relied on facts outside of the record and not readily ascertainable by the trial court. These claims included defendant's allegations that trial counsel failed to investigate and present witnesses and evidence that defendant identified to counsel prior to trial. Therefore, even if defendant's claims lacked merit, the trial court is required to make some type of inquiry and afford defendant the opportunity to specify and support his complaints. See *People v. Robinson*, 157 Ill. 2d 68 (1993); *People v. Remsik-Miller*, 2012 IL App (2d) 100921.

¶ 17 The State further claims that any error in failing to conduct an inquiry into defendant's claims was harmless, because newly appointed counsel could have raised defendant's claims of ineffective assistance. However, it is only after the trial court determines that defendant's allegations show possible neglect of his case that new counsel must be appointed. See *Moore*, 207 Ill. 2d 68. Moreover, despite the appointment of new counsel, counsel did not argue any of defendant's ineffective assistance claims or state that he evaluated them and found them to be without merit. Thus, without any inquiry into defendant's *pro se* claims, we cannot say the error was harmless. See *People v. Tolefree*, 2011 IL App (1st) 100689 (stating that the appellate court cannot conduct a harmless error analysis where the trial court conducted no inquiry and made no

ruling concerning defendant's claims of ineffective assistance of counsel).

¶ 18 As stated above, the law mandates the trial court to conduct some type of preliminary inquiry into the underlying factual basis of a defendant's *pro se* posttrial claims of ineffective assistance of counsel. *Moore*, 207 Ill. 2d 68. No such investigation occurred in this case; therefore, we must remand the cause to the trial court for a preliminary investigation into defendant's allegations to determine whether the appointment of new counsel to present defendant's claims is appropriate and necessary. See *Id.*

¶ 19 CONCLUSION

¶ 20 For the foregoing reasons, this cause is remanded to the circuit court of Peoria County for an inquiry into the factual basis underlying defendant's allegations of ineffective assistance of counsel.

¶ 21 Remanded with directions.