

necessary preliminary examination concerning the factual basis of the defendant's claim of ineffective assistance of counsel.

¶ 3

BACKGROUND

¶ 4

On April 6, 2010, the State charged the defendant with violation of an order of protection pursuant to section 12-30(a)(1) of the Criminal Code of 1961 (720 ILCS 5/12-30(a)(1) (West 2010)). The State alleged that the defendant placed a telephone call to Tiffany Becker from the Effingham County jail. The State further alleged that Becker was a person protected under an order of protection that expressly prohibited the defendant from contacting Becker through telephone calls. At the defendant's jury trial, the following evidence was presented.

¶ 5

Becker testified that she had dated the defendant for approximately two years and that they had an 11-month-old son together. On November 19, 2009, she obtained an order of protection against the defendant that expired on November 19, 2011. The order of protection expressly prohibited the defendant from contacting Becker over the telephone. Becker testified that on April 1, 2010, she was at a grocery store in the afternoon with her friend, Sandra Hutson, when she received a telephone call on her cellular phone. When she answered the call, a recorded message informed her that the call was coming from the Effingham County jail. Although the recording allows the calling inmate to identify himself, the identification portion of the recording was blank with "just some weird noises."

¶ 6

Becker believed that it was the defendant, and she accepted the call because, according to Becker, the defendant had told her in the past if she did not accept his calls he would make her "life a living hell" and would make sure she never saw their son again. When she accepted the call, she recognized the defendant's voice at the other end of the line. Becker told the defendant that she was "tired of all this" and

that she was going to hang up. Hutson, however, encouraged Becker to keep the defendant on the phone while they went to the sheriff's department. Becker and Hutson then headed to the sheriff's department while the defendant was still on the telephone.

¶ 7 According to Becker, Officer Kuhns of the Effingham County sheriff's department met Becker and Hutson in the lobby of the county jail. At that point, Officer Kuhns listened to the defendant on Becker's cellular phone. After listening for approximately one minute, Officer Kuhns took Becker's phone and spoke to the defendant.

¶ 8 Officer Kuhns also testified that Becker was still on the phone with the defendant when she came into the sheriff's office. He took her phone, listened, and recognized the defendant's voice. When Officer Kuhns tried to interrupt the defendant by stating "Brandon," the defendant cursed and told him that he "better stay out of it." The officer then identified himself as Sergeant Kuhns with the sheriff's office, and the defendant then stopped talking.

¶ 9 Officer Kuhns told the defendant that he would be back in the jail to speak with him, and the defendant said okay and hung up the telephone. Officer Kuhns went back into the jail and issued the defendant a written citation for violation of the order of protection.

¶ 10 Officer Kuhns obtained a copy of a recording of the defendant's telephone call from the assistant jail administrator. The State introduced portions of the recording at the trial.

¶ 11 The State also presented testimony from Deputy Travis Monnet who testified that he served the order of protection on the defendant at the jail on November 19, 2009, at 11:40 a.m.

¶ 12 During his testimony, the defendant admitted that he placed two telephone calls to Becker on April 1, 2010. He testified that he called Becker because "she had told me to" and that he was on the telephone with her for about 17 minutes. He testified that he was not aware that there was an active order of protection at the time he called. He claimed that he did not remember being served in jail with the order of protection because he had been huffing paint for three weeks before the time of his arrest and did not remember much from that period of time.

¶ 13 At the conclusion of the evidence, the jury convicted the defendant of violating the order of protection. Before he was sentenced for the offense, the defendant filed a *pro se* motion for a new trial that alleged, in part, as follows:

"The Court erred in allowing undue advantage to be taken of the Defendant as a result of poor representation by court-appointed Public Defender's office [citation], in that, despite the Defendant's establishment of *per se* conflicts of interests with the Public Defender's office, [citation][,] [t]he Public Defender's Office refused to withdraw from the case, [citation] and the judge denied the Defendant's pre-trial request for *pro se* representation, and thereby violated the Defendant's right to a fair trial, as well as his right to due process, as set forth in the United States Constitution's Fourteenth Amendment."

¶ 14 The defendant's court-appointed assistant public defender also filed a motion for a new trial on behalf of the defendant. Prior to a hearing on the defendant's *pro se* motion, the circuit court entered the following docket entry:

"Crt. reviews '*pro se*' motion filed on 7-26-10 by [defendant]. As [defendant] is represented by counsel, all *pro se* motions are stricken. *** Clerk is to provide copies of all *pro se* pleadings to [the public defender]."

¶ 15 The circuit court subsequently sentenced the defendant to four years'

imprisonment in the Illinois Department of Corrections. The defendant timely filed a notice of appeal from his conviction and sentence.

¶ 16

ANALYSIS

¶ 17

The defendant raises several issues on appeal that concern his conviction and sentence. The first issue we address concerns the defendant's claim that the circuit court erred in striking his *pro se* claim of ineffective assistance of counsel without conducting the inquiry required by *People v. Krankel*, 102 Ill. 2d 181 (1984). We address only this issue, which is meritorious and dispositive.

¶ 18

When a defendant brings a *pro se* posttrial claim that trial counsel was ineffective, the trial court must inquire adequately into the claim and, under certain circumstances, must appoint new counsel to argue the claim. *Id.* at 187-89. New counsel is not automatically required merely because the defendant presents a *pro se* posttrial claim that his counsel was ineffective. *People v. Moore*, 207 Ill. 2d 68, 77 (2003). The trial court must first examine the factual basis of the claim. The supreme court has listed three ways in which a trial court may conduct its examination: (1) the court may ask trial counsel about the facts and circumstances related to the defendant's allegations; (2) the court may ask the defendant for more specific information; and (3) the court may rely on its knowledge of counsel's performance at trial and "the insufficiency of the defendant's allegations on their face." *Id.* at 78-79. If the defendant's allegations show possible neglect of the case, the court should appoint new counsel to argue the defendant's claim of ineffective assistance. *People v. Taylor*, 237 Ill. 2d 68, 75 (2010). However, if the court concludes that the defendant's claim lacks merit or pertains only to matters of trial strategy, the court may deny the claim. *Id.*

¶ 19

The appeal in the present case concerns "[t]he threshold question of whether

defendant's statement constituted a *pro se* claim of ineffective assistance sufficient to trigger the court's duty to inquire into the factual basis of the claim." *People v. Remsik-Miller*, 2012 IL App (2d) 100921, ¶ 9. This analysis involves a question of law; thus, our review is *de novo*. *Id.*

¶ 20 In the present case, the defendant's *pro se* motion for a new trial alleged, in part, as follows:

"The Court erred in allowing undue advantage to be taken of the Defendant as a result of poor representation by court-appointed Public Defender's office [citation], in that, despite the Defendant's establishment of *per se* conflicts of interests with the Public Defender's office, [citation][,] [t]he Public Defender's Office refused to withdraw from the case, [citation] and the judge denied the Defendant's pre-trial request for *pro se* representation, and thereby violated the Defendant's right to a fair trial, as well as his right to due process, as set forth in the United States Constitution's Fourteenth Amendment."

¶ 21 On appeal, our task is to determine whether this statement in the defendant's *pro se* motion is sufficient to trigger the court's duty to inquire into the factual basis of the claim. We believe that it does and that the trial court erred in striking the *pro se* claim without conducting the preliminary inquiry required by *Krankel*.

¶ 22 The facts of the present case are substantially similar to *Moore*. In *Moore*, the defendant filed a *pro se* motion that contained "a number of allegations of trial counsel's ineffectiveness." *Moore*, 207 Ill. 2d at 70. The circuit court, however, refused to consider the defendant's *pro se* motion, but stated that the matter could be considered by the State Appellate Defender who would appeal the defendant's conviction. *Id.* at 74.

¶ 23 The supreme court held that the trial court was unaware of the requirement

that it examine the factual basis of the defendant's claim. *Id.* at 79. The *Moore* court then stated:

"The trial court conducted no inquiry of any sort into defendant's allegations of ineffective assistance of counsel. Indeed, the record does not show whether the trial court ever read defendant's *pro se* posttrial motion. Rather, the court apparently concluded that defendant's claim of ineffective assistance of counsel could be resolved by the appointment of different counsel *on appeal*." (Emphasis in original.)
Id.

¶ 24 Because the court did not conduct any type of inquiry into the underlying factual basis of the defendant's *pro se* claim of ineffective assistance of counsel, the *Moore* court held that it "must remand the cause to the trial court for that limited purpose." *Id.*

¶ 25 Likewise, in the present case, the defendant filed a posttrial motion alleging that his attorney provided him with "poor representation." Similar to *Moore*, the circuit court did not conduct any inquiry into the factual basis for the defendant's claim. Instead, the circuit court struck the defendant's *pro se* motion and directed the clerk to send copies of the *pro se* motion to the same attorney that the defendant contended was ineffective. Similar to *Moore*, the record does not show whether the trial court ever read defendant's *pro se* posttrial motion. Under such circumstances, *Moore* directs us to remand this case to the circuit court for the limited purpose of inquiry into the underlying factual basis of the defendant's *pro se* claim. See also *People v. Serio*, 357 Ill. App. 3d 806, 818 (2005) ("Where the trial court undertakes no investigation of the defendant's *pro se* claim of ineffective assistance, a reviewing court must remand the cause to the trial court for that purpose.").

¶ 26 The State cites *Taylor* in support of its argument that the defendant's *pro se*

allegation was too vague to require the circuit court to conduct any *Krankel* inquiry. We believe that *Taylor* is distinguishable. In *Taylor*, the defendant argued on appeal that a statement he made during allocution implied that his trial counsel was ineffective for failing to advise him about the possible penalties if he rejected the State's plea offer. Therefore, the defendant concluded, the circuit court erred by failing to inquire into his *pro se* claim of ineffective assistance of counsel to determine whether it had potential merit and whether new defense counsel should be appointed to argue the claim. *Taylor*, 237 Ill. 2d at 74.

¶ 27 The *Taylor* court, however, noted that "there is nothing in defendant's statement specifically informing the court that defendant is complaining about his attorney's performance" and that the defendant "does not [even] mention his attorney." *Id.* at 77. The court deemed the defendant's statement at sentencing insufficient to require a *Krankel* inquiry. *Id.* We believe that the defendant's *pro se* motion in the present case is distinguishable from the *Taylor* defendant's statements during allocution. In the present case, the defendant's motion specifically identified the public defender's office and alleged that it provided "poor representation."

¶ 28 In *People v. Remsik-Miller*, 2012 IL App (2d) 100921, the court distinguished *Taylor* under a similar analysis. In that case, the defendant filed a *pro se* motion for reconsideration of her sentence. In arguing her motion, the defendant stated: "First, I want to make sure that [defense counsel] is no longer listed as my attorney. I don't believe he did represent me to his fullest ability during my trial." *Id.* at ¶ 5. On appeal, the defendant contended that this statement required the circuit court to inquire into the factual basis of her claim. The State, citing *Taylor*, maintained that the defendant's statement was too vague and conclusory to warrant further

investigation.

¶ 29 The *Remsik-Miller* court agreed with the defendant. The court held that when the defendant stated that her attorney did not represent her to his fullest ability, the trial court "should have at least asked a follow-up question." *Id.* at ¶ 17. The court held that such a follow-up question is required by *People v. Moore*, 207 Ill. 2d 68, 77 (2003). The court also cited *People v. Bolton*, 382 Ill. App. 3d 714, 721 (2008), for the proposition that even a bare claim of ineffectiveness warrants some degree of inquiry under *Moore*. *Remsik-Miller*, 2012 IL App (2d) 100921, ¶ 16.

¶ 30 The *Remsik-Miller* court distinguished *Taylor* by noting that, in *Taylor*, the defendant did not specifically complain about his attorney's performance or expressly state he was claiming ineffective assistance of counsel. The court then stated: "Here, defendant's comment that her attorney did not represent her 'to his fullest ability during [her] trial' made clear that she was raising a claim of ineffectiveness and, thus, the court should have inquired further." *Remsik-Miller*, 2012 IL App (2d) 100921, ¶ 17.

¶ 31 Likewise, in the present case, the defendant's statement in his *pro se* posttrial motion that the public defender's office provided him with "poor representation" was a clear statement that he was claiming the ineffectiveness of his attorney. The defendant's *pro se* claim that he received "poor representation" may or may not lack merit, but the circuit court, nonetheless, must make *some* inquiry into the claim's factual basis. The defendant's *pro se* motion in the present case presents at least the minimum requirement for the circuit court to conduct an initial inquiry in one of three ways: (1) asking trial counsel about the facts and circumstances related to the defendant's allegations, (2) asking the defendant for more specific information, or (3) relying on its knowledge of counsel's performance at trial and "the insufficiency of

the defendant's allegations on their face." *Moore*, 207 Ill. 2d at 78-79. The record in the present case, however, indicates that the circuit court struck the *pro se* motion without conducting the required inquiry or even perhaps reading the defendant's *pro se* motion. Because the record does not establish that the circuit court conducted any inquiry into the defendant's *pro se* allegations of ineffective assistance of counsel, we are required to remand the case to the circuit court for that limited purpose. *Id.* at 81.

¶ 32 We want to emphasize that we are not remanding for a full evidentiary hearing and appointment of counsel on the defendant's claim. *Id.* Instead, we are remanding only for the limited purpose of allowing the trial court to conduct the required preliminary investigation. *Id.* "If the court determines that the claim of ineffectiveness is spurious or pertains only to trial strategy, the court may then deny the motion and leave standing defendant's convictions and sentences. If the trial court denies the motion, defendant may still appeal his assertion of ineffective assistance of counsel along with his other assignments of error." *Id.* at 81-82.

¶ 33 CONCLUSION

¶ 34 For the foregoing reasons, we remand the cause to the circuit court for proceedings consistent with this decision.

¶ 35 Remanded with directions.