

No. 1-10-2098

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 09 CR 21560
)	
CHARLES GRAHAM,)	Honorable
)	Stanley Sacks,
Defendant-Appellant.)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Justices Quinn and Simon concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court, pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984), conducted an adequate inquiry into defendant's posttrial motion for new trial in which defendant contended he received ineffective assistance of counsel where he argued his trial counsel failed to investigate three witnesses.

¶ 2 Following a bench trial, defendant Charles Graham was convicted of two counts of aggravated criminal sexual assault and sentenced to two consecutive terms of nine years' imprisonment. Defense counsel filed a motion for a new trial and defendant filed a *pro se* motion for a new trial alleging that he received ineffective assistance of counsel at trial because

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his trial counsel failed to investigate three additional witnesses, among other claims. The trial court indicated it would treat defendant's *pro se* motion pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984), and denied it after hearing argument on the motion. In the instant appeal, defendant contends that the trial court failed to adequately examine his allegation of ineffective assistance of counsel, and as a result, this court should remand for further proceedings pursuant to *Krankel*.

¶ 3 At trial, the State argued that defendant sexually assaulted his then girlfriend, A.L., following an outing to a nightclub. Defendant slammed A.L. into the floor of his apartment, punched her once and slapped her in the face twice, forced her to engage in oral and vaginal sex with defendant, and then held her against her will in the apartment. In an effort to get help, A.L. surreptitiously sent four text messages to her mother requesting her mother's aid in getting law enforcement to defendant's apartment. The text messages stated: "Ma plz don't txt back I need help," "He will kill me if u txt," "I need 911," and "Ma I might die 2day."

¶ 4 The State introduced the text messages as well as A.L.'s written statement detailing the events leading up to and including the sexual assault. Assistant State's Attorney Meg O'Sullivan testified that she took A.L.'s statement at the police station at approximately 11:20 p.m. on November 9, 2009. O'Sullivan testified that she did not smell any alcoholic beverage on A.L. and A.L. did not appear to be under the influence of drugs or alcohol. O'Sullivan observed A.L. initial and sign each page of the statement. The statement was published to the court.

¶ 5 In her statement, A.L. stated that on November 8, 2009, she and defendant went to Zentra night club at about 11:30 p.m. While there, she drank two mixed drinks and one shot, and defendant drank gin and tonic. They left the club around 4 a.m. Defendant stopped and picked up an unknown woman on the street. A.L., defendant, and the unknown woman went to defendant's home and drank more alcohol. After A.L. declined defendant's request for a "threesome," he slammed her onto the floor. While A.L. was in the bathroom crying, with the

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woman consoling her, defendant entered and accused them of conspiring against him. Defendant placed his gun on the sink and told them to "do whatever they had to do." A.L. gave the gun back to defendant. When defendant again demanded a threesome, the woman left the apartment.

¶ 6 A.L. and defendant began arguing about their relationship and she left the apartment around 6:30 a.m. or 7 a.m. While she was walking on the street, defendant followed in his vehicle and demanded she get in the car. A.L.'s friend, Keith, drove by and offered her a ride home. As A.L. got into Keith's vehicle, defendant cut them off and told Keith that Keith was with his "bitch" and Keith was not going anywhere with A.L. Defendant grabbed A.L. out of Keith's vehicle and forced her into his vehicle. While in the vehicle, defendant slapped A.L. twice and punched her in the face. She suffered a cut lip and her nose began bleeding.

¶ 7 When they were back inside defendant's apartment, defendant threatened A.L. that she could not leave until she performed oral sex on him and had sex with him. Defendant forced her into his bedroom, to undress, and to engage in oral and vaginal sex. He held her tightly so that she could not get up from the bed. A.L. briefly fell asleep and defendant took her phone. When she tried to leave, defendant told her she could only leave completely naked. A.L. told defendant to just kill her or shoot her, but defendant said he would not sacrifice himself and instead he wanted her to play Russian roulette with his gun so he would not be blamed.

¶ 8 She was able to retrieve her phone, which defendant placed on the bed, when defendant was lying on the bed away from A.L. She texted her mother she needed help, defendant would kill her if her mother texted her back, she needed 911 because she might die today, and told her mother not to text her back. She attempted to retrieve her clothes several times, but each time, defendant charged at her with closed fists and slapped the clothes out of her hand. Defendant also took her phone away and removed its battery. A.L. asked defendant to go get her cigarettes so that she could escape. As defendant was getting dressed, the police announced their office,

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forced entry into the apartment, and placed defendant under arrest. A.L. also stated that her injuries from the attack included lacerations to her upper lip, and lacerations and bruises to her chest and elbow. She also stated that she was not under the influence of alcohol or drugs while giving her statement.

¶ 9 Officer Sargon Oshana of the Chicago police conducted a well-being check on A.L. after meeting with her mother, Mary, and viewing text messages on Mary's phone. Oshana observed that A.L. had a bloody lip and had scratches on her body. The State entered into evidence photographs depicting A.L.'s injuries, including her cut lips, scratches on her chest, and bruised elbow. The State's evidence also included testimony from Meredith Watkins, the emergency room nurse who treated A.L. at West Suburban Hospital. Watkins testified that A.L. told her and the treating physician who was also present defendant forced her to engage in oral and vaginal sex. A.L. also stated that she had been punched in the face, slapped and kicked.

¶ 10 Defendant argued that A.L.'s statement was unreliable because she was under the influence of ecstasy. Defendant called A.L. as a witness and A.L. testified that she only engaged in consensual sexual acts with defendant and that she did not remember how she sustained her injuries. A.L. did not recall whether defendant showed her a gun, busted her lip, slammed her to the ground, confined her against her will, dragged her from Keith's car, or punched her. She remembered that the police kicked in the door and took her to the police station, but she could not recall what occurred at the station because the ecstasy made her feel panicked and confused. She testified that she did not understand what was happening at the police station.

¶ 11 The trial court found defendant guilty of two counts of aggravated criminal sexual assault. The trial court stated that it did not believe A.L. was under the influence of drugs when she gave her statement to O'Sullivan because the statement was very detailed and because she made an

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outcry statement to the nurse. It also stated that the statement was corroborated by the evidence, the fact of her injuries, and the four text messages to her mother.

¶ 12 Defense counsel filed a posttrial motion for a new trial, which the trial court denied following a hearing on July 2, 2010. Defendant also filed a *pro se* motion for a new trial and the trial court asked him to present his arguments. Defendant argued that his trial counsel was ineffective for failing to file a motion to suppress evidence, to suppress identification, and to quash arrest. He also argued that his arrest was unlawful because the police did not have probable cause to force entry into his home and that the State committed a *Brady* violation for failing to produce general progress reports related to A.L.'s statement to the police. Defendant contended that A.L.'s statement was inadmissible at trial. Finally, defendant argued that his trial counsel was ineffective for failing to investigate three witnesses, including Nikial¹ Herd, who allegedly could have testified that she had a physical altercation with A.L. at the night club and caused A.L.'s injuries. His mother could have testified that she was on the phone with A.L. when the police forced entry to his apartment and his brother could have testified that he left defendant's house shortly before the police arrived "and everything was fine."

¶ 13 The trial court stated it would treat defendant's motion pursuant to *People v. Krankel*, and allowed defendant to extensively argue the grounds of his motion. Defendant's comments to the trial court extend over 70 pages of the transcript. The trial court also allowed defendant to file his motion with the court. The trial court stated that, upon receiving defendant's handwritten motion, he read the motion's subtitles but not the entire handwritten 10-page, double-sided document. The trial court informed defendant's counsel that because defendant alleged ineffective assistance, defense counsel had the right to respond. Defense counsel responded that he reviewed the trial transcripts and believed he effectively represented defendant and objected

¹ The witness's name is improperly spelled "Micale Heard" in the transcript.

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when he should have. Further, defense counsel stated, "In terms of the allegations – specific allegations of what I did or didn't do, some of which, your Honor, are new to me, however, I don't want to hurt my client's case should this matter go to the appeal level." Defense counsel declined to respond further. The State replied that defendant immediately demanded speedy trial and his former attorney indicated her desire to investigate more, but defendant insisted upon demanding trial. It also explained that defendant demanded trial in January 2010 and defendant's trial counsel entered his appearance on the case in March of 2010, when the case was set for trial.

¶ 14 In denying defendant's *pro se* motion for new trial, the trial court did not specifically reference the claim of ineffectiveness for failing to investigate witnesses. Instead it addressed defendant's other grounds, and ultimately concluded, "[t]he motion for new trial is basically just like sour grapes on [defendant's] part. He thought, he hoped, he believed by [A.L.] coming to court and saying nothing happened that would be the end of the story." The trial court also detailed all of the evidence supporting defendant's conviction, including the text messages to A.L.'s mother, the evidence of A.L.'s injuries, A.L.'s outcry to the nurse, and A.L.'s statement to Assistant State's Attorney O'Sullivan. Defendant was then sentenced two consecutive sentences of nine years' imprisonment and three years of mandatory supervised release. The trial court denied defendant's motion to reconsider sentence. This appeal follows.

¶ 15 Defendant contends on appeal that pursuant to *Krankel* and its progeny, the trial court failed to adequately inquire into his posttrial *pro se* allegation of ineffective assistance of counsel. He requests this court remand the matter for appointment of new counsel to conduct an independent investigation or remand for the trial court to conduct an adequate inquiry. As an initial matter, we note the State argues that *Krankel* does not apply in the instant matter because it does not apply to defendants represented by private counsel. Citing *People v. Pecoraro*, 144 Ill. 2d 1, 15 (1991). We acknowledge there is a split of authority on this issue. See *People v.*

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McGee, 345 Ill. App. 3d 693, 699-700 (2003); *People v. Johnson*, 227 Ill. App. 3d 800, 810 (1992), *People v. Taylor*, 237 Ill. 2d 68, 81 (2010) (Burke, J., specially concurring). However, we need not reconcile this split because assuming *Krankel* applies, the trial court conducted an adequate inquiry into defendant's claim.

¶ 16 On appeal, the standard of review for a *Krankel* motion depends upon whether the trial court reached a determination on the merits of the defendant's *pro se* posttrial claims of ineffective assistance of counsel. *Tolefree*, 2011 IL App (1st) 100689 at ¶ 25. Where the trial court made no determination on the merits, the standard of review is *de novo* and the reviewing court will perform the same analysis that a trial judge would perform. *Moore*, 207 Ill. 2d at 75. However, if the trial court made a determination on the merits, this court will reverse only if the trial court's action was manifestly erroneous, that is, the error is clearly plain, evident, and indisputable. *Tolefree*, 2011 IL App (1st) 100689 at ¶ 25. Here, the trial court commented upon the various contentions of defendant's *pro se* motion for ineffective assistance of counsel and then denied the motion, noting in its determination that the motion is "basically just like sour grapes." Because the trial court reached a determination on the merits of defendant's ineffective assistance of counsel claim, we will reverse only if the trial court's action was manifestly erroneous. *Tolefree*, 2011 IL App (1st) 100689 at ¶ 25; see also *People v. McCarter*, 385 Ill. App. 3d 919, 941 (2008).

¶ 17 *Krankel* and its progeny provide a blueprint for the handling of posttrial *pro se* claims of ineffective assistance of counsel. *Tolefree*, 2011 IL App (1st) 100689, ¶21. "A trial court is not automatically required to appoint new counsel anytime a defendant claims ineffective assistance of counsel." *People v. Moore*, 207 Ill. 2d 68, 77 (2004). Rather, the trial court must first conduct an inquiry to examine the factual basis underlying the defendant's claim. *Id.* at 77-78. The trial court may base its *Krankel* decision on: "(1) the trial counsel's answers and explanations; (2) a

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'brief discussion between the trial court and the defendant'; or (3) 'its knowledge of defense counsel's performance at trial and the insufficiency of the defendant's allegations on their face.' " *Tolefree*, 2011 IL App (1st) 100689, ¶ 22; quoting *Moore*, 207 Ill. 2d at 78-79. The trial court does not need to appoint new counsel if it determines the claim lacks merit or pertains only to matters of trial strategy. *Moore*, 207 Ill. 2d at 78.

¶ 18 Our review of the record shows that the trial court conducted an adequate inquiry into defendant's ineffective assistance claim. The trial court permitted defendant to extensively argue the grounds of his motion and permitted defendant to file the written motion in court. Defendant named the specific witnesses he believed his trial counsel failed to investigate and stated the grounds upon which he believed the witnesses would have testified. The trial court also asked defense counsel to respond to defendant's allegation. Defense counsel responded, although he did not go into detail in his response, indicating that he did not want to prejudice his client's case in the event the case proceeded to appeal. Moreover, the State responded that it believed defendant's claim of failure to investigate witnesses was predicated upon his insistence for a speedy trial, and in effect, refusing to provide his former trial counsel with adequate time to investigate the claims raised against defendant. The State also highlighted the very short timeline provided to his current trial counsel to prepare for trial after counsel was retained. The trial court essentially concluded that defendant's allegations were insufficient on their merits when it concluded that defendant's claim was "basically just like sour grapes," in that defendant raised the allegations only after his plan to have his former girlfriend recant her story at trial backfired. It was not until after the trial court heard defendant's contentions and the attorneys' responses to defendant's claims that the trial court issued its judgment on his ineffective assistance of counsel claim. The trial court's action in denying defendant's posttrial motion for new trial due to ineffective assistance of counsel does not constitute error that is "clearly plain, evident and

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indisputable" such that it is against the manifest weight of the evidence. *Tolefree*, 2011 IL App (1st) 100689, ¶ 25.

¶ 19 Defendant argues his case is similar to *Moore* and *People v. Parsons*, 222 Ill. App. 3d 823 (1991), because those cases concluded the trial courts, upon hearing the defendants' claims of ineffective assistance, should have engaged in an interchange with the defendants' counsel to resolve their claims. Defendant's case is distinguishable from *Moore* because in *Moore* the trial court simply failed to consider defendant's motion for new counsel in any manner, incorrectly concluding that the defendant would have appellate counsel appointed upon the defendant's filing of a notice of appeal. *Moore*, 207 Ill. 2d at 74. Here, the trial court permitted defendant to extensively argue his motion, indicated by more than 70 pages in the transcript. It considered and commented upon defendant's arguments, heard argument from defense counsel and the Assistant State's Attorney, and finally concluded the motion lacked merit.

¶ 20 Defendant's case is similarly distinguishable from *Parsons* because in that case, during the sentencing hearing, the defendant made numerous allegations of ineffective assistance, including alleging his counsel neglected his case by failing to interview and call a key witness. *Parsons*, 222 Ill. App. 3d at 826-28. The trial court, again, made no inquiry of trial counsel. *Id.* at 830. This court explained in *Parsons* "that there should be *some* interchange between the trial court and the defendant's trial counsel to explain complained-of possible neglect." (Emphasis added.) *Id.* Further, the record revealed in *Parsons* that defense counsel secured the witness' presence at trial and even repeatedly stated on the record that the witness would be called at trial. *Id.* Based upon these circumstances, this court held that the case would be remanded to clarify why the witness was not called. *Id.* at 831. These circumstances do not exist in the present case. There was, in fact, an interchange between the trial court and defense counsel, and there was no indication in the record that defense counsel intended to call the three additional witnesses yet

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simply failed to do so. Because *Moore* and *Parsons* are distinguishable, we find them inapplicable, and conclude that the trial court's *Krankel* inquires were sufficient.

¶ 21 Based on the foregoing, we affirm the judgment of the circuit court of Cook County.

¶ 22 Affirmed.