

No. 1-11-1722

**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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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 09 CR 17897
	)	
CLETIS HICKS,	)	Honorable
	)	Earl B. Hoffenberg,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE HYMAN delivered the judgment of the court.  
Presiding Justice Neville and Justice Pierce concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* Denial of the appointment of new counsel after a proper *Krankel* inquiry was not manifestly erroneous; defendant's 20-year sentence was not an abuse of discretion; the three-year term of MSR was proper; \$200 DNA fee vacated; mittimus corrected; judgment affirmed in all other respects.
- ¶ 2 Defendant Cletis Hicks contends that on his *pro se* allegation of ineffective assistance of counsel, the trial court did not first conduct a preliminary inquiry but undertook a "full-blown" *Krankel* hearing without new counsel. In addition, Hicks contests the propriety of his sentence,

the imposition of a three-year term of mandatory supervised release (MSR), and a DNA fee. He also requests that his mittimus be corrected.

¶ 3 We hold that the length, tone, and scope of the proceeding did not convert it from a proper *Krankel* preliminary inquiry into a "full blown" *Krankel* hearing. The trial court's statements before, during, and after the proceeding establish that he was well aware of the difference between a *Krankel* preliminary inquiry and a *Krankel* hearing, and that he was conducting a preliminary inquiry. Moreover, Hicks's sentence of 20 years' imprisonment was not an abuse of discretion, and he is subject to a three-year term of MSR. Finally, the \$200 DNA fee should be vacated, and the mittimus corrected to reflect Hicks's conviction of attempted aggravated battery, a Class 2 felony.

¶ 4 Background

¶ 5 At 10 p.m. on September 13, 2009, Ali Alturfee was working as a cashier at J and B Foods at 6532 North Clark Street when Hicks entered, threw some pennies on the counter, and asked for change. Alturfee told Hicks that he could not open the cash register without a purchase. Hicks then picked up a bag of candy, returned to the counter, and brought his face inches away from Alturfee, and twice told him "[g]ive me the money, that's good for your life."

¶ 6 Alturfee noted that Hicks initially had his right hand in his pocket, and said he had a gun there, but then placed both of his hands on the counter in front of him. Alturfee did not see a gun, and asked Hicks if he wanted the money in the cash register. Hicks indicated that he did, and Alturfee then pressed the 911 button by his cash register, pulled out a can of mace, and sprayed Hicks in the face. Hicks fled. On September 22, 2009, Alturfee viewed a lineup at which he identified Hicks as the offender.

¶ 7 Alturfee also noted that the store had a security camera which accurately recorded the incident, although it replays faster than real time, and does not process sound. The video was shown in court without objection.

¶ 8 At the close of evidence, the trial court found Hicks guilty of attempted aggravated robbery. In doing so, the court accepted Alturfee as a credible witness, and noted the evidence showed that Hicks had a hand in his pocket or at least down by his side when he first approached Alturfee. But later the court was "not quite sure that [defendant] put [his] hand back down there or not. But that really is not relevant" because it found Alturfee credible and that the key statements were that Hicks asked Alturfee for the money, told him he had a gun, and told him it would better for his life to comply with the request for the money.

¶ 9 *Pro Se Motion Regarding Ineffective Assistance of Trial Counsel*

¶ 10 On December 3, 2010, Hicks filed a *pro se* motion for a new trial alleging ineffective assistance of trial counsel. Hicks claimed that counsel only visited him once. He also claimed that he was not shown the video until the trial and the video did not show the location of his right hand, and thus, not satisfy the burden of proof beyond a reasonable doubt. And, Hicks maintained that the video failed to show that he told the cashier he was armed or that he demanded money. Also, he argued that the video hurt his contention that the incident involved a dispute over a bike that Alturfee had sold him the day before, and his counsel should have objected to the video's admission into evidence because it did not play in real time, but rather on "fast forward," making his movements appear suspicious.

¶ 11 On January 10, 2011, the trial court stated it had received Hicks's *pro se* motion alleging ineffective assistance of trial counsel. The court informed Hicks that it would conduct a *Krankel* hearing, and that it would continue the matter so that the court could review the motion and Hicks could gather the "specifics" of his claim, and be prepared to testify at the hearing.

¶ 12 On April 7, 2011, the trial court allowed Hicks to present the issues he raised in the motion, then stated, in relevant part:

"Although you did not ask for in your motion for a motion to appoint a new lawyer to -- to go into this issue, I am going to be -- I am going to suggest that I am going to allow you to air all your differences -- all your concerns out to the Court.

And in doing so, I will then have to make a determination whether I think there is enough on this as a matter of law to merit appointing another attorney to really file or proceed on your ineffective assistance of counsel claim and/or -- and have a hearing on that."

The court then told Hicks that it "will listen today," and gave him "the floor."

¶ 13 Hicks told the trial court that the first time he was allowed to view the video was during trial, although the victim was allowed to review it before trial. After viewing the video, Hicks learned that the video was "messed up." The court inquired as to what Hicks meant by "messed up," and Hicks stated that it recorded at a high speed. Hicks claimed that counsel was ineffective for failing to file a motion to suppress the video because the video's high-speed distorted the reality of what occurred.

¶ 14 Hicks also maintained that his hands are in fists in the lineup pictures because he had surgery on them, and that counsel made no effort to object to the State's comments that his fists showed his aggression. The court noted that it could not consider anything not in evidence, and the thrust of the proceeding focused on whether there "may be a possibility of inadequacy of representation."

¶ 15 Defense counsel responded that she had met with Hicks in person and talked to him over the phone numerous times. Hicks advised her that he had seen the video tape at the police station when he was arrested, and it showed that his hands were on the counter. Hicks also told her that the video exonerates him, and once she had the opportunity to view the video, she would agree that it would prove him not guilty. Counsel stated that she did not file a motion to suppress the video because the placement of Hicks's hands in the video mattered to her trial strategy. She also noted that Hicks described the scene of the alleged crime and the video corroborated the details he provided her. As to allowing the video into evidence without objection, counsel said Hicks believed it would exonerate him, and, Hicks having admitted he was the person in the video, identification was not in issue.

¶ 16 The court, having heard about 80 pages of transcripts, commented on the breath of the proceeding just concluded, and stated the issue as whether Hicks's claim of ineffective assistance of counsel had merit or not. The court ruled against Hicks, finding "no reason to appoint new counsel," when his counsel kept copious notes reflecting on trial strategy, and nothing suggested a reason to believe she rendered ineffective assistance. The judge permitted Hicks's same counsel to present the motion for a new trial.

¶ 17 Sentencing Hearing

¶ 18 At sentencing, defense counsel pointed to Hicks' good relationship with his fiancé and her children, his earning of an Associates degree in social studies, and his needing four credit hours to receive an Associates degree in psychology. Counsel noted that Hicks has used every educational opportunity provided him, and received certificates in accounting, data processing, forklift operation, baking, paralegal studies, milk and juice manufacturing, maintenance and construction. He has been gainfully employed at Goldie's Place, was in computer training at Jarvis Place, and also had helped community members with drug addiction. Counsel further

noted, in prison, Hicks was transferred to the "church deck based on his good behavior," and advising other inmates. She noted mitigation letters from Goldie's Place, Jarvis Place, and Jesus Outreach Ministry, and testimony from Cecilia Ellis of Jesus Outreach Ministry that Hicks is currently teaching bible studies, and has never demonstrated any sign of physical aggression or violence. Counsel then requested the minimum sentence of six years' imprisonment.

¶ 19 In aggravation, the State set forth Hicks's criminal history which included a 1992 DUI conviction in Alabama for which he was fined, an August 1994 battery conviction and sentence of 12 months' probation, and an October 1994 forgery conviction and sentence of 30 months' probation. The State further noted that Hicks was convicted of armed robbery in 1995 and sentenced to 16 years' imprisonment, and was also convicted of unlawful possession of a controlled substance in 1995 and sentenced to three years' imprisonment, and had a 2006 conviction for possession of a stolen motor vehicle. The State then argued that Hicks has repeatedly victimized members of society, and asked the court to sentence him to 28 years' imprisonment to protect the public.

¶ 20 In allocution, Hicks stated that had a troubled childhood, which included his father giving him first cannabis cigarette at age eight, joining a street gang at age 13, and suffering along with his mother physical and emotional abuse by his father. Also, he was imprisoned at a young age, and was not ready for his release in 2005. On reincarceration, he worked hard to change and educate himself. He maintained that the State would like the court to believe that once a criminal, always a criminal, and once a violent man, always a violent man, but that he has worked hard to change.

¶ 21 The trial court sentenced Hicks to 20 years' imprisonment. Although it listened carefully to allocution, valued the mitigation of which Hicks "had some good mitigation," and weighed everything in sentencing, the court considered Hicks's conduct to be contrary to what he stated in

allocution. The court observed that Hicks had four prior felony convictions, and each time he was released into society, he conformed for a little while, before going back to committing crime, and became a better person when in a controlled setting. Notwithstanding the mitigating factors, the court felt that justice would not be served by the minimum sentence. The trial court stated:

"I don't think 28 years is something I would give you based upon the testimony today and evidence presented, but I do not move backward in life. I think that 6 years would be way too low and I think 28 is high. I think 16 years is what you did and what you had and you got 20, then I really think that since I don't move backward, I think the appropriate sentence in this case will be 20 years."

¶ 22 The trial court denied a motion to reconsider the sentence.

¶ 23 Analysis

¶ 24 *Krankel* Issue

¶ 25 In this appeal, Hicks first maintains that the trial court bypassed the initial *Krankel* inquiry and improperly conducted a "full-blown" *Krankel* inquiry without appointing him new counsel. He claims that the tone and conduct of the proceeding, which included extensive preparation by counsel, and the court's comments that it was conducting a "hearing," shows that it was a full-blown hearing in which he was forced to represent himself. He also maintains that he demonstrated possible neglect based on counsel's admission that she failed to view the video with him, so that he could make an informed decision to plead guilty or testify. Hicks thus requests that this court remand his cause for the appointment of new counsel to represent him at a proper *Krankel* hearing.

¶ 26 We initially observe that appointment of new counsel is not automatically required when defendant presents a *pro se* motion alleging ineffective assistance of counsel. *People v. Moore*, 207 Ill. 2d 68, 77 (2003). Rather, the trial court must first conduct an inquiry into the factual basis for defendant's claim. *Moore*, 207 Ill. 2d at 77-78. The operative concern for the reviewing court is whether the trial court conducted an adequate inquiry into defendant's *pro se* allegations. (*Moore*, 207 Ill. 2d at 78), which poses a question of law that is reviewed *de novo* (*People v. Strickland*, 363 Ill. App. 3d 598, 606 (2006)).

¶ 27 Rather than claiming there was an inadequate inquiry, Hicks claims that the inquiry was so extensive that it was not a preliminary inquiry at all; but rather, a full-blown *Krankel* hearing requiring the appointment of new counsel. He maintains, citing *Moore*, 207 Ill. 2d at 78, and *People v. Tolefree*, 2011 IL App (1st) 100689, ¶22, that the discussion is "required" to be "brief," with only "some, not extensive interchange" between the parties. We observe that *Moore*, 207 Ill. 2d at 78, and *Tolefree*, ¶22, merely explained that a brief discussion is sufficient to adequately inquire into defendant's *pro se* allegations. Neither of these courts held that if there is an extensive inquiry involving the questioning of defendant and trial counsel, then the inquiry is no longer a preliminary inquiry to determine whether to appoint new counsel, but a *Krankel* hearing. Furthermore, questioning of trial counsel and defendant, which the court did here, was proper for an adequate inquiry. *People v. Milton*, 354 Ill. App. 3d 283, 292 (2004).

¶ 28 We also note, contrary to Hicks's contention, that the trial court specifically stated that it was conducting an extensive inquiry to determine whether Hicks should be appointed new counsel on his claim of ineffective assistance of trial counsel, which shows that it was not confused as to the nature of an initial inquiry and a *Krankel* hearing. Although the court made reference to a "hearing," the record shows that it conducted a proceeding to determine whether Hicks presented a "*possibility* of inadequacy of representation," and specifically concluded that

there was, "*no reason to appoint new counsel.*" We thus find that the trial court conducted a proper inquiry to examine the factual basis for Hicks's allegations (*Tolefree*, ¶21), and to determine whether new counsel was required.

¶ 29 We applaud the trial judge for his thoroughness and thoughtfulness, when, all too often, busy dockets and other constraints, restrain a judge from conducting an inquiry as protracted as this one.

¶ 30 Hicks further contends that his counsel's admission that she failed to view the video with him demonstrated possible neglect of his case. He maintains that "not showing a client a piece of evidence that he believes will exonerate him has nothing to do with trial strategy." He further maintains that it was unclear whether he knew there was no audio in the video, that he did not know the angle at which the camera captured the event, the degree of clarity, and the speed at which it played, and had he reviewed the video with counsel, he could have made an informed decision to testify or even plead guilty based on counsel's statement that the video corroborated, rather than disputed, the victim's testimony.

¶ 31 If Hicks's allegations show possible neglect of the case, the trial court should appoint new counsel who would then represent defendant at the post-trial hearing on defendant's claims of ineffective assistance of counsel. *Moore*, 207 Ill. 2d at 78. But, a defendant's claims lack merit if they are conclusory, misleading, or legally immaterial, or do not bring to the trial court's attention a colorable claim of ineffective assistance of counsel. *People v. Johnson*, 159 Ill. 2d 97, 126 (1994). The trial court's merits' determination of defendant's claim will not be reversed unless it was manifestly erroneous. *People v. Dixon*, 366 Ill. App. 3d 848, 852 (2006).

¶ 32 Hicks maintains that counsel never reviewed the video with him to discuss its impact, and that counsel should have told him that what mattered were his words and not the placement of his hands. We observe, however, that counsel stated that Hicks told her that he had reviewed the

video at the police station and believed it would exonerate him, and she then used the video as part of her trial strategy. The record specifically shows that during closing arguments counsel argued that the video showed both of Hicks's hands on the counter, and did not show a gun or any furtive movements by Hicks, thus employing the video in defense. Under these circumstances, Hicks's claim pertains to matters of trial strategy, which do not require the appointment of new counsel (*Moore*, 207 Ill. 2d at 78), and we, therefore, find that the court's determination that none was required was not manifestly erroneous.

¶ 33 Hicks does not raise any of the other numerous allegations of ineffective assistance he alleged in his *pro se* petitions. Therefore, they are waived, and we will not review them *sua sponte*. *People v. Givens*, 237 Ill. 2d 311, 326 (2010).

¶ 34 Sentencing Issue

¶ 35 Hicks next contends that the imposition of a 20-year prison sentence was an abuse of discretion. Hicks does not dispute that this sentence fell within the statutory range of 6 and 30 years' imprisonment. 730 ILCS 5/5-4.5-95(b) (West 2010); 730 ILCS 5/5-4.5-25 (West 2010). Given that fact, we may not disturb Hicks's sentence absent a showing of an abuse of discretion. *People v. Jones*, 168 Ill. 2d 367, 373-74 (1995).

¶ 36 Hicks maintains that the court improperly set the sentencing range as 16 to 30 years, disregarding the statutory range of 6 to 30 years' imprisonment. As evidence, Hicks points to the court's statement that, "I think 16 years is what you did and what you had and you got 20, then I really think that since I don't move backward, I think the appropriate sentence in this case will be 20 years." This statement, contrary to Hicks's contention, does not show that the court created a 16-year minimum sentence for this offense, but merely commented on Hicks's prior history which it can consider in aggravation. 730 ILCS 5/5-5-3.2(a)(3) (West 2010). The record also shows that the court specifically noted that a sentence of 6 years was too low and that 28 years

was too high, thus showing its awareness and application of the proper statutory range, before deciding that 20 years was appropriate.

¶ 37 Hicks further maintains, relying on *People v. Henry*, 254 Ill. App. 3d 899, 905 (1993), that his 20-year sentence was entered on the court's own subjective feelings. We find *Henry* factually inapposite. In *Henry*, defendant was convicted of armed robbery and aggravated battery, and in imposing the sentence, the court stated that this was a "disgusting" crime and "that's why" it was imposing the sentences that it did. *Henry*, 254 Ill. App. 3d at 900, 905. Here, no such statement was made by the court, which properly noted defendant's criminal history, his attempts at rehabilitation, and his recidivism, which led to the sentence imposed. 730 ILCS 5/5-5-3.2(a)(3) (West 2010).

¶ 38 Hicks, nonetheless, claims that the court ignored and set aside the mitigating factors, and looked at his most significant prior conviction to determine his current sentence. The record, however, shows that the court noted that Hicks "had some good mitigation," that it values the mitigation, and that it weighs everything in sentencing. The court thus considered the evidence in mitigation, but found, in light of his four prior felony convictions, that a lengthy term was required to protect the public from his criminal deeds. Thus, we find no abuse of discretion by the court in sentencing Hicks to a 20-year term of imprisonment.

¶ 39 Hicks next maintains, the State concedes, and we agree that the mittimus incorrectly reflects that he was convicted of aggravated robbery, a Class 1 felony. We, accordingly, direct the clerk of the circuit court to correct the mittimus to accurately reflect Hicks's conviction of attempted aggravated battery, a Class 2 felony. *People v. McCray*, 273 Ill. App. 3d 396, 403 (1995).

¶ 40 Hicks next contends that the mittimus should be amended to require only two years of mandatory supervised release (MSR) instead of three years. Section 5-8-1(d) of the Unified

Code of Corrections (Code) (730 ILCS 5/5-8-1(d) (West 2010)) provides that the MSR term for a Class X felony is three years and two years for a Class 2 felony. Since he was convicted of a Class 2 felony offense, Hicks maintains that he is subject to a two-year term of MSR, citing *People v. Pullen*, 192 Ill. 2d 36 (2000).

¶ 41 *Pullen*, however, has been fully addressed by this court and found not to change the conclusion that defendants sentenced as Class X offenders shall receive the same three-year MSR term imposed on defendants convicted of Class X felonies. *People v. McKinney*, 399 Ill. App. 3d 77, 82-83 (2010); *People v. Lee*, 397 Ill. App. 3d 1067, 1072-73 (2010); accord *People v. Rutledge*, 409 Ill. App. 3d 22, 26 (2011); *People v. Holman*, 402 Ill. App. 3d 645, 652-653 (2010); *People v. Watkins*, 387 Ill. App. 3d 764, 767 (2009). We agree with the reasoning of these decisions, and likewise conclude that the three-year MSR term was correctly entered where defendant was sentenced as a Class X offender.

¶ 42 We also observe that the plain language of the MSR statute does not indicate that the MSR term in this case should be two years (*McKinney*, 399 Ill. App. 3d at 82), and further, that there is no ambiguity in sections 5-8-1 and 5-4.5-95(b) of the Code (730 ILCS 5/5-8-1, 5-4.5-95(b) (West 2010)), which can be read together in a consistent and harmonious manner (*Lee*, 397 Ill. App. 3d at 1069-70, 1073).

¶ 43 Finally, Hicks maintains that the \$200 DNA assessment must be vacated because he has already submitted a DNA sample based on his conviction. In light of the supreme court decision in *People v. Marshall*, 242 Ill. 2d 285, 297, 303 (2011), the State agrees that here defendant is already registered in the DNA database, a DNA analysis fee should not be assessed. Under the authority granted us by Supreme Court Rule 615(b)(2) (eff. Aug. 27, 1999), we vacate the \$200 DNA assessment, and direct the trial court's order to be modified to that effect.

¶ 44 In sum, we find that the trial court conducted a proper *Krankel* inquiry, that its decision not to appoint new counsel was not manifestly erroneous, that Hicks's sentence of 20 years' imprisonment was not an abuse of discretion, and that Hicks is subject to a three-year term of MSR. We further order the mittimus corrected as indicated, vacate the \$200 DNA fee, and affirm the judgment of the circuit court in all other respects.

¶ 45 Affirmed as modified.