

2013 IL App (2d) 120195-U  
No. 2-12-0195  
Order filed September 4, 2013

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of Du Page County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 11-CF-355
	)	
KENNETH HARDING,	)	Honorable
	)	Daniel P. Guerin,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE SCHOSTOK delivered the judgment of the court.  
Justices McLaren and Spence concurred in the judgment.

**ORDER**

¶ 1 *Held:* (1) Because the trial court failed to inquire under *Krankel* into one of defendant's claims of ineffective assistance of counsel, we remanded for that inquiry; (2) because the record did not show that the trial court, in sentencing defendant, gave any significant weight to its subjective beliefs or to other cases, defendant did not show reversible error (and thus plain error) or ineffective assistance of counsel.

¶ 2 Following a jury trial, defendant, Kenneth Harding, was found guilty of unlawful delivery of 1 gram or more but less than 15 grams of any substance containing heroin (720 ILCS 570/401(c)(1) (West 2010)) and sentenced to 15 years in prison. The trial court denied his motion for reconsideration of his sentence, and defendant timely appealed. There are two issues on appeal.

The first is whether the case must be remanded for further proceedings under *People v. Krankel*, 102 Ill. 2d 181 (1984), where the trial court did not inquire into the factual basis of one of defendant's two allegations of ineffective assistance of counsel. The second is whether the case must be remanded for resentencing where, according to defendant, the trial court based defendant's sentence on its own subjective belief about drug crimes. As to the first issue, we hold that, because the court failed to inquire into the factual basis of one of defendant's claims, the cause must be remanded for that limited purpose. As to the second issue, we find no reversible error and affirm defendant's sentence.

¶ 3

#### I. BACKGROUND

¶ 4 Defendant was indicted on three counts of unlawful delivery of a controlled substance. Each count alleged that he delivered between 1 and 15 grams of a substance containing heroin. The dates of the alleged deliveries were December 15, 2010 (count I), December 2, 2010 (count II), and December 10, 2010 (count III). The State nol-prossed counts II and III.

¶ 5 Prior to trial, defendant filed a motion to suppress any statements he allegedly made. According to the motion, defendant did not make any statements in response to an interrogation and, further, defendant was not read his *Miranda* rights (see *Miranda v. Arizona*, 384 U.S. 436 (1966)) prior to being interrogated. At the hearing, Jeffrey Lizik and Daniel Alaimo, police officers with the Du Page Metropolitan Enforcement Group (DuMEG), testified that they interviewed defendant at 7:30 a.m. on February 17, 2011, at a Chicago police department detention center. The interview was not recorded. Lizik read defendant his *Miranda* rights, and defendant signed and initialed a *Miranda* waiver form. According to Lizik, defendant told the officers that he delivered heroin for his cousin, Thomas Harding, that his cousin would go to defendant's residence almost daily, that his cousin

would package heroin and give it to defendant for delivery, that defendant made 6 to 10 deliveries per day (sometimes as many as 15), and that defendant would receive money from the customers and give it to his cousin. Lizik further testified that defendant told him that he had been making deliveries for his cousin for about 10 months and that he usually used his cousin's truck. Lizik identified the *Miranda* waiver form that was signed by defendant, and it was admitted into evidence. Alaimo testified that he was present for the interrogation, which was conducted by Lizik. He witnessed defendant sign and initial the *Miranda* waiver form.

¶ 6 Defendant testified that he did not recognize Lizik or Alaimo and that he was never interviewed by them. He was shown the *Miranda* waiver form that he purportedly signed and initialed on February 17, 2011. He denied signing and initialing the form on that date. He acknowledged that the initials and signature were his; however, he stated that when he signed the form he had been told that it was for a bond reduction. He was not wearing his glasses when he signed the form, but he did not tell anyone that he did not know what he was signing.

¶ 7 Following the testimony, defense counsel argued that the issue was one of credibility. According to defense counsel, defendant was more credible than the officers. Defendant's testimony was "clear, unequivocal," whereas the officers "were somewhat slow to speak, and they had to think about their answers." The trial court disagreed, finding the officers more credible, and denied defendant's motion to suppress.

¶ 8 At defendant's jury trial, Andrew Anselm, an Illinois state police officer with DuMEG, testified that, on December 2, 2010, at about 5:30 p.m., he was working undercover in Westmont. Anselm entered a Jewel parking lot and saw defendant, who was standing in a parking lane and waving at Anselm. When Anselm was sure that he could be seen by James McGreal (another officer

who was present on the scene), he pulled over, and defendant approached his vehicle. Defendant entered Anselm's vehicle and gave him a clear plastic bag, containing multiple foils of heroin, in exchange for \$200. Anselm asked defendant if Anselm could buy larger quantities of heroin from him, and defendant told him that he could do so after defendant had dealt with him a few more times. Anselm identified People's Exhibit No. 1 as the heroin that he had purchased from defendant on December 2, 2010. Anselm further testified that, on December 8 and December 10, 2010, he again met with defendant in the same Jewel parking lot and gave defendant money in exchange for heroin. McGreal was present in the parking lot and observed each transaction. Anselm also identified People's Exhibit Nos. 3 and 4 as the heroin purchased on December 8 and 10, respectively. Defendant was not arrested at any point during the purchases made on December 2, 8, and 10, 2011.

¶ 9 Anselm further testified that he met with defendant a fourth time, on December 15, 2010, in the Jewel parking lot. On that day, Anselm purchased "five jabs of heroin" from defendant, in exchange for \$500. Defendant was present in Anselm's car for about three or four minutes. Anselm identified People's Exhibit No. 5 as the heroin that he purchased from defendant on December 15, 2010. Defendant was not arrested on December 15, 2010.

¶ 10 McGreal testified that he was an officer with DuMEG and that he was at the Jewel parking lot on December 2, 8, 10, and 15, 2010, to supervise and coordinate undercover heroin purchases. On each date, McGreal observed defendant enter Anselm's vehicle, remain inside for a few minutes, and then exit. On each date, McGreal met with Anselm after defendant had left the area and saw the heroin that Anselm had purchased from defendant. McGreal explained that they did not arrest defendant when any of the transactions occurred because they were conducting an on-going investigation and hoped to identify sources of supply or possible routines. On cross-examination,

McGreal agreed that no photographs were taken and no video recordings were made during any of the transactions.

¶ 11 Following McGreal's testimony, the trial court instructed the jury that the evidence pertaining to the transactions that occurred on December 2, 8, and 10 should be considered for the limited purpose of establishing defendant's intent and the absence of mistake.

¶ 12 Lizik testified consistent with the testimony that he had provided at the hearing on defendant's motion to suppress. A forensic scientist confirmed that the substance that was recovered on December 15, 2010, weighed 5.21 grams and testified positive for heroin.

¶ 13 Prior to closing arguments, defense counsel informed the trial court that he intended to argue the absence of audio recordings or that the jury "didn't hear" an audio recording. The State argued that such an argument would be improper, because, although there were audio recordings made of the transactions on December 8 and 10, 2010, they were inadmissible. The State explained that the audio recordings were made pursuant to section 14-3(g) of the Criminal Code of 1961 (Code) (720 ILCS 5/14-3(g) (West 2010)), as necessary for the protection of the officer. However, the audio recordings were inadmissible, except "(i) where a party to the conversation suffers great bodily injury or is killed during such conversation, or (ii) when used as direct impeachment of a witness concerning matters contained in the interception or recording." *Id.* Thus, the State argued that it would be improper for defense counsel to argue to the jury that the jury did not hear an audio recording (allowing the inference that none had been made), given that the State was precluded from introducing them into evidence. Further, the State indicated that copies of the recordings from December 8 and 10 had been provided to defense counsel, and defense counsel conceded that he did receive them. As to the transaction that took place on December 2, 2010, the State conceded that

no recording had been made. As to the transaction that took place on December 15, 2010, the State advised the court that it had obtained a “court-authorized overhear” to record the transaction but that the equipment had malfunctioned and no recording was obtained. The court ruled that defense counsel was free to argue the absence of recordings as to December 2 and 15 but that counsel could not argue the absence of recordings as to December 8 and 10 or that the jury “didn’t hear” an audio recording.

¶ 14 Following closing arguments, the jury found defendant guilty of unlawful delivery of 1 gram or more but less than 15 grams of any substance containing heroin (720 ILCS 570/401(c)(1) (West 2010)).

¶ 15 On February 17, 2012, at the outset of the sentencing hearing, the judge asked defendant about a document that defendant had prepared and had mentioned the previous day concerning defense counsel’s performance. Defendant told the court that he did not bring it, because the court had told him that it would not look at it. The court denied telling defendant that it would not look at it and asked defendant whether he had anything that he wanted to bring up concerning the issue of counsel’s performance. The following colloquy occurred:

“[THE DEFENDANT]: Well, I was—It was said in court that I made a statement. There was no statement. And I was accused of delivery. *And on the audio tape, the officer clearly said, this is not Kenneth Harding, abort the mission.* And it was said that I was involved in a criminal activity. And that’s not true. And the officer stated that, there was evidence to say that I wasn’t the one.

I just felt like it wasn't brought up in trial that I never made a statement. There was no proof of no statement. There was no evidence of no statement. *And the officer said on the audio tape—*

THE COURT: No. What I want to know is: What are you alleging or arguing that your trial counsel did that was ineffective. That's what I understood you to bring up yesterday.

THE DEFENDANT: He didn't object to a statement being made. There was no objection made in my trial concerning a statement. And that was the only defense that I had. And I had spoke to you October the 5th in trial that he said he had no intention on discrediting DUMEG or arguing those statements. And I said, how can I win in trial if you don't attack the statement? Because they're saying that I admitted to making some deliveries. And I never did say that. I never made no delivery, you know. And that's what I was on trial for. And I was fighting the statement. And I said, what good was it to put a motion in to suppress statement and you not even question the officer saying that I made a statement? There was no proof of no statement. No statement ever made.

I had no defense to defend me concerning the statement. And I was convicted based on a statement, a confession that they presented in trial. Not because I was—done something illegal or I was in a place of doing some illegal activity. I was at home in bed; they come and got me out of bed.

Out of the whole investigation, all of these were controlled buys that they said was supposedly happening by me. And there was no proof of that.” (Emphases added.)

As the court began questioning defense counsel, defendant again stated: “*The audio tapes states it’s not Kenneth Harding, abort the mission, on the audio tape. And that wasn’t heard at trial, you know.*” (Emphasis added.)

¶ 16 Thereafter, the court found without merit defendant’s allegations of ineffectiveness as to his statement. The court noted that defense counsel had filed a motion to suppress defendant’s statement, arguing, *inter alia*, that defendant had denied making a statement. The court further noted that a hearing was held on the motion to suppress, at which defendant testified that he never spoke with the officers and that he never initialed or signed the *Miranda* form. The court also pointed out that during trial defense counsel obtained testimony from the officers during trial admitting that they did not record the statement. Based on the foregoing, the court denied defendant’s request for the appointment of new counsel. The court did not specifically address defendant’s claim concerning the audio tape.

¶ 17 The matter proceeded to a sentencing hearing. After hearing arguments in aggravation and mitigation, the court made the following comments. First, the court noted that it considered various factors in determining an appropriate sentence, including the facts and circumstances of the offense, the information contained in the presentence investigation report (PSI), and the factors in aggravation and mitigation. Thereafter, the court evaluated the relevant factors as follows. As to the facts and circumstances of the offense, the court noted the series of transactions leading up to the transaction for which defendant was to be sentenced. Concerning the factors in aggravation, the court found defendant’s criminal history to be particularly aggravating. The court noted that defendant’s criminal history extended “pretty steadily” from 1985 through 2010, including nine felony convictions, of which six were drug convictions. The court noted that defendant’s criminal history

made defendant eligible for Class X sentencing. The court also found relevant the fact that defendant violated MSR on numerous occasions. The court stated:

“So there are a series of violations of the Court’s orders in his criminal history. And it demonstrates to me, being arrested like that and eventually convicted right after he gets out of prison while he’s on MSR, basically a total disregard for the law and the Court sentences. It indicates to me an inability or a refusal to comply with the law. So I find that his criminal history is an aggravating factor.”

The court next considered the need to deter others from committing the same crime. The court stated:

“I find that factor to be particularly relevant here when we’re dealing with delivery of heroin. I note that the defendant—and he said it here today and he said it in the [PSI]—that he does not deal drugs. But on page thirteen, it says he is a—he did not deal drugs but was a runner and would pick up drugs for others. In the process, he would get them for himself.

The case I heard with this jury with these deliveries, four total, leading up to the charged offense and his prior conviction for manufacture and delivery of a controlled substance in 2003 which he was sent to the penitentiary for six years, indicates to me he does deal heroin. And I think you’re in denial when you say that you do not deal drugs. Because the history and the evidence shows you do deal drugs. And because you do so and you possess the drugs and you have dealt the drugs in the past and you did so here, you are, in my opinion, contributing to basically a wave a devastation that is occurring certainly in DuPage County. I sit up here every day. I see people addicted to heroin. I see people charged with

heroin. I see young people charged with heroin. And the reason they get it is because somebody is selling it to them.

I'm not sentencing you for all the ills of society, but I do think that this sentence has to deter you and other people who decide that maybe they're going to sell drugs. Because the heroin, particularly, and the drugs are just causing tremendous devastation, eventually leading to violence. I see it every day. So I have that in mind with this sentence, especially with drug dealing sentences. It is necessary to deter others from committing the same crime. And I have that in mind."

¶ 18 The court went on to consider the factors in mitigation. The court found in mitigation that defendant's conduct did not threaten or cause serious harm and that defendant did not contemplate or try to cause any physical harm. Nevertheless, the court further found that many of the factors in mitigation did not apply. For instance, the court stated that it could not find the absence of a criminal history. The court also could not find that defendant's conduct was the result of circumstances unlikely to recur, given defendant's extensive criminal history. The court addressed whether defendant's character and attitude indicated that he was unlikely to commit another crime and concluded that there was evidence that "cut both ways." For instance, the court pointed to defendant's extensive criminal history and lack of steady employment. The court noted that the PSI indicated that defendant had quit his job to spend more time doing drugs and that the evidence was clear that defendant was a heroin and cocaine addict. Defendant had never sought treatment for his addiction. On the other hand, the court noted that a letter presented from JUST showed that defendant had, since incarcerated, attempted to address some of his issues. The court noted that defendant had been sincere and motivated in his attempts. He had attended 254 meetings in the jail.

Defendant had passed all tests in an effort to obtain his GED and needed only to complete the written portion of the test. The court found that defendant's participation in jail was a mitigating factor.

¶ 19 Thereafter, the court stated:

“So I have balanced factors in aggravation and mitigation. I've considered the defendant's potential to be rehabilitated against his—against the need to protect the public from his actions—his repeated actions of committing felony offenses, felony drug offenses, which I have gone through.

I understand that it is very likely, [defendant], you're addicted. And I wish that that had been addressed at some point in your life before. But at a certain point when you commit your ninth felony and your sixth drug felony and your second delivery and you've been to the penitentiary seven times? I can't overly concern myself with your addiction anymore. To me, the protection of the public has got to be paramount at some point. And I think we've reached that point. So I do hope that somehow you can address that issue. But the seriousness of the offense and the protection of the public in deterrents take precedence at this point.

The State has asked for eighteen years in the Illinois Department of Corrections. I have considered that. Based on the mitigation that I went through and at least your effort in the jail to address your problems, I'm not going to impose eighteen years. But you're eligible for six to thirty years. The delivery of the controlled substances has to stop.

I'm going to sentence you to fifteen years in the Illinois Department of Corrections.”

¶ 20 Defendant moved for reconsideration of his sentence, arguing that it was excessive. Following the denial of his motion, defendant timely appealed.

¶ 21

## II. ANALYSIS

¶ 22

### A. *Pro se* Claim of Ineffective Assistance of Counsel

¶ 23 Defendant first argues that, because the trial court did not inquire into the factual basis of his claim of ineffectiveness concerning the audio recording, the case must be remanded for that limited purpose. In response, the State argues that defendant's argument is forfeited, because defendant failed to raise the issue at the *Krankel* hearing. In the alternative, the State maintains that the court's failure to inquire was harmless error. We agree with defendant.

¶ 24

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. *Krankel*, 102 Ill. 2d at 187-89; *People v. Remsik-Miller*, 2012 IL App (2d) 100921, ¶ 9. To trigger the court's duty to conduct an inquiry, "a *pro se* defendant is not required to do any more than bring his or her claim to the trial court's attention." *People v. Moore*, 207 Ill. 2d 68, 79 (2003); see also *People v. Sanchez*, 329 Ill. App. 3d 59, 66-67 (2002) (finding that the defendant's posttrial oral allegations were sufficient to raise an ineffective-assistance claim). New counsel is not automatically required merely because the defendant presents a *pro se* posttrial claim that his counsel was ineffective. *Moore*, 207 Ill. 2d at 77; *Remsik-Miller*, 2012 IL App (2d) 100921, ¶ 9. Instead, the trial court must first examine the factual basis of the claim. *Moore*, 207 Ill. 2d at 77; *Remsik-Miller*, 2012 IL App (2d) 100921, ¶ 9; *People v. Pence*, 387 Ill. App. 3d 989, 994 (2009). The supreme court has listed three ways in which the 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." *Moore*, 207 Ill. 2d 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. *Remsik-Miller*, 2012 IL App (2d) 100921, ¶ 9; *Pence*, 387 Ill. App. 3d at 994. 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. *Remsik-Miller*, 2012 IL App (2d) 100921, ¶ 9; *Pence*, 387 Ill. App. 3d at 994. If the court fails to conduct the necessary preliminary examination as to the factual basis of the defendant's allegations, the case must be remanded for the limited purpose of allowing the court to do so. *Remsik-Miller*, 2012 IL App (2d) 100921, ¶¶ 17, 19; *Pence*, 387 Ill. App. 3d at 996; *People v. Serio*, 357 Ill. App. 3d 806, 819 (2005).

¶ 25 Our standard of review depends on whether the trial court made a determination on the merits of defendant's ineffective-assistance claim. If the trial court made no determination on the merits, then our standard of review is *de novo*. *Moore*, 207 Ill. 2d at 75. Conversely, if the trial court made a determination on the merits, we reverse only if the trial court's determination was manifestly erroneous. *People v. McCarter*, 385 Ill. App. 3d 919, 941 (2008). Here, although the trial court denied defendant's *pro se* claim on the merits as to one of his claims, defendant argues that the trial court did not address all of the claims that he raised. Thus, the issue is the adequacy of the court's *Krankel* inquiry, which raises a legal question reviewed *de novo*. See *Moore*, 207 Ill. 2d at 75; see also *People v. Taylor*, 237 Ill. 2d 68, 75 (2010) (whether the defendant's statement at sentencing constituted a *pro se* claim of ineffective assistance of counsel sufficient to trigger the court's duty to conduct a *Krankel* inquiry presents a question of law and is thus subject to *de novo* review).

¶ 26 We first address the State's arguments concerning forfeiture. According to the State, defendant forfeited his argument that the trial court failed to inquire about the audio tape, because

defendant never indicated to the court that that was a basis for his ineffective-assistance claim. See *People v. Reed*, 197 Ill. App. 3d 610, 612-13 (1990) (where the defendant made no express motion to the trial court, written or oral, claiming ineffective assistance of counsel or requesting substitute counsel, remand for a *Krankel* inquiry was not warranted). Contrary to the State's assertion, the record makes clear that defendant raised the issue regarding the audio tape during the *Krankel* hearing. When the court asked defendant whether he had anything that he wanted to bring up concerning the issue of counsel's performance, defendant stated, within his first few comments: "And on the audio tape, the officer clearly said, this is not Kenneth Harding, abort the mission." He further stated: "[T]here was evidence to say that I wasn't the one." When he again brought up the audio tape, he was interrupted by the trial court, and unable to complete his comment. Later, as the court began questioning defense counsel, defendant again stated: "The audio tapes states it's not Kenneth Harding, abort the mission, on the audio tape. And that wasn't heard at trial, you know." In light of these comments, the State's arguments concerning forfeiture are baseless.

¶ 27 Turning to the merits, not only is the record clear that defendant raised the claim concerning the audio tape, it is equally clear that the trial court failed to conduct any inquiry into the factual basis of that claim. Defendant asserted that on the audio tape an officer could be heard stating, " '[T]his is not Kenneth Harding, abort the mission.' " The court did not ask any questions to either defense counsel or defendant about the audio tape. He did not listen to the tape or mention it in his ruling. Unless the court conducts an adequate inquiry, it is impossible to determine whether defendant's claim has merit. See *Moore*, 207 Ill. 2d at 81. Because the court failed to inquire into the factual basis of defendant's claim, we must remand for the limited purpose of doing so. See *Remsik-Miller*, 2012 IL App (2d) 100921, ¶ 19; *Pence*, 387 Ill. App. 3d at 996; *Serio*, 357 Ill. App. 3d at 819.

¶ 28 We reject the State’s argument that the court’s failure to inquire into the factual basis of the claim was harmless error. In *People v. Tolefree*, 2011 IL App (1st) 100689, the defendant, who was charged with driving on a suspended license, argued that the court erred in failing to inquire into his claim that his counsel was ineffective for failing to cross-examine an officer concerning whether the officer searched the defendant’s car for drugs or whether the defendant had a valid driver’s license. The reviewing court found that the court’s failure to inquire was harmless, because the claims concerned a witness who testified at trial (and thus the court was aware of the cross-examination) and because the claim was either not relevant to the charges against him or related to trial strategy. The reviewing court found that the trial court did not have to engage in further questioning as “the substance of defendant’s claim was found within the trial court record.” *Id.* The court specifically noted: “Defendant’s ineffective assistance of counsel claim did not indicate there was any substance beyond what was already in the trial record that would require a further inquiry under *Krankel*.” *Id.*

¶ 29 Here, unlike in *Tolefree*, the audio tape at issue was not made a part of the record. The record confirms that audio tapes were made (pursuant to section 14-3(g) of the Code (720 ILCS 5/14-3(g) (West 2010))) of the transactions that occurred between defendant and Anselm on December 8 and December 10 and, further, that defense counsel had been provided with copies of the audio tapes. If the officer can be heard on an audio tape saying what defendant claims, then the tape might have been admissible as “direct impeachment of a witness concerning matters contained in the interception or recording” (*id.*), *i.e.*, as proof that, on one of the occasions that Anselm claimed to have conducted a drug transaction with defendant, defendant was not present. Although it was not made on the day of the present offense, this evidence would have impacted the officer’s credibility, which was critical in this case, given that no video or audio tapes were admitted at trial and

defendant was not arrested at the scene. As defendant argues, if evidence of the transactions occurring on December 2, 8, and 10, was relevant, then an audio tape containing evidence suggesting that defendant was not present during one of those transactions would have been similarly relevant. Indeed, witness credibility is always relevant. See *People v. Jackson*, 237 Ill. App. 3d 712, 719 (1992) (“Generally, a defendant has the right to pursue any kind of impeachment of the witnesses because one of the purposes of cross-examination is to test the credibility of the witnesses.”). Defendant’s argument might be without merit or pertain to matters of trial strategy; however, given that the audio tape was not a part of the record, the trial court cannot make that determination without first inquiring into the factual basis of defendant’s claim and, thus, we remand for that limited purpose.

¶ 30

B. Sentencing

¶ 31 Defendant next argues that, because “the judge explicitly considered his own subjective beliefs about drug crimes as well as other cases that had previously been before the judge,” the case must be remanded for resentencing. Specifically, defendant points to the court’s comments that defendant was contributing to a “wave of devastation” in Du Page County, that the court sees young people charged with heroin offenses, and that heroin leads to violence.

¶ 32 Defendant admits that he did not contemporaneously object during the sentencing hearing or at least raise the issue in his postsentencing motion. He therefore properly concedes that, under standard principles of appellate review, he forfeited this argument on appeal. See *People v. Hillier*, 237 Ill. 2d 539, 544 (2010) (to preserve a claim of sentencing error, a defendant must object at the sentencing hearing and object in a postsentencing motion). However, he argues that his claim is amenable to review under the plain-error doctrine. See Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967);

*Hillier*, 237 Ill. 2d at 545. According to defendant, relief is warranted under either prong of the plain-error rule. In the alternative, he argues that his counsel was ineffective for failing to properly preserve the sentencing issue. In response, the State maintains that the complained-of comments do not rise to the level of plain error or ineffective assistance. According to the State, even if the judge considered an improper factor, remand for resentencing is unnecessary because the court's consideration did not result in a greater sentence. See *People v. Bourke*, 96 Ill. 2d 327, 332 (1983). On this issue, we agree with the State.

¶ 33 To obtain relief under the plain-error rule, a defendant must show that error occurred (*Hillier*, 237 Ill. 2d at 545), and further show that that error is reversible error (*People v. Naylor*, 229 Ill. 2d 584, 602 (2008)). If no reversible error occurred, the reviewing court's analysis need go no further, as, when no reversible error exists, *a fortiori*, no plain error can exist. See *id.* at 602 (there can be no plain error without reversible error). If reversible error occurred, a defendant asserting plain error still has the burden to show that the error meets one prong of the plain-error rule. See *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). "In the sentencing context, a defendant must \*\*\* show either that: (1) the evidence at the sentencing hearing was closely balanced, or (2) the error was so egregious as to deny the defendant a fair sentencing hearing." *Hillier*, 237 Ill. 2d at 545. In plain-error review, the burden of persuasion remains on the defendant; this is in contrast to review of preserved error, in which, once the defendant has shown error, the burden shifts to the State to show that the error was harmless. *People v. McLaurin*, 235 Ill. 2d 478, 495 (2009). Application of the plain-error rule is not warranted here because defendant cannot establish that the court committed reversible error.

¶ 34 Illinois's constitution requires that "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11. A reviewing court should not disturb a sentence that is within the applicable sentencing range unless the trial court abused its discretion. *People v. Stacey*, 193 Ill. 2d 203, 209-10 (2000). The sentencing range for a Class X felony is no less than 6 and no more than 30 years. See 730 ILCS 5/5-4.5-25(a) (West 2010). In determining an appropriate sentence, relevant considerations include the nature of the crime, the protection of the public, deterrence, punishment, and the defendant's rehabilitative potential. *People v. Kolzow*, 301 Ill. App. 3d 1, 8 (1998). The weight that the trial court should attribute to each factor in aggravation and mitigation depends upon the particular circumstances of the case. *Id.* Provided that the trial court " 'does not consider incompetent evidence, improper aggravating factors, or ignore pertinent mitigating factors, it has wide latitude in sentencing a defendant to any term within the statutory range prescribed for the offense.' " *People v. Bosley*, 233 Ill. App. 3d 132, 139 (1992) (quoting *People v. Hernandez*, 204 Ill. App. 3d 732, 740 (1990)). Reviewing courts presume that a sentence within the statutory guidelines is proper. *People v. Boclair*, 225 Ill. App. 3d 331, 335 (1992).

¶ 35 In fashioning a sentence, a trial court's reliance on its personal beliefs or arbitrary reasons, rather than authorized factors, can warrant remandment for resentencing. *People v. Bolyard*, 61 Ill. 2d 583, 586-87 (1975). However, reliance on an improper factor does not always necessitate remandment for resentencing. *Bourke*, 96 Ill. 2d at 332. Remandment is not required when it can be determined from the record that the weight placed on the improperly considered factor was so insignificant that it did not lead to a greater sentence. *Id.* In considering whether reversible error occurred, a reviewing court should not focus on a few words or statements of the trial court, but

should make its decision based on the record as a whole. See *People v. Curtis*, 354 Ill. App. 3d 312, 326 (2004).

¶ 36 Thus, we review the court's complained-of comments within the context of the record as a whole. At the outset of its ruling, the court emphasized that the case involved not an isolated drug transaction but rather a series of drug transactions leading to the transaction for which defendant was convicted. The court emphasized the particularly aggravating nature of defendant's criminal history, specifically noting that, of defendant's nine felony convictions, six were drug convictions. The court noted that defendant showed a "total disregard for the law and the Court sentences" and "an inability or refusal to comply with the law." The court also noted defendant's denial (both in court and in the PSI) that he was a drug dealer and found that the evidence refuted that claim, stating that "the evidence shows that you do deal drugs" and that "you have dealt drugs in the past." The court then addressed the need to deter others from committing the same offense, *i.e.*, delivery of heroin, and it was within that context that the court made the complained-of comments. The court commented that defendant was "contributing to basically a wave of devastation" in Du Page County. The court commented that it sees "young people charged with heroin" and that "the reason they get it is because somebody is selling it to them." The court also stated that drugs "lead[] to violence." Defendant argues that these comments were improper as they were based on evidence not before the court and reflected the court's personal beliefs. We note, however, that the court also specifically stated, "*I'm not sentencing you for all the ills of society*, but I do think that this sentence has to deter you and other people who decide that maybe they're going to sell drugs." In any event, aside from deterrence, the court also emphasized the seriousness of the offense and the need to protect the public, stating: "[T]he protection of the public has got to be paramount at some point."

¶ 37 The court's comments here do not rise to the level of the errors committed in the cases relied on by defendant. For instance, in *People v. Smith*, 176 Ill. 2d 217 (1997), the trial court, in imposing sentence on a remand for resentencing, specifically relied on notes that it had taken concerning testimony presented at the defendant's first sentencing hearing. The supreme court found that this was error. In any event, it should be noted that the *Smith* court concluded: "[O]ur review of the record reveals that the trial court's isolated reference to its notes was inconsequential and had no effect on the sentence it imposed." *Id.* at 238. In *People v. Dameron*, 196 Ill. 2d 156 (2001), the supreme court reversed the defendant's death sentence where the record showed that the sentencing judge appeared to have conducted some "private investigation" during the pendency of the case regarding the appropriateness of the death penalty and also remarked about the significance of a 1966 murder trial over which the judge's father presided and the sentencing comments his father made in that case. The supreme court held: "The trial judge sought alternative avenues of information in his effort to reach the correct result. Unfortunately, that effort led to the error here." *Id.* at 179. In *People v. Whitney*, 297 Ill. App. 3d 965, 971 (1998), the trial court, in sentencing the defendant, considered a nonexistent prior conviction. The reviewing court reversed and remanded for resentencing, because not only did the trial judge specifically state on the record that he was considering the conviction, but the conviction was also the first factor specifically mentioned by the judge in handing down his sentence. Here, although the court generally referenced the heroin problems in Du Page County, it did so only in explaining the need for deterrence, the seriousness of the offense, and the need for protection of the public, which are appropriate factors.

¶ 38 Even if the comments were improper, remand is not required, because the record demonstrates that the court's sentence was based on proper factors and that any weight placed on the

improper factors was insignificant. See *Bourke*, 96 Ill. 2d at 332. Indeed, a review of the entire transcript from the sentencing reveals that the court considered very thoroughly all of the appropriate factors in aggravation and mitigation in fashioning defendant's sentence. The present case is distinguishable from the cases relied on by defendant finding reversible error, because in those cases the courts' comments at sentencing established that the weight placed on the courts' personal beliefs was not insignificant. In *People v. Henry*, 254 Ill. App. 3d 899, 904-05 (1993), the reviewing court found reversible error where the trial court stated, " 'This is really a disgusting crime. And that's why you are given this amount of time.' " Certainly, the court's comments in *Henry* established that the court's personal feelings about the crime directly impacted the sentence. In *Bolyard*, 61 Ill. 2d at 585-86, the trial court expressed its personal policy that crimes involving physical or sexual violence were not probationable and thus denied the defendant's request for probation. The supreme court found the defendant entitled to a new sentencing hearing, finding that the record showed that "the trial judge arbitrarily denied probation because [the] defendant fell within the trial judge's category of disfavored offenders." *Id.* at 587. Here, unlike in *Bolyard*, the court did not arbitrarily sentence defendant based on his status as a drug dealer. Rather, as noted, the record shows that the court considered all the factors in aggravation and mitigation in fashioning an appropriate sentence and that, while it made certain generalized comments concerning "drug dealing sentences," any reliance on improper factors was insignificant.

¶ 39 Accordingly, we find no reversible error and thus no plain error. It follows that defendant's alternative argument, that he was denied the effective assistance of counsel when his trial counsel failed to preserve the sentencing issue, must fail. To establish a claim for ineffective assistance of counsel, a defendant must show that counsel's representation fell below an objective standard of

reasonableness and that counsel's actions resulted in prejudice to the defendant. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Here, because no reversible error occurred, defendant was not prejudiced by counsel's failure to preserve the sentencing issue.

¶ 40

### III. CONCLUSION

¶ 41 For the reasons stated, we remand for the limited purpose of allowing the court to inquire into the factual basis of defendant's ineffective-assistance claim concerning only the audiotape. If defendant's allegations show possible neglect of the case, the court should appoint new counsel to argue defendant's claim of ineffective assistance. However, if the court concludes that defendant's claim lacks merit or pertains only to matters of trial strategy, the court may deny the claim. We otherwise affirm.

¶ 42 Affirmed in part and remanded.