2015 IL App (1st) 132094-U

FIFTH DIVISION
May 22, 2015

No. 1-13-2094

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. 06 C6 60510
	)	
ROBERT STITNICKY,	)	Honorable
	)	Christopher J. Donnelly,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Justices McBride and Gordon concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's case is remanded for the trial court to conduct a *Krankel* inquiry into his *pro se* posttrial allegations of ineffective assistance of counsel in compliance with the mandate we issued following defendant's direct appeal.

¶ 2 Defendant, Robert Stitnicky, now appeals from a judgment following our limited remand to the trial court to conduct an inquiry into his claim of ineffective assistance of trial counsel pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984). On remand, the court denied defendant's motion for a *Krankel* hearing, which was filed through newly appointed counsel. Defendant

appeals, arguing his case should be remanded before a different judge to inquire into his allegations of ineffective assistance. For the reasons that follow, we remand for the purpose of allowing the trial court to inquire into defendant's claim of ineffective assistance of counsel.

¶ 3 Prior to defendant's trial, the presiding judge transferred Judge Christopher J. Donnelly, who had initially been assigned to defendant's case, to a misdemeanor courtroom. At a hearing, Judge Donnelly indicated to the parties that he would keep the case despite his transfer. Thereafter, defendant filed a motion for substitution of judge as of right, which Judge Donnelly denied. Defendant then filed a petition for substitution of judge for cause, asserting Judge Donnelly was prejudiced against him. Judge Robert J. Clifford denied defendant's motion. Defendant was represented by privately retained counsel (Daniel Peters and Ronald Belmonte).

¶ 4 At trial, 13-year-old Megan A. testified that defendant, her godfather, put his finger into her vagina two times when she was 9 and 10 years old. During both occasions, Megan was at defendant's home alone. The State admitted into evidence defendant's signed statement in which he admitted to putting his finger in Megan's vagina on two occasions. Defendant testified that he agreed to sign the statement because he felt sick, upset, intimidated, and threatened. He denied ever touching Megan's vagina and asserted that she threatened to make allegations against him for taking away her cell phone and not giving her money. Following trial, a jury found defendant guilty of two counts of predatory criminal sexual assault.

¶ 5 At defendant's sentencing hearing, the trial court allowed defendant the opportunity to make a statement in allocution. Defendant stated that his attorneys failed to "bring up" certain facts at trial, including that Megan was "arrested" in 2005 for an unidentified crime and Megan's mother said in front of Megan and reporters, "how do I know that male police officer didn't touch my daughter and she's too afraid to say anything right now?" According to defendant, "saying

this in front of" Megan, who was only nine at the time, "just gave her one little aspect of how do you get what you want." Defendant also asserted that about 20 years earlier, he "crossed paths" with Judge Donnelly at a police officer's wedding, where he "came up" to Judge Donnelly because he was upset about teenagers drinking at the wedding. Defendant provided the name of the bride and groom and the wedding's location. After confirming the wedding took place 20 years ago, Judge Donnelly stated he had only been a judge for 14 years and thus could not have performed the wedding, and he did not recognize the names defendant mentioned "at all." Defendant responded he "could be a little bit off on the time" but he had requested his attorneys check into the matter because he thought he recognized the judge "from day one." The trial judge made no comment on or reference to defendant's first complaint.

¶ 6 Following this exchange, the trial court sentenced defendant to15 years in prison on each count, ordering the two sentences to run consecutively. The court found defendant's crime was particularly "heinous" and "outrageous" because of defendant's age and the position of trust he held over the victim. The court characterized defendant's crime as "one step below murder."

¶ 7 On direct appeal, defendant argued, among other things, that the trial court failed to conduct a *Krankel* inquiry into his first *pro se* allegation of ineffective assistance of counsel concerning the victim's alleged prior arrest. This court agreed, finding defendant met the minimum pleading requirements to trigger a *Krankel* inquiry when he claimed that counsel failed to investigate potentially impeaching information that he provided to counsel prior to trial. *People v. Stitnicky*, No. 1-09-0558 (2010) (unpublished order under Supreme Court Rule 23). We further observed the court made no inquiry into defendant's claim. Accordingly, we remanded defendant's case "for the limited purpose of allowing the trial court to inquire into defendant's claim of ineffective assistance of counsel." *Stitnicky*, order at 20.

¶ 8 On remand, the public defender was appointed to represent defendant. In December 2012, defense counsel filed a "Motion For New Trial" on defendant's behalf, attaching thereto an appendix in excess of 100 pages. In the motion, defendant again claimed that he told counsel about an alleged incident in which prior charges against Megan were dropped after Megan's mom told reporters she had no way of knowing if the police officer touched Megan. Defendant said that he "discussed this matter" with his attorneys and they said they "were going to subpoena the two reporters and that article into court." However, according to defendant, his attorneys failed to look into the matter. At a hearing on the motion, defense counsel indicated defendant wrote the motion. She stated as follows. "I've gone through it, and it doesn't hurt him at all. But I think that this is part and parcel of his whole complaint. He wants the whole thing to be looked at it, and he wants the whole situation to be examined so that he can have his day in court, as the Appellate Court has requested—has required." Counsel suggested a date "for hearing," and the court asked what type of hearing it was going to be. Counsel responded, "Well, Judge, [defendant] wishes to stand before you and explain to you what—what it is that is in—contained in the motion for new trial. I think, the motion for new trial kind of speaks for itself, but he needs to have his day in court. We will have certain witnesses here, if necessary. And, in fact, I think, they are necessary. So that if the Court wants to inquire further into his claim, those people will be available to testify."

¶ 9 On the next court date, defense counsel advised the trial court that defendant's motion, although titled "a motion for new trial," was actually intended to be a motion for a *Krankel* hearing. Counsel further stated that "defendant is very adamant about, we want to have, as the Appellate Court has indicated, an inquiry made into the allegations that we have set out in this motion before any new trial is granted or denied." Later, counsel stated as follows:

> "So, Judge, the first thing we are asking for is the *Krankel* hearing or rather a *Krankel* inquiry because that is exactly what the Appellate Court has indicated. It indicated over here on Page 9 that it believed that this Court did not conduct any inquiry into the defendant's ineffective assistance claim, and that it is asking at the beginning that some inquiry be made into that, into the defendant's claim of ineffective assistance of counsel. We believe this is the heart and soul of a *Krankel* hearing.
>
> And then, obviously, if there was ineffective assistance of counsel found, then a new hearing—a new trial would be granted. If not, then the Court's ruling would go on the record and, of course, [defendant] is looking forward to an appeal in this matter. That being the case, Judge, we are asking that the Court make the inquiry."

¶ 10 Defense counsel indicated she had four witnesses present in court ready to testify in support of defendant's claims. Counsel agreed with the trial court's suggestion to retitle her motion for new trial to a motion for a *Krankel* hearing. The court then asked the State whether it was prepared to respond, and the prosecutor stated as follows. "Well, Judge, as it relates to the *Krankel* hearing, my understanding is that the Appellate Court has mandated that we do that. My understanding also of *Krankel* is that it would be an inquiry of your Honor as it relates to the defendant's allegations of, for lack of a better term, ineffective assistance of counsel." The prosecutor stated it was not prepared to respond to the lengthy motion and it would prefer to wait to conduct a *Krankel* hearing, indicating that "generally in a *Krankel* hearing, we would like to have the attorney who represented the defendant here because he can make allegations, and the only people who were privy to why certain things were done the way they were done would have been naturally the defendant and his attorney." The court concluded as follows. "Based on all the

evidence before me and what's contained in what is now amended to motion for a *Krankel* hearing, the motion for a *Krankel* hearing will be respectfully denied."

¶ 11 Defendant filed a motion asking the trial court to reconsider its ruling, asserting the court failed to conduct an inquiry as ordered by this court. At a hearing on the motion, defense counsel argued the court did not give defendant's motion the attention we asked it to be given. The State responded that it was not "really" taking a position but acknowledged "[i]t basically is the Court's duty to inquire of the defendant's issues with his prior counsel." Stating it had given "careful consideration" to defendant's motion, the court denied it. This appeal followed.

¶ 12 On appeal, defendant asserts that the trial court failed to conduct a *Krankel* inquiry as mandated by this court and, thus, another remand is needed to conform to our mandate. Defendant further requests a different judge to conduct the inquiry on remand.

¶ 13 Initially, we reject the State's argument that defense counsel invited or acquiesced in any error in this case. Although she used the expressions *"Krankel* hearing" and *"Krankel* inquiry" interchangeably and indicated she had witnesses ready to testify, defense counsel repeatedly sought to have the court conduct an inquiry into defendant's claims pursuant to our mandate. The State likewise recognized that the trial court was required to conduct such an inquiry when it stated as follows: "Well, Judge, as it relates to the *Krankel* hearing, my understanding is that the Appellate Court has mandated that we do that. My understanding also of *Krankel* is that it would be an inquiry of your Honor as it relates to the defendant's allegations of *** ineffective assistance of counsel." Any purported confusion was eliminated when defense counsel agreed to retitle the subject filing as a motion for a *Krankel* hearing which necessarily must be preceded by a *Krankel* inquiry.

¶ 14 Our mandate was clear and required the trial court to inquire into defendant's posttrial claim of ineffective assistance of counsel under *Krankel*. " '[A] trial court must obey the clear and unambiguous directions in a mandate issued by a reviewing court.' " *People v. Stephens*, 2012 IL App (1st) 110296, ¶ 123 (quoting *People ex rel. Daley v. Schreier*, 92 Ill. 2d 271, 276 (1982)). Accordingly, we will address the merits of defendant's appeal.

¶ 15 Pursuant to *Krankel* and its progeny, when a defendant presents a *pro se* posttrial motion alleging ineffective assistance of counsel, the trial court should examine the factual basis of the defendant's claims. *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003). During such an inquiry, "some interchange between the trial court and trial counsel regarding the facts and circumstances surrounding the allegedly ineffective representation is permissible and usually necessary in assessing what further action, if any, is warranted on a defendant's claim." *Id.* 78. A brief discussion between the trial court and the defendant may also be sufficient, or the trial court can base its evaluation of the defendant's allegations on its knowledge of defense counsel's performance at trial and the insufficiency of the defendant's allegations on their face. *Id.* 78-79.

¶ 16 If the trial court determines after its inquiry that a defendant's claim lacks merit or pertains only to matters of trial strategy, new counsel need not be appointed and the *pro se* motion may be denied. *Moore*, 207 Ill. 2d at 78. However, where a defendant's allegations show possible neglect of the case, new counsel should be appointed who will then represent the defendant at a hearing on his ineffective-assistance claim. *Id.* The purpose of appointing counsel is to allow presentation of an ineffective-assistance claim without the conflict of interest that would result from trial counsel having to argue his own incompetence. *People v. Phipps*, 238 Ill. 2d 54, 63 (2010). The adequacy of a trial court's inquiry into allegations of ineffective assistance

in light of *Krankel* is a legal question that we review *de novo*. *People v. Willis*, 2013 IL App (1st) 110233, ¶ 72.

¶ 17 Here, the trial court failed to conduct an adequate *Krankel* inquiry on remand. In addition to other claims, defendant's motion for *Krankel* hearing again asserted the same allegations that he made during sentencing, *i.e.*, that his trial attorneys failed to investigate information he provided that police dropped prior charges against the victim after her mother told reporters she had no way of knowing if the police officer touched the victim. Based on the nature of defendant's allegations, we fail to see how the trial court could properly assess if further action was warranted without asking any questions of defendant's trial attorneys. See *Moore*, 207 Ill. 2d at 78 (during the initial *Krankel* inquiry, "some interchange between the trial court and trial counsel surrounding the allegedly ineffective representation is permissible and *usually necessary* in assessing what further action, if any, is warranted on a defendant's claim." (Emphasis added.)); see also *People v. Parsons*, 222 Ill. App. 3d 823, 830 (1991) (finding there should have been "some interchange between the trial court and the defendant's trial counsel" to explain the defendant's claim that his counsel failed to interview the police informant); *People v. Gilmore*, 356 Ill. App. 3d 1023, 1037 (2005) (finding the defendant's claim that counsel failed to call a witness would require "at least a brief inquiry into the potential substance of [the witness's] testimony and why counsel was unable to secure her presence or obtain a stipulation."). Indeed, the State even acknowledged at the hearing on defendant's motion that "[t]he only people who were privy to why certain things were done the way they were done would have been naturally the defendant and his attorney." Yet, the court made no inquiry of defendant or defense counsel or sought the appearance of either trial attorney.

¶ 18 Our limited remand for a *Krankel* inquiry arose because the trial court made no inquiry regarding defendant's *pro se* allegation of ineffective assistance of counsel for failing to investigate evidence to impeach the victim, the primary witness at trial. The trial court's silence on the record triggered our remand. Yet, on remand, the court did nothing more than make the following cursory conclusion: "Based on all the evidence before me and what's contained in what is now amended to motion for a *Krankel* hearing, the motion for a *Krankel* hearing will be respectfully denied." We fail to see how this cursory comment comports with our mandate.

¶ 19 To clarify, we specifically held on direct appeal that defendant had sufficiently alleged a *pro se* claim of ineffective assistance of trial counsel to warrant a *Krankel* inquiry. *Stitnicky*, No. 1-09-0558, order at 9 ("we find defendant has met the minimum pleading requirements so as to trigger the need for an inquiry."). We remanded for the limited purpose of having the trial court conduct such inquiry. *Stitnicky*, No. 1-09-0558, order at 10 ("Because the trial court made no inquiry in this case, we must remand this cause to the trial court for that limited purpose."). As the supreme court recently reaffirmed, "the goal of any *Krankel* proceeding is to facilitate the trial court's full consideration of a defendant's *pro se* claims of ineffective assistance of trial counsel and thereby potentially limit issues on appeal." *People v. Jolly*, 2014 IL 117142, ¶ 29 (December 4, 2014), citing *People v. Patrick*, 2011 IL 111666, ¶ 41; *People v. Jocko*, 239 Ill. 2d 87, 91 (2010). In turn, "[b]y initially evaluating the defendant's claims in a preliminary *Krankel* inquiry, the circuit court will create the necessary record for any claims raised on appeal." *Jolly*, 2014 IL 117142, ¶ 38, citing *People v. Nitz*, 143 Ill. 2d 82, 134-35 (1991) (reviewing the record of the preliminary inquiry to assess defendant's claims on appeal); *People v. Moore*, 207 Ill. 2d 68, 81 (2003) (explaining that failure to conduct a preliminary *Krankel* inquiry precludes appellate review). In *Jolly*, the supreme court remanded the cause to the circuit court for a new

preliminary *Krankel* inquiry because the State had improperly participated in the prior inquiry on appeal. *Jolly*, 2014 IL 117142, ¶ 48. The same remedy is appropriate here where the impropriety is based on the trial court's failure to conduct any inquiry.

¶ 20 Further, we reject the State's contention that defendant was afforded the relief envisioned by *Krankel* and its progeny. We acknowledge that counsel was appointed and defendant was given the opportunity to articulate his claims of ineffective assistance in a written motion filed by counsel. However, if the trial court had conducted an initial inquiry and determined defendant's allegations showed possible neglect, new counsel would not only be appointed but would also represent the defendant at a *hearing* on his *pro se* claims. See *Moore*, 207 Ill. 2d at 78. Here, the court's failure to conduct the initial inquiry for which we remanded defendant's case denied defendant the possibility of such a hearing. Moreover, although defense counsel filed defendant's motion, she acknowledged he wrote the motion. We cannot find that the foregoing served as a sufficient substitute for the inquiry that this court mandated the trial court conduct.

¶ 21 Finally, we are not persuaded by the State's assertion that an inquiry into defendant's claims was unnecessary because he was represented by private counsel at trial. We already rejected such a contention on direct appeal and determined defendant was entitled to a *Krankel* inquiry. The law of the case doctrine bars relitigation of an issue previously decided in the same case. *People v. Hopkins*, 235 Ill. 2d 453, 469 (2009).

¶ 22 In sum, we agree with defendant that his case should be remanded for the trial court to conduct a *Krankel* inquiry. However, we disagree that remand to a different judge is necessary. Pursuant to Illinois Supreme Court Rule 366(a)(5) (eff. Feb. 1, 1994), we may assign a matter to a different judge on remand. *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248, 263 (2004). However, a trial judge is presumed to be impartial, and the burden of overcoming this

presumption rests on the party making a claim of prejudice. *Id.* Here, defendant has failed to meet his burden of showing prejudice. Although he alleged during trial proceedings that Judge Donnelly was biased, defendant has provided no proof of such bias. Moreover, in light of the unusual proceedings that took place in this case, we cannot agree with defendant's assertion that no reasonable explanation exists for Judge Donnelly's failure to comply with our order. In short, we find defendant has failed to show the court displayed "animosity, hostility, ill will, or distrust" toward defendant such that remand to a different judge is warranted. See *People v. Vance*, 76 Ill. 2d 171, 180 (1979).

¶ 23 For the reasons stated, we remand for the trial court to conduct a *Krankel* inquiry into defendant's *pro se* post-trial allegations of ineffective assistance of counsel in compliance with the mandate we issued following defendant's direct appeal.

¶ 24 Remanded with directions.