2015 IL App (1st) 140291-U

FOURTH DIVISION
September 30, 2015

No. 1-14-0291

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. 12 CR 18174
	)	
LATRAIL BRUNT,	)	Honorable
	)	James M. Obbish,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Howse and Cobbs concurred in the judgment.

O R D E R

¶ 1 *Held*: Court failed to inquire into defendant's *pro se* post-trial claims of ineffective assistance, so case must be remanded for such inquiry. Sentence of eight years' imprisonment for fourth burglary by mandatory Class X offender not excessive.

¶ 2 Following a bench trial, defendant Latrail Brunt was convicted of burglary and sentenced as a mandatory Class X offender to eight years' imprisonment. On appeal, he contends that the trial court failed to inquire into his *pro se* post-trial claims of ineffective assistance of trial

counsel. He also contends that his sentence was excessive. For the reasons stated below, we remand for the court to inquire into defendant's ineffectiveness claims.

¶ 3 Defendant and codefendants Johnelle Brunt (Johnelle), Jermaine Harper, and Corey Smith[1] were charged with burglary for allegedly entering a Burlington Northern railroad car on or about September 7, 2012, near 3611 South Kedzie Avenue in Chicago without authority and with the intent to commit theft therein. Before trial, defendants sought severance, but the court assured them that it would not consider statements by one defendant against the others.

¶ 4 At defendants' trial in May and June of 2013, Burlington Northern Santa Fe railroad (BNSF) police officer Gerald Sowell testified that, at about 4 p.m. on September 7, 2012, he was working in uniform and driving in a marked vehicle southwesterly on the Stevenson Expressway east of Pulaski Avenue in Chicago. When he looked up at a railroad overpass across the expressway, leading from a BNSF railyard south of the expressway, he saw a stopped BNSF train and three persons on the overpass. On further examination, he testified that he was approaching the overpass at about 25 miles per hour but saw it for several minutes before he passed under it. One of the men opened the door of one of the shipping containers on the train. While Officer Sowell did not see the door seal being broken due to distance, he explained that a seal would have to be broken to open the door and that it could not be broken by hand. All three men then participated in removing merchandise from the open container before climbing down from the overpass with nothing in their hands. Officer Sowell saw their faces for about 15 to 20 seconds, and at trial identified defendant as the man who opened the container and codefendants Smith and Harper as the men who assisted in removing merchandise. He had seen all three men,

[1]Codefendants Harper and Smith appealed separately; Smith has withdrawn his appeal and Harper's appeal is still pending. *People v. Smith*, No. 1-13-2885 (2014); *People v. Harper*, No. 1-13-2600.

and knew their names, before the date of the offense. All three men were wearing black t-shirts, and defendant and Harper had the tails of white t-shirts underneath visible. Officer Sowell radioed a description of the men, including that all three men were wearing black shirts with white shirts underneath.

¶ 5 Officer Sowell left the expressway and went to the scene, by which time the men were gone. He saw a man fleeing the railyard but could not tell if he was one of the three men from the overpass. Officer Sowell inspected the train, "noticed that the seal had been removed" and saw merchandise – several televisions and boxes of cookware – scattered on the ground near the container. Based on a message from BNSF Officer Jose Rodriguez, Officer Sowell went to 36th Place near Kedzie Avenue in Chicago where he saw the three men from the overpass and identified them as such to other officers who had detained the men. None of them were now wearing black t-shirts; defendant and Harper had white t-shirts and Smith had a green t-shirt. Defendant, Smith, and Harper were not employed by BNSF and not given permission to remove anything from the containers.

¶ 6 BNSF Officer Jose Rodriguez testified that he was in uniform and responding to the dispatch of a man with a gun when he heard Officer Sowell's report of a container break-in and went to the railyard. There, he saw about ten men, all wearing black shirts and dark pants, throwing boxes from a shipping container into the brush along the tracks. At trial, he identified defendant and Smith as two of the men throwing boxes into the brush; he had not seen them before the date of the offense. When Officer Rodriguez approached the men on foot, they fled. He pursued them as they ran down the railroad embankment towards the expressway, where they entered a white Denali sports utility vehicle and a red minivan that then fled southwesterly on the expressway. Officer Rodriguez described the two vehicles by radio to Chicago police and

returned to the scene, where he saw that the seal on one of the containers had been broken. He explained that the seal could not be broken by hand, and while he saw no burglary tools at the scene, one of the fleeing men – a short juvenile – had bolt-cutters. A few minutes after describing the vehicles, he received a report that a vehicle possibly matching his description had been found. When he went to 36th Place and Albany Avenue (the latter being the next street east of Kedzie), he saw the red minivan he had seen fleeing the break-in. He also saw defendants detained there and identified defendant and Smith as men he saw fleeing from the break-in. At that time, neither was wearing a black shirt and Smith was wearing a green t-shirt. On cross-examination, Officer Rodriguez admitted that his report of the incident mentioned only three men breaking into the container and did not mention that he saw one of the men with bolt-cutters. He also clarified that none of the defendants was the man with the bolt-cutters.

¶ 7 Chicago police officer Robert Vahl testified that he and another officer responded at about 4 p.m. on September 7, 2012, to a report of a man with a gun on the Stevenson Expressway between Kedzie and California Avenues. When they arrived in the area, they received another dispatch and, in response, went to the area of 36th and Kedzie in search of a red or maroon van occupied by four men. There, Officer Vahl saw such a van with four men inside driving along 36th Place, and he and his partner stopped the van without incident. At trial, Officer Vahl identified defendants as the four men from that van and specifically identified codefendant Johnelle as the driver. After Officer Vahl reported the stop by radio, BNSF Officers Sowell and Rodriguez came separately to the scene and identified all four defendants and the van as involved in the theft from the container. On cross-examination, Officer Vahl clarified that Officer Sowell identified defendants collectively rather than individually. Inside the van were

three black t-shirts; Officer Vahl did not know if they were tested for DNA or fingerprints, nor did he see any burglary tools or merchandise in the van.

¶ 8 The parties stipulated to the effect that the red vehicle with a particular license plate number, stopped by the police, was registered to Johnelle.

¶ 9 At the close of the State's case on June 27, 2013, all defendants made and separately argued motions for a directed finding, which the court denied except as to Johnelle. Defendant, Smith, and Harper decided not to testify after the court admonished them of their personal rights to testify and to refrain from testifying. Following closing arguments, the court convicted defendant, Smith, and Harper of burglary. The court found that while each witness's testimony was separately insufficient to convict, there was clear evidence of burglary when considering their testimony as a whole. The court found that there were no proceeds from the burglary in the red van because the BNSF officers arrived before they could be loaded from the trackside brush into the van. The court found that bolt-cutters had not been found because "somebody else" carried them away, but there had to be such a tool as the container seal was broken. The court found that defendants "attempted to conceal their identities, to confuse others, by removing their black t-shirts. But they were a little too thrifty and they left them in the car."

¶ 10 On July 12, 2013, defendant filed various *pro se* motions. He sought a subpoena of the black t-shirts and related inventory records. In motions to reconsider judgment and for new trial, he argued insufficiency of the evidence and particularly that it was erroneous for the court to convict when neither the black t-shirts nor related inventory records were produced as trial evidence. In a motion entitled "Motion to Direct Appeal," he argued in addition to his insufficiency claims that (1) his arrest was without probable cause because he and codefendants were stopped on an unrelated report of men with a gun, as would be corroborated by 911

recordings, and (2) trial counsel was ineffective for not challenging probable cause and the absence of the black t-shirts at trial.

¶ 11 On July 24, 2013, defense counsel filed a post-trial motion challenging the sufficiency of the evidence.

¶ 12 On August 1, 2013, the court noted that defendant had filed a motion alleging ineffective assistance but his counsel was not in court so "I would address those issues with counsel present [to] respond in a hearing at this stage" and continued defendant's case to September 10 "to resolve the issue of your allegations that your attorney was not effective." As codefendant Smith and his counsel were ready, the court heard Smith's *pro se* motion alleging ineffective assistance after a recess to review the motion. Smith's ineffectiveness claims were that counsel did not file a motion to quash arrest and did not seek to produce in court the black t-shirts found in the red van. Smith's counsel explained that she felt a motion to quash would have been frivolous because the van was stopped a short time and distance from the break-in for fitting the brief description provided by the BNSF police who saw the break-in. After reviewing the evidence, the court found that the stop was a detention for witness identification and was near in time and place to the break-in so that a motion to quash would have been futile. As to the black t-shirts, the court concluded that their presence in the van was evidence of defendants' guilt that the State could choose to produce but defense counsel would not seek to introduce. The court also denied counsel-filed post-trial motions by Smith and Harper arguing insufficiency of the evidence before sentencing them as mandatory Class X offenders to prison terms of 10 years for Smith and 9 years for Harper.

¶ 13 On September 10, after brief argument by counsel, the court denied defendant's counsel-filed post-trial motion. The court found that defendant was positively identified by a BNSF

police officer as the man who broke the seal on the shipping container and opened the door before fleeing with other offenders. The court found a burglary based on the officer seeing the men fleeing the overpass and then finding that the seal had been broken and merchandise removed from the container. The court also found that, while defendant was not wearing a black t-shirt when stopped, as described by the BNSF officer, a black t-shirt was found in the van near the burglary scene. Finding the witnesses generally credible and corroborated, the court denied counsel's motion and proceeded immediately to sentencing without defendant or his counsel objecting that the *pro se* motions had not been addressed.

¶ 14 The presentence investigation report (PSI) states that defendant has three prior convictions for burglary: in 2001 for which he received probation, in 2004 on a 2002 charge for which he received three years in prison, and in 2004 on 2003 theft and 2004 burglary charges for which he received consecutive prison terms of two and three years. He also had a 2001 conviction for manufacture or delivery of cannabis, for which he received probation. He was born in 1982 and raised in Mississippi, his mother, stepfather and three step-siblings still reside there, and he maintains a relationship with them. He denied any childhood abuse or neglect. He has two children, ages 11 and 9 years, who he visited weekly but does not support financially. He attended school through the seventh grade and received a GED in jail. He had two jobs – as a carpet cleaner from July 2011 until the instant arrest, and as a car salesman for about six months in 2008 – and was otherwise supported by his family. He has stomach ulcers controlled with medication, suffered rib and lung injuries in a 2009 accident, and denied any mental health issues. He denied alcohol abuse, admitted using marijuana from when he was 18 years old until he quit in 2004, and denied any other drug use. He denied being under the influence of alcohol or

illegal drugs at his arrest. He admitted prior gang membership from when he was 16 years old until 2000 and noted that some of his friends have criminal backgrounds.

¶ 15 At sentencing, the State argued that defendant is subject to Class X sentencing due to prior felony convictions and sought a prison sentence of 10 years. Defense counsel clarified the PSI by noting that, though defendant was sentenced to prison on the latter two burglaries and theft, he successfully served "boot camp" and thus never actually went to prison. Counsel argued that defendant has tried to work and "has children which he supports." Noting defendant's medication for his ulcers and 2009 injuries, and history of marijuana use, and arguing that "nobody was out any goods" by what "amounted to essentially a criminal trespass," counsel asked for drug treatment and the minimum six-year prison sentence. Defendant addressed the court, asking for the minimum sentence and treatment "so I can help my kids when I get out."

¶ 16 The court found that defendant's offense was not a mere trespass or happenstance but organized burglary of a shipping container on a train with multiple offenders, deception (changing clothes) to avoid arrest, and a getaway that was "highly suspicious" in organization even though the court did not convict Johnelle. The court noted that defendant actually opened the container. The court also noted his limited employment and prior burglary convictions where "boot camp" was unsuccessful in deterring him from the instant offense. Conversely, the court found, his criminal record is not "terrible" and contains no offenses with weapons or violence. The court found that the proper sentence in light of defendant's mandatory Class X offender status and the factors in mitigation and aggravation is eight years imprisonment and so ordered, recommending drug treatment and imposing fines and fees. Defendant did not make a post-sentencing motion orally nor file such a written motion. This appeal followed.

¶ 17 On appeal, defendant first contends that the trial court failed to inquire into his *pro se* post-trial claims of ineffective assistance of trial counsel. The State responds that no such inquiry was required here because defendant failed to bring his claims to the trial court's attention, and alternatively that any error in not holding such an inquiry was harmless as the court had already evaluated and rejected the same ineffectiveness claims in codefendant Smith's *pro se* post-trial motion hearing.

¶ 18 In *People v. Krankel*, 102 Ill. 2d 181 (1984), our supreme court found that a trial court's failure to appoint new counsel to argue a defendant's *pro se* post-trial motion alleging ineffective assistance of counsel was erroneous, while not imposing a *per se* rule that new counsel must be appointed whenever a defendant presents such a claim. Instead, our supreme court has held:

> "If the trial court conducts a preliminary investigation of the defendant's allegations and determines them to be spurious or pertaining only to trial tactics, no new counsel should be appointed to represent the defendant. If, however, the defendant's allegations of incompetence indicate that trial counsel neglected the defendant's case, the court should appoint new counsel to argue defendant's claims of ineffective assistance of counsel." *People v. Nitz*, 143 Ill. 2d 82, 134-35 (1991).

Thus, the supreme court in *Nitz* held "that the trial court's failure to appoint new counsel to argue defendant's *pro se* motion alleging ineffective assistance of counsel was harmless beyond a reasonable doubt" because the ineffectiveness claim raised by the defendant was not meritorious. *Nitz*, 143 Ill. 2d at 135.

¶ 19 In *People v. Moore*, 207 Ill. 2d 68 (2003), our supreme court noted that, in a preliminary *Krankel* hearing or inquiry, a discussion between the court and trial counsel is preferable, but a

"brief discussion between the trial court and the defendant may be sufficient," and indeed the court "can base its evaluation of the defendant's *pro se* allegations of ineffective assistance on its knowledge of defense counsel's performance at trial and the insufficiency of the defendant's allegations on their face." *Moore*, 207 Ill. 2d at 78-79. However, where the "trial court conducted no inquiry of any sort into defendant's allegations of ineffective assistance of counsel" nor even indicated on the record that it read the *pro se* motion, the court violated its duty "to conduct some type of inquiry into the underlying factual basis, if any, of a defendant's *pro se* posttrial claim of ineffective assistance of counsel." *Moore*, 207 Ill. 2d at 79. The *Moore* court acknowledged that "failure to appoint new counsel to argue a defendant's *pro se* posttrial motion claiming ineffective assistance of counsel can be harmless beyond a reasonable doubt. [Citation.] However, in *Nitz*, the trial court produced a record that demonstrated the meritless nature of defendant's claims." *Moore*, 207 Ill. 2d at 80, citing *Nitz*, 143 Ill. 2d at 135. "In contrast, in the present case, no record at all was made on defendant's claims of ineffective assistance of counsel. Therefore, unlike the above-cited cases, it is simply not possible to conclude that the trial court's failure to conduct an inquiry into those allegations was harmless beyond a reasonable doubt." *Moore*, 207 Ill. 2d at 81.

¶ 20 In *Moore*, our supreme court also rejected a State argument that a defendant forfeited his *Krankel* claims "when he and his trial counsel 'stood mutely and did nothing to request further inquiry' " after the defendant filed a *pro se* written motion raising said claims. *Moore*, 207 Ill. 2d at 79. The *Moore* court noted that, to trigger a preliminary *Krankel* inquiry, "a *pro se* defendant is not required to do any more than bring his or her claim to the trial court's attention." *Id.*

¶ 21 The issues of whether the trial court properly conducted a preliminary *Krankel* inquiry and whether harmless error applies to errors in a *Krankel* proceeding are legal questions

reviewed *de novo*. *People v. Jolly*, 2014 IL 117142, ¶ 28. Conversely, where the court held a preliminary *Krankel* hearing and determined the merits of a defendant's ineffectiveness claims, we reverse only if that determination is manifestly erroneous. *People v. Sims*, 2014 IL App (4th) 130568, ¶ 142.

¶ 22 Here, defendant cites *People v. Peacock*, 359 Ill. App. 3d 326 (4th Dist. 2005) in support of his contention that he has not forfeited his *Krankel* claims, while the State cites *People v. Allen*, 409 Ill. App. 3d 1058 (4th Dist. 2011), and the pre-*Moore* case of *People v. Lewis*, 165 Ill. App. 3d 97 (2d Dist. 1988), to contend that he has indeed forfeited them. See also *Zirko*, 2012 IL App (1st) 092158, ¶¶ 66-73 (discussing *Lewis*, *Peacock* and *Allen*). However, it is apparent after reading these cases that whether a defendant has brought his *Krankel* claims to the trial court's attention is determined very much by the circumstances of the case. Under the circumstances of our case, we conclude that defendant indeed brought his *Krankel* claims to the court's attention. Not only did defendant file his post-trial motions (that is, they were stamped "filed" and not merely "received" by the clerk of the court) including ineffectiveness claims, the court expressly acknowledged defendant's ineffectiveness claims and continued the matter for a preliminary *Krankel* hearing when his counsel would be present. Notably, the court immediately heard codefendant Smith's *Krankel* claims because he and his counsel were ready. We find that defendant did not forfeit his *Krankel* claims by "standing mute" (as the State unsuccessfully argued in *Moore*) after he had clearly brought his claims to the court's attention. We therefore find that the court erred by not holding a preliminary *Krankel* inquiry on defendant's claims as the court itself had scheduled.

¶ 23 The State contends, however, that we have the record created by the preliminary *Krankel* hearing on codefendant's Smith's *pro se* claims, which were the same ineffectiveness claims

regarding probable cause and the absence of the black t-shirts at trial that defendant raised in his *pro se* motion. Defendant and Smith were detained and arrested at the same time under the same circumstances, and they were tried on the same evidence except for Smith's post-arrest statements not relevant to his or defendant's ineffectiveness claims. The State argues that we can find any error in the court's failure to hold a preliminary *Krankel* inquiry into defendant's claims to be harmless under such circumstances. However, the State does not cite, and we are unaware of, any published case creating an exception to the *Moore* rule that a categorical failure to inquire cannot be harmless. We shall therefore follow *Moore*, which requires us to remand a case for a preliminary *Krankel* inquiry where none was held.

¶ 24 Defendant also contends that his eight year prison sentence is excessive in light of his non-violent and minor offense, his marijuana addiction, and his strong family relationships.

¶ 25 Before proceeding to challenge this contention on the merits, the State briefly argues that defendant has forfeited this claim by failing to raise it in a motion to reduce his sentence. 730 ILCS 5/5-4.5-50(d) (West 2012). Defendant does not contend that his excessive sentence constitutes plain error overcoming forfeiture. *People v. Hillier*, 237 Ill. 2d 539, 544-46 (2010) (forfeiture and plain error apply to sentencing, and failing to argue plain error is itself a forfeiture). Assuming *arguendo* that defendant invoked plain error, there is no plain error where, as here, we find no error. *Hillier*, 237 Ill. 2d at 549 ("the face of the record shows no error, let alone a clear and obvious one").

¶ 26 Burglary is a Class 2 felony. 720 ILCS 5/19-1(b) (West 2012). A defendant over 21 years old convicted of a Class 1 or Class 2 felony after two separate and sequential convictions for felonies of Class 2 or greater must be sentenced as a Class X offender, with a prison term of 6 to 30 years. 730 ILCS 5/5-4.5-25(a), -95(b). A sentence within statutory limits is reviewed on an

abuse of discretion standard, so that we may alter a sentence only when it varies greatly from the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense. *People v. Snyder*, 2011 IL 111382, ¶ 36. So long as the trial court does not consider incompetent evidence or improper aggravating factors, or ignore pertinent mitigating factors, it has wide latitude in sentencing a defendant to any term within the applicable range. *People v. Jones*, 2014 IL App (1st) 120927, ¶ 56. This broad discretion means that we cannot substitute our judgment simply because we may weigh the sentencing factors differently. *Id.*, citing *People v. Alexander*, 239 Ill. 2d 205, 212-13 (2010).

¶ 27 In imposing a sentence, the trial court must balance the relevant factors, including the nature of the offense, the protection of the public, and the defendant's rehabilitative potential. *Id.*, citing *Alexander*, 239 Ill. 2d at 213. The trial court has a superior opportunity to evaluate and weigh a defendant's credibility, demeanor, character, mental capacity, social environment, and habits. *Snyder*, 2011 IL 111382, ¶ 36. The court does not need to expressly outline its reasoning for sentencing, and we presume that the court considered all mitigating factors on the record absent some affirmative indication to the contrary other than the sentence itself. *Jones*, 2014 IL App (1st) 120927, ¶ 55. Because the most important sentencing factor is the seriousness of the offense, the court is not required to give greater weight to mitigating factors than to the severity of the offense, nor does the presence of mitigating factors either require a minimum sentence or preclude a maximum sentence. *Id.*, citing *Alexander*, 239 Ill. 2d at 214. Similarly, the court is not required to view a defendant's troubled childhood, history of mental health issues, or substance abuse problems as inherently mitigating. *People v. Holman*, 2014 IL App (3d) 120905, ¶ 75, citing *People v. Ballard*, 206 Ill. 2d 151, 189-90 (2002).

¶ 28 Here, defendant does not challenge that he was subject to mandatory class X sentencing and (despite his argument that he "desperately needs drug treatment – not prison") acknowledges that his minimum sentence was six years imprisonment. He was subject to a sentence of up to 30 years due to two of his three prior convictions for burglary, which along with the instant offense demonstrate his recidivism and inability to respect the property of others. The trial court correctly noted that the object of the burglary here was organized theft, and while defendant asserts in mitigation that there was a "lack of harm to anyone" from his non-violent offense, it was neither minor nor victimless. The cost to property owners—here, a railroad entrusted to ship the property of others—of securing their property against depredations such as defendant's is considerable, as demonstrated concretely by the existence of the railroad police. In mitigation, defendant also cites his addiction to marijuana and strong family relationships. First and foremost, trial counsel argued defendant's marijuana usage and the PSI discussed his family relationships. Secondly, the PSI does not fully bear out defendant's argument that he is addicted to marijuana and requires treatment: defendant told the PSI preparer that he stopped using marijuana in 2004, years before the instant offense. We cannot find under these circumstances that the court abused its sound discretion by sentencing defendant to eight years' imprisonment, two years (or only about 8%) more than the minimum sentence.

¶ 29 Accordingly, this cause is remanded for the circuit court to inquire into defendant's *pro se* post-trial claims of ineffective assistance of counsel. The judgment of the circuit court is otherwise affirmed.

¶ 30 Affirmed in part and remanded with directions.