2015 IL App (3d) 130571-U

Order filed July 30, 2015

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2015

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ERNEST P. GARZA, Defendant-Appellant.	)))))))))))	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois. Appeal No. 3-13-0571 Circuit No. 12-CF-242 Honorable Sarah F. Jones, Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Presiding Justice McDade and Justice Lytton concurred in the judgment.

ORDER

¶ 1 *Held*: Four separate convictions for aggravated child pornography were upheld on appeal where the convictions were based on different images with multiple victims, even though all the images were contained on a single cellphone. The case was remanded with respect to two of the convictions, however, for the appointment of new counsel to argue the defendant's claim of ineffective assistance of counsel for failing to investigate the ages of the victims.

¶ 2 After a bench trial, the defendant, Ernest Garza, was convicted of four counts of aggravated child pornography (720 ILCS 5/11-20.1B(a)(6) (West 2012) (repealed by P.A. 97-

995, § 10 (eff. Jan. 1, 2013)) and sentenced to an aggregate of 8 years in prison. The defendant appealed.

¶ 3 FACTS

¶ 4 On January 30, 2012, the defendant was arrested at a library for disorderly conduct after he took pictures of a young library patron with his cellphone. After a search of the defendant's cellphone, the defendant was charged by indictment with four counts of aggravated child pornography. According to the indictment, the defendant's cellphone contained four separate pornographic images of girls who appeared to be under 13 years of age.

¶ 5 The defendant applied to be heard in Veterans and Servicemembers Court (Veterans Court). At the time of the instant offenses, the defendant was on probation for aggravated battery. When the trial court considered the defendant's application requesting Veterans Court, the defendant's probation had been revoked. Based on that information, the judge denied the request, and the matter proceeded to a bench trial.

¶ 6 The librarian testified that, in the late afternoon of January 30, 2012, a nine-year old girl and her sister were brought to her office after the girls were approached by a man who asked to take a picture of one of them. The librarian described the girls as distraught. She reported the incident to the police. Romeoville police officer Christopher Swiatek testified that when he arrived at the library, he met with the sisters and their mother. The nine-year-old described the person who took her picture as a man wearing a black jacket with a dragon on it. Swiatek located such a person in the library and identified him as the defendant. The defendant told Swiatek that he had approached the girl to take her picture because she looked like his fiancé when she was younger. Since the mother wanted to file a complaint for disorderly conduct,

Swiatek placed the defendant into custody and the defendant was transported to the police station.

¶ 7 Romeoville police sergeant Brant Hromadka testified that he also responded to the library, and the defendant admitted to taking the picture of the nine-year-old, with her consent. Hromadka asked to see the photos that the defendant took. In response to that request, the defendant started scrolling through his photos, and Hromadka could see that some were pornographic images. The defendant's cellphone was taken from the defendant when he was taken into custody at the library.

¶ 8 Romeoville police detective Paul Tuuk testified that he interviewed the defendant at the police station on January 30, 2012, and again on January 31. The videotapes of the interviews were played for the court. Detective Tuuk identified four images that were found on the defendant's cellphone.

¶ 9 A detective with the Will County Sheriff's police department, James Zdzinicki, testified that he analyzed the defendant's cellphone. He identified four images from the defendant's cellphone, corresponding to the four charges. He testified that all of the images contained what appeared to be prepubescent females in sexual positions with adults. Zdzinicki testified that it appeared that the images were downloaded off the internet, but they could have been texted to the defendant. Also, although the girls appeared prepubescent, there was no way to verify their ages.

¶ 10 The defendant made a motion for a directed finding, arguing that the ages of the girls in the images had not been established in any way. The trial court denied the motion and found the defendant guilty of all four counts. A pre-sentence investigation and a sex offender risk evaluation were completed before sentencing. The sex offender risk evaluation indicates that the

defendant complained that the trial court would not fund a search for the subjects of the photographs to prove they were of legal age. Before sentencing the defendant, the trial court asked the defendant's trial counsel to explain that allegation. The defendant's trial counsel informed the trial court that he had conversations with the defendant regarding a search for the subjects, but he never made a motion to the court. The sentencing hearing proceeded, and the defendant exercised his right of allocution, where he made further allegations that his trial counsel failed to investigate the ages of the subjects. The trial court sentenced the defendant to four years each on Counts 1 and 2, to be served consecutively, and four years each on Counts 3 and 4, to be served concurrently. The trial court also assessed fines, fees, and costs in the amount of $1884. The defendant appealed.

¶ 11 ANALYSIS

¶ 12 As an initial matter, the defendant argues that the trial court erred in refusing his request to be evaluated for participation in Veterans Court. The defendant argues that the charges against him, aggravated child pornography, did not disqualify him from eligibility for the Veterans Court program. Thus, the defendant argues that the trial court failed to exercise its discretion and made a mistake of law in denying the defendant's request to be evaluated by the Veterans Court. The State contends that the trial court was not operating under a mistake of law and did not abuse its discretion in denying the defendant's request based upon his prior conviction for aggravated battery. Since the statute provides that a defendant will be admitted to the program only with approval of the court, we review the trial court's denial of the defendant's request to be admitted into a Veterans Court program for an abuse of discretion. See 730 ILCS 167/20(a) (West 2012).

¶ 13 Section 20(a) of the Veterans and Servicemembers Court Treatment Act (the Act), at the time of the defendant's request in 2012, provided:

> "A defendant may be admitted into a Veterans and Servicemembers Court program only upon the agreement of the prosecutor and the defendant and with the approval of the Court." 730 ILCS 167/20(a)(West 2012).

¶ 14 Section 20(b) of the Act provides that a defendant shall be excluded from Veterans and Servicememembers Court program if the defendant has been convicted of a crime of violence in the past 10 years, including but not limited to:

> "first degree murder, second degree murder, predatory criminal sexual assault of a child, aggravated criminal sexual assault, criminal sexual assault, armed robbery, aggravated arson, arson, aggravated kidnapping and kidnapping, aggravated battery resulting in great bodily harm or permanent disability, stalking, aggravated stalking, or any offense involving the discharge of a firearm or where occurred serious bodily injury or death to any person." 730 ILCS 167/20(b)(3) (West 2012).

¶ 15 The State contends that the trial court properly determined that the defendant was not eligible for Veterans Court under this exclusion, due to his aggravated battery conviction. Specifically, the transcript states:

> "ASA: Pretrial. He's pending resentencing on a case out of Judge Rozak's courtroom for which he was on probation that was revoked.
>
> THE COURT: What was the nature of that offense?
>
> ASA: Judge, that was a – I believe, an agg. battery.

THE COURT: Show that the Court – show the nature of the offense does not fall within the guidelines of Veteran's Court. Your request to be considered for Veteran's Court is denied."

¶ 16 Based on this exchange, it would appear that the State's interpretation was correct – that the judge denied the defendant's request based upon the nature of the prior offense, not the current offense. The defendant argues that the trial court still erred because aggravated battery was not a specifically listed crime in section 20 of the Act.

¶ 17 Our primary goal when interpreting a statute is to ascertain and give effect to the intent of the legislature, and the most reliable indicator of that intent is the language of the statute itself. *People v. McKinney*, 2012 IL App (1st) 103364, ¶ 8 (citing *People v. Williams*, 239 Ill.2d 503, 506 (2011)). The defendant is correct that the statute only specifically excludes "aggravated battery resulting in great bodily harm or permanent disability." 730 ILCS 167/20(b)(3) (West 2012). However, the statute also excludes from Veterans Court those "convicted of a crime of violence in the past 10 years, including but not limited to" a number of listed offenses." 730 ILCS 167/20(b)(3) (West 2012). The defendant argues that his prior conviction was not a crime of violence because he was convicted based upon the status of the victim (over 60), with no great bodily harm or permanent disability. See 720 ILCS 5/12-4(b) (West 2008).

¶ 18 However, that argument was not raised in the trial court. The defendant's written application for Veterans Court is not in the record. In addition, after the defendant's request was heard and denied, it was not revisited until the defendant's statement in allocution. Based on the record before us, we find that the trial court did not abuse its discretion in denying the defendant's application for Veterans Court based upon his prior conviction. The statute

specifically excludes defendants who have committed crimes of violence in the last 10 years, not limited to the listed offenses.

¶ 19 Next, the defendant argues that his statement in allocution was actually a posttrial claim of ineffective assistance of counsel, contending that it should have triggered a *Krankel* inquiry. He contends that the cause should be remanded for appointment of posttrial counsel or, at least, a proper *Krankel* hearing. The State contends that remand under *Krankel* is not warranted because the defendant's complaint to the person preparing the sexual offender risk evaluation was not sufficient to trigger a *Krankel* inquiry. The State argues that, even if a *Krankel* inquiry was warranted, the trial court's inquiry of the defendant's claim was adequate. Whether a defendant's posttrial claims of ineffective assistance of trial counsel trigger a *Krankel* inquiry, and whether the trial court made an adequate inquiry, are both questions of law that we review *de novo*. *People v. Taylor*, 237 Ill. 2d 68, 75 (2010).

¶ 20 Under *People v. Krankel*, 102 Ill. 2d 181 (1989), where a defendant makes a *pro se* posttrial allegation of ineffective assistance of counsel, the trial court should conduct an adequate inquiry into the factual basis for the claim. *People v. Moore*, 207 Ill. 2d 68, 79 (2003). New counsel is not automatically required in every case where a defendant brings such a motion. *Taylor*, 237 Ill. 2d at 75. After examining the factual basis of the defendant's claim, the trial court may deny the defendant's motion if it determines the claim lacks merit or concerns only to matters of trial strategy. *Id.* If, however, the defendant's allegations show possible neglect of the case, new counsel should be appointed to argue the defendant's claim of ineffective assistance. *Id.*

¶ 21 The defendant complained to the sexual offender risk evaluator that the trial court refused to fund a search for the individuals depicted in the pictures. Prior to sentencing, the trial court

brought up the issue and asked the defendant's trial attorney to address the statement. The defendant's trial attorney stated that he had conversations with the defendant about finding the female subjects in the Philippines, but he did not make any motions for funds to search for the females, for an investigator, or for an expert. Thereafter, in his statement in allocution, the defendant stated that the females depicted in the pictures appeared much younger, but they were actually of legal age. The defendant stated that he had asked his attorney to obtain witnesses, such as his fiancé who lived out the country or the actual females pictured, to call an expert to testify, or to contact the federal regulation agencies to verify the females' ages.

¶ 22 The defendant's verbal allegations were sufficient to be considered a motion raising the issue of ineffectiveness of trial counsel. See *People v. Pence*, 387 Ill. App. 3d 989 (2009) (allegations of ineffectiveness made by the defendant during allocation, in addition to the fact that the defendant filed a complaint against trial counsel with the ARDC, were sufficient to trigger a *Krankel* inquiry); see also *People v. Sanchez*, 329 Ill. App. 3d 59, 66 (2002) (posttrial remarks alleging that counsel failed to investigate his case were sufficient to trigger a *Krankel* inquiry).

¶ 23 The defendant contends that the trial court made no inquiries into the allegations that the defendant's trial counsel failed to investigate. However, the record reflects that the trial court did conduct an inquiry into the factual basis of the defendant's claim. The State contends that the trial court's inquiry was adequate and resulted in the conclusion that the defendant's claims only addressed matters of trial strategy. After reviewing the four images, it is apparent that the defendant's claim lacks merit with respect to counts I and III. The girls depicted in those images are clearly underage and any investigation to that effect would be unnecessary. However, with respect to the two images that depict girls with breasts and pubic hair (counts II and IV), the

defendant's allegations show possible neglect of the case. Thus, we affirm the defendant's convictions on counts I and III. With respect to counts II and IV, we remand for the appointment of new counsel to argue the defendant's claim of ineffective assistance and for further appropriate proceedings.

¶ 24 Lastly, the defendant argues that the simultaneous possession of multiple pornographic images constitutes a single offense and will not support multiple convictions. The defendant was convicted of four counts of violating section 11-20.1B(a)(6) of the Criminal Code of 2012. At the time of the defendant's offenses, that section provided that a person commits aggravated child pornography who:

> "with knowledge of the nature or content thereof, possesses any film, videotape, photograph or other similar visual reproduction or depiction by computer of any child whom the person knows or reasonably should know to be under the age of 13 engaged in any activity described in subparagraphs (i) through (vii) of paragraph (1) of this subsection[.]" 720 ILCS 5/11-20.1B(a)(6) (West 2012) (repealed by P.A. 97-995, § 10 (eff. Jan. 1, 2013).

¶ 25 The interpretation of a statute is a question of law that we review *de novo*. *People v. Harris*, 203 Ill. 2d 111, 116 (2003). If a statute is ambiguous, it ordinarily will be resolved in the defendant's favor – known as the rule of lenity – but not so rigidly as to defeat the intent of the legislature. *People v. Murphy*, 2013 IL App (2d) 120068, ¶ 5.

¶ 26 The defendant relies on *People v. McSwain*, 2012 IL App (4th) 100619, for his argument that his simultaneous possession of the images on a single medium, his cellphone, constituted a single offense. In *McSwain*, the defendant was charged with five separate counts of child pornography, for the five separate images of the same victim in a single email. The Fourth

District concluded that the term "any" in the child pornography statute (720 ILCS 5/11–20.1(a)(6) (West 2008)) made the statute ambiguous, relying on similar reasoning in *People v. Carter*, 213 Ill. 2d 295 (2004) (unlawful possession of a firearm by a felon statute was ambiguous). The *McSwain* court merged the defendant's five convictions into one, concluding that the simultaneous possession of the five images of the same victim in a single email could not support multiple convictions.

¶ 27 Thereafter, the second district issued two simultaneous opinions, both considering and interpreting *McSwain*. In *People v. Sedelsky*, 2013 IL App (2d) 111042, the defendant was convicted of possession of child pornography for three images that he had uploaded to a social media site. *Sedelsky*, 2013 IL App (2d) 111042, ¶ 1. In that case, the defendant argued that one of his convictions should be vacated because two of the images were identical, even though they had different file names. The Second District found *McSwain* to be factually distinguishable, but agreed that the term "any" in the child pornography statute (720 ILCS 5/11-20.1(a)(6) (West 2008)) was ambiguous because it did not "indicate whether the simultaneous possession of a duplicate 'depiction by computer' could constitute a separate offense." *Id.* ¶ 21. Thus, the conviction for the duplicate image was reversed, but the other two convictions were affirmed. *Id.* ¶ 31. Then, in *People v. Murphy*, 2013 IL App (2nd) 120068, the Second District upheld the defendant's convictions for 15 counts of aggravated child pornography (720 ILCS 5/11-20.3(a)(6) (West 2010) (renumbered as §11-20.1B by P.A. 96-1551, Art. 2, § 5 (eff. July 1, 2011)) based upon the possession of 15 different images on a single thumb drive. That court did not reach the issue of whether *McSwain* was correctly decided, but concluded that, while the statutory language was ambiguous in terms of the allowable unit of prosecution, interpretation of

the statute upheld multiple convictions for the possession of multiple images of multiple children. *Murphy*, 2013 IL App (2d) 120068, ¶ 10.

¶ 28 The defendant in this case was convicted of four separate violations of the aggravated child pornography statute, the exact statute that was at issue in *Murphy*. The images were all contained on a single cellphone, similar to the thumb drive in *Murphy*, and there were no duplicate images. The images had different file names and depicted different victims. Thus, interpreting the aggravated child pornography statute at issue here, we find that the defendant's four convictions should stand, subject to the remand pursuant to *Krankel*.

¶ 29 Lastly, the defendant argues that he is entitled to a $95 offset against some of the fees, fines and costs assessed against him. Specifically, the defendant argues that the $30 Children's Advocacy Center fee (55 ILCS 5/5-1101(f-5) (West 2012); the $50 court systems fee (55 ILCS 5/5-1101(c)(1) (West 2012); the $10 for specialized court fee (55 ILCS 5/5-1101(d-5) (West 2012); and the $5 drug court assessment (55 ILCS 5/5-1101(f) (West 2012) were fines that could be offset by the defendant's *per diem* for pretrial incarceration. See 725 ILCS 5/110-14 (West 2012); *People v. Graves*, 235 Ill.2d 244 (2009). The State agrees that the defendant is entitled to a credit of $95 against the total $1,884 fines, costs, and fees assessed in this case.

¶ 30 CONCLUSION

¶ 31 The judgment of the circuit court of Will County is affirmed in part, modified in part, and remanded in part. The defendant's convictions on Counts I and III are affirmed. The defendant's sentence is modified to reflect a credit of $95 against the fines, costs, and fees assessed. The case is remanded for the appointment of new counsel to argue the defendant's claim of ineffective assistance with respect to Counts II and IV and for further appropriate proceedings.

¶ 32 Affirmed in part, modified in part and remanded with directions.