NOTICE
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2015 IL App (4th) 130855-U

NO. 4-13-0855

FILED
May 15, 2015
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	Appeal from
v.	)	Circuit Court of
MELVIN J. TURNER,	)	Vermilion County
Defendant-Appellant.	)	No. 12CF596
	)	
	)	
	)	Honorable
	)	Craig H. DeArmond,
	)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Justices Turner and Holder White concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court reversed and remanded with directions that the trial court (1) conduct an adequate *Krankel* hearing and (2) sentence defendant on his conviction for armed robbery.

¶ 2 In July 2013, a jury found defendant, Melvin J. Turner, guilty of (1) home invasion (720 ILCS 5/12-11(a)(2) (West 2010)) (count II), (2) armed robbery (720 ILCS 5/18-2(a)(2) (West 2010)) (count III), and (3) criminal trespass to a residence (720 ILCS 5/19-4(a)(2) (West 2010)) (count V).

¶ 3 Prior to his sentencing hearing, defendant sent a letter to the trial court, raising several claims regarding the effectiveness of his trial counsel. At an August 2013 hearing, the court conducted an inquiry into defendant's ineffective-assistance-of-trial-counsel claims as required by *People v. Krankel*, 102 Ill. 2d 181, 464 N.E.2d 1045 (1984), and its progeny. Based on that inquiry, the court found that defendant failed to allege a credible claim that would have enti-

tled him to the appointment of new counsel. Immediately thereafter, the court conducted a sentencing hearing during which it merged defendant's convictions on counts III and V with count II. On count II, the court sentenced defendant to 25 years in prison.

¶ 4 Defendant appeals, arguing that the trial court erred by failing to conduct an adequate *Krankel* hearing. In addition, defendant concedes the State's claim that the court should have imposed a sentence on his armed robbery conviction. For the reasons that follow, we reverse the trial court's denial of defendant's ineffective-assistance-of-counsel claims and remand with directions that the court (1) conduct an adequate *Krankel* hearing and (2) sentence defendant on his armed robbery conviction.

¶ 5 I. BACKGROUND

¶ 6 A. The State's Charges

¶ 7 The State initially charged defendant with five criminal counts, alleging that in December 2012, defendant knowingly and without authority entered a residence armed with a handgun and took money and property therein. Prior to defendant's July 2013 jury trial, the State informed the court that it was proceeding on the following three counts: (1) home invasion (count II), (2) armed robbery (count III), and (3) criminal trespass to a residence (count V).

¶ 8 B. The Evidence Presented at Defendant's Jury Trial

¶ 9 Evony Jackson testified that on December 2, 2012, she was at home with her boyfriend, Bryson Newsome, and their three-year-old daughter. After Jackson put her daughter to bed, she was in a different bedroom studying for a nursing exam when she heard a knock at the door. Jackson saw Newsome, who was in the living room, walk toward the door. Thereafter, Jackson heard more than one voice order, "Get on the ground. Get on the ground." At that moment, Jackson got up and saw several men. Jackson immediately locked her bedroom door and

called 9-1-1. While on the phone, Jackson opened the bedroom door and saw one of the intruders enter her daughter's bedroom. As that man exited, Jackson saw his face but did not recognize him. The intruders left abruptly after realizing that Jackson had called the police.

¶ 10 After the police arrived, Jackson told an officer that she could not identify any of the intruders. Newsome later told Jackson that he recognized one of the intruders. Afterward, Jackson identified defendant as the person she saw exiting her daughter's bedroom, noting that defendant and she had attended the same middle school and high school.

¶ 11 Newsome testified that on the evening of December 2, 2012, he was at Jackson's home when he heard a knock at the back door. Newsome approached the door, opened the blinds covering the window, and saw defendant—whom Newsome knew—accompanied by another man who had his back to the window. When defendant "cracked the door open," defendant pushed open the door and the other man struck Newsome in his left eye with a gun. The unknown intruder took at least $300 from Newsome's pocket and threw him to the ground. While on the ground, Newsome saw three men. One stood over him, telling him not to move, while defendant and the other man moved about the house. Defendant told the person standing over Newsome to, "Keep the .40 on him." Newsome then heard defendant say, "[Newsome's] girlfriend is in the bedroom calling the police. Let's go." Newsome observed that in addition to the money, the intruders also took an electronic gaming system and a laptop computer.

¶ 12 Newsome explained that he knew defendant for about 10 years, noting that they were former classmates. Earlier in the day, Newsome saw defendant at a local gas station. Newsome agreed to give defendant a ride, but stopped en route to buy cannabis. Newsome realized that defendant saw the cash he possessed when he purchased the cannabis.

¶ 13 Defendant did not present any evidence.

¶ 14 Following argument, the jury convicted defendant on all three counts.

¶ 15 B. Defendant's Letter to the Court

¶ 16 On August 6, 2013, after defendant's conviction but before his sentencing, defendant sent a two-page handwritten letter to the trial court, listing nine claims—in bullet-point format—that questioned the effectiveness of his trial counsel. Specifically, defendant complained that counsel (1) withheld information about his case; (2) withheld the information that led to defendant's arrest; (3) did not examine defendant's motion for discovery; (4) waited until the day of trial to inform defendant that Tevin Mullins and Joseph Gordon had made statements against him; (5) failed to disclose that counsel represented Mullins in criminal cases knowing that Mullins had made statements against defendant; (6) advised defendant that no incriminating evidence against him existed; (7) told defendant that the 9-1-1 recording the State provided was blank; (8) declined to ask witnesses questions defendant recommended; and (9) failed to file several motions that defendant requested. At the end of his letter, defendant requested the appointment of new counsel.

¶ 17 Two days later, trial counsel filed a motion requesting that the trial court conduct a *Krankel* inquiry into defendant's ineffective-assistance-of-trial-counsel claims.

¶ 18 C. The Trial Court's Judgment

¶ 19 At a hearing conducted later that month, the trial court conducted a preliminary inquiry into defendant's ineffective-assistance-of-trial-counsel claims as required by *Krankel* and its progeny. At the start of the hearing, the court addressed defendant, as follows:

> "[A] letter [was] sent to the court which [the court has not] read because [the court does not] read them until both parties have an opportunity to see them. But [the court is] assuming that's what

> stimulated the motion by [trial counsel] with regard to a *Krankel* hearing. What particularly are your concerns or allegations with regard to [trial counsel's] representation?"

¶ 20 Defendant responded that trial counsel informed him that the incriminating statements Mullins and Gordon made started the police investigation that resulted in his conviction, but those statements were never presented to the jury. Trial counsel elaborated, as follows:

> "I discussed with [defendant] the issue of *** Mullins ***. I did inform [defendant] it was just a hearsay statement and that the State *** could not use that person as a witness ***; so it should not be a problem. Furthermore, I filed a motion *in limine* *** to keep out even hearsay references to those statements, which this court granted.
>
> In my view, there is no conflict."

The trial court rejected defendant's claim that the omission of the hearsay statements showed his trial counsel was ineffective.

¶ 21 Defendant also claimed that trial counsel declined to ask witnesses questions defendant recommended, which he felt "would have been important to my case." The trial court also rejected this claim explaining, as follows:

> "So it may very well have been true that you had questions you wanted [trial counsel] to ask. But like [the court] said, (a), they're not permissible; or (b), because of trial tactics it just may not be a good idea because this then opens up something that *** would be more damaging to you in the long-run. So the fact that

> you had questions that you might have wanted asked, that by itself doesn't tell me that [trial counsel] did a bad job."

(We note that the court did not inquire about the specific questions defendant requested trial counsel ask.)

¶ 22 As to defendant's claims regarding trial counsel's purported statement that no incriminating evidence against him existed, yet at his trial the State introduced a 9-1-1 recording against him, the trial court reminded defendant that the State provided testimony from two witnesses, identifying defendant as one of three intruders. When defendant pointed out that Jackson's identification occurred seven months later, the following exchange occurred:

> "THE COURT: And that was brought out during the trial. Then it became a question of are they believable or not. So [the court] understand[s] your perspective. But as far as allegations of ineffective assistance, [the court] need[s] to hear something else other than what you're telling [the court].
>
> THE DEFENDANT: There's nothing else, Your Honor."

¶ 23 Thereafter, the trial court—quoting from defendant's August 6, 2013, letter—asked trial counsel to address defendant's claim that she "advised [defendant] that the 9-1-1 recording *** received from the State's Attorney was blank before trial but during trial *** a 9-1-1 *** recording [was] used against [defendant.]" Trial counsel explained that although she could not play the 9-1-1 recording during a meeting with defendant, she subsequently reviewed the recording and discussed possible trial strategies with defendant.

¶ 24 Based on this inquiry, the trial court found that defendant failed to allege a credible claim that would have entitled him to the appointment of new counsel to evaluate inde-

pendently his ineffective-assistance-of-trial-counsel assertions. Immediately thereafter, the court conducted a sentencing hearing during which the court merged defendant's convictions on counts III and V with count II. On count II, the court sentenced defendant to 25 years in prison.

¶ 25 This appeal followed.

¶ 26 II. ANALYSIS

¶ 27 A. Defendant's *Krankel* Claim

¶ 28 Defendant argues that the trial court erred by failing to conduct an adequate *Krankel* hearing. We agree.

¶ 29 In *People v. Taylor*, 237 Ill. 2d 68, 75, 927 N.E.2d 1172, 1175-76 (2010), the supreme court succinctly explained *Krankel* and its progeny as follows:

> "This court has previously considered the issue of whether new counsel should be appointed where a defendant brings a *pro se* posttrial motion alleging ineffective assistance of counsel. In a line of cases beginning with [*Krankel*], the following rule developed. New counsel is not automatically required in every case where a defendant brings such a motion. Instead, the trial court should first examine the factual basis of the defendant's claim. If the court determines the 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. However, if the defendant's allegations show possible neglect of the case, new counsel should be appointed to argue the defendant's claim of ineffective assistance. [Citations.] The appointed counsel can independently evaluate the

> defendant's claim and would avoid the conflict of interest that trial counsel would experience if trial counsel had to justify his or her actions contrary to defendant's position." [Citation.] (Internal quotation marks omitted.)

¶ 30 "The operative concern for the reviewing court is whether the trial court conducted an adequate inquiry into the defendant's *pro se* allegations of ineffective assistance of counsel." *People v. Moore*, 207 Ill. 2d 68, 78, 797 N.E.2d 631, 638 (2003). "During this evaluation, 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.* To satisfy the adequacy requirement, the trial court can (1) question trial counsel regarding the "facts and circumstances surrounding the defendant's allegations," (2) have a brief discussion with defendant about his ineffective-assistance-of-trial-counsel claims, or (3) base its determination "on its knowledge of defense counsel's performance at trial and the insufficiency of the defendant's allegations on their face." *Id.* at 78-79, 797 N.E.2d at 638. "The issue of whether the [trial] court properly conducted a preliminary *Krankel* inquiry presents a legal question that we review *de novo*." *People v. Jolly*, 2014 IL 117142, ¶ 28, 25 N.E.3d 1127.

¶ 31 In this case, defendant acknowledges that the trial court conducted an inquiry into several of his ineffective-assistance-of-trial-counsel claims, but he argues that his August 2013 *Krankel* hearing was nonetheless inadequate because the court failed to inquire about his claims that trial counsel (1) failed to disclose that counsel represented Mullins in multiple criminal cases, (2) withheld information about his case, and (3) declined to ask witnesses questions defendant recommended.

¶ 32 The State, citing *People v. Munson*, 171 Ill. 2d 158, 662 N.E.2d 1265 (1996), responds that because defendant failed to articulate a credible basis after the trial court provided him "a full opportunity to orally present his claims," the court properly rejected defendant's request for the appointment of counsel. We are not persuaded.

¶ 33 In *Munson*, 171 Ill. 2d at 200, 662 N.E.2d at 1283-84, the defendant essentially argued that when a defendant asserts an ineffective-assistance-of-trial-counsel claim, the trial court *must* appoint another attorney to represent the defendant. In addressing that claim, the court noted that the defendant had not provided any basis to support his claim, noting that a "mere blanket statement claiming ineffectiveness [was] not sufficient." *Id.*, 662 N.E.2d at 1284. At a later hearing, the defendant was again permitted to raise an ineffective-assistance claim, but it became apparent that the defendant "had no idea" how his counsel was ineffective. *Id.* at 201, 662 N.E.2d at 1284. The supreme court affirmed the trial court's denial of the defendant's purported ineffective-assistance claim, concluding that "the court made every effort to ascertain the nature and substance of [the] defendant's ineffectiveness claim," but the defendant "provided neither a basis nor facts from which the court could infer a basis in support of such a claim." *Id.*

¶ 34 Despite the State's reliance, this court is not presented with the factual scenario the supreme court considered in *Munson*—namely, that although the trial court made every effort to determine the nature of the defendant's specific claim, the defendant was unable to articulate a credible basis for his otherwise general ineffective-assistance-of-trial-counsel assertion. Instead, in the instant case, the court did not inquire about claims defendant raised in his August 2013 letter but did not repeat to the court during his *Krankel* hearing.

¶ 35 The record does not contain any discussion about the specific issues defendant raises here—namely, that his trial counsel (1) failed to disclose that counsel represented Mullins

in multiple criminal cases, (2) withheld information about his case, and (3) declined to ask witnesses questions defendant recommended. The trial court should have sought additional input from either defendant or his trial counsel to determine whether a credible factual basis exists. Specifically, the record in this case does not reveal (1) the extent of counsel's representation of Mullins, despite counsel's bald assertion that no conflict existed; (2) the type of the information defendant claims trial counsel withheld and how its absence prejudiced defendant, or (3) if the specific questions defendant requested that trial counsel ask were pertinent.

¶ 36 As to defendant's claim that trial counsel declined to ask witnesses questions defendant recommended, we note that the trial court was correct that generally, "matter[s] of trial strategy will typically not support a claim of ineffective representation." *People v. Mims*, 403 Ill. App. 3d 884, 890, 934 N.E.2d 666, 672 (2010). However, it is possible that (1) defendant could have had a credible reason for requesting that trial counsel ask specific questions and (2) the absence of such questioning prejudiced his case. *People v. Peacock*, 359 Ill. App. 3d 326, 339-40, 833 N.E.2d 396, 407 (2005).

¶ 37 As this court stated in *Peacock*, "[t]o trigger a *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*. 359 Ill. App. 3d at 340, 833 N.E.2d at 408 (quoting *Moore*, 207 Ill. 2d at 79, 797 N.E.2d at 638). Defendant did so in his August 2013 letter to the trial court. Thereafter, the court was required to conduct a preliminary inquiry into the underlying factual basis, if any, of defendant's specific claims regarding the ineffectiveness of his trial counsel. Because the court failed to do so, we reverse the court's denial of defendant's August 2013 ineffective-assistance-of-trial-counsel claims and remand with directions that the court conduct an adequate *Krankel* hearing.

¶ 38 B. The State's Sentencing Claim

¶ 39 At defendant's August 2013 sentencing hearing, the trial court stated as follows:

> "[The court] agree[s] with [defense counsel] that home invasion and armed robbery couldn't receive separate sentences. Although they involve different elements and there could be convictions entered for both, [the court does not] believe that there can be two sentences imposed; and they would merge for purposes of sentencing. Obviously[,] the criminal trespass to residence merges with [c]ount II."

¶ 40 In its brief to this court, the State argues that the trial court erred by (1) improperly merging defendant's convictions for armed robbery (count III) into his conviction for home invasion (count II) and (2) imposing a 25-year sentence only on his conviction for home invasion. Specifically, the State contends that because the trial court provided no legal basis for its finding that sentences could not be imposed for both armed robbery and home invasion, this court should remand this case with directions that the court impose a sentence on defendant's conviction for armed robbery. See *People v. Yaworski*, 2011 IL App (2d) 090785, ¶ 10, 958 N.E.2d 361 ("[T]he reviewing court may correct an erroneous trial court ruling that one offense merges into another and may remand for sentencing on the former offense so that a complete judgment will have been entered.").

¶ 41 In his reply brief, defendant concedes the State is correct but requests that this court enter a 25-year sentence on defendant's armed robbery conviction, which defendant claims is consistent with the trial court's intent. We accept defendant's concession but decline to impose a 25-year sentence on defendant's armed robbery conviction. Instead, because this court has al-

ready remanded this case for a *Krankel* hearing, we leave it to the sound discretion of the trial court to impose the appropriate sentence.

¶ 42 III. CONCLUSION

¶ 43 For the reasons stated, we reverse the trial court's judgment and remand with directions that the court (1) conduct an adequate *Krankel* hearing and (2) sentence defendant on his armed robbery conviction.

¶ 44 Reversed; cause remanded with directions.