SECOND DIVISION
January 19, 2016

No. 1-13-3896



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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | No. 11 C4 40927 |
| | ) | |
| TUWAYNE BELL, | ) | Honorable |
| | ) | Paula M. Daleo, |
| Defendant-Appellant. | ) | Judge Presiding. |

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JUSTICE NEVILLE delivered the judgment of the court.
Justices Simon and Hyman concurred in the judgment.

**O R D E R**

¶ 1 *Held*: Case remanded for the trial court to conduct a preliminary inquiry into defendant's *pro se* allegation of ineffective assistance of counsel.

¶ 2 Following a bench trial, Tuwayne Bell, the defendant, was convicted of delivery of a controlled substance and sentenced to eight years' imprisonment. On appeal, he contends that the trial court erred in failing to conduct a preliminary *People v. Moore*, 207 Ill. 2d 68 (2003) inquiry into his *pro se People v. Krankel*, 102 Ill. 2d 181 (1984) post-trial motion alleging ineffective assistance of trial counsel.

¶ 3 The record reveals that defendant was convicted on evidence establishing that in September 2009, Investigator McNamara of the Cook County Sheriff's Police was working as an undercover officer and assigned to attempt a crack cocaine purchase from defendant, who was already known to him. Investigator McNamara had previously programmed defendant's telephone number into his phone, and on September 2, 2009, left a message on defendant's voicemail telling him that he was interested in purchasing crack cocaine. Shortly thereafter, defendant returned his call, and the investigator went to a Marathon gas station on Mannheim road in Stone Park where he met defendant, who entered his vehicle, and told him to drive. The investigator drove to the 1800 block of North 38th Avenue in Stone Park, and handed defendant $40 in official advanced funds. Defendant pulled out a bag, reached into it, and handed the investigator four individual plastic wraps with an off-white, rock-like substance in them, which the investigator suspected was crack cocaine. Investigator McNamara then gave defendant a ride to the train station. He estimated that defendant was with him for a total of half an hour. Defendant was arrested later in conjunction with the ongoing investigation.

¶ 4 The parties stipulated that the four recovered bags of suspect cocaine were sent to the Illinois State Police Forensic Science Center. One of the bags was determined to weigh .1 gram, and tested positive for cocaine.

¶ 5 In finding defendant guilty of delivery of a controlled substance, the court determined that the investigator testified clearly that he was in an undercover operation, that he tendered defendant prerecorded funds, and defendant then gave him a bag containing four separate smaller bags containing a substance which later tested positive for cocaine. The court also noted that

there was no question of identity where the investigator knew defendant before this incident, and spent half an hour with him in the car. The court then denied defendant's motion for a new trial.

¶ 6 On March 14, 2013, defendant filed a *pro se* motion alleging that trial counsel was ineffective for failing to investigate and call his alibi witnesses, file a motion to suppress where there was no probable cause for his arrest, hold the State to its burden of proof, and never demanded video and audio of the alleged transaction. Defendant requested that the court "grant this motion and set a hearing under the *Krankel* inquiry rule and appoint new counsel to assist[] [him] in arguing his motion."

¶ 7 When the matter was called on March 21, 2013, the court asked defendant if he wished to proceed with his *pro se* motion for ineffective assistance of counsel. Defendant indicated that he did, and the court then asked the State if it would like time to respond. The State informed the court that it had not been served a copy of the motion and would like to set the matter for a *Krankel* hearing. The court then asked defendant if he understood that he was asking to act as his own attorney in litigating this matter, and that he would be held to the same standards that a lawyer would be held to as far as admission of evidence and "things like that." Defendant indicated that he understood, and the court continued the matter to May 23, 2013.

¶ 8 On that date, the court stated that it was confused as to what defendant was requesting since he asked to file and argue a *pro se* motion for ineffective assistance of counsel, and on the other hand, he was asking for the appointment of counsel to help him argue the *pro se* motion. The court then asked defendant if he was seeking to proceed *pro se* or requesting appointment of counsel to help him argue this motion. Defendant responded that he was going to hire a private attorney because he had witnesses he wanted to bring in on this motion.

¶ 9 The court then sought to clarify the bases for his ineffective assistance of counsel claim. Defendant acknowledged that he was alleging that trial counsel failed to investigate or call his witnesses to testify, which would have confirmed his alibi; failed to file a motion to suppress, or hold the State to its burden of proof; and never demanded the video and audio of the transaction.

¶ 10 Following that colloquy, the court granted defendant a continuance to hire private counsel. In doing so, the court noted that defendant's counsel would need to take a look at what defendant filed to determine whether he wanted to proceed in the trial court or whether this was really an appellate issue. The State then inquired if the next date will be for status on whether defendant hired an attorney, and the court responded, "[r]ight."

¶ 11 On the next date, the court noted that they were awaiting defendant's decision on a new attorney. Defendant informed the court that his family could not pay for an attorney, explaining that, "there is a lot of violence going on in Chicago with my family, a lot of stuff has happened, so I just want to disregard the motion." The court then inquired, "[y]ou want to withdraw this Motion for Ineffective Assistance of Counsel," and defendant responded, "[y]es." The court allowed defendant to withdraw his motion, and sentenced him to eight years' imprisonment.

¶ 12 On appeal, defendant solely contends that the trial court erred in failing to conduct an appropriate preliminary inquiry into his *Krankel* claims of ineffective assistance of counsel under *Moore*. He maintains that the court abdicated its judicial duty and treated the matter as if defendant needed to retain private counsel to initiate the *Krankel* inquiry, and requests that his case be remanded for the necessary *Moore* inquiry.

¶ 13 According to *Krankel*, the trial court is required to inquire into the factual basis of defendant's post-trial *pro se* claim of ineffective assistance of counsel. *Moore*, 207 Ill. 2d at 77-

79. The evolution of the *Krankel* inquiry has led to a rule that counsel need not be appointed in every case where defendant presents a *pro se* claim of ineffective assistance of counsel. *People v. Vargas*, 409 Ill. App. 3d 790, 801 (2011), citing *Moore*, 207 Ill. 2d at 77. Instead, it is incumbent upon the trial court to examine the claim and its factual underpinnings, *i.e.*, the preliminary inquiry, and where a *pro se* claim is determined to be without merit or concerns a matter of trial strategy, there is no need to appoint counsel; alternatively, if the allegations demonstrate the possibility of neglect, counsel should be appointed. *Moore*, 207 Ill. 2d at 77-78.

¶ 14 The operative concern for a court of review is to determine whether the trial court conducted an adequate *Krankel* inquiry into defendant's *pro se* allegations of ineffective assistance of counsel. *Moore*, 207 Ill. 2d at 78. A *Krankel* inquiry presents a legal question that this court reviews *de novo*. *People v. Jolly*, 2014 IL 117142, ¶ 28.

¶ 15 In this case, the court clearly acknowledged defendant's *Krankel* motion and claims, and then asked him if he wished to proceed *pro se*. After indicating that he would, the State requested time to respond, and the court advised defendant as to the standard he would be held in representing himself. On the next court date, the court expressed its confusion regarding defendant's request to file and argue his motion *pro se*, and on the other hand, seeking the appointment of counsel to help him argue his motion. At that point, defendant informed the court that he wished to hire private counsel. The court then had defendant explain the allegations in his motion and allowed him a continuance to obtain private counsel. Ultimately, defendant was unable to retain private counsel, citing money and family issues, and withdrew his motion.

¶ 16 Defendant claims that this chronology shows that the court failed to conduct the initial inquiry into his claims and instead treated the matter as if he was required to retain private

counsel to initiate the inquiry. We must determine whether the court's efforts were sufficient and what effect, if any, it had on defendant's decision to withdraw his motion.

¶ 17 The State asserts that defendant voluntarily withdrew his motion without any pressure from the court, and that his impetus for doing so was rooted in financial and familial problems. In support, the State cites *People v. McGee*, 345 Ill. App. 3d 693 (2003), claiming that it is analogous to this case. In *McGee*, 345 Ill. App. 3d at 699, defendant was represented by private counsel of his own choosing and after trial, filed a *pro se* motion alleging ineffective assistance of counsel. When private counsel was informed of the motion, he asked to discuss it with defendant and after consulting with his counsel on several occasions, defendant withdrew his motion. *Id*. On appeal, defendant argued that the trial court erred by failing to conduct a preliminary investigation into his claims of ineffective assistance of counsel, and the fact that he withdrew his motion was irrelevant and implied that he was pressured into withdrawing by counsel. *Id.* This court found that defendant hired private counsel, was in a position to end the attorney-client relationship and obtain new counsel if he so chose, and, instead, withdrew his motion, effectively preventing the trial court from any substantive review of his motion. *Id.*

¶ 18 In the instant case, the trial court initially acknowledged defendant's motion and asked if he wished to proceed *pro se*. Defendant indicated that he would. However, the court focused on the procedures to be followed in a hearing, cautioned defendant on the responsibilities inherent in representing himself, and defendant then decided to seek counsel. On the succeeding date, the court followed a similar pattern, and defendant ultimately withdrew his motion after being unable to secure private counsel.

¶ 19 The facts of this case are readily distinguishable from *McGee* where defendant had private counsel, who consulted with him regarding the allegations in his motion before the court considered them. Finally, defendant decided to withdraw his motion.

¶ 20 Here, the court reviewed the allegations in Bell's motion and, instead of proceeding with the preliminary inquiry regarding the merits of defendant's claims, focused on the procedure to be followed in a hearing which prompted defendant to seek private counsel and, when his family was unable to hire a private attorney, defendant withdrew his motion.

¶ 21 We also find, contrary to the State's argument, that *People v. Washington*, 2015 IL App (1st) 131023, is analogous to the case at bar, rather than distinguishable from it. In *Washington*, 2015 IL App (1st) 131023, ¶ 12, defendant made an oral post-trial *pro se* claim of ineffective assistance of trial counsel, and rather than inquiring into his claim, the trial court told defendant that he would have to file a written motion and would be given time to do so. Defendant repeatedly told the court that he did not have access to the law library, but the court continued to inform him that the motion must be in writing, and when defendant relented, the court asked him if he was withdrawing his motion and defendant stated that he had to withdraw it. *Id.* The *Washington* court found that defendant's oral statement during allocution was sufficient to bring his ineffective assistance claim to the attention of the trial court, but that in the colloquy that followed, the court focused on the necessity of a written motion, rather than the basis for the claim, and failed to accomplish the very purpose of the *Krankel* inquiry. *Id.* ¶ 13. The *Washington* court concluded that the exchange between the trial court and defendant was not the type of preliminary inquiry required into the underlying basis for defendant's post-trial claim,

and remanded the case for a preliminary *Krankel* inquiry. *Id.* ¶¶ 14-15. We reach the same conclusion here.

¶ 22 Here, the trial court was aware of defendant's *pro se* claims of ineffective assistance, but it failed to determine whether they showed counsel's possible neglect of the case necessitating the appointment of new counsel. *Moore,* 207 Ill. 2d at 78. As in *Washington,* the trial court turned its attention to the procedural matters attendant to presenting the claims, and indicated that the proceeding would be adversarial, conceivably prompting defendant to attempt to hire private counsel. When that proved impossible, defendant withdrew his motion. Under these circumstances, we cannot say that defendant's withdrawal of his motion comports with the notion that it was made voluntarily or that he invited error, as suggested by the State. *Washington,* 2015 IL App (1st) 131023, ¶ 15. Like *Washington,* we find that the trial court erred in failing to conduct the preliminary inquiry into the factual basis of defendant's *pro se* post-trial claims of ineffective assistance of counsel contemplated by *Moore*, and remand the case for the limited purpose of allowing the trial court to conduct the required preliminary inquiry. *Moore*, 207 Ill. 2d at 81.

¶ 23 Remanded, with directions.