2016 IL App (1st) 141261-U

THIRD DIVISION
March 2, 2016

No. 1-14-1261

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. 13 DV 74593
	)	
JOHNNY RUSH,	)	Honorable
	)	Yolande M. Bourgeois,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Mason and Justice Fitzgerald Smith concurred in the judgment.

O R D E R

¶ 1 *Held:* We affirm the circuit court's judgment over defendant's contention that the trial court failed to inquire into his posttrial ineffective assistance of counsel claims as he subsequently withdrew the claims.

¶ 2 Following a bench trial, defendant Johnny Rush was convicted of violating an order of protection and domestic battery and sentenced to 364 days in the Cook County Department of Corrections. On appeal, defendant contends that the trial court failed to adequately inquire into his posttrial ineffective assistance of counsel claims. We affirm.

¶ 3 At trial, Janeill Atkinson testified that as she was walking with her children to a restaurant located at 5458 South Halsted Street in Chicago at about 3:30 p.m. on August 26, 2013, she saw defendant across the street. At the time, she was eight months pregnant with defendant's baby and had an order of protection against him. The order of protection, which was admitted into evidence, was issued on April 18, 2013, and was in effect until October 16, 2014. The order specified that defendant was not to have any contact with Atkinson, and he was served the order in open court.

¶ 4 Defendant ran up to Atkinson, and she told him to stay away or she would call the police. Defendant grabbed Atkinson by the arm, pushed her, and tried to take her phone. He threatened Atkinson by telling her that if she called the police she would have the baby in the restaurant that day, and that she was "going to get it." After about 20 minutes of yelling and struggling with Atkinson, defendant left the scene. Atkinson called the police and she spoke to officers about two hours after the incident.

¶ 5 Officer Elmer testified for the defense that he was in a squad car with his partner on routine patrol when Atkinson waved them down near 5458 South Halsted Street at about 5:30 p.m. on August 26, 2013. Atkinson related to Elmer that she called 9-1-1 several times and was waiting for a police car for over an hour. Atkinson appeared agitated, but did not have any visible injuries and refused medical attention.

¶ 6 Following closing arguments, the court stated that Atkinson was "extremely credible," found defendant guilty of violating an order of protection and domestic battery, and sentenced him to 364 days in jail on October 24, 2013.

¶ 7 On November 20, 2013, defendant filed a *pro se* petition for writ of *habeas corpus*, alleging:

> "I would like a retrial for a jury trial and or a reconsideration of sentence because stipulations was unjust without me presented the next day after sentences 364 day time considered served was the final judgement [*sic*] first a misrepresentation of cancle [*sic*], second an ineffective of assistances, third a reconcerideration [*sic*] of sentences and or a time deduction because I never violated the order of protection at a place of work or living."

In further support of his petition defendant said:

> "I would like to be granted a retrial do [*sic*] to the fact of misrep[re]sentation of counsel, and even ineffective of assistance's [*sic*], for allowing trial to start without evidence's [*sic*] that was subpenoda [*sic*] to trial the video tape my only witness and defence's [*sic*] to prove my inn[o]cence in a public place and for stipulations being made without me being present at court[.]"

¶ 8 On November 22, 2013, defendant's trial counsel filed a motion for a new trial on defendant's behalf that rested solely on his petition for writ of *habeas corpus*. On December 13, 2013, counsel sought leave to withdraw and requested that the court appoint defendant an attorney from the public defender's conflicts division. Counsel stated that she was seeking leave to withdraw "[b]ased on the allegations in the motion." The court granted counsel's motion for leave to withdraw, and, on January 17, 2014, defendant's new counsel appeared for the first time on defendant's behalf. Posttrial counsel indicated that she spoke to defendant and that he wished

to withdraw the *habeas corpus* petition, which was the basis for his motion for a new trial. The court continued the matter.

¶ 9 At a hearing on March 25, 2014, posttrial counsel again told the court that, after speaking with defendant, she wanted to withdraw his *habeas corpus* petition. She explained defendant had been "trying *** to file a notice of appeal." In lieu of the motion for a new trial that relied on the petition, defendant wished to file a motion to reconsider sentence. The motion to reconsider would "replace" the motion for a new trial. The court granted defendant leave to file his motion to reconsider sentence. In the motion, defendant alleged that his sentence was excessive, but did not include any allegations of ineffective assistance of counsel. Defendant's motion to reconsider was denied, and this appeal followed.

¶ 10 On appeal, defendant contends that the trial court failed to conduct any inquiry into his *pro se* allegations of ineffective assistance of counsel, as is required under *People v. Krankel*, 102 Ill. 2d 181 (1984). Defendant thus requests that his cause be remanded for further proceedings consistent with *Krankel* and its progeny.

¶ 11 Our supreme court, beginning with its decision in *Krankel*, has instructed that when a defendant presents a *pro se* posttrial claim of ineffectiveness of counsel, the trial court should examine the factual basis of the claim. *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003). To accomplish this, the trial court may confer with counsel regarding the facts surrounding the allegations, or hold a brief discussion with the defendant. *People v. Milton*, 354 Ill. App. 3d 283, 292 (2004). The court may also evaluate the defendant's claims based on its knowledge of counsel's performance at trial, or the insufficiency of the defendant's allegations. *Id*. In addition, "where the trial court's probe into a defendant's allegations reveals [those claims] are 'conclusory,

misleading, or legally immaterial' or do 'not bring to the trial court's attention a colorable claim of ineffective assistance of counsel,' the trial court may be excused from further inquiry." *People v. Burks*, 343 Ill. App. 3d 765, 774 (2003) (quoting *People v. Johnson*, 159 Ill. 2d 97, 126 (1994)).

¶ 12 After the inquiry, the trial court need not appoint new counsel if it concludes that the ineffectiveness claim lacks merit or pertains purely to matters of trial strategy, but should appoint new counsel if the defendant's allegations reveal "possible neglect." *Moore*, 207 Ill. 2d at 78. If appointed, new counsel would represent defendant on his claims of ineffectiveness, and independently investigate those claims. *Id.*

¶ 13 Both parties agree that the trial court never held a hearing on defendant's claims of ineffective assistance of counsel alleged in his *habeas corpus* petition. The State, however, relying on the doctrine of invited error and principles of affirmative waiver, maintains that defendant prevented the court from conducting a *Krankel* hearing by withdrawing the pleadings that contained his ineffective assistance of counsel claims. The State thus asserts that defendant cannot now complain on appeal that the trial court failed to conduct a preliminary hearing into his claims of ineffective assistance of counsel. We agree.

¶ 14 A defendant's invitation or agreement to the procedure later challenged on appeal, his active participation in the direction of the proceedings, "goes beyond mere waiver" (*People v. Villarreal*, 198 Ill. 2d 209, 227 (2001)), and Illinois courts sometimes refer to the issue as estoppel (*People v. Harvey*, 211 Ill. 2d 368, 385 (2004)). "Under the doctrine of invited error, an accused may not request to proceed in one manner and then later contend on appeal that the course of action was in error." *People v. Carter*, 208 Ill. 2d 309, 319 (2003). To permit a

defendant to use the exact ruling or action he procured in the trial court as a vehicle for reversal on appeal "would offend all notions of fair play" (*Villarreal*, 198 Ill. 2d at 227), and "encourage defendants to become duplicitous" (*People v. Sparks*, 314 Ill. App. 3d 268, 272 (2000)).

¶ 15 Here, the record shows that defendant filed a petition for writ of *habeas corpus* on November 20, 2013, alleging incoherent claims of ineffective assistance of counsel. Two days later, trial counsel filed a motion for a new trial, attaching defendant's *habeas corpus* petition. On December 13, 2013, trial counsel requested leave to withdraw based on the allegations in defendant's *pro se* petition, which the trial court granted. On January 17, 2014, new posttrial counsel, appeared on defendant's behalf and stated:

> "Your honor, I spoke to [defendant] and at this point he wishes to withdraw the petition for *habeas corpus* and he's requesting to be allowed to file a *** late notice of appeal instead. He had until November 25 to file an appeal. He filed his petition instead on November 20."

Posttrial counsel then clarified that defendant was "withdrawing the petition that he filed, that is the *habeas corpus*. The motion for the new trial *** has the same allegations as the petition." Posttrial counsel requested a hearing on defendant's motion for a new trial, and the court set a hearing on March 25, 2014.

¶ 16 On March 25, 2014, the following colloquy occurred between defendant's posttrial counsel and the court:

> "ASSISTANT PUBLIC DEFENDER (APD): Your Honor, [defendant] filed a petition for a writ of *habeas corpus* in this case. I have spoken to him. What he was

trying to do is to file a notice of appeal, so I'm asking for leave to *** withdraw his *habeas corpus* petition and be allowed to file a motion to reconsider sentence.

THE COURT: He was sentenced on October 24, 2013.

APD: Yes but he filed his petition, and I believe they filed a motion for new trial also on that date.

THE COURT: On November 22nd?

APD: Right.

THE COURT: And you want to file an additional motion, or you want to file a motion in lieu of what I have in my hand.

APD: Yes. I would like to replace that one with that motion to reconsider sentence.

THE COURT: Leave to file motion to reconsider sentence granted."

¶ 17 The record demonstrates defendant, with the assistance of his newly appointed posttrial counsel, withdrew his motion for a new trial and *habeas corpus* petition, which contained his ineffective assistance of counsel claims, and was granted permission by the court to replace it with a motion to reconsider. The motion to reconsider did not contain any allegations of ineffective assistance of counsel. Defendant thus affirmatively waived any ineffective assistance of counsel claims he had made in his *pro se habeas corpus* petition and accompanying motion for a new trial by withdrawing them in open court. As there was no longer an allegation of ineffective assistance of counsel pending before the trial court, defendant was not seeking a remedy for the claims. Defendant makes no allegations that posttrial counsel mischaracterized

his intention. Further, defendant was present during both hearings and made no objection to posttrial counsel's statements.

¶ 18 The trial court was under no obligation to *sua sponte* raise the issue of trial counsel's ineffectiveness, where such an action would have been against the expressed wishes of defendant. See *People v. Gillespie*, 276 Ill. App. 3d 495, 502 (1995) (stating that "[n]othing in *Krankel* suggests that if the issue is not raised before the trial court a duty should be placed on it to raise the issue of ineffectiveness of counsel *sua sponte*"); see also *People v. Davis*, 337 Ill. App. 3d 977, 988 (2003) (finding that the trial court did not err in failing to inquire into the effectiveness of defense counsel where the record did not show a "clear basis" for an allegation of ineffectiveness). In this case, by withdrawing the petition for *habeas corpus* and motion for a new trial based thereon and not raising allegations of ineffective assistance in his motion to reconsider sentence, defendant effectively told the court he no longer wanted it to examine the ineffective assistance of counsel claims. He thus forestalled the trial court from giving him exactly what he now requests, *i.e.*, a *Krankel* hearing, and invited the alleged error by his action and affirmative waiver of this issue. See *People v. McGee*, 345 Ill. App. 3d 693, 699 (2003) (where the defendant withdrew his *pro se* motion alleging ineffective assistance of counsel, this court found that the defendant "effectively prevented the trial court from any substantive review of his motion").

¶ 19 In reaching this conclusion, we find unpersuasive defendant's contention that the trial court improperly conflated the two-step *Krankel* process by appointing defendant new counsel before inquiring into his allegations of ineffective assistance. As the State correctly points out in its brief on appeal, defendant's claim that the trial court eliminated the first step of the *Krankel*

process is of no consequence where the record showed that defendant had the benefit of conflict-free counsel to represent him on his allegations that his trial counsel was ineffective. When defendant, with the benefit of posttrial counsel, affirmatively chose to withdraw his allegations of ineffective assistance of trial counsel, there was no reason to hold a *Krankel* hearing. Defendant's assertion on appeal that a *Krankel* hearing remained necessary to clarify his inarticulate allegations of ineffective assistance of counsel does not change our result. In fact, defendant's incomprehensible allegations in his *habeas corpus* petition might have been the very reason defendant and posttrial counsel decided not to pursue the claims further.

¶ 20 Defendant also contends in his reply brief that the State's argument that he affirmatively waived the issue of his trial counsel's ineffectiveness and invited the alleged error fails because he was only required to bring his claim of trial counsel's ineffectiveness to the court's attention, which he did when he filed his *habeas corpus* petition. In so arguing, defendant maintains that he did everything required of him in order to present the issue to the court. We disagree. As set forth above, although defendant did initially argue in his *habeas corpus* petition that counsel was ineffective, he later withdrew the allegation. Defendant points to no case law showing that a trial court is obligated make a judicial inquiry into allegations of ineffective assistance of counsel when the defendant later withdraws those contentions. We also note that defendant's assertion that the invited error doctrine has no bearing on his case where he never asked the court to refuse to consider his allegations of ineffective assistance is without merit. Defendant's decision to withdraw both his *habeas corpus* petition and motion for new trial effectively told the court not to consider the content of those pleadings.

¶ 21 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 22 Affirmed.