2016 IL App (4th) 150338-U

NO. 4-15-0338

FILED
August 2, 2016
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Macon County
MICHAEL E. NIXON,	)	No. 12CF1224
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas E. Griffith, Jr.,
	)	Judge Presiding.

PRESIDING JUSTICE KNECHT delivered the judgment of the court.
Justices Turner and Harris concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, concluding defendant was not entitled to a second remand for compliance with Illinois Supreme Court Rule 604(d) (eff. Feb. 6, 2013) as he received a full and fair opportunity to raise his claims of error.

¶ 2 In October 2013, defendant, Michael E. Nixon, pleaded guilty to residential burglary (720 ILCS 5/19-3 (West 2010)). In November 2013, the trial court sentenced defendant to 20 years' imprisonment. Defendant appeals a second time from the denial of his motions to withdraw his guilty plea and reduce his sentence, arguing defense counsel did not properly certify compliance with Illinois Supreme Court Rule 604(d) (eff. Feb. 6, 2013). We affirm.

¶ 3 I. BACKGROUND

¶ 4 In August 2012, the State charged defendant by information with residential burglary (720 ILCS 5/19-3 (West 2010)).

¶ 5 Between February and May 2013, the trial court continued multiple status hearings as defendant's counsel, assistant public defender Steven Langhoff, was in negotiations with the State.

¶ 6 In June 2013, the trial court appointed assistant public defender David Ellison to represent defendant as Langhoff was leaving the public defender's office.

¶ 7 In July and August 2013, the trial court continued multiple pretrial hearings as Ellison was in negotiations with the State.

¶ 8 In October 2013, the trial court held a jury trial. Following opening statements and the commencement of the State's case in chief, defendant indicated he wished to enter an open plea of guilty. Defendant acknowledged he was subject to Class X sentencing due to his criminal record (730 ILCS 5/5-4.5-95(b) (West 2012)). Defendant acknowledged Ellison had tried to answer his questions prior to seeking to plead guilty. Upon finding a factual basis and the plea to be knowingly and voluntarily made, the court accepted defendant's plea and entered judgment against him.

¶ 9 In November 2013, the trial court held a sentencing hearing. In aggravation, the State elicited testimony from a detective and a police officer regarding the nature of the offense and defendant's extensive criminal record. With respect to defendant's criminal record, the State's evidence indicated, in relevant part, defendant (1) had previously assaulted corrections officers, and (2) was convicted of a 1995 federal weapons offense for his involvement in a burglary where multiple firearms were stolen. In mitigation, Ellison elicited testimony from defendant, defendant's uncle, and defendant's cousin regarding defendant's difficult childhood and drug addiction. The State recommended the maximum 30-year sentence of imprisonment,

while defendant requested between 10 and 15 years' imprisonment. The trial court sentenced defendant to 20 years' imprisonment.

¶ 10 In December 2013, defendant filed *pro se* motions to withdraw his guilty plea and reduce his sentence. As to his motion to withdraw his guilty plea, defendant alleged Ellison provided ineffective assistance by failing to (1) discuss his case, (2) allow him to review the police report, (3) allow him to review the State's evidence, and (4) file any motions to suppress evidence. As to his motion to reduce his sentence, defendant alleged Ellison provided ineffective assistance by failing to meet with him after he pleaded guilty, which prevented defendant from disclosing character witnesses. Defendant's motion to reduce his sentence further alleged the State's evidence (1) suggesting he was involved in a burglary of a gun store was prejudicial, and (2) indicating he assaulted corrections officers was fabricated by the State.

¶ 11 In May 2014, the trial court conducted a preliminary inquiry into defendant's *pro se* claims of ineffective assistance as required by *People v. Krankel*, 102 Ill. 2d 181, 464 N.E.2d 1045 (1984), and its progeny. The court indicated it did not need transcripts as it presided over the case. As a matter of process, the court allowed defendant to elaborate on his claims, and Ellison was given the opportunity to respond.

¶ 12 In elaborating on his claims, defendant acknowledged Ellison (1) presented him with the State's plea deal, (2) obtained multiple continuances at his request, (3) obtained a plea conference pursuant to Illinois Supreme Court Rule 402 (eff. July 1, 2012), (4) met with him at the jail, and (5) prepared a defense of mistaken identity. Defendant asserted Ellison did not provide him with the opportunity to review the police report or suggest a strategy of motions to suppress. Defendant further added, when he first met with Ellison in the jail, Ellison asked him

if he recalled why he had a conflict of interest in case No. 03-CF-607, but neither he nor Ellison could determine the basis of the conflict.

¶ 13 In responding to defendant's allegations, Ellison noted his records indicated, on September 20, 2012, defendant reviewed the police report.

¶ 14 Following its inquiry, the trial court found no basis to support defendant's claims of ineffective assistance and declined to appoint new counsel.

¶ 15 That same month, defendant filed a *pro se* motion for substitution of judge for cause (725 ILCS 5/114-5(d) (West 2012)), alleging Judge Thomas E. Griffith, Jr. was prejudiced against him as shown by his failure to find Ellison had provided ineffective assistance.

¶ 16 In June 2014, the trial court held a hearing on defendant's motions to substitute the judge, withdraw his guilty plea, and reduce his sentence. A Rule 604(d) certificate was not filed. As to defendant's motion for substitution, the court struck the motion as it failed to be supported by affidavit. The court otherwise denied defendant's motions, and defendant appealed.

¶ 17 In October 2014, on an agreed motion for summary remand, this court remanded the matter to the trial court "for the filing of a 604(d) certificate, the opportunity to file a new post-plea motion, if counsel concludes that a new motion is necessary, a new hearing on the motion, a[]new judgment, and strict compliance with the requirements of Rule 604(d)." *People v. Nixon*, No. 4-14-0518 (summary order under Supreme Court Rule 23(c)(2)).

¶ 18 In November 2014, defendant filed a *pro se* motion for substitution of judge for cause (725 ILCS 5/114-5(d) (West 2014)), (1) asserting Judge Griffith improperly struck his May 2014 motion for substitution without allowing a separate judge to review the motion, and (2) alleging additional facts in support of his claim Judge Griffith was prejudiced against him.

As evidence of prejudice, defendant cited the following procedural irregularities occurring during his May 2014 preliminary *Krankel* hearing: (1) the trial court's limitation of his ability to present argument by stating he could not read "all day"; (2) the court's indication it did not need to review transcripts as it presided over the matter; and (3) the court's denial of his request to respond to Ellison's comments. Defendant attached to his motion an affidavit asserting his belief Judge Griffith was prejudiced against him given his failure to find Ellison had provided ineffective assistance.

¶ 19 At a November 12, 2014, status hearing, the trial court assigned defendant's motion for a substitution to Judge Albert Webber. A November 13, 2014, docket entry by Judge Webber indicates:

> "CLERK presents Defendant's 'Motion for Substitution of Judge' for review by the Court. Court finds that the Motion essentially recites that Judge Thomas Griffith entered an order with which the Defendant disagrees. The remainder of the Petition consists of unverified opinions concerning Judge Griffith. As a matter of law, an adverse decision alone is not evidence of prejudice by the court against any party. Defendant's Motion for Substitution of Judge filed November 6, 2014, is denied. Cause referred back to Judge Griffith for further proceedings."

¶ 20 At a December 12, 2014, status hearing, Ellison adopted the previously filed motion to reduce sentence and filed a Rule 604(d) certificate.

¶ 21 On December 29, 2014, defendant sent the trial court a letter asserting Ellison failed to file his motion to withdraw his guilty plea. Defendant believed Ellison failed to file the motion as it alleged claims of ineffective assistance.

¶ 22 In March 2015, the trial court held a preliminary *Krankel* hearing. The court indicated it had reviewed defendant's file and recalled the prior proceedings. As a matter of process, the court allowed defendant to elaborate on his allegations, Ellison the opportunity to respond, and defendant the opportunity to address Ellison's response.

¶ 23 Defendant asserted Ellison failed to file his motion to withdraw his guilty plea. Defendant also noted Ellison's failure to (1) discuss the case with him, (2) allow defendant to review discovery material, (3) file motions to suppress, and (4) discover and disclose why he had a conflict in defendant's 2003 case. Defendant acknowledged the latter allegations were addressed in prior proceedings.

¶ 24 Ellison indicated, on December 12, 2014, he intended and was under the belief that he had adopted defendant's previously filed motions. Ellison otherwise maintained defendant's claims were previously addressed by the trial court.

¶ 25 In response to Ellison's comments, defendant indicated his motion alleged additional issues not previously addressed by the trial court.

¶ 26 Following its inquiry, the trial court found defendant's claims did not indicate possible neglect. The court further noted Ellison could file an amended motion to withdraw defendant's guilty plea after further consultation with defendant.

¶ 27 On April 28, 2015, defendant, through Ellison, filed an amended motion to withdraw his guilty plea, which asserted several claims of ineffective assistance of counsel.

Attached to the motion was defendant's handwritten motion to withdraw his guilty plea. That same day, Ellison filed an amended Rule 604(d) certificate, which stated: (1) "That I have consulted with the Defendant, Michael Nixon, by mail to ascertain Defendant's contentions of error in the sentence or the entry of the plea of guilty"; (2) "That I have examined the trial court file"; (3) "That I have examined the report of proceedings of the plea of guilty"; and (4) "That I have made any amendments to the motion necessary for adequate presentation of any defects in those proceedings."

¶ 28 On April 29, 2015, the trial court held a hearing on defendant's amended motion to withdraw his guilty plea and motion to reduce his sentence.

¶ 29 Ellison called defendant to testify. Defendant indicated Ellison (1) failed to discuss a defense strategy with him, (2) failed to ask whether he had an alibi witness, (3) failed to keep him informed, (4) failed to disclose discovery, and (5) coerced him into pleading guilty. Ellison questioned defendant about whether he had been more interested in seeking a favorable plea deal than discussing his case and possible alibi witnesses, to which defendant stated to the trial court, "I'm not trying to go back and forth with him." The court responded by stating it did not want the questioning to turn into an argument. Ellison questioned defendant if he recalled seeing the police report when he was represented by another attorney, to which defendant indicated he did not. The trial court questioned Ellison about whether he had a document indicating defendant reviewed the police report, to which Ellison indicated such a document existed. The court asked Ellison whether it was his position defendant had reviewed the discovery materials prior to his representation, to which Ellison responded affirmatively. Ellison produced a September 20, 2012, jail record, which indicates defendant read pages 26 through 82

of the police report. The court directed Ellison to mark the document as "Defendant's Exhibit 1." Ellison asked defendant if he had reviewed the police report as indicated in Defendant's Exhibit 1, to which defendant indicated he did not. Ellison moved to admit the exhibit. On cross-examination, defendant indicated his alibi witness was at a "female house."

¶ 30 With respect to defendant's amended motion to withdraw his guilty plea, Ellison argued:

> "[T]he allegations are—and I'm in a tough position because I felt like because of the allegations *** I'm forced to defend myself. *** I haven't testified or anything like that, and I don't want to proffer anything, but I think this stuff has been *** through before for the most part. [Defendant] feels like he was not treated fairly by myself or the courts, and he's asking to be allowed to withdraw his guilty plea. I think the Court should allow him to do that if that's what the Court deems necessary."

As to defendant's motion to reduce his sentence, Ellison argued the sentence was excessive.

¶ 31 In response, the State argued defendant failed to demonstrate his plea was coerced, the claims of ineffective assistance were conclusory and meritless, and the sentence was reasonable in light of defendant's criminal record.

¶ 32 The trial court denied defendant's motions, and this appeal followed.

¶ 33 II. ANALYSIS

¶ 34 On appeal, defendant asserts we should remand a second time as defense counsel failed to properly certify compliance with Illinois Supreme Court Rule 604(d) (eff. Feb. 6, 2013).

Specifically, defendant contends defense counsel's certificate is deficient as it fails to indicate counsel consulted with defendant about his contentions of error in both his guilty plea *and* his sentence. See *People v. Tousignant*, 2014 IL 115329, ¶ 20, 5 N.E.3d 176 ("[C]ounsel is required to certify that he has consulted with the defendant 'to ascertain defendant's contentions of error in the sentence *and* the entry of the plea of guilt.' " (Emphasis in original.)); *People v. Hobbs*, 2015 IL App (4th) 130990, ¶ 34, 42 N.E.3d 471 (finding *Tousignant* requires "defense counsel to certify he or she has discussed with a defendant his or her contentions of error in the sentence *and* the entry of the plea of guilty") (Emphasis in original.); *People v. Mason*, 2015 IL App (4th) 130946, ¶ 13, 37 N.E.3d 927 ("Rule 604(d)'s verbatim language *** does not precisely show compliance with Rule 604(d) as explained by our supreme court in *Tousignant*."). The State concedes defense counsel's Rule 604(d) certificate is technically deficient.

¶ 35 Defendant acknowledges the supreme court has held, where a case has previously been remanded for the filing of a proper Rule 604(d) certificate, the filing of another improper certificate may not require another remand if the defendant was afforded a full and fair second opportunity to present his claims and another remand would amount to an empty and wasteful formality. *People v. Shirley*, 181 Ill. 2d 359, 369, 692 N.E.2d 1189, 1194 (1998). Defendant contends, unlike the circumstances described in *Shirley*, a second remand is appropriate as the trial court (1) improperly dismissed his motion for substitution of judge for cause without a hearing, (2) conducted an inadequate inquiry into his *pro se* claims of ineffective assistance of counsel, and (3) improperly allowed defense counsel to argue his own ineffectiveness. The State maintains, in accordance with *Shirley*, a second remand is unwarranted.

¶ 36 A. Motion for Substitution of Judge for Cause

¶ 37 Defendant contends he is entitled to a remand as the trial court improperly denied his motion for substitution of judge for cause without a hearing. In response, the State maintains a hearing was unwarranted as defendant's motion failed to allege any basis by which he may have been entitled to substitution.

¶ 38 Section 114-5(d) of the Code of Criminal Procedure of 1963 (725 ILCS 5/114-5(d) (West 2014)) grants criminal defendants the ability to "move at any time for substitution of judge for cause, supported by affidavit." Section 114-5(d) provides:

> "Upon the filing of such motion a hearing shall be conducted as soon as possible after its filing by a judge not named in the motion; provided, however, that the judge named in the motion need not testify, but may submit an affidavit if the judge wishes. If the motion is allowed, the case shall be assigned to a judge not named in the motion. If the motion is denied the case shall be assigned back to the judge named in the motion." *Id.*

¶ 39 In *In re Estate of Wilson*, 238 Ill. 2d 519, 939 N.E.2d 426 (2010), our supreme court addressed the application of section 114-5(d) through a comparison of its civil counterpart. See 735 ILCS 5/2-1001(a)(3) (West 2012). The court noted, while the provisions of section 114-5(d) are to be liberally construed to promote rather than defeat the right of substitution, the right to a hearing before another judge is warranted only where the petition requesting substitution alleges grounds that, if true, would justify granting substitution for cause. *Estate of Wilson*, 238 Ill. 2d at 553-54, 939 N.E.2d at 446-47; see also *People v. Klein*, 2015 IL App (3d) 130052, ¶ 85, 40 N.E.3d 720 (discussing the initial threshold requirements the party requesting substitution

must satisfy). When a claim of prejudice is invoked as cause, it normally must stem from an extrajudicial source—"[a] judge's previous rulings almost never constitute a valid basis for a claim of judicial bias or partiality." *Estate of Wilson*, 238 Ill. 2d at 554, 939 N.E.2d at 447; see also *People v. Butler*, 137 Ill. App. 3d 704, 720, 484 N.E.2d 921, 933 (1985); *People v. Massarella*, 80 Ill. App. 3d 552, 565, 400 N.E.2d 436, 447 (1979).

¶ 40 In support of his claim Judge Griffith was prejudiced against him, defendant's motion cited the following procedural irregularities occurring during his May 2014 preliminary *Krankel* hearing: (1) the trial court's limitation of defendant's ability to present argument by stating he could not read "all day"; (2) the court's indication it did not need to review transcripts as it presided over the matter; and (3) the court's denial of defendant's request to respond to Ellison's comments. The actions taken by Judge Griffith in conducting a preliminary *Krankel* hearing were within his discretion and the confines of the law. See *People v. Mays*, 2012 IL App (4th) 090840, ¶ 57, 980 N.E.2d 166 (the trial court may rely on its knowledge of trial counsel's performance in evaluating a defendant's posttrial *pro se* claims of ineffective assistance); *People v. Fields*, 2013 IL App (2d) 120945, ¶ 40, 997 N.E.2d 791 ("[A] trial court's method of inquiry at the *Krankel* hearing is somewhat flexible ***."). Defendant's motion fails to substantiate a claim Judge Griffith was prejudiced against him. Defendant's motion for substitution of judge was properly denied without a hearing. See *Klein*, 2015 IL App (3d) 130052, ¶ 85, 40 N.E.3d 720 (finding an evidentiary hearing was unwarranted where the pleadings were insufficient to demonstrate prejudice).

¶ 41 Defendant contends whether the allegations in his motion were sufficient to entitle to him to a hearing before a different judge is irrelevant as Judge Griffith had already

assigned his motion to Judge Webber. We disagree. Defendant's November 2014 motion for substitution alleged Judge Griffith improperly struck his May 2014 motion for substitution without allowing a separate judge to review the motion. While Judge Griffith's cautious assignment may have appeased defendant by allowing a judge not named in his motion to make the initial determination as to whether defendant's motion met the threshold requirements for substitution, we caution such a practice may allow the unscrupulous defendant to effectively halt and delay proceedings. See *Estate of Wilson*, 238 Ill. 2d at 561, 939 N.E.2d at 451. A trial judge may deny a motion to substitute without referring it to another judge for a hearing if the motion is not made at the earliest practical moment after discovery of the cause alleged in the motion, is not accompanied by the requisite affidavit, lacks specificity, or is not made in good faith but rather for purposes of delay. *Id.* at 563, 939 N.E.2d at 452. Setting aside the premature assignment, Judge Webber correctly concluded defendant was not entitled to a hearing as his motion failed as a matter of law.

¶ 42 B. Preliminary *Krankel* Inquiry

¶ 43 Defendant asserts he is entitled to a remand as the trial court failed to conduct an adequate preliminary *Krankel* inquiry into his *pro se* claims of ineffective assistance of counsel. Specifically, defendant asserts the court failed to adequately inquire into his claim Ellison (1) operated under a conflict of interest, (2) failed to file motions to suppress, and (3) deprived him of the ability to disclose character witnesses. In response, the State contends defendant's conclusory allegations of ineffectiveness did not even necessitate a preliminary *Krankel* hearing.

¶ 44 Under *Krankel* and its progeny, when a defendant files a colorable *pro se* posttrial motion alleging claims of ineffective assistance, the trial court must conduct an inquiry into the

defendant's claims to determine whether new counsel should be appointed to assist the defendant in presenting his claims. See *Krankel*, 102 Ill. 2d at 189, 464 N.E.2d at 1049; *People v. Johnson*, 159 Ill. 2d 97, 126, 636 N.E.2d 485, 498 (1994); *People v. Moore*, 207 Ill. 2d 68, 77-78, 797 N.E.2d 631, 637 (2003). Conclusory, misleading, or legally immaterial claims do not require inquiry by the trial court. *Johnson*, 159 Ill. 2d at 126, 636 N.E.2d at 498.

¶ 45 An adequate inquiry involves the court understanding the defendant's claims and evaluating them for potential merit. *Mays*, 2012 IL App (4th) 090840, ¶ 58, 980 N.E.2d 166. To understand the factual bases of the defendant's claims, the trial court may question trial counsel, question defendant, or rely on its own knowledge of counsel's performance. *Id.*, ¶ 57. After an adequate investigation, the trial court must determine whether there was a "possible neglect of the case." *Moore*, 207 Ill. 2d at 77-78, 797 N.E.2d at 637. In making such a determination, the court may rely on the allegations and responses of trial counsel and the defendant, its knowledge of trial counsel's performance, or on its own legal knowledge of what does and does not constitute ineffective assistance. *Mays*, 2012 IL App (4th) 090840, ¶ 57, 980 N.E.2d 166. If the court finds possible neglect, it should appoint new counsel to independently investigate and represent the defendant at a separate hearing. *Moore*, 207 Ill. 2d at 78, 797 N.E.2d at 637. If, on the other hand, the court determines the claims "lack[ ] merit or pertain[ ] only to matters of trial strategy," the court may deny the motion without appointing new counsel. *Id.* at 78, 797 N.E.2d at 637. Whether the trial court conducted an adequate preliminary *Krankel* inquiry is reviewed *de novo*. *People v. Jolly*, 2014 IL 117142, ¶ 28, 25 N.E.3d 1127.

¶ 46 The trial court conducted multiple preliminary *Krankel* inquires into defendant's claims of ineffective assistance of counsel. At each hearing, defendant was given the

opportunity to elaborate on his claims. With respect to defendant's claim Ellison operated under a conflict of interest, defendant's comments indicated (1) Ellison had information he had withdrawn from representing defendant in a 2003 case, (2) Ellison brought that information to defendant's attention as he was uncertain of the basis for the withdrawal, and (3) defendant was uncertain of the basis for the withdrawal. Contrary to defendant's claim, defendant's comments demonstrated questioning Ellison as to the basis of the withdrawal was unwarranted as Ellison was uncertain of the basis. With respect to defendant's claim Ellison failed to file motions to suppress, defendant failed to identify the evidence he thought should have been suppressed. As to his claim he was deprived of the ability to inform Ellison of character witnesses, defendant failed to allege the character witnesses he would have called to testify, the expected testimony they would provide, or how the expected testimony would differ from the testimony Ellison elicited from defendant, his uncle, and his cousin. The court conducted an adequate inquiry into the factual bases of defendant's claims to determine they failed to demonstrate possible neglect.

¶ 47 C. Conflict of Interest

¶ 48 Defendant contends he is entitled to a remand as the trial court improperly allowed defense counsel to argue his own ineffectiveness, which demonstrates either a *per se* or actual conflict of interest.

¶ 49 Stemming from a criminal defendant's sixth amendment right to effective assistance of counsel is the right to conflict-free representation. *People v. Hernandez*, 231 Ill. 2d 134, 142, 896 N.E.2d 297, 303 (2008). Our supreme court has recognized two categories of conflicts of interest: *per se* and actual. *Id.* at 142, 144, 896 N.E.2d at 303-04. We review *de*

novo whether a conflict of interest exists. See *People v. Fields*, 2012 IL 112438, ¶ 19, 980 N.E.2d 35.

¶ 50 A *per se* conflict exists where facts about a defense counsel's status, by themselves, engender a disabling conflict. *Hernandez*, 231 Ill. 2d at 142, 896 N.E.2d at 303. Where a *per se* conflict exists, a defendant need not show the conflict affected counsel's performance. *Fields*, 2012 IL 112438, ¶ 18, 980 N.E.2d 35. In fact, "the very nature of a *per se* conflict rule precludes inquiry into the specific facts of a case." *Hernandez*, 231 Ill. 2d at 150, 896 N.E.2d at 307; see also *People v. Kester*, 66 Ill. 2d 162, 168, 361 N.E.2d 569, 572 (1977) (rejecting the State's request to inquire into the nature and extent of defense counsel's involvement as a former prosecutor). Absent a waiver of conflict-free representation, a *per se* conflict is automatic grounds for reversal. *Fields*, 2012 IL 112438, ¶ 18, 980 N.E.2d 35.

¶ 51 In the criminal context, our supreme court has identified three situations where a *per se* conflict exists: defense counsel (1) has a prior or contemporaneous association with the victim, the prosecution, or an entity assisting the prosecution; (2) contemporaneously represents a prosecution witness; or (3) is a former prosecutor who had been personally involved in the defendant's prosecution. *Hernandez*, 231 Ill. 2d at 143-44, 896 N.E.2d at 303-04; see also *Fields*, 2012 IL 112438, ¶ 41, 980 N.E.2d 35 ("Pursuant to long-standing precedent, this court has recognized three situations where a *per se* conflict of interest exists."). In *People v. Spreitzer*, 123 Ill. 2d 1, 16, 525 N.E.2d 30, 35 (1988), the supreme court noted "[t]he justification for treating these conflicts as *per se* has been that the defense counsel in each case had a tie to a person or entity—either counsel's client, employer, or own previous commitments—which would benefit from an unfavorable verdict for the defendant."

¶ 52 Defendant acknowledges defense counsel arguing his or her own ineffectiveness is not one of the *per se* conflicts identified by our supreme court but asserts, citing *People v. Lawton*, 212 Ill. 2d 285, 818 N.E.2d 326 (2004), and *People v. Willis*, 134 Ill. App. 3d 123, 479 N.E.2d 1184 (1985), we should find such a conflict exists under the circumstances presented. The State, citing *People v. Perkins*, 408 Ill. App. 3d 752, 762, 945 N.E.2d 1228, 1237 (2011), *People v. Sullivan*, 2014 IL App (3d) 120312, ¶¶ 46-47, 6 N.E.3d 888, and *People v. Short*, 2014 IL App (1st) 121262, ¶ 116, 20 N.E.3d 817, disagrees.

¶ 53 We reject defendant's invitation to find a *per se* conflict exists, and thus automatic reversal is required, anytime defense counsel argues his or her own ineffectiveness. See *People v. Jones*, 219 Ill. App. 3d 301, 304, 579 N.E.2d 1192, 1194 (1991). We find defendant's reliance on *Lawton* unpersuasive. In *Lawton*, 212 Ill. 2d at 296, 818 N.E.2d at 333, the supreme court found defense counsel's failure to assert his own ineffectiveness in a posttrial motion did not forfeit the issue on appeal, noting an attorney forced to argue his own ineffectiveness would face "an inherent conflict of interest." The court's comments relating to its forfeiture finding is not dispositive as to whether a *per se* conflict of interest exists to warrant automatic reversal. See *Perkins*, 408 Ill. App. 3d at 762, 945 N.E.2d at 1237 ("It is far from clear that the recognition of a conflict of interest in the context of forfeiture *** means that it is a constitutional *per se* conflict of the sort warranting automatic reversal outside [that] situation[]."); *Sullivan*, 2014 IL App (3d) 120312, ¶ 46, 6 N.E.3d 888 ("[T]he *Lawton* court did not hold that a *per se* conflict would occur in such a situation: its discussion was limited to [forfeiture]."). While counsel arguing his or her own ineffectiveness may create a situation where the interests of the defendant and counsel diverge (see *Willis*, 134 Ill. App. 3d at 131-32, 479 N.E.2d at 1190), counsel may

also zealously argue his or her own ineffectiveness without such divided loyalties (see *Jones*, 219 Ill. App. 3d at 304, 579 N.E.2d at 1194; *Perkins*, 408 Ill. App. 3d at 762, 945 N.E.2d at 1237). We reserve our inquiry into the extent of defense counsel's representation to deciding whether an actual conflict of interest existed. See *Hernandez*, 231 Ill. 2d at 150, 896 N.E.2d at 307.

¶ 54 Defendant contends the record demonstrates defense counsel acted under an actual conflict of interest. To demonstrate an actual conflict of interest, a defendant must point to some specific defect in defense counsel's strategy, tactics, or decision making attributable to a conflict. *Id*. at 144, 896 N.E.2d at 304. In other words, a defendant "need not prove prejudice in that the conflict contributed to the conviction, but it is necessary to establish that an actual conflict of interest adversely affected the lawyer's performance." *People v. Austin M.*, 2012 IL 111194, ¶ 82, 975 N.E.2d 22. Speculative allegations or conclusory statements are insufficient to establish an actual conflict affected counsel's performance. *Hernandez*, 231 Ill. 2d at 144, 896 N.E.2d at 304.

¶ 55 Defense counsel voluntarily adopted defendant's motion to reduce his sentence and filed an amended motion to withdraw defendant's guilty plea on defendant's behalf. See *Perkins*, 408 Ill. App. 3d at 762, 945 N.E.2d at 1237 (finding no conflict of interest where defense counsel voluntarily and zealously asserted a claim of ineffective assistance on the defendant's behalf). Given the nature of the allegations, defense counsel called defendant to testify, allowing defendant the opportunity to explain his thoughts. See *Jones*, 219 Ill. App. 3d at 304, 579 N.E.2d at 1194 (finding no conflict of interest where defendant was permitted to testify and defense counsel did not make any arguments to refute the defendant's claims). Defendant

highlights counsel's (1) position defendant had reviewed the discovery prior to his appointment, and (2) introduction of an exhibit harmful to his claims. Defendant fails to note defense counsel indicated his position and produced the exhibit at the behest of the trial court and, following the introduction of the exhibit, elicited testimony from defendant refuting the document's relevance. *Cf. Willis*, 134 Ill. App. 3d at 131-32, 479 N.E.2d at 1190 (finding a conflict of interest existed where defense counsel responded evasively to a question posed to him by the defendant relating to the basis of the defendant's claims.); see also *People v. Dean*, 2012 IL App (2d) 110505, ¶ 17, 975 N.E.2d 1250 (distinguishing *Willis*). Defendant further notes defense counsel's direct examination included leading questions which suggested his claims lacked merit, and he highlights the trial court's indication it did not want an argument to occur between defendant and counsel. Our review of the examination indicates defense counsel elicited testimony in support of defendant's claims without proffering a position contrary to defendant.

¶ 56 In further support of his claim an actual conflict manifested itself, defendant highlights defense counsel's (1) "half-hearted" argument in support of his motion to withdraw his guilty plea, which included counsel's statement he was in a tough position as he was forced to defend himself; and (2) failure to argue the merits of his motion to reduce his sentence. Although most, if not all, of defendant's claims had been previously addressed, defense counsel presented defendant's claims and requested defendant be allowed to withdraw his guilty plea or have his sentence reduced. We reject defendant's suggestion counsel's lack of oral argument relating to the additional claims raised in defendant's motion to reduce his sentence demonstrates a situation of conflicting loyalties. Defendant has failed to establish defense counsel operated under an actual conflict of interest.

¶ 57 III. CONCLUSION

¶ 58 We affirm the trial court's judgment. As part of our judgment, we award the State its $75 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2014).

¶ 59 Affirmed.