

NOTICE

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2016 IL App (5th) 130083-U

NO. 5-13-0083

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Jackson County.
)	
v.)	No. 12-CF-88
)	
TOMMY L. ADAMS,)	Honorable
)	William G. Schwartz,
Defendant-Appellant.)	Judge, presiding.

JUSTICE MOORE delivered the judgment of the court.
Justices Chapman and Stewart concurred in the judgment.

ORDER

¶ 1 *Held:* The trial judge's denial of the defendant's *pro se* motion for a new trial is vacated because the trial judge did not conduct a proper preliminary *Krankel* inquiry into the defendant's allegations of ineffective assistance of trial counsel and because the State participated in an adversarial manner in the inquiry that did take place; cause remanded with instructions for the trial court to: (1) conduct a proper preliminary *Krankel* inquiry before a different judge and without the State's adversarial participation, said inquiry to include the claims developed on appeal, if the defendant wishes to add those claims to his *pro se* motion; (2) determine the proper course of action with regard to the possible merger of the defendant's convictions, as explained in detail herein; and (3) determine the proper amount of credit for presentence custody to which the defendant is entitled and to, if necessary, make any amendments necessary to ensure the defendant receives that credit.

¶ 2 The defendant, Tommy L. Adams, appeals his convictions and sentence following a jury trial in the circuit court of Jackson County.

¶ 3 FACTS

¶ 4 The facts necessary to our disposition of this appeal follow. Following a trial by jury, the defendant was convicted of both aggravated battery with a firearm and unlawful possession of a weapon by a felon. Prior to sentencing, the defendant filed, *pro se*, a motion for a new trial. Therein, he contended, *inter alia*, that his trial counsel was ineffective. On the date for which sentencing was originally set, the defendant's trial counsel requested a continuance, so that law enforcement officials could speak with the defendant concerning "an old case that's still open." Trial counsel stated that he believed it would be in his client's best interest for that to happen, and that his client consented to an interview with law enforcement officials. Over the objection of the State, the trial judge granted the motion to continue the sentencing hearing. He then turned to the defendant's *pro se* motion for a new trial.

¶ 5 With regard to the defendant's *pro se* motion, the trial judge asked the defendant's trial counsel if he wished "to be heard" on the motion. Trial counsel perused the motion, which he had not previously seen, and then noted that the defendant was "alleging ineffective assistance of counsel," and that "[a]s such, I would have nothing to comment about his *pro se* motion for a new trial." The trial judge stated, "All right." Counsel for the State then responded to the *pro se* motion, first arguing that the motion's contentions not related to ineffective assistance of counsel were without merit. Counsel for the State then stated: "With regard to the ineffective assistance of counsel, that refers to matters

that are outside of my knowledge and there is really nothing that I can comment on, other than this was an adversarial proceeding." Immediately thereafter, counsel for the State did comment, stating in reference to the defendant's trial counsel that trial counsel "did represent and cross-examined his—the witnesses at trial and made the arguments that needed to be made and so I would ask the [c]ourt to deny the motion for a new trial." Without seeking any input from the defendant, any substantive input from the defendant's trial counsel, and/or articulating a basis for denial as a result of his knowledge of trial counsel's performance at trial and/or any insufficiency in the defendant's allegations on their face, the trial judge then stated: "Motion for new trial is denied."

¶ 6 The defendant was subsequently sentenced on the aggravated battery with a firearm conviction. The trial judge did not enter a sentence on the unlawful possession of a weapon by a felon conviction; however, he also did not vacate that conviction. The defendant received credit for 337 days in presentence custody. This timely appeal followed.

¶ 7 ANALYSIS

¶ 8 On appeal, the defendant raises four claims, which we restate as follows: (1) the trial judge failed to conduct a proper preliminary *Krankel* inquiry into the defendant's allegations of ineffective assistance of trial counsel; (2) the defendant received ineffective assistance of trial counsel; (3) the defendant's conviction for unlawful possession of a weapon by a felon, upon which no sentence was entered, must be vacated as an incomplete judgment; and (4) the defendant is entitled to credit for 357 days, rather than 337 days, in presentence custody. We shall address each of these claims in turn.

¶ 9 With regard to the first claim raised by the defendant, we begin by noting our standard of review. "The issue of whether the circuit court properly conducted a preliminary *Krankel* inquiry presents a legal question" that is considered by a reviewing court under a *de novo* standard of review. *People v. Jolly*, 2014 IL 117142, ¶ 28. In 1984, the Supreme Court of Illinois issued its decision in *People v. Krankel*, 102 Ill. 2d 181 (1984). Since that time, and in accordance therewith, a common law procedure has developed that "is triggered when a defendant raises a *pro se* posttrial claim of ineffective assistance of trial counsel." *People v. Jolly*, 2014 IL 117142, ¶ 29. It is well-settled law that in such situations, the trial court is not automatically required to appoint new counsel for a defendant. *Id.* Indeed, if the trial court ultimately determines that the allegations of the defendant are without merit, or pertain solely to matters of trial strategy, then the trial court may deny the *pro se* motion without appointing new counsel. *People v. Moore*, 207 Ill. 2d 68, 78 (2003). If, on the other hand, "the allegations show possible neglect of the case, new counsel should be appointed" to represent the defendant at a hearing on the defendant's allegations. *Id.* This process ensures that newly-appointed counsel can make an independent evaluation of the defendant's allegations, and the process avoids "the conflict of interest that trial counsel would experience if trial counsel had to justify his or her actions contrary to defendant's position." *Id.*

¶ 10 To determine whether the appointment of new counsel is required, the trial court must take some action, the first step being to "examine the factual basis of the defendant's claim." *Id.* at 77-78. To effectuate this examination by the trial court, "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.* at 78. The trial court may ask trial counsel to "simply answer questions and explain the facts and circumstances surrounding the defendant's allegations." *Id.* In addition, "[a] brief discussion between the trial court and the defendant may be sufficient" to help the trial court understand the defendant's allegations. *Id.* Finally, the trial court may base its evaluation of the defendant's allegations on the court's "knowledge of defense counsel's performance at trial and the insufficiency of the defendant's allegations on their face." *Id.* at 79.

¶ 11 The goal of a preliminary *Krankel* inquiry "is to facilitate the trial court's full consideration of" the defendant's allegations. *People v. Jolly*, 2014 IL 117142, ¶ 29. Moreover, by conducting an initial evaluation of the defendant's allegations in such an inquiry, the trial court "will create the necessary record for any claims raised on appeal." *Id.* ¶ 38. To ensure the goal of the preliminary *Krankel* inquiry is met, "[t]he law requires the trial court to conduct some type of inquiry into the underlying factual basis" of the defendant's allegations, and if no such inquiry is conducted, a cause must be remanded to the trial court for that purpose. *People v. Moore*, 207 Ill. 2d 68, 79, 80 (2003). As the Supreme Court of Illinois has recognized, even where a defendant's claims may ultimately be without merit, the trial court must afford " 'the defendant the opportunity to specify and support his complaints,' " and the trial court may not " 'precipitously and prematurely' " deny the defendant's *pro se* motion. *Id.* at 80 (quoting *People v. Robinson*, 157 Ill. 2d 68, 86 (1993)).

¶ 12 Another issue that can arise in the context of a preliminary *Krankel* inquiry is the scope of the participation of the State therein. The Supreme Court of Illinois has held "that a preliminary *Krankel* inquiry should operate as a neutral and nonadversarial proceeding," and that because the defendant is without new counsel at this stage, "it is critical that the State's participation at that proceeding, if any, be *de minimis*." *People v. Jolly*, 2014 IL 117142, ¶ 38. To that end, "the State should never be permitted to take an adversarial role against a *pro se* defendant at the preliminary *Krankel* inquiry." *Id.* That is because "the purpose of *Krankel* is best served by having a neutral trier of fact initially evaluate the claims at the preliminary *Krankel* inquiry without the State's adversarial participation, creating an objective record for review." *Id.* ¶ 39. When the State participates in an adversarial manner, the record produced "cannot reveal, in an objective and neutral fashion, whether the circuit court properly decided that a defendant is not entitled to new counsel." *Id.* Accordingly, in such cases, a reviewing court may not engage in a harmless-error analysis. *Id.* ¶¶ 40-45. Instead, the remedy when the State has participated in a preliminary *Krankel* inquiry in an adversarial manner, and has thus thwarted the purpose of the inquiry, "is to remand for a new preliminary *Krankel* inquiry before a different judge and without the State's adversarial participation." *Id.* ¶ 46. The *Jolly* holding applies retroactively. *People v. Robinson*, 2015 IL App (1st) 130837, ¶ 79. However, as in any case that is remanded for a proper preliminary *Krankel* inquiry, if following that inquiry and any actions that may flow therefrom, the trial court ultimately determines that the defendant's allegations are without merit, "the court may then deny the motion and leave standing [the] defendant's convictions and sentences." *People v.*

Moore, 207 Ill. 2d 68, 81 (2003). If that happens, the defendant remains free to "appeal his assertion of ineffective assistance of counsel along with his other assignments of error." *Id.* at 81-82.

¶ 13 Turning to the case at bar, we note that the State concedes, and we agree, that based upon the foregoing case law, two errors were made that require this cause to be remanded: (1) the trial judge did not conduct an adequate preliminary *Krankel* inquiry; and (2) the State participated in an adversarial manner in the inquiry that did take place. As explained above, the trial judge asked the defendant's trial counsel if he wished "to be heard" on the defendant's *pro se* motion. Trial counsel perused the motion, which he had not previously seen, and then noted that the defendant was "alleging ineffective assistance of counsel," and that "[a]s such, I would have nothing to comment about his *pro se* motion for a new trial." The trial judge stated, "All right." Counsel for the State then argued that the motion's contentions not related to ineffective assistance of counsel were without merit, and then stated: "With regard to the ineffective assistance of counsel, that refers to matters that are outside of my knowledge and there is really nothing that I can comment on, other than this was an adversarial proceeding." Immediately thereafter, counsel for the State nevertheless did comment, stating in reference to the defendant's trial counsel that trial counsel "did represent and cross-examined his—the witnesses at trial and made the arguments that needed to be made and so I would ask the [c]ourt to deny the motion for a new trial." Without seeking any input from the defendant, any substantive input from the defendant's trial counsel, and/or articulating a basis for denial as a result of his knowledge of trial counsel's performance at trial and/or any

insufficiency in the defendant's allegations on their face, the trial judge then stated: "Motion for new trial is denied." With regard to the first error, we agree with both parties that because the trial judge did not question the defendant about his *pro se* allegations, because the defendant's trial counsel declined to comment on the allegations, and because the trial judge failed to articulate whether he was taking judicial notice of any action or inaction by the defendant's trial counsel, the trial judge's actions were not adequate under *Krankel* and the other cases cited above. With regard to the second error, the State very clearly participated in an adversarial manner in the inquiry that did take place, arguing that with regard to the ineffective assistance of counsel claims, the defendant's motion lacked merit and should be denied. Accordingly, we must we vacate the trial court's order that denied the defendant's *pro se* motion for a new trial, and remand with instructions for the trial court to conduct a proper preliminary *Krankel* inquiry before a different judge and without the State's adversarial participation, said inquiry to include the claims developed on appeal, if the defendant wishes to add those claims to his *pro se* motion. See, e.g., *People v. Jolly*, 2014 IL 117142, ¶ 46.

¶ 14 With regard to the second claim raised on appeal by the defendant—that the defendant received ineffective assistance of trial counsel—in light of our discussion above, we do not believe it would be appropriate for this court to consider the defendant's claims of ineffective assistance of trial counsel at this time. As explained above, the goal of a preliminary *Krankel* inquiry "is to facilitate the trial court's full consideration of" the defendant's allegations. *People v. Jolly*, 2014 IL 117142, ¶ 29. Moreover, by conducting an initial evaluation of the defendant's allegations in such an inquiry, the trial court "will

create the necessary record for any claims raised on appeal." *Id.* ¶ 38. This is desirable because "the purpose of *Krankel* is best served by having a neutral trier of fact initially evaluate the claims at the preliminary *Krankel* inquiry without the State's adversarial participation, creating an objective record for review." *Id.* ¶ 39. At this point in time, no objective record for review has been created by the trial court. The defendant's contentions of ineffective assistance of trial counsel, including as developed on appeal by appellate counsel in his opening and reply briefs, and his oral argument, are serious and of great consequence to the defendant's future. Accordingly, we decline to evaluate them in the absence of an objective, fully-developed record from the trial court, as we believe doing so would usurp the role of the trial court and the purpose of a *Krankel* inquiry. See, e.g., *People v. Jackson*, 158 Ill. App. 3d 394, 401 (1987). We note that regardless of the action ultimately taken by the trial court, the defendant has preserved these issues for future appellate review, should that become necessary. See *People v. Moore*, 207 Ill. 2d 68, 81-82 (2003).

¶ 15 With regard to the third claim raised on appeal by the defendant—that the defendant's conviction for unlawful possession of a weapon by a felon, upon which no sentence was entered, must be vacated as an incomplete judgment—the State concedes that the defendant is correct with regard to the general law on this issue, and that this court is empowered by Illinois Supreme Court Rule 366 (eff. Feb. 1, 1994) to vacate the conviction. See, e.g., *People v. Cunningham*, 365 Ill. App. 3d 991, 994 (2006). We begin by noting that the trial judge made the correct decision when he declined to enter a sentence upon the defendant's conviction for unlawful possession of a weapon by a felon,

as that conviction was a lesser-included offense which merged into the defendant's conviction for aggravated battery with a firearm. We also agree with the parties that under our decision in *Cunningham* and under other decisions of this court, we are authorized by the rules of the Supreme Court of Illinois to vacate the conviction upon which no sentence was entered as it is an incomplete judgment. However, because we do not know what will result from the preliminary *Krankel* inquiry that we have ordered on remand, we conclude it would be premature to vacate the conviction at this time. If, following that inquiry and the actions that may flow therefrom, the trial court ultimately determines that the defendant's motion for a new trial should be denied, and therefore leaves standing the defendant's aggravated battery with a firearm conviction (see *People v. Moore*, 207 Ill. 2d 68, 81 (2003)), the trial court should then vacate the defendant's conviction for unlawful possession of a weapon by a felon, because, as the trial court correctly surmised initially, it would be a lesser-included offense of the aggravated battery with a firearm conviction and would merge therewith. If, however, a different outcome results from the preliminary *Krankel* inquiry, the trial court will need to determine the proper course of action with regard to both convictions, and will be in a better position, as a finder of fact, to do so than would be this court, at this time.

¶ 16 With regard to the fourth claim raised on appeal by the defendant—that the defendant is entitled to credit for 357 days, rather than 337 days, in presentence custody—in its brief on appeal the State concedes that this may be true, but notes that the defendant has failed to cite the dates he used to make his determination, and that therefore it is not clear if the defendant is correct in his assertion. In his reply brief on appeal, the

defendant has specified the dates of his presentence custody, with citation to the record on appeal, said dates being February 8, 2012, to January 31, 2013. At oral argument, the State responded that in fact it is not clear from the record on appeal whether the defendant was in continuous custody during the dates in question. We agree, and we direct the trial court, on remand, to determine the proper amount of credit for presentence custody to which the defendant is entitled and, if necessary, to make any amendments necessary to ensure the defendant receives that credit.

¶ 17

CONCLUSION

¶ 18 For the foregoing reasons, we vacate the trial court's order that denied the defendant's *pro se* motion for a new trial and remand with instructions for the trial court to: (1) conduct a proper preliminary *Krankel* inquiry before a different judge and without the State's adversarial participation, said inquiry to include the claims developed on appeal, if the defendant wishes to add those claims to his *pro se* motion; (2) determine the proper course of action with regard to the possible merger of the defendant's convictions, as explained in detail above; and (3) determine the proper amount of credit for presentence custody to which the defendant is entitled and to, if necessary, make any amendments necessary to ensure the defendant receives that credit.

¶ 19 Order denying motion for new trial vacated; cause remanded with instructions.