2017 IL App (1st) 143296-U

No. 1-14-3296

October 31, 2017

Second Division

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).

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 13 CR 16298
	)	
RAFAEL AVILA,	)	Honorable
	)	Thomas P. Fecarotta, Jr.,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE NEVILLE delivered the judgment of the court.
Justices Pucinski and Mason concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's remarks during sentencing did not constitute a clear posttrial claim of ineffective assistance of counsel requiring a *Krankel* inquiry; mittimus amended to correct name of offense; Child Pornography Fine vacated.

¶ 2 Following a bench trial, Rafael Avila, the defendant, was convicted of four counts of criminal sexual assault and two counts of aggravated criminal sexual abuse for acts perpetrated against his daughter over a span of two years. Defendant was sentenced to consecutive terms of four years' imprisonment for each count of sexual assault. He also received three years'

imprisonment for each count of sexual abuse to be served concurrently, but consecutive to the assault convictions, for an aggregate sentence of 19 years' imprisonment.

¶ 3 On appeal, defendant contends that the trial court erred when it failed to conduct an inquiry into his clear *pro se* posttrial claim of ineffective assistance of counsel pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984). Defendant also contends, and the State agrees, that his mittimus should be amended to correct the name of one of the offenses, and that the $500 Child Pornography Fine should be vacated. We correct the mittimus, vacate the fine, and affirm defendant's convictions in all other respects.

¶ 4 Defendant does not challenge his convictions or sentences, and thus, a limited discussion of the facts of this case is sufficient. At trial, defendant's daughter, W.A., testified that nearly every day between August 2011 and July 31, 2013, defendant committed acts of criminal sexual assault and/or criminal sexual abuse against her. W.A. provided specific details of numerous acts. She was 13 and 14 years old during that time. A swab taken from W.A.'s breast contained defendant's DNA.

¶ 5 Following the State's case, the trial court granted defendant's motion for a directed finding as to the charge that he made contact between his mouth and W.A.'s vagina. Defendant confirmed that he did not wish to testify and rested his case.

¶ 6 The trial court found that W.A.'s testimony was "incredibly credible." The court also noted that defendant's DNA was found on W.A.'s breast. Consequently, the court found defendant guilty of four counts of criminal sexual assault for making contact between his penis and W.A.'s vagina, his penis and her anus, his penis and her mouth, and his finger and her

vagina. The court also found defendant guilty of two counts of aggravated criminal sexual abuse for making contact with W.A.'s breast with his hand and mouth.

¶ 7 Immediately following the guilty finding, defendant raised his hand and stated that he wanted to speak with the court. The court advised defendant to speak with defense counsel first. Counsel advised defendant that he would have a right of allocution at sentencing. Defendant insisted, however, that he wanted to address the court. The following exchange then occurred:

> "THE DEFENDANT: Like I was saying with all due respect, with all those that are present thank you very much for being here. My work team, thank you very much. You did a fine job. Honestly, I didn't want to get on the witness stand. I did that voluntarily because I left all this in God's hands. It wasn't in my hands. What I wanted to prove I did prove with all my heart and sincerely I say to you without disrespect, like I told my wife that is present, I told her I didn't do anything.
>
> THE COURT: Hold on a second. I'm not going to let you go into this now. You can make your statement appropriately at the appropriate time. I'm not going to allow you to do this. Put your hand down. No. No. Do not interrupt me.
>
> What I wanted to do was to give you the opportunity to speak because the law requires me to do so to inquire as to whether you had dissatisfaction with your lawyers. Since that is not where you're going with this and you want to explain away or explain your conduct after my finding prior to having a sentencing hearing or prior to me having a hearing on post trial motions would be improper for me to do.
>
> So I will give you another opportunity to address the Court at the appropriate time."

¶ 8 At sentencing, the trial court allowed defendant to speak at great length in his statement of allocution, which spans 15 pages of the report of proceedings. Therein, defendant asked the court to reconsider granting him a new trial. Defendant stated:

> "I don't know what Ms. Anne [defense counsel] does here because it's been very difficult for me to see her again in this case. From the beginning I told you that I had no communication with her. From the beginning I told Ms. Anne I know my rights. Not entirely like an American citizen, but no more than two hours ago I asked her just one question, my Attorney, had she had been able to contact a detective to go ahead and try to really investigate things in my favor, not only the things that are against me, and she said no. Afterwards I had outside here, outside this room that we're in here, Ms. Anne started talking about my case with the sheriffs and this led me to believe she is working with the State.
>
> I have a detective who can come here. The things I'm telling you truthful, at the same time all the things that I'm telling you are the truth. Ms. Anne put my life in risk when she talked about confidential things outside. And she has done it before and it was a person from the penitentiary and she did it before. I am sorry that I am telling you now at this time but I didn't have the opportunity to talk to you about this. This is the second time that I had a confrontation. She will put my life at risk and she is talking about confidential things.
>
> Secondly, I can assure you I have over 500 days in the correctional. I asked Ms. Anne many things that I would like, truth to prove my innocence. And I repeat the person that knows the most in this room is – the people that knows my daughter Erika the best –

I mean [W.A.], are my wife Erika and me. Like I told one time Ms. Anne, the things that I am asking you, they are not big things. In three days I can get those proofs, I need three days and that is not too long. Those proofs are really very important to prove my innocence.

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Ms. Anne and I didn't have the correct communication. Made comments to you more than once, not only once. Ask Ms. Camilla all what I'm telling you. I ask to change my Attorney because she was not working for me."

¶ 9 Defendant continued by stating that he would bring in the "necessary proofs," including the police. He also stated that he had a cellulitis infection and could only move his head from left to right. Defendant also said he could bring a letter from his daughter regarding what she said when he was arrested. Defendant stated that he had several problems at home with his wife and daughter, and that he had made mistakes in the past, but was improving himself while in custody.

¶ 10 Midway through defendant's statement, the court noted that he had been speaking for almost an hour. The court then stated:

"Let me tell you something, this is your opportunity to address the Court for purposes of sentencing, I'm not going to listen to a retrial of the case, that's already been done. Now, I will let you speak but a lot of this is you want to retry the case and that's not what this is. What I want you to do, this is your opportunity to tell me why I shouldn't pose a fair and just sentence and what that sentence should be. I don't want to prevent you from saying anything but I certainly don't want to rehash the facts of the case."

Defendant handed the court a letter of support from a priest. He then concluded his statement of allocution by discussing his spiritual faith and asking the court for "very good consideration."

¶ 11 The trial court stated that it considered the evidence and arguments in aggravation and mitigation, and commented that it appreciated defense counsel's "professional demeanor and hard work in this case." The court then stated:

> "At no time does the Court recall that Mr. Avila stated he wanted to change Ms. Dykes as his lawyer, in fact I remember at the end of the trial he thanked his lawyer and he thanked the Court. But be that as it may, the defendant has a right to speak on his own behalf. The Court will be patient and listen intently and be open-minded in his allocution."

¶ 12 The court stated that it considered the statutory sentencing factors in aggravation and mitigation, and the information contained in the presentence investigation report. It also stated that it had listened to defendant's statement in allocution "intently." The court then sentenced defendant to consecutive terms of four years' imprisonment for each of the four sexual assault convictions. It also sentenced him to three years' imprisonment for each count of sexual abuse, to be served concurrently with each other, and consecutive to the assault convictions, for an aggregate sentence of 19 years' imprisonment.

¶ 13 On appeal, defendant first contends that the trial court failed to conduct an inquiry into his *pro se* posttrial claim of ineffective assistance of counsel pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984). Defendant claims that during his statement of allocution, he raised a clear allegation that counsel refused to investigate and discover evidence that was favorable to him. He asserts that he clearly alleged that counsel failed to introduce evidence of his cellulitis

infection which made it impossible for him to move his head in the way his daughter claimed. He also asserts that he clearly stated that he had a letter from his daughter that supported his innocence. Defendant argues that this court must remand his case for a *Krankel* inquiry.

¶ 14 The State responds that the trial court conducted a sufficient inquiry because it allowed defendant to present his arguments in great detail. It argues that after listening to defendant, the court properly determined that his claims of ineffective assistance of counsel were without merit. The State further asserts that although defendant discussed his cellulitis infection and a letter from his daughter, he did not state that counsel was aware of this evidence, or explain how it was favorable to his case.

¶ 15 Where defendant raises a *pro se* posttrial claim that trial counsel rendered ineffective assistance, the trial court is required to examine the factual basis of the claim to determine if it has any merit. *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003). The court can evaluate defendant's *pro se* claim by either discussing the allegations with defendant and asking for more specific details, questioning trial counsel regarding the facts and circumstances surrounding defendant's allegations, or relying on its own knowledge of counsel's performance at trial and determining whether the allegations are facially insufficient. *Id.* at 78-79. On review, the appellate court's primary concern is whether the trial court conducted an adequate inquiry into defendant's *pro se* claims. *Id.* at 78.

¶ 16 Here, the parties disagree as to whether or not the trial court conducted an inquiry into defendant's alleged claims. Consequently, they disagree about the appropriate standard of review. Defendant asserts that no inquiry was made into his claims, and therefore, our review is *de novo*. *People v. Washington*, 2015 IL App (1st) 131023, ¶ 11. The State, on the other hand,

claims that the trial court conducted an inquiry and found that defendant's claims were without merit, and thus, we review the court's ruling to determine if it was manifestly erroneous. *People v. Tolefree*, 2011 IL App (1st) 100689, ¶ 25.

¶ 17 When reading the trial court's commentary during its sentencing pronouncement in context, we find that the court did not conduct a *Krankel* inquiry. The court remarked that it did not recall defendant ever stating that he wanted to change his lawyer, and noted that he thanked counsel at the end of trial. However, the record shows that the court did not render any consideration of any alleged claims of ineffective assistance of counsel. Therefore, our review is *de novo*. *Washington*, 2015 IL App (1st) 131023, ¶ 11.

¶ 18 Although the pleading requirements for raising a *pro se* claim of ineffective assistance of counsel are somewhat relaxed, defendant must still meet the minimum requirements necessary to trigger a preliminary inquiry by the trial court. *Washington*, 2015 IL App (1st) 131023, ¶ 11. Mere awareness by the trial court that defendant complained of counsel's representation imposes no duty on the court to *sua sponte* investigate his complaint. *Id.* Moreover, when defendant makes a "rambling" statement that may be amendable to more than one interpretation, his remarks are insufficient to require a *Krankel* inquiry. *People v. Taylor*, 237 Ill. 2d 68, 77 (2010). Our supreme court recently clarified that the trial court's duty to conduct a *Krankel* inquiry is triggered "when a defendant brings a *clear claim* asserting ineffective assistance of counsel, either orally or in writing." (Emphasis added.) *People v. Ayres*, 2017 IL 120071, ¶ 18.

¶ 19 Here, the record reveals that defendant did not present a clear claim that defense counsel refused to investigate and discover evidence that was favorable to him. During his allocution at sentencing, defendant stated "*no more than two hours ago* I asked her just one question, my

Attorney, had she had been able to contact a detective to go ahead and try to really investigate things in my favor, not only the things that are against me, and she said no." (Emphasis added.) When read in context, defendant's statement was that, just that very day, *i.e.*, a month after he had been found guilty at trial, he asked counsel if she had contacted a detective, and she replied no. Defendant did not claim that counsel had rendered ineffective assistance by refusing to investigate his case in preparation for trial.

¶ 20 Nor did defendant clearly allege that counsel failed to introduce evidence of his cellulitis infection and a letter from his daughter that supported his innocence. The record shows that during his allocution, defendant asked the court to allow him three days to obtain proof of his innocence, including proof of his medical condition and the letter from his daughter. Defendant did not state that he had notified counsel about this evidence, or that she was aware of this specific evidence and failed to introduce it.

¶ 21 The record shows that from the moment he was found guilty, defendant persistently pleaded his innocence to the court. As he began his statement of allocution, he asked the court to reconsider granting him a new trial. After allowing defendant to speak for almost an hour, the trial court expressly stated that defendant was attempting to retry the case. The court stated that it had listened intently to defendant's statement. It specifically noted that it did not recall defendant ever stating that he wanted to replace counsel, and in fact, that he had thanked her at the end of the trial. The record thus shows that the trial court did not find that defendant was presenting a claim of ineffective assistance of counsel, but instead, it interpreted defendant's rambling statement as an attempt to retry the case. We agree with the trial court's assessment.

¶ 22 Some of defendant's statements in his lengthy allocution may be amendable to more than one interpretation. Those statements, however, fall short of constituting a clear claim of ineffective assistance of counsel. Accordingly, defendant's statements did not trigger the trial court's duty to conduct a *Krankel* hearing. *Ayres*, 2017 IL 120071, ¶ 18.

¶ 23 Defendant next contends, and the State agrees, that his mittimus should be amended to correct the name of one of the offenses of which he was convicted. For Count 15, the mittimus incorrectly indicates that the name of the offense is aggravated criminal sexual *assault*. The record shows, however, that under Count 15, defendant was charged and convicted of aggravated criminal sexual *abuse*. We direct the clerk of the circuit court to amend the mittimus to reflect that for Count 15, the correct name of the offense is aggravated criminal sexual abuse.

¶ 24 Finally, defendant contends that the $500 Child Pornography Fine assessed under section 5-9-1.14 of the Unified Code of Corrections (730 ILCS 5/5-9-1.14 (West 2014)) must be vacated. He asserts that the fine was erroneously assessed to him as it only applies to convictions for child pornography, and he was not convicted of such offense.

¶ 25 Defendant acknowledges that he failed to preserve this issue for appeal because he did not challenge the fine in the trial court. It is well settled that a defendant forfeits a sentencing issue that he fails to raise in the trial court through both a contemporaneous objection and a written postsentencing motion. *People v. Hillier*, 237 Ill. 2d 539, 544 (2010). He urges this court, however, to review his claim under the second prong of the plain error doctrine. The State does not argue against the forfeiture, but instead, addresses the merits of the issue and asserts that this court may correct the fines and fees order pursuant to our authority under Illinois Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999).

¶ 26 We disagree that defendant's challenge is reviewable under the plain error doctrine. *People v. Grigorov*, 2017 IL App (1st) 143274, ¶ 15; *People v. Griffin*, 2017 IL App (1st) 143800, ¶ 9. We further disagree that we can reach the merits of defendant's claim under Rule 615(b). *Grigorov*, 2017 IL App (1st) 143274, ¶¶ 13-14. However, the rules of forfeiture and waiver also apply to the State, and where the State fails to argue that defendant has forfeited the issue, it waives the forfeiture. *People v. Bridgeforth*, 2017 IL App (1st) 143637, ¶ 46. Here, the State has not argued that the issue is forfeited, and thus, we address the merit of defendant's claim.

¶ 27 The State concedes, and we concur, that the $500 Child Pornography Fine was erroneously assessed to defendant because that fine only applies to persons convicted of the offense of child pornography. Given the State's concession of error, the better course would have been for both counsel to agree to resolve the issue by presenting a stipulation to the trial court. We encourage counsel in criminal cases to confer in order to resolve such errors by agreement. We direct the clerk of the circuit court to amend the fines, fees and costs order by vacating the fine.

¶ 28 For these reasons, we amend the mittimus, vacate the $500 Child Pornography Fine from the fines, fees and costs order, and affirm defendant's convictions in all other respects.

¶ 29 Affirmed as modified; mittimus amended; fines, fees and costs order amended.