2017 IL App (4th) 140576-U

NO. 4-14-0576

FILED
April 25, 2017
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.	)	Adams County
SHANE D. HARVEY,	)	No. 13CF394
Defendant-Appellant.	)	
	)	Honorable
	)	Scott H. Walden,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Harris and Pope concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Because the trial court conducted no inquiry into defendant's claim of ineffective assistance of trial counsel presented in his posttrial motion, the case is remanded for the court to conduct an adequate inquiry.

(2) The case is remanded to the trial court for the application of *per diem* credit toward an imposed fine.

(3) Defendant forfeited review of issues pertaining to the erroneous imposition of fees and failed to demonstrate that the errors were subject to plain-error review.

¶ 2 Defendant, Shane D. Harvey, appeals from his conviction of domestic battery. The trial court sentenced defendant to three years in prison. Defendant claims the trial court erred when it failed to conduct an inquiry into his claim of ineffective assistance of counsel, which he presented in his *pro se* posttrial motion. He also challenges the imposition of certain fines and fees and claims he is entitled to additional *per diem* credit. For the reasons that follow, we remand the case to the trial court for an inquiry into defendant's ineffective assistance of counsel

claim and for the application of appropriate *per diem* credit. We find defendant forfeited review of his claims pertaining to the imposition of fees. We otherwise affirm as modified.

¶ 3 I. BACKGROUND

¶ 4 On June 20, 2013, the State charged defendant by information with one count of domestic battery (720 ILCS 5/12-3.2(a)(1) (West 2012)), alleging he caused bodily harm to his ex-girlfriend, Michelle Dierker, by striking her in the mouth with his fist. Defendant was charged with a Class 4 felony due to a prior aggravated-battery conviction. 720 ILCS 5/12-3.2(b) (West 2012). At his July 3, 2013, preliminary hearing, defendant knowingly waived his right to counsel and proceeded *pro se*. However, at an August 30, 2013, pretrial hearing, defendant requested the appointment of counsel for trial. The trial court appointed the public defender.

¶ 5 After a November 18, 2013, trial, the jury found defendant guilty. The court ordered the preparation of a presentence investigation report (PSI). Defendant filed a posttrial motion, through counsel, claiming the trial court had erred by prohibiting defendant from questioning a police officer about the victim's admission that she had lied during the course of the investigation. Defendant requested a judgment notwithstanding the verdict or, in the alternative, a new trial. The motion was denied.

¶ 6 On February 4, 2014, the trial court sentenced defendant to the maximum sentence of three years in prison, followed by a four-year mandatory-supervised-release term. The court ordered defendant to pay enumerated fines and fees. Defendant indicated he wanted to appeal, so the court appointed the office of the State Appellate Defender (OSAD). OSAD filed the appeal, which this court docketed as case No. 4-14-0100.

¶ 7 While the appeal was pending, on March 6, 2014, defendant filed a *pro se* "petition for reduced sentence," alleging, *inter alia*, that his trial counsel should have pointed out

several errors that appeared in the PSI—errors which, defendant claimed, caused the trial court to impose the maximum sentence. Defendant did not raise any issue regarding the imposition of fines, fees, or *per diem* credit. Upon this filing, the trial court reappointed defendant's trial counsel. Meanwhile, on April 16, 2014, this court granted OSAD's motion for the voluntary dismissal of the pending appeal. *People v. Harvey*, No. 4-14-0100 (Apr. 16, 2014) (dismissed on defendant's motion).

¶ 8 On June 25, 2014, at a hearing on defendant's motion to reconsider his sentence, defendant's counsel indicated she wished to stand on defendant's *pro se* motion. After considering arguments of counsel, the trial court entered an order denying defendant's motion. This appeal followed.

¶ 9 II. ANALYSIS

¶ 10 A. *Krankel* Inquiry

¶ 11 Defendant first contends the trial court erred by failing to conduct any inquiry into his claim that his counsel had rendered ineffective assistance. Defendant contends the mere mention of counsel's alleged error was sufficient to trigger a *Krankel* inquiry. See *People v. Krankel*, 102 Ill. 2d 181 (1984) (when a defendant raises a claim of ineffective assistance of counsel, the trial court should examine the factual basis of the claim in a preliminary inquiry to determine whether new counsel should be appointed). Specifically, in his *pro se* motion to reduce his sentence, defendant had stated: "Several points in the PSI were incorrect (which should have been argued by 'my' public defender at sentencing)." This statement, he alleges, should have triggered the trial court to at least question or conduct a preliminary investigation into the facts.

¶ 12 The record indicates that at a status hearing, after defendant had filed his *pro se* motion, the following exchange occurred between the trial court and defendant's public defender (the same counsel who represented defendant at trial and sentencing):

"THE COURT: *** [Defendant] has filed a motion to reduce sentence. Ms. Henze [(defense attorney)], have you had an opportunity to review that?

MS. HENZE: Your Honor, I have. I don't have a good recollection of Your Honor saying all of the things [defendant] says you said, so I think I need to order a transcript from the sentencing hearing.

THE COURT: Did he express some dissatisfaction with his trial counsel?

MS. HENZE: Not in this motion.

THE COURT: Not in that motion.

MS. HENZE: He certainly has directly to me, but he didn't express it in the motion. I don't think there's any reason to appoint other counsel; it might come to that. But I would ask that we go approximately four weeks and get the transcript from the sentencing hearing which would have occurred on February 4 [, 2014]."

¶ 13 At the hearing on defendant's posttrial motion, the following exchange occurred:

"MS. HENZE: Your Honor, I would just ask that the petition stand on its own, and that would be the, for the record, the petition filed *pro se* by [defendant].

Pursuant to my certificate, I have examined the transcripts of the sentencing hearing and of the trial. I don't believe there are any additional items to bring up or any changes to be made to his *pro se* motion.

I would ask that it stand. I know Your Honor, excuse me, has reviewed it.

THE COURT: Thank you. Mrs. Rodriguez [(Assistant State's Attorney)]?

MS. RODRIGUEZ: Your Honor, likewise, the sentencing transcript has been reviewed. This was a jury trial, at which the defendant was found guilty. The court in rendering the sentence that you did certainly set forth specific findings on—considered all the factors in aggravation and mitigation.

Those were all properly considered in arriving at the three-year sentence in this case.

It appears to me that the defendant takes issue with some information in the [PSI], but they're certainly not things that affected the sentence that the court rendered.

THE COURT: Excuse me, Mrs. Rodriguez. I'm sorry I'm making noise. I'm just cutting open the PSI."

¶ 14 The State goes on to reiterate defendant's claims as stated in his motion, without mentioning the three alleged errors in the PSI that he contends his counsel should have challenged. At the hearing, the trial court addressed neither those alleged errors in the PSI nor defendant's contention that counsel failed to address those alleged errors at sentencing.

¶ 15 The issue in this appeal is whether defendant's statement in his *pro se* posttrial motion was sufficient to trigger a *Krankel* inquiry by the trial court. The issue of whether the trial court properly conducted a preliminary *Krankel* inquiry presents a legal question that we review *de novo*. *People v. Jolly*, 2014 IL 117142, ¶ 28.

¶ 16 Under *Krankel* and its progeny, when a defendant presents a *pro se* posttrial motion alleging ineffective assistance of counsel, the trial court must conduct some type of

inquiry into the underlying factual basis of the defendant's claims. *People v. Moore*, 207 Ill. 2d 68, 79 (2003). If the allegations "show possible neglect of the case," the court should appoint new counsel to represent the defendant at an evidentiary hearing on his *pro se* claims. *Moore*, 207 Ill. 2d at 77-78. However, if, after the preliminary inquiry, the trial court determines that the claims lack merit or pertain only to matters of trial strategy, the court may deny the *pro se* motion without appointing counsel. *Moore*, 207 Ill. 2d at 78.

¶ 17 "[T]he goal of any *Krankel* proceeding is to facilitate the trial court's full consideration of a defendant's *pro se* claims of ineffective assistance of trial counsel and thereby potentially limit issues on appeal." *Jolly*, 2014 IL 117142, ¶ 29. After the parties submitted their briefs in this appeal, our supreme court, in an opinion filed February 17, 2017, addressed the issue of how much detail a defendant needs to present on his posttrial claim of ineffective assistance to trigger a trial court's *Krankel* inquiry. *People v. Ayres*, 2017 IL 120071, ¶ 9. The *Ayres* court recognized the appellate courts were split on this issue. *Ayres*, 2017 IL 120071, ¶ 9. The Second District had held in several cases that a bare claim warrants inquiry. *Ayres*, 2017 IL 120071, ¶ 9. Our court and the First District have held that a bare allegation is insufficient and a defendant must meet minimal requirements by asserting some facts in support. *Ayres*, 2017 IL 120071, ¶ 9. The supreme court sided with the Second District's line of decisions. *Ayres*, 2017 IL 120071, ¶ 24 (abrogating this court's decision in *Montgomery*, where we held there are " 'minimum requirements a defendant must meet in order to trigger a preliminary inquiry by the circuit court.' " *People v. Montgomery*, 373 Ill. App. 3d 1104, 1121 (2007) (quoting *People v. Ward*, 371 Ill. App. 3d 382, 431 (1st Dist. 2007))).

¶ 18 In *Ayres*, the court relied on principles previously espoused in *Moore*. Namely, the court noted a *pro se* defendant is not required to do anything more than bring his claim to the

trial court's attention. *Ayres*, 2017 IL 120071, ¶ 11 (citing *Moore*, 207 Ill. 2d at 79). At that point, the trial court must conduct some type of inquiry into the defendant's claim. *Ayres*, 2017 IL 120071, ¶ 11 (citing *Moore*, 207 Ill. 2d at 79). The concern is whether the trial court conducted an adequate inquiry into the defendant's claims. *Ayres*, 2017 IL 120071, ¶ 11 (citing *Moore*, 207 Ill. 2d at 78). The goal of a proper *Krankel* proceeding is to create a record for appellate purposes. *Ayres*, 2017 IL 120071, ¶ 9 (citing *Moore*, 207 Ill. 2d at 81).

¶ 19 With these principles in mind, the *Ayres* court held that, in order to "comport[] with [the] post-*Krankel* jurisprudence," including *Moore*, "when a defendant brings a clear claim asserting ineffective assistance of counsel, either orally or in writing, this is sufficient to trigger the trial court's duty to conduct a *Krankel* inquiry." *Ayres*, 2017 IL 120071, ¶ 18. The *Ayres* court stated: "Our holding in *Moore* supports a conclusion that a claim need not be supported by facts or specific examples." *Ayres*, 2017 IL 120071, ¶ 19. That is, to comply with the primary purpose of *Krankel* by allowing the defendant the opportunity to "flesh out" his claim before the trial court so the court can determine whether new counsel should be appointed, all a defendant is required to do is make an "express claim of ineffective assistance of counsel." *Ayres*, 2017 IL 120071, ¶ 21.

¶ 20 Prior to *Ayres*, this court found bare, conclusory, or "rambling" statements of an "unhappy position," without a specific claim of ineffective assistance of counsel or supporting facts, were not sufficient to trigger a preliminary inquiry by the trial court. *Montgomery*, 373 Ill. App. 3d at 1120-21. However, after *Ayres*, our supreme court has made it clear a defendant's burden should not be so great. Post-*Ayres*, a defendant is required only to raise "a clear claim asserting ineffective assistance of counsel," not pinpoint a " 'particular action that counsel took or neglected to take.' " *Ayres*, 2017 IL 120071, ¶¶ 17-18. A defendant's claim "need not be

supported by facts or specific examples." *Ayres*, 2017 IL 120071, ¶ 19. The trial court will need to gather further and necessary information during its resulting preliminary inquiry, while making the requisite record for any claims raised on appeal.

¶ 21 Here, as in *Ayres*, the trial court failed to conduct *any* inquiry into (1) defendant's stated claim in his *pro se* posttrial motion that his trial counsel had failed to challenge the veracity of information contained in the PSI, and (2) counsel's comments to the court that defendant had expressed to her his dissatisfaction with her representation. Without the court's initial inquiry into defendant's claims, we have no record to review on appeal. *Ayres*, 2017 IL 120071, ¶ 21 ("Absent such a record, as in the case at bar, appellate review is precluded."). From *Ayres*, we conclude a defendant is required only to express his dissatisfaction with his counsel's representation to trigger a preliminary inquiry by the trial court. After such an inquiry, the court would then decide whether the claim lacks merit or whether the claim is sufficient to justify the appointment of new counsel. Because the trial court did not conduct *any* inquiry, in light of *Ayres*, we remand the case back to the trial court for that stated purpose.

¶ 22 B. Fines and Fees

¶ 23 Defendant next contends some of his fines and fees were improperly assessed and that he did not receive the proper *per diem* credit to which he was entitled. The State concedes error on one of defendant's contentions and argues, for the remainder of the claims, defendant has forfeited review by not raising them in the trial court. Defendant, in turn, claims we may consider the issues under the plain-error doctrine.

¶ 24 First, the State concedes error regarding defendant's claim that the $20 court-appointed special advocate (CASA) fee is comparable to the Children's Advocacy Center (CAC) fee, is actually a fine, and subject to the application of *per diem* credit. We accept the State's

concession without invoking the plain-error rule. See *People v. Buffkin*, 2016 IL App (2d) 140792, ¶ 11 (confession of error permits review of an otherwise precluded claim). Further, forfeiture does not apply to defendant's statutory right to *per diem* credit. *People v. Woodard*, 175 Ill. 2d 435, 455-57 (1997). We remand this case to the trial court for the purpose of applying the $5 *per diem* credit toward the $20 CASA assessment. See *People v. Millsap*, 2012 IL App (4th) 110668, ¶ 30 (notwithstanding the statutory label of fee, the CAC fee is actually a fine).

¶ 25 For the remainder of defendant's claims, he contends: (1) the $2 State's Attorney automation fee is actually a fine and is subject to *per diem* credit; (2) the Sheriff's fee was improperly assessed; (3) the circuit clerk should not have assessed the $250 deoxyribonucleic acid fee because defendant was already in the database; and (4) the trial court should not have assessed the $10 Crime Stoppers assessment. This court has previously determined that the $2 State's Attorney automation fee (55 ILCS 5/4-2002(a) (West 2012) (amended by Pub. Act 97-673, §5 (eff. June 1, 2012))), is a fee, not a fine, because it is intended to reimburse the State's Attorneys for record-keeping expenses and is not punitive in nature. *People v. Warren*, 2016 IL App (4th) 120721-B, ¶ 115 (The assessment is a fee because it is intended to reimburse the State's Attorneys for their expenses related to automated record-keeping systems.)). Because it is a fee, the $2 State's Attorney automation assessment is not subject to the *per diem* credit. 725 ILCS 5/110-14 (West 2012).

¶ 26 The remainder of defendant's contentions of error relate to the imposition of fees, not fines. As such, we find the claims do not rise to the level of errors affecting the fundamental fairness or integrity of the judicial process. *Cf. People v. Lewis*, 234 Ill. 2d 32, 48 (2009) (imposition of a fine without an evidentiary basis implicates fundamental fairness and the integrity of the judicial process sufficient to apply plain-error review). Defendant has not

explained how the plain-error doctrine may be applied to review the imposition of fees. Instead, defendant cites cases applying plain error to challenges regarding the imposition of fines, not fees. As such, we agree with the State that defendant forfeited review of the issues he raises in this appeal pertaining to the imposition of fees. Such issues were not raised in the trial court proceedings, are forfeited, and are not subject to plain-error review.

¶ 27 III. CONCLUSION

¶ 28 For the reasons stated, we remand the case to the trial court to conduct a *Krankel* inquiry into defendant's claims of ineffective assistance of counsel. We also remand the case to the trial court for the purpose of applying *per diem* credit to the $20 CASA fine imposed. Otherwise, we affirm the trial court's judgment as modified. Because the State has in part successfully defended a portion of the criminal judgment, we grant the State its statutory assessment of $50 against defendant as costs of this appeal. See *People v. Smith*, 133 Ill. App. 3d 613, 620 (1985) (citing *People v. Nicholls*, 71 Ill. 2d 166, 179 (1978)).

¶ 29 Affirmed as modified and cause remanded with directions.