2018 IL App (1st) 150978-U

THIRD DIVISION
June 27, 2018

Modified upon denial of rehearing July 18, 2018

No. 1-15-0978

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. 11 CR 12410 (03)
	)	
CARDELL TAYLOR,	)	The Honorable
	)	Geary W. Kull,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Cobbs and Justice Lavin concurred in the judgment.

MODIFIED ORDER UPON DENIAL OF REHEARING

HELD: Remand required for the limited, and sole, purpose of the holding of a *Krankel* inquiry into the specific ineffectiveness claim raised in the posttrial motion for new trial; where defense counsel, rather than defendant *pro se*, raised her own ineffectiveness for failing to secure agreement with State regarding witness testimony, duty nevertheless fell upon trial court pursuant to *Krankel* to conduct adequate inquiry into that claim, which it did not satisfy herein. Additionally, jurisdiction is retained.

¶ 1 Following a jury trial, defendant Cardell Taylor (defendant) was convicted of eight counts of first degree murder, with four to merge. The jury additionally found that defendant committed the murder pursuant to a contract, agreement or understanding, and that he personally discharged a firearm that proximately caused death. He was sentenced to four concurrent terms of 70 years in prison. He appeals, contending that the trial court erred in denying his motion to suppress his statements to police where his diminished intellectual capacity, coupled with the stress of interrogation, rendered him incapable of knowingly and intelligently waiving his *Miranda* rights; that the State committed severe and repeated prosecutorial misconduct during trial, with each individual instance, as well as their cumulative effect, causing him substantial prejudice; that the trial court erred in failing to conduct a *Krankel* hearing (see *People v. Krankel* 102 Ill. 2d 181 (1984)) where trial counsel confessed to providing ineffective assistance; and that his sentence and mittimus must be corrected pursuant to the one-act, one-crime rule. He asks that we reverse his convictions and remand for a new trial or, alternatively, that we remand his case for the trial court to conduct a *Krankel* inquiry. He further asks that we vacate seven of his eight convictions and adjust his mittimus accordingly. For the following reasons, we remand defendant's case for the limited purpose of conducting a hearing on his *Krankel* claims, and we retain jurisdiction.

¶ 2 BACKGROUND

¶ 3 The instant cause arose from events that occurred on the evening of July 11, 2011, in the parking lot of Dominican Priory Park in River Forest, Illinois. The victim-decedent, Chevron Alexander, was shot once in the face and three times in the shoulder while sitting in the front passenger seat of a car parked in that lot. Two codefendants, Devin Bickham, Sr. and Devin

Bickham, Jr., were also tried for this crime. Their trials were simultaneous with each other but severed, and otherwise completely separate, from defendant's trial. Codefendant Devin Bickham, Sr., who was the victim's fiancé (albeit married to another woman) and with the victim at the time of the crime, was convicted of first degree murder with the additional findings that he committed the murder with a firearm and in a cold, calculated and premeditated manner. While his cause was remanded for a minor sentencing issue, his conviction was affirmed by this Court on appeal. See *People v. Devin Bickham, Sr.*, No. 1-14-2895 (July 19, 2017) (*modified upon denial of rehearing*) (unpublished order under Illinois Supreme Court Rule 23, *pet. for leave to appeal denied*, No. 122578, 419 Ill. Dec. 671 (Ill. Nov. 22, 2017)). Codefendant Devin Bickham, Jr., codefendant Devin Bickham, Sr.'s son, was convicted of first degree murder with the additional findings that he committed the murder with a firearm and did so pursuant to a contract, agreement or understanding to receive something of value or procured another to commit the murder for something of value. With the vacation of lesser included offenses and the correction of his mittimus, his conviction was also affirmed by this Court on appeal. See *People v. Devin Bickham, Jr.*, No. 1-14-2984 (Mar. 22, 20170 (unpublished order under Illinois Supreme Court Rule 23, *pet. for leave to appeal denied*, No. 122174, 417 Ill. Dec. 838 (Ill. Sep. 27, 2017), *cert. denied Bickham v. Illinois*, No. 17-8581, 2018 WL 1912552 (June 25, 2018)).

¶ 4 Since we find that limited remand is in order in the instant cause based upon what occurred posttrial in defendant's particular case, we present only those facts relevant to that determination.

¶ 5 At the conclusion of defendant's jury trial, defense counsel filed an amended motion for

new trial, preserving a variety of claims. In paragraph 37 of the motion, counsel claimed that defendant was "severely prejudiced" when the State "refused to honor an agreement regarding the stipulated direct testimony of Bryan Johnson." Counsel explained that this witness' testimony would have gone directly to the identification of Devin Bickham, Jr. as the shooter and would have supported the defense's contention that defendant did not kill the victim, thus making Johnson's testimony "key to the defense strategy." Johnson, however, was not called by the State to testify, contrary to this agreement counsel believed she had with the State and upon which she had relied. Counsel further stated that, had she known that the State would not call Johnson to testify as otherwise agreed, she never would have answered ready for trial. Then, in paragraph 38 of the motion for new trial, defense counsel stated that she "was ineffective for failing to secure an agreement providing that neither side could back out of the stipulation to put into evidence the direct examination of Bryan Johnson."

¶ 6 At the hearing on the motion, when the trial court afforded defense counsel the first opportunity to speak, she told the court she "would like to rest on the motion as it's written, but *** would like to reserve the right to respond to anything that [the prosecutor] says." The trial court allowed this and turned to the prosecutor, asking if there was anything he would like to address from defendant's posttrial motion. The prosecutor commented on a few issues raised therein, including an alleged outburst that had occurred during trial in the presence of the jury involving the attorneys, a concern regarding jury instructions, and statements made during closing argument. Then, the prosecutor turned to paragraphs 37 and 38 of the motion, explaining that, contrary to defense counsel's insistence, "there was no agreement" regarding Johnson's

testimony and that, after defendant's opening statement, the State had "made a strategic decision not to call" that witness. The prosecutor commented that it was "rare" for a defense attorney to argue in a posttrial motion that she was ineffective and, although she had, he believed she was not ineffective. The court allowed defense counsel to respond, as promised, whereupon counsel explained her disagreement with the prosecutor's characterization and effect of the alleged outburst, and then told the court she did not need to argue her point about the agreement or nonagreement regarding Johnson's testimony again because "the parties have made their positions clear" and that the "record is clear" on this issue.

¶ 7 The trial court spent the next portion of its colloquy addressing counsels' argument regarding the alleged outburst, finding that, although it was an emotional moment, what ensued did not affect the jury or deny defendant a fair trial. The court then stated that "[a]s to everything else, I think I ruled on it." The court addressed one additional instance of potential error on its part when it believed it had complimented in front of the jury one attorney who had just received a promotion, but defense counsel pointed out that she had not cited this as error and did not believe it to be. Lastly, the court commented that it would not rule on the propriety of rulings that had been made on defendant's motion to quash, motion to suppress statements and motion to suppress identification, as these pretrial motions had been ruled upon by another judge. The court then concluded the hearing by stating that "for all of those reasons," defendant's "entire motion [for new trial] is denied."

¶ 8 ANALYSIS

¶ 9 On appeal, defendant contends that the trial court erred in failing to conduct a *Krankel*

inquiry following defense counsel's admission in the motion for new trial that she had provided ineffective assistance.[1] Defendant asserts that, upon counsel's confession, the trial court was required to, at the very least, conduct such an inquiry to determine if new counsel should be appointed. Because the trial court did not, defendant insists that we should remand the matter for a proper *Krankel* inquiry. Based upon our review of the record, we will remand, but for this very limited purpose only.

¶ 10 The general legal principles surrounding *Krankel* hearings are not new to this court. See *Krankel*, 102 Ill. 2d at 187-89; see also *People v. Bridgeforth*, 2017 IL App (1st) 143637, ¶¶ 35, 36, quoting *People v. Patrick*, 2011 IL 111666, ¶ 39, and *People v. Ayres*, 2017 IL 120071, ¶ 13 (*Krankel* hearing " 'serves the narrow purpose of allowing the trial court to decide whether to appoint independent counsel to argue a defendant's *pro se* posttrial ineffective assistance claims' " in order to " 'facilitate the trial court's full consideration of a defendant's *pro se* claim and thereby potentially limit issues on appeal' "). That case and its progeny make clear that when a defendant raises a *pro se* posttrial claim of ineffective assistance of counsel, a trial court must examine the factual basis of the defendant's claim to determine whether it has merit. See *People v. Jolly*, 2014 IL 117142, ¶ 29; accord *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003). The claim must be specific and include supporting facts. See *People v. Milton*, 354 Ill. App. 3d 283, 292 (2004). If the claim lacks merit or if it only pertains to matters of trial strategy, the court need

[1]Again, as we have noted, this is only one of several issues defendant raises on appeal. However, because, as per our discussion herein, we find error has occurred with respect to it and conclude that limited remand to remedy it is necessary, we do not, at this time, address his remaining arguments on appeal.

not appoint new counsel and may deny the defendant's motion. See *Jolly*, 2014 IL 117142, ¶ 29; *Moore*, 207 Ill. 2d at 78 (appointment of new counsel is not automatically required whenever a defendant presents a *pro se* posttrial motion). If, however, the allegations show possible neglect of the case, new counsel should be appointed. See *Jolly*, 2014 IL 117142, ¶ 29; *Moore*, 207 Ill. 2d at 78.

¶ 11 The key concern for us as a reviewing court is to determine whether the trial court conducted an "adequate inquiry" into the allegations of ineffective assistance, as it is required to do. *Moore*, 207 Ill. 2d at 78, citing *People v. Johnson*, 159 Ill. 2d 97, 125 (1994) (this is the reviewing court's primary objective in a *Krankel* review context); see also *Bridgeforth*, 2017 IL App (1st) 143637, ¶¶ 36, 39 (this is the "main objective" of a *Krankel* inquiry and it is a question of law subject to *de novo* review). During the trial court's evaluation, some sort of interchange between it and the defense 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." *Moore*, 207 Ill. 2d at 78. As directed by our state supreme court, the trial court can conduct this interchange in one of three ways: the court may ask counsel about the facts and circumstances related to the defendant's allegations; the court may have a brief discussion with the defendant himself; or, the court may rely on its own knowledge of counsel's performance at trial and the insufficiency of the defendant's allegations on their face. See *Moore*, 207 Ill. 2d at 78-79; *Milton*, 354 Ill. App. 3d at 292; accord *Bridgeforth*, 2017 IL App (1st) 143637, ¶ 38; see also *People v. Mourning*, 2016 IL App (4th) 140270, ¶13 (trial court can base evaluation on own knowledge). Whichever method is chosen,

ultimately, "[w]hen the trial court is presented with a posttrial motion alleging counsel's deficient representation, the court is required to conduct some inquiry to examine the factual basis of the defendant's claim." *Bridgeforth*, 2017 IL App (1st) 143637, ¶ 36; accord *Mourning*, 2016 IL App (4th) 140270, ¶ 13, quoting *Moore*, 207 Ill. 2d at 79 (" '[i]n every case, the court must conduct some type of inquiry into the underlying factual basis, if any, of a defendant's *pro se* posttrial claim of ineffective assistance of counsel' ").

¶ 12 What makes the instant cause unique is that we are confronted with a situation wherein defense counsel, rather than defendant *pro se*, raised a posttrial claim of ineffectiveness. While this situation itself is not new in that this is not the first time our courts have addressed the ramifications, in light of *Krankel*, of defense counsel raising the issue of her own ineffectiveness as opposed to a defendant doing it himself, there seems to now be a sort of division among the different districts of our reviewing court on this issue. And, as expected, the parties in the instant cause split directly along those lines.

¶ 13 Citing the First District decision of *People v. Willis*, 2013 IL App (1st) 110233, along with the main principles of *Krankel* and its progeny, defendant argues that, because a reviewing court's primary consideration is to determine whether the trial court conducted an adequate inquiry into the posttrial ineffectiveness claim, and because a trial court cannot ignore or fail to address such a claim once it is raised, it does not matter whether defense counsel or defendant himself raised it it must always, in one of the three prescribed forms, be addressed. The State, meanwhile, relies wholly on the relatively new Fourth District decision of *People v. McGath*, 2017 IL App (4th) 150608, for its position that *Krankel* considerations are so limited in their

application that they do not apply, and thus no such hearing may be granted, unless, and only when, a defendant himself raises a *pro se* posttrial ineffectiveness claim against his counsel. Because we find our Court's *Willis* decision to be directly on point with the instant cause and *McGath* to be wholly distinguishable, we agree with defendant here.

¶ 14 In *Willis*, the minor defendant, represented by private counsel, was found guilty of first degree murder and aggravated battery with a firearm. Just as in the instant cause, before sentencing, defense counsel filed a motion for new trial alleging, in part, that he provided ineffective assistance of counsel by failing to use due diligence to ensure that a certain witness would be available to testify at trial. In paragraph 9 of the motion, he stated that this witness's live testimony was " 'material' " to defendant's trial strategy, that a stipulation as to the testimony offered by the State was insufficient to satisfy this strategy, and that the defendant was thereby prejudiced because the jury did not hear the live testimony. *Willis*, 2013 IL App (1st) 110233, ¶ 62.

¶ 15 At the hearing on this motion, the State noted the conflict of interest created by defense counsel's raising his own ineffectiveness. The trial court addressed this with defense counsel, who informed the court he would strike that paragraph of the motion. The cause was then continued for four months, whereupon the court finally heard argument on the motion, but at that time, neither defendant nor defense counsel made any allegation of ineffectiveness. Accordingly, the trial court made no inquiry into the allegation, the issue was not raised again, and the motion for new trial was denied. See *Willis*, 2013 IL App (1st) 110233, ¶ 62.

¶ 16 On appeal, the *Willis* defendant, just like defendant here, cited error upon the trial court

for its failure to satisfy the preliminary requirements of *Krankel* in the face of defense counsel's allegation of ineffectiveness and asked that we remand for a *Krankel* inquiry. See *Willis*, 2013 IL App (1st) 110233, ¶ 63. We agreed. Citing *Krankel*'s principles, we focused on a reviewing court's main objective in that context, to wit, determining whether the trial court conducted an adequate inquiry into an allegation of ineffective assistance of counsel. See *Willis*, 2013 IL App (1st) 110233, ¶ 64. In doing so, we found that it becomes irrelevant whether the defendant is represented by private or public counsel, and whether the defendant raises the matter *pro se* or counsel does so on his behalf. See *Willis*, 2013 IL App (1st) 110233, ¶¶ 66-67, 68-70 (a trial court is not free to automatically deny a posttrial *pro se* ineffectiveness allegation simply because defense counsel was privately retained, nor is a trial court absolved from inquiry into the claim because defense counsel rather than defendant raised it). While we recognized that the facts were unusual, we acknowledged that the conflict of interest faced by defense counsel arguing his own ineffectiveness is exactly the conflict a *Krankel* inquiry attempts to rectify, regardless of its inception. See *Willis*, 2013 IL App (1st) 110233, ¶ 71. In other words, we held that it was primarily because this inherent conflict was brought to the trial court's attention, irrespective of who raised it, that the trial court had a duty to conduct an adequate inquiry into those allegations of ineffectiveness. See *Willis*, 2013 IL App (1st) 110233, ¶ 72 ("[i]n light of this inherent conflict, the trial court has a duty to conduct an adequate inquiry when allegations of ineffective assistance arise. (Citation omitted.) The trial court can not simply ignore or fail to address a claim of ineffective assistance of counsel without consideration of the claim's merits").

¶ 17 At this point, we turned to the facts presented in *Willis* to determine whether the trial

court had, in fact, conducted such an inquiry. Noting that an adequate inquiry "did not need to be lengthy or arduous," we found, based upon our review of the record, that the trial court had failed to look into the allegation at all and otherwise ignored it, thereby failing to determine whether it showed possible neglect of the defendant's case such that appointment of counsel was necessary. See *Willis*, 2013 IL App (1st) 110233, ¶ 73 ("a brief discussion between" the trial court and the defendant "would have been sufficient to satisfy the court's burden under *Krankel*"). We pointedly noted that the trial court did not ask defense counsel about his efforts to secure the live testimony of the cited witness at trial, or what importance the live testimony, as opposed to the stipulation, had with respect to the defense strategy. See *Willis*, 2013 IL App (1st) 110233, ¶ 74. Moreover, the trial court never questioned defense counsel or the defendant about the alleged ineffective assistance, nor did it make any mention of the allegation or any potential prejudice to the defendant resulting from the situation when it denied the motion for new trial. See *Willis*, 2013 IL App (1st) 110233, ¶ 74. Accordingly, when it came to us upon review, because the record "reveal[ed] nothing concerning defense counsel's efforts or lack thereof," we could not evaluate the claims of ineffective assistance and, thus, we had to remand the cause for a *Krankel* hearing. See *Willis*, 2013 IL App (1st) 110233, ¶ 74.

¶ 18 Critically, our decision in *Willis* made clear that, once an ineffectiveness claim is raised, regardless of who raised it, the trial court is required to conduct at least a preliminary inquiry into its factual basis pursuant to *Krankel* and, if it does not conduct such an inquiry, the trial court fails to satisfy *Krankel*'s requirements and remand is required. See *Willis*, 2013 IL App (1st) 110233, ¶ 74 ("[w]hen the defendant's claims of ineffective assistance of counsel are based on

matters outside the record, as they are here, and the trial court failed to conduct an adequate *Krankel* inquiry, the proper remedy is to remand the matter to the trial court for the limited purpose of allowing the trial court to conduct the required hearing"). See also *People v. Hayes*, 229 Ill. App. 3d 55, 65 (1992) (First District decision remanding for *Krankel* inquiry where trial court failed to conduct adequate inquiry into ineffectiveness claim raised by defense counsel in posttrial motion as it was otherwise obligated to do; the trial court has a duty to inquire into possibility of conflict once issue is raised, regardless of whether the defendant or defense counsel raised it, since "[t]he ultimate focus of the trial court's inquiry must be on the underlying conduct alleged to have prejudiced the defendant"); *People v. Williams* 224 Ill. App. 3d 517, 524 (1992) (First District decision remanding for *Krankel* hearing also where defense counsel raised ineffectiveness, holding that "[w]here this is a clear basis for an allegation of ineffectiveness of counsel, a defendant's failure in explicitly making such an allegation does not result in a waiver of a *Krankel* problem").

¶ 19 The instant cause mirrors *Willis* and merits the same result. Just as defense counsel in that case raised his ineffectiveness in paragraph 9 of his motion for new trial describing that he failed to use diligence in securing the live testimony of a particular witness who was critical to his trial strategy, defense counsel here did essentially the same thing. In paragraphs 37 and 38 of defendant's motion for new trial, she presented a cogent, specific and precise allegation of her ineffectiveness. She asserted that defendant was "severely prejudiced" when Bryan Johnson, a witness who was present in the parking lot at the time the victim was murdered, was not called to testify in violation of an agreement she believed she had with the State for this to occur. She

explained that Johnson's testimony was critical because it would have gone directly to the identification of the shooter the main issue of the case since several men were said to have been at the park, and the "key to the defense strategy" to show that defendant was not the one who killed the victim. Defense counsel further explained that she prepared defendant's cause in reliance on her agreement with the State that Johnson would testify and, had she known that the State would back out of this deal, she never would have answered ready for trial. She admitted her ineffectiveness lay directly in her failure to ensure that neither side could back out of the agreement the parties had with respect to Johnson's testimony.

¶ 20 Just as the trial court in *Willis*, the trial court in the instant cause had a duty to conduct an adequate inquiry into the factual basis of this allegation of ineffectiveness once it was raised regardless of the fact that it originated from defense counsel rather than from defendant *pro se*. As we made clear in *Willis*, the primary concern is not who raised the claim. This is because the conflict of interest faced by defense counsel is exactly the conflict a *Krankel* inquiry seeks to rectify having to argue her own ineffectiveness. It does not matter how the claim came to be. Once it is raised before the trial court, that court cannot simply ignore or fail to address it without consideration of its merits.

¶ 21 So what does this mean the trial court must do? Again, and just as we described in *Willis*, it need not be anything "lengthy or arduous," but it must be some sort of inquiry to satisfy the principles of *Krankel* and its progeny, which require a determination as to whether the alleged error of defense counsel showed possible neglect of defendant's case such that he should be appointed counsel. The record in the instant cause demonstrates that the trial court here did

nothing. The court did not inquire into the effort made by defense counsel to secure Johnson's testimony, whether there truly was some sort of agreement between her and the State, what that agreement entailed with respect to Johnson's testimony, and, most significant in our view, the importance of Johnson's testimony to the defense strategy. To the contrary, the record here shows that, while the trial court discussed some points found in defense counsel's motion for new trial, it did not address her ineffectiveness claim. The court discussed the impact of an alleged outburst, *sua sponte* mentioned a potential error when it congratulated a participating attorney on a promotion, and told the parties it was inappropriate for it to rule on the propriety of another judge's prior rulings in the cause. Then, it simply stated that defendant's "entire motion is denied." Having failed to use any of the *Krankel* methods of inquiry, such as having some sort of interchange with defendant or defense counsel about the ineffectiveness claim or even relying on its own knowledge of counsel's performance at trial and the insufficiency of the allegation on its face, it cannot be said that the trial court here satisfied its duty to conduct an adequate inquiry into the underlying factual basis of the ineffectiveness claim.

¶ 22 The State relies primarily on *McGath*, 2017 IL App (4th) 150608, for its claim that the trial court here committed no error, as it was not required to conduct an inquiry of any kind because *Krankel* is only triggered when posttrial claims are raised by a defendant *pro se*. The State then attempts to distinguish *Willis*, and insists that regardless, defense counsel here never argued her ineffectiveness at the posttrial hearing. None of these arguments, however, causes us to depart from our *Willis* analysis.

¶ 23 The State is admittedly correct with respect to *McGath*'s holding. However, we refuse to

follow that holding, for two main reasons: the facts upon which that holding is based are markedly different than those of the instant cause and, more critically, we find that holding, in light of *Krankel*'s principles, to be incredibly myopic.

¶ 24 In *McGath*, the defendant was convicted of unlawful delivery of a controlled substance. Defense counsel filed a motion for new trial and argued, among other things, that a certain witness was not called although she could have provided testimony contradictory of another witness with respect to the defendant's knowledge. During the hearing on the motion, defense counsel asked the trial court to allow the witness to testify. The trial court sustained the State's objection to this, but allowed counsel to make an offer of proof; the court then denied the motion. See *McGath*, 2017 IL App (4th) 150608, ¶¶ 17-19. On appeal, the defendant argued that the trial court erred by failing to conduct a *Krankel* hearing even though defense counsel "seemed to argue his own ineffectiveness" in the posttrial motion. *McGath*, 2017 IL App (4th) 150608, ¶ 45. Citing common law and the origins of *Krankel*, and disputing holdings from our First District appellate courts, the *McGath* court rejected the defendant's argument and refused to follow what it called our "loose and broad reading of *Krankel*." *McGath*, 2017 IL App (4th) 150608, ¶ 51. Instead, it insisted that where a defendant fails to raise a *pro se* posttrial claim of ineffectiveness, the trial court need not conduct a *Krankel* hearing. See *McGath*, 2017 IL App (4th) 150608, ¶ 51. It reasoned that *Krankel* is nothing more than a "term of art to describe the hearing the court must conduct when a defendant *pro se* has raised an ineffectiveness claim." *McGath*, 2017 IL App (4th) 150608, ¶ 51. Thus, without a defendant doing so himself, and because it is otherwise "inappropriate" for defense counsel to argue his own ineffectiveness, the *McGath* court held that

Krankel is inapplicable in situations where anyone but defendant raises a posttrial ineffectiveness claim. See *McGath*, 2017 IL App (4th) 150608, ¶ 52.

¶ 25 We find *McGath* inapposite to the instant cause for many reasons. First, it is factually distinguishable. Nowhere in *McGath* does it indicate that defense counsel there specifically and explicitly raised his own ineffectiveness in the posttrial motion he filed. The *McGath* court noted that trial counsel "seemed to argue his own ineffectiveness" in the motion, but that remains, at best, unclear. Unlike defense counsel in both *Willis* and the instant cause, who provided cogent paragraphs in their motions for new trial clearly claiming their ineffectiveness and detailing the reason why, defense counsel in *McGath* never did so. Yes, that defense counsel argued that a particular witness who could have testified as to the defendant's knowledge of the drugs involved should have been called and was not. But, defense counsel, even after making an offer of proof at the hearing, never stated, in the written motion or orally before the court, that he was ineffective for that witness's failure to testify. This is a fact essential to our holding in *Willis* and our analysis of the instant cause the actual presentation to the trial court of an allegation of ineffectiveness posttrial, which is the key that triggers *Krankel* concerns. This is also a fact significantly missing in *McGath*.

¶ 26 Second, we respectfully disagree with the decision and reasoning of *McGath* regarding how it views *Krankel*. While that court was quick to label our reading of *Krankel* as "loose and broad," we find, for many concrete reasons, its reading to be severely myopic. *McGath* treats *Krankel* as nothing more than "a term of art" that has not progressed or developed since that decision was issued in 1984. Yes, *Krankel* is "limited," but only in the sense that it serves a

narrow *purpose* allowing a trial court to decide whether to appoint independent counsel to argue a posttrial ineffective assistance claim, thereby facilitating the court's full consideration of the claim and potentially limiting issues on appeal. See *Krankel*, 102 Ill. 2d at 187-89; see also *Ayres*, 2017 IL 120071, ¶ 13; *Patrick*, 2011 IL 111666, ¶ 39; *Bridgeforth*, 2017 IL App (1st) 143637, ¶¶ 35, 36. Apart from this, our courts' *reading and application* of *Krankel* is not "limited." To the contrary, our courts have consistently been on a trend to expand *Krankel*. For example, we have already thoroughly discussed *Willis*, and have made mention of its parent cases *Hayes* and *Williams*, among others. In all of these, the reviewing courts made clear that, when a posttrial ineffectiveness claim is raised, a duty of inquiry falls upon the trial court and the primary objective, and main concern, of reviewing courts is to determine whether the trial court conducted an adequate inquiry into that allegation. After all, this is the heart of *Krankle*; it sought to prevent the conflict of interest that trial counsel would experience if she had to justify her actions contrary to her own defendant's position. In contradistinction to *McGath*'s allusions, this conflict of interest arises regardless of who raises the ineffectiveness claim; it certainly does not resolve itself, nor is it any less concerning, when defense counsel pointedly raises it as opposed to the defendant *pro se*. In our view, it is not so important how the issue came to be; rather, and contrary to the Fourth District, it is that the issue has been raised and must, consequently, be evaluated.

¶ 27 Our third reason for not adhering to *McGath* is, simply put, it is not binding precedent. Again, it is a Fourth District decision. We are not obligated to follow decisions from another district of the appellate court. See *People v. Burns*, 2016 IL 118973, ¶ 66 (such rulings are not

binding precedent upon other districts of appellate court); accord *People v. Smith*, 2013 IL App (2d) 121164, ¶ 7. This is particularly true where, as here, a case from our own district addresses the same issue and specifically provides a contrary holding. See *Burns*, 2016 IL 118973, ¶ 66.

¶ 28 Finally, we find *McGath* inapposite to the instant cause because the State does not cite, and we have not found, any other case that has followed it or has held similarly within the context of the circumstances presented herein. The reasoning the *McGath* court uses is clearly contrary to the approach we have taken in our district focusing on the heart of *Krankel*. Thus, *McGath* stands alone and we decline to apply it in the instant cause.

¶ 29 In a last effort to sway our decision, the State attempts to distinguish *Willis* on its facts. First, it insists that the linchpin in *Willis* was that the defendant there was a juvenile who was "too young" to raise an ineffectiveness claim *pro se*, and concludes that we found remand appropriate because of that. Second, it boldly states that, regardless, any claim in the instant cause must "fail" because here, "neither defendant nor his attorney ultimately argued to the trial court that defense counsel had been ineffective" during the posttrial motion hearing. Neither of these assertions has any merit.

¶ 30 That the defendant in *Willis* was a juvenile was completely irrelevant to the crux of our decision in that case, which focused entirely on *Krankel* and the concerns raised when a posttrial ineffectiveness claim is brought to the attention of a trial court. We did mention the defendant's age, but only in passing and only as one of many facts which the trial court should have considered had it not ignored its duty in that case once the ineffectiveness claim was raised. See *Willis*, 2013 IL App (1st) 110233, ¶¶ 69, 70 (the "trial court made no inquiry into the factual

matters underlying the ineffective assistance claim" which included, among others, "the matter of the age of the defendant and what that implies"). Again, and as we discussed thoroughly above, our holding that a *Krankel* inquiry is required when defense counsel raises his own ineffectiveness was based on the conflict inherent in these attorneys having to litigate their own ineffectiveness, not on the age of the defendant in that case. See *Willis*, 2013 IL App (1st) 110233, ¶¶ 71-72.

¶ 31 Additionally, as to defendant's assertion that "neither defendant nor his attorney" in the instant cause "ultimately argued to the trial court" counsel's ineffectiveness, we find this to be a woeful mischaracterization of the record. Again, paragraphs 37 and 38 of the motion for new trial presented a cogent, clear and specific claim of defense counsel's ineffectiveness for failing to secure Johnson's testimony. It is true that this point was not discussed during the hearing on the motion. But it was not as if defendant or defense counsel had somehow abandoned it. When the trial court asked defense counsel if she wanted "to argue anything specifically," she responded that she wanted to "rest on the motion as it's written," which clearly included her assertion of ineffectiveness in paragraphs 37 and 38, and asked to have some time to respond to points the State would make. In the relatively short oral discussion that followed, the State raised some of the matters in the motion, such as the outburst that had occurred at trial. Then, it briefly mentioned the alleged agreement regarding Johnson's testimony, naturally disputing that it existed. After the State spoke, the trial court asked defense counsel if she wanted to respond to any of these points, and counsel specifically stated:

"With respect to Point 37, the parties have made their positions clear I think about

> the agreement or nonagreement about Mr. Johnson. I don't need to argue that again. The record is clear."

There was nothing more for defense counsel to do. This was literally a he-said, she-said argument between defense counsel who attested that the parties had an agreement and the State who claimed that they never did. Further argument would have been fruitless. Instead, what was required was an inquiry into the underlying circumstances of this to determine whether defense counsel had been ineffective in that context a requirement that fell to the trial court once the ineffectiveness claim was raised.

¶ 32 Moreover, even if we could conclude, as the State would have us, that defense counsel here somehow abandoned her claim of ineffectiveness, we cannot help but note the parallel in *Willis*. As we described, in that case, after defense counsel raised his ineffectiveness in the posttrial motion, he later told the trial court at the hearing on the motion that he wanted to "strike that paragraph" when he was confronted with disqualification from the case. See *Willis*, 2013 IL App (1st) 110233, ¶ 62. The cause was continued for four months, and at the subsequent continuation of the hearing on the motion for new trial, when neither the defendant nor defense counsel made any allegation of ineffective assistance, the trial court made no inquiry regarding it. Yet, in spite of this, we held as we did that the trial court was nevertheless required to make the inquiry once the ineffectiveness claim was raised, even though defense counsel told the court he wanted to "strike" it and it was never raised again. See *Willis*, 2013 IL App (1st) 110233, ¶¶ 67, 69 (it did not matter that defense counsel "changed his mind based on the court's comments and withdrew his allegation;" this was another of the many factors the trial court should have

considered in an inquiry which was required the moment the ineffectiveness claim was raised).

¶ 33 In the instant cause, nowhere in the record did defense counsel here indicate she changed her mind or wanted to strike her claim of ineffectiveness. Even if she had, as evidenced by *Willis*, this would not have mattered. Once she raised the claim, the trial court could not ignore or fail to address it. A duty fell upon it to conduct an adequate inquiry, pursuant to *Krankel* and the methods originating therefrom, into the allegation of ineffectiveness and its impact upon defendant's trial. This is particularly true here, where, as in *Willis*, the claim of ineffective assistance of counsel is based on a matter outside the record the procurement of a certain witness's testimony. See, *e.g.*, *Willis*, 2013 IL App (1st) 110233, ¶ 74 ("[w]hen the defendant's claims of ineffective assistance of counsel are based on matters outside the record, as they are here, and the trial court failed to conduct an adequate *Krankel* inquiry, the proper remedy is to remand the matter to the trial court for the limited purpose of allowing the trial court to conduct the required inquiry"). While in some instances we may find harmless error when a trial court fails to appoint new counsel to argue a posttrial ineffectiveness claim under *Krankel* (see *People v. Tolefree*, 2011 IL App (1st) 100689, ¶ 23, citing *Moore*, 207 Ill. 2d at 80), we cannot do so when the underlying allegation of ineffectiveness is not suitable for rejection on its face (see *Mourning*, 2016 IL App (4th) 140270, ¶ 23).

¶ 34 Ultimately, the fact remains that the trial court was required to inquire into the posttrial ineffectiveness claim that was raised in the instant cause. It did not do so, and the record discloses nothing with respect to the existence or nonexistence of an agreement between the parties with respect to Johnson's testimony or, of more critical concern, defense counsel's efforts

or lack thereof in relation to that alleged agreement. We are unable to evaluate defendant's claim of ineffective assistance of counsel, as raised by his trial counsel, because the trial court made no *Krankel* inquiry, as was its duty.

¶ 35 CONCLUSION

¶ 36 From all this, we hold that the trial court in the instant cause erred by failing to conduct an appropriate preliminary inquiry under *Krankel* to evaluate the posttrial claim of ineffective assistance of trial counsel, as raised by defense counsel here surrounding the lack of testimony from witness Johnson. Accordingly, we remand, but only for the limited, and sole, purpose of conducting a hearing on this particular and specific claim. We offer no opinion as to whether new counsel should be appointed to undertake an independent review of the claim. That determination is for the trial court. We order only that the trial court will conduct a preliminary inquiry, pursuant to the principles of *Krankel* and its progeny, into the factual basis of the claim to determine if it shows possible neglect of the case warranting the appointment of new counsel thereunder.

¶ 37 We would further note here that on July 5, 2018, defendant filed a petition for rehearing in our court, asking us to grant rehearing to resolve the issues raised on direct appeal in the interest of judicial economy or, alternatively, to modify our decision to retain jurisdiction so that in the event the trial court does not grant him a new trial upon our remand, we will be able to review the trial court's ruling on remand as well as the trial issues that have already been fully briefed but not yet resolved by this court. We are mindful of defendant's right to a timely-adjudicated appeal. At the same time, we feel that the trial court must first be given the

opportunity to rectify what occurred in this cause and hold the *Krankel* hearing as ordered, without any interference from our Court. Critically, much is dependent upon what happens upon our remand here. Therefore, while we choose at this time not to resolve the other issues defendant has raised on direct appeal, we do, at his urging, choose to modify our decision and retain jurisdiction. See, *e.g.*, *People v. Garrett*, 139 Ill. 2d 189, 195 (1990) ("[t]he appellate court is empowered under Rule 615(b) to remand a cause for a hearing on a particular matter while retaining jurisdiction;" thus, it may order remand and, once that is complete and any supplementary appellate issues have been briefed, it may then announce its judgment on all pending issues). Accordingly, we now clarify to state that we remand with directions as described in our decision herein while also retaining jurisdiction over the instant cause.

¶ 38 Remanded with directions; jurisdiction retained.