2018 IL App (1st) 152379-U

No. 1-15-2379

SIXTH DIVISION
JANUARY 12, 2018



IN THE

APPELLATE COURT OF ILLINOIS

FIRST JUDICIAL DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | No. 08 CR 17647 |
| | ) | |
| THOMAS BRITTON, | ) | Honorable |
| | ) | Colleen Ann Hyland, |
| Defendant-Appellant. | ) | Judge Presiding. |

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Hoffman and Justice Delort concurred in the judgment.

**ORDER**

¶ 1 *Held*: The summary dismissal of defendant's *pro se* petition for relief under the Post-Conviction Hearing Act is reversed and remanded for further proceedings because defendant presented an arguable claim that appellate counsel was ineffective.

¶ 2 Defendant-Appellant Thomas Britton appeals the summary dismissal of his *pro se* petition for relief filed under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq*. (West 2014)). He contends that the trial court improperly dismissed his petition because he raised an arguable claim of ineffective assistance of appellate counsel based on counsel's failure

to argue on direct appeal that (1) the trial court erred in conducting an adversarial, preliminary *Krankel* inquiry (*People v. Krankel*, 102 Ill. 2d 181 (1984)) without appointing him new counsel; and (2) trial counsel was ineffective for failing to strike a juror, who expressed his opinion regarding the use of guns. For the reasons set forth herein, we reverse and remand for further proceedings.

¶ 3 Following a 2010 jury trial, defendant was found not guilty of attempted first degree murder (720 ILCS 5/8-4 (West 2008); 720 ILCS 5/9-1 (West 2008)), but guilty of aggravated battery with a firearm (720 ILCS 5/12-4.2 (West Supp. 2007)). Defendant was sentenced, as a habitual offender, to natural life imprisonment. See 720 ILCS 5/33B-1 (West 2008). We affirmed defendant's conviction on direct appeal. *People v. Britton*, 2013 IL App (1st) 112031-U. Because we set forth the facts on direct appeal, we recount them here only to the extent necessary to resolve the issues raised in this appeal. See *Britton*, 2013 IL App (1st) 112031-U, ¶¶ 3-21.

¶ 4 The evidence at trial showed that, on July 6, 2008, the victim, Dwan Powell, his brother Darrell Powell, and his friends Brandon Berry, Gregory Tolbert, and Gary Morris were at Darrell's apartment when they learned that defendant was sitting on the porch of a nearby building. Dwan wanted to fight defendant because defendant had punched him two nights earlier while Dwan was working as a bouncer at a local night club. When the men arrived in front of the building located at 7430 West 63rd, where defendant was sitting, defendant went inside and returned to the porch with a gun. Defendant then said "what's up now" or "do you think this is a game," pointed the gun below Dwan's waist, and fired one round, which struck Dwan in the leg. Before running back into the building, defendant pointed the gun at Darrell's chest and asked "do you want to die?"

¶ 5 The jury found defendant not guilty of attempted first degree murder but guilty of aggravated battery with a firearm.

¶ 6 On September 29, 2010, defendant filed: (1) a *pro se* "Motion for Ineffective Assistance of Counsel"; and (2) a *pro se* "Motion to Discharge Defendant Pursuant to: Violation of Speedy Trial Rights." On October 7, 2010, defendant's trial counsel filed a motion for a new trial. On November 24, 2010, defendant filed a *pro se* "Motion to Amend Ineffective Assistance of Counsel Motion and Motion for a New Trial / Motion to Supplement." On December 1, 2010, defendant's trial counsel filed an amended motion for a new trial. On December 14, 2010, defendant filed *pro se* "Amended Motions for Ineffective Assistance of Trial Counsel, and Motion for New Trial."

¶ 7 On December 22, 2010, the trial court held a hearing on defendant's *pro se* motions, which the State noted "in essence claimed ineffective assistance of counsel." At the hearing, defendant first argued that counsel was ineffective for answering "not ready" for trial on the day that trial was set. The court stated that it recalled that trial counsel asked for a continuance because certain defense witnesses were not present, and trial counsel explained how she had previously informed the State that the witnesses might not appear in court in time for trial. Defendant responded that he told trial counsel to answer ready even if the witnesses, who were to support his affirmative defense, were not present. The court then asked the State to respond to defendant's allegation. The State responded:

> "Judge, counsel had informed us ahead of time that she would not be ready for trial. So, I think we had put some of our witnesses on phone hold. I know we only had one witness in court that date. I recall that they had at least four or five witnesses listed

on their answer to discovery. And, in addition, on the jury trial date they had personally served one of the State's witnesses and actually were asking for a rule to show cause on that witness who did turn out was actually there and did actually testify for the State."

¶ 8 The trial court and defendant then discussed defendant's claims that counsel was ineffective for failing to pursue a strategy of misidentification and that the court had erred in not allowing him to proceed *pro se* after he told trial counsel "you're fired" in open court. After discussing the claims with defendant, the court asked the State to respond to defendant's allegations. The State responded:

"With respect to defendant's motion of defendant's claim, I believe, [trial counsel] is in the best position as his trial lawyer and as someone who graduated from law school to determine whether or not she is prepared to proceed to jury trial.

As she mentioned, your Honor, she had filed at least four motions *in limine* which included the defendant's prior convictions using the nickname Teardrop. Motion to sever, I believe, she obviously would have wanted the Court to rule on them before beginning a jury trial.

In addition, on a date after that first time set for trial the State had filed a proof of other crimes which needed to be argued and ruled upon. She would have needed to know the court's ruling on those before going to trial on the jury trial.

I believe that it is because of her arguing self-defense that the defendant was found not guilty on the attempt murder.

I believe, the record shows that there has been at least two or three interim status dates where the defendant sat in court and never said anything while his counsel indicated for the record that they were going to use a defense of self-defense.

* * *

[STATE'S ATTORNEY]: I believe what's going on here is that Mr. Britton is not happy with the outcome of his jury trial for which he's looking at natural life and as [trial counsel] said, she did negotiate extensively with the State. We did make a generous offer of 15 years which he did reject on the record. And, it is a little bit after buyer's remorse at this point. And, now on today's date he's accusing his counsel of being ineffective.

I believe, based on her actions at trial you were here when you saw her argue. You saw her direct and cross examination of the witnesses, which I do believe, lead [sic] to the not guilty on one of the counts.

We believe that all the matters that the defendant is bringing up lack merit or pertain to matters of trial strategy. Based on that we believe his claim lacks merit and we do not believe a new attorney needs to be assigned to investigate whether or not his counsel acted ineffective.

And, we ask you to deny his motion."

¶ 9 The trial court denied defendant's motion. In doing so, the court noted that trial counsel's decisions to request a continuance on the day of trial and pursue a self-defense strategy were matters of trial strategy and that defendant did not clearly and unequivocally waive his right to an attorney or indicate that he wished to proceed *pro se*. After denying trial counsel's amended

motion for a new trial, the trial court found defendant to be a habitual offender and sentenced him to natural life imprisonment.

¶ 10 On direct appeal, this court affirmed the judgment of the trial court over defendant's contentions that the prosecutor misstated the law of intent during closing arguments and that the State failed to prove beyond a reasonable doubt that he intentionally or knowingly injured Dwan. See *Britton*, 2013 IL App (1st) 112031-U.

¶ 11 On May 6, 2015, defendant filed a *pro se* postconviction petition under the Act, alleging, *inter alia*, that (1) trial counsel was ineffective for failing to strike Edward Banowski from the jury pool; (2) the trial court erred in allowing the State to participate in *Krankel* proceedings without appointing him counsel to argue his *pro se* motions of ineffective assistance of counsel; and (3) "Appellate counsel was ineffective for failing to raise the issue of trial counsel's ineffectiveness prior to and during trial; for not raising all of petitioner's viable and meritorious issues."

¶ 12 In a July 31, 2015, written order, the trial court dismissed defendant's claims as frivolous and patently without merit. In the order, the court concluded that defendant failed to advance any meritorious constitutional arguments where he did not attach affidavits from any purported witness. The court also found that the remainder of his claims failed under the two-prong *Strickland* analysis.

¶ 13 On appeal, defendant argues that the trial court erred in dismissing his petition as frivolous and patently without merit because he set forth two meritorious claims of ineffective assistance of appellate counsel. First, he contends that appellate counsel was ineffective for failing to challenge his preliminary *Krankel* proceedings, where the record shows that the trial

court allowed the State's adversarial participation in the proceedings without appointing new counsel to represent him. Second, he contends that appellate counsel was ineffective for failing to argue on direct appeal that trial counsel was ineffective for not striking a juror, who expressed the opinion that guns should never be used outside of the home, even for self defense.

¶ 14 The Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2014)) provides a method by which a defendant can assert that his conviction was the result of a substantial denial of his constitutional rights. *People v. Applewhite*, 2016 IL App (1st) 142330, ¶ 9. At the first stage of postconviction proceedings, the trial court may dismiss a petition only if it " 'frivolous or is patently without merit.' " *People v. Cotto*, 2016 IL 119006, ¶ 26 (quoting 725 ILCS 5/122-2.1(a)(2) (West 2014)). Our supreme court has held that *pro se* postconviction petitions should be given a liberal construction and that "courts should review their petitions 'with a lenient eye, allowing borderline cases to proceed.' " *People v. Hodges*, 234 Ill. 2d 1, 21 (2009) (quoting *Williams v. Kullman*, 722 F.2d 1048, 1050 (2d Cir. 1983)). "Because most petitions are drafted at the first stage by defendants with little legal knowledge or training, this court views the threshold for survival as low." *People v. Mabery*, 2016 IL App (1st) 141359, ¶ 34. We review the dismissal of a first-stage postconviction petition *de novo*. *People v. Williams*, 2015 IL App (1st) 131359, ¶ 28.

¶ 15 We initially note that the parties, and this court, agree that, construed liberally, defendant's postconviction petition raises the claim that appellate counsel was ineffective for failing to argue that the trial court improperly conducted a preliminary *Krankel* inquiry when it allowed the State to respond to defendant's claims of ineffective assistance without appointing new counsel to represent him.

¶ 16 To prevail on a claim of ineffective assistance of counsel, "a defendant must show that counsel's performance was objectively unreasonable under prevailing professional norms and that there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *People v. Domagala*, 2013 IL 113688, ¶ 36 (quoting *Strickland v. Washington*, 466 U.S. 688, 694 (1984)). The *Strickland* standard applies equally to claims of ineffective assistance of appellate counsel and a defendant raising such a claim " 'must show both that appellate counsel's performance was deficient and that, but for counsel's errors, there is a reasonable probability that the appeal would have been successful.' " *People v. Papaleo*, 2016 IL App (1st) 150947, ¶ 21 (quoting *People v. Petrenko*, 237 Ill. 2d 490, 497 (2010)). At the first stage of postconviction proceedings, a petition alleging ineffective assistance of appellate counsel may not be summarily dismissed if (1) it is arguable that counsel's performance was deficient; and (2) it is arguable that the appeal would have been successful. *Papaleo*, 2016 IL App (1st) 150947, ¶ 21; *People v. Tate*, 2012 IL 112214, ¶¶ 19-20.

¶ 17 Here, we find that defendant raised an arguable claim of ineffective assistance of appellate counsel based on counsel's failure to argue that the trial court improperly allowed for the State's adversarial participation during the preliminary *Krankel* inquiry. Stated differently, defendant has shown that it is arguable that, both, appellate counsel's performance was deficient and that his appeal would have been "successful."

¶ 18 It is well-settled that appellate counsel is not obligated to brief every conceivable issue on appeal, and " 'it is not incompetence of counsel to refrain from raising issues which, in his or her judgment, are without merit, unless counsel's appraisal of the merits is patently wrong.' " *Papaleo*, 2016 IL App (1st) 150947, ¶ 21 (quoting *People v. Simms*, 192 Ill. 2d 348, 362 (2000)).

"In order to show prejudice, the defendant must show that the underlying issue had merit." *People v. Moore*, 402 Ill. App. 3d 143, 147 (2005).

¶ 19 Pursuant to *Krankel*, and its progeny, when a defendant presents a colorable *pro se* posttrial claim of ineffective assistance of counsel, the trial court must conduct an adequate preliminary inquiry into the factual basis for the defendant's claims to determine whether appointment of new counsel is warranted. *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003); *Krankel*, 102 Ill. 2d at 189. In conducting its inquiry, the trial court may: "(i) ask defense counsel to 'answer questions and explain the facts and circumstances' relating to the claim; (ii) briefly discuss the claim with the defendant; or (iii) evaluate the claim based on its observation of defense counsel's performance at trial 'and the insufficiency of the defendant's allegations on their face.' " *People v. Willis*, 2016 IL App (1st) 142346, ¶ 17 (quoting *Moore*, 207 Ill. 2d at 78-79). However, "the State should never be permitted to take an adversarial role against a *pro se* defendant at the preliminary *Krankel* inquiry." *People v. Jolly*, 2014 IL 117142, ¶ 38. This is because "[a] record produced at a preliminary *Krankel* inquiry with one-sided adversarial testing cannot reveal, in an objective and neutral fashion, whether the circuit court properly decided that a defendant is not entitled to new counsel." *Id.* at ¶ 39. This court has found that our supreme court's holding in *Jolly* should be applied retroactively. *People v. Robinson*, 2015 IL App (1st) 130837, ¶ 79.

¶ 20 In this case, the record shows that trial court improperly allowed the State to participate during the preliminary inquiry into defendant's *pro se* claims of ineffective assistance of trial counsel. The State's participation in the inquiry went well beyond "verifying concrete and easily verifiable facts" and included substantive argument about the effectiveness of trial counsel's

strategic decisions. See *People v. Fields*, 2013 IL App (2d) 120945, ¶ 40 (envisioning "a situation where the State may be asked to offer concrete and easily verifiable facts at the hearing"). The record shows that, after discussing the claims with defendant, the trial court asked the State to respond to the claims. The State then *substantively*, and at length, *argued against* defendant's *pro se* claims of ineffective assistance, characterizing them as lacking in merit or pertaining to matters of trial strategy. Accordingly, the trial court's preliminary inquiry into defendant's claims was patently improper and appellate counsel's failure to raise this issue arguably constituted deficient performance.

¶ 21 Further, it is arguable that, if appellate counsel had raised the issue on appeal, the appeal may have been "successful" with regard to this issue. That is to say that, given the nature and extent of the State's adversarial participation in the preliminary *Krankel* inquiry, it is arguable that this court would have remanded the matter for a proper inquiry into defendant's *pro se* claims of ineffective assistance of counsel. See *People v. Cabrales*, 325 Ill. App. 3d 1, 6 (2001) (remanding for a proper preliminary *Krankel* inquiry before a different judge where the State's adversarial participation amounted to a full evidentiary hearing on the merits); see also *Jolly*, 2014 IL 117142, ¶ 46 (the proper remedy for State's improper participation in a preliminary *Krankel* inquiry is to "remand for a new preliminary *Krankel* inquiry before a different judge and without the State's adversarial participation"). Given that defendant has satisfied both prongs of the *Strickland* analysis, we find that he has stated an arguable claim of ineffective assistance of appellate counsel. Accordingly, the trial court erred in summarily dismissing this claim as frivolous and patently without merit.

¶ 22 Because partial summary dismissal of a postconviction petition is not permitted by the Act, we need not address defendant's claim that appellate counsel was ineffective for failing to argue that trial counsel was ineffective for not moving to strike a juror. See *People v. Romero*, 2015 IL App (1st) 140205, ¶ 27 ("[i]f a single claim in a multiple-claim postconviction petition survives the summary dismissal stage of proceedings under the Post-Conviction Hearing Act, then the entire petition must be docketed for second-stage proceedings regardless of the merits of the remaining claims in the petition").

¶ 23 Therefore, we reverse the trial court's summary dismissal of defendant's postconviction petition. However, because we have found that the State impermissibly participated in defendant's preliminary *Krankel* inquiry, we remand this case to the presiding judge of the criminal division for assignment to a different trial judge to preside over a new preliminary *Krankel* inquiry without the State's adversarial participation. See *Fields*, 2013 IL App (2d) 120945, ¶ 42. Following that inquiry, the case may proceed to second-stage proceedings under the Act before the original judge.

¶ 24 For the reasons set forth herein, we reverse the judgment of the circuit court of Cook County and remand for further proceedings consistent with this order.

¶ 25 Reversed and remanded with directions.