2018 IL App (1st) 153195-U

No. 1-15-3195

Order filed June 13, 2018

Third Division

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. 12 C4 41152
	)	
MORRIS WILLIAMS,	)	Honorable
	)	Gregory R. Ginex,
Defendant-Appellant.	)	Judge, presiding.

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

ORDER

¶ 1 *Held*: Defendant's right to counsel of his choice was not violated where defendant's complaints did not include a request for different representation. Moreover, the trial judge conducted a sufficient inquiry into defendant's posttrial claim of counsel's ineffectiveness and could rule on defendant's contentions based on his knowledge of counsel's performance at trial.

¶ 2 Following a jury trial, defendant Morris Williams was convicted of retail theft. Based on defendant's criminal background, the trial court imposed an extended-term sentence of six years in prison. On appeal, defendant contends his conviction should be reversed because he was

denied his right to the counsel of his choice at trial. In the alternative, he argues this case should be remanded for the appointment of new counsel and additional inquiry into his posttrial claims of counsel's ineffectiveness pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984).

¶ 3 Defendant was charged with felony retail theft in November 2012 after Cordero Flowers, a loss prevention officer at a Menard's store in Cicero, reported that defendant took two drills from the store without paying for them. Flowers watched defendant on a closed-circuit camera and testified at a preliminary hearing that a video recording existed of defendant's actions.

¶ 4 From December 2012 to February 2014, defendant was represented by various Cook County public defenders and the proceedings in this case occurred in Maywood. During that period, the defense filed a motion for sanctions against the State, asserting the video recording was not preserved.

¶ 5 While out on bond in the retail theft case, defendant was charged with burglary in a separate case. In May 2014, Elliot Zinger, who was defendant's retained counsel in the burglary case being tried in Chicago, appeared in these proceedings and informed the court that defendant was in custody on the burglary case.

¶ 6 Defendant's burglary case was treated as the elected matter, and status hearings were held in the instant case. At a December 2014 hearing, assistant Cook County public defender (APD) Jessica Schreiber told the court that defendant's burglary case was proceeding toward trial and asked for a February date in the instant case.

¶ 7 Defendant asked the court for the names of the public defenders who had represented him and said APD Schreiber told him he could not have those names or she did not know them. The following exchange then occurred:

THE COURT: "Let me ask you why do you need those names?

DEFENDANT: Because I am doing my own law work.

THE COURT: What law work are you doing?

DEFENDANT: In case I have to do my own case.

THE COURT: Wait a minute. Wait a minute. Slow down. Either you represent yourself or --

DEFENDANT: That's what I am saying.

THE COURT: Or you have a private lawyer or you have the public defender.

DEFENDANT: As of now, I have the public defender.

THE COURT: Right now you are represented by the public defender. You have a private lawyer at 26th Street [in the burglary case]. *** Now if you are telling me you want to represent yourself, that's a whole different ballgame. Think about that.

DEFENDANT: That's what I am thinking about."

¶ 8 The court admonished defendant of the risks of self-representation and told defendant he could not have standby counsel if he chose to defend himself. At the next few court dates, the court denied the defense's motion for sanctions, and the parties engaged in plea negotiations.

¶ 9 On May 8, 2015, the following colloquy occurred:

"MS. SCHREIBER: Judge, this matter is up for status. *** Mr. Williams has indicated he would either proceed either *pro se* or have time to hire a private attorney.

DEFENDANT: Excuse me, Judge. What I told her is that since she decided that she was not going to help file a motion on my case. She told me that --

THE COURT: What motion?

DEFENDANT: I told her that I would like to have a motion hearing before talking about going to trial.

THE COURT: What motion?

DEFENDANT: A motion to dismiss.

THE COURT: Well, here. Let me ask you something. You had a motion for sanctions, which I -- we thoroughly went through, and I denied it. Now, you got a case at 26th Street --

DEFENDANT: Right.

THE COURT: -- and we were going back and forth.

DEFENDANT: We're nowhere near close to no trial."

¶ 10 The court noted defendant's instant case had been pending since November 2012 and he had several public defenders, culminating with APD Schreiber, whom the court said had represented defendant "extremely well." The court also noted attorney Zinger represented defendant in his burglary case.

¶ 11 The court then addressed defendant as follows:

"Now, if you're telling me you want to bring that lawyer in to this case, fine. But if you want another lawyer, no. I think it's a delay, and I'm not going to allow it. Either you have Mr. Zinger come in, who's your lawyer on that case, who's aware of this case, or Ms. Schreiber stays on this case. The only alternative is you represent yourself. I'm not going [to] allow another lawyer to come in because then he's going to say, 'Oh, wait, I need time to find out all the discovery and we're going to build in another six months.' I'm not going to allow it. This is a delay, clearly. We were going to set your case for trial

> some time ago. So that's the deal. Either you bring Mr. Zinger in, [APD Schreiber] represents you, or you represent yourself. That's it."

¶ 12 Defendant responded: "I asked for trial the first day that I got this case." Defendant then reviewed the public defenders he had been assigned, stating:

> "[I]t's not me, your Honor. It's these public defenders that you've been working with because they have done nothing that I asked. I've been asking for trial since the first day I got here. I was ready for trial and the record will show that I've been ignored because I have representation. Because I have counsel, I was ignored. *** [M]y objections to every continuance was ignored [*sic*] because I have counsel. Okay?"

¶ 13 Defendant argued his "right to a speedy trial has been violated a long time ago" and complained of the time spent attempting to retrieve the Menard's video. He also argued that "[t]he state's attorney's office is doing all the stalling."

¶ 14 Defendant continued to address the court:

> "Now you're telling me [] about me having to get my own attorney, get him over here or she's doing to do it. She hasn't done anything for me. She can be good for somebody else."

¶ 15 The court noted that it could not "let you go on forever" and that defendant had "made [his] record." The court told defendant his attorney agreed to the various continuances and needed to spend time investigating and preparing the motion regarding the video.

¶ 16 The court further noted that during the pendency of this case, proceedings had begun on his burglary case, stating:

"Mr. Zinger has been in here. We understand that you have a case at 26th. My understanding was they were going to try and work them both out.

Now, here's the deal. If you're ready for trial on this case, we will set it for trial. I have said all along we would set this case for trial. So when you say that nobody's done anything, your attorneys have approached the State based on your background. *** Nobody is trying to force you to [plead]. ***

So if you're ready for trial, I will set this for trial. If you want to represent yourself, you have a right to do that under the Constitution. If you want to bring in private counsel, you can do that. It has to be Mr. Zinger. If you want Ms. Schreiber to represent you, that's fine. You tell me what you want to do but I will not allow you at this stage to bring in an attorney other than Ms. Schreiber or Mr. Zinger or yourself. You tell me what you want to do?"

¶ 17 The following exchange then took place:

DEFENDANT: "Now, what I said is that I would *** like to have a motion hearing before I ---

THE COURT: What motion do you want to file?

DEFENDANT: I had --- I had ---

THE COURT: What motion do you want to file?

DEFENDANT: Well, first of all, motion for -- motion for dismissal.

THE COURT: What is the basis of the motion to dismiss?

DEFENDANT: For a speedy trial."

¶ 18 The court denied that motion, stating there was no speedy trial violation. Defendant then asserted he had a *Miranda* motion, and the court responded he had not made a statement in this case. After further discussion, defendant stated: "As long as I know that[] it's going to be denied so it could be on record that I did."

¶ 19 The court then asked defendant: "So now what do you want to do? Do you want to go to trial or do you want to bring Mr. Zinger in? What do you want to do?" Defendant responded: "I want to go to trial."

¶ 20 Defendant's trial took place on October 8, 2015, and he was represented by APD Schreiber and assistant Cook County public defender Mark Teague. At trial, Flowers testified he saw defendant put two drills inside his coat while viewing closed-circuit camera footage. The drills were recovered from defendant's coat after he was confronted in the Menard's parking lot. A receipt generated after the incident was entered into evidence listing the drills' total value as $240.32. Defendant testified Flowers confronted him while he shopped and followed him out of the store. Defendant denied taking the drills and denied that the items were recovered from his coat. The jury found defendant guilty of retail theft.

¶ 21 At sentencing, APD Schreiber filed a motion for a new trial, stating defendant told her he "wishes to proceed *pro se* on any and all posttrial motions." The court told defendant he had been represented by competent counsel and asked defendant why he wanted to proceed *pro se*. APD Schreiber said defendant wanted matters such as his "speedy trial issues" to be included in counsel's motion.

¶ 22 The court addressed defendant:

"I know the history of your case because you had the other case at 26th Street, [and I have] given you the minimums, maximums based on your background. We have gone through a lot of stuff with [APD] Teague and Ms. Schreiber."

¶ 23 The court noted the different public defenders who represented defendant and noted that at this point, defendant could raise his claims on appeal. The court stated he was going to allow the attorneys to argue and if defendant wanted "to supplement and argue additional, I'll let you do that." The court admonished defendant: "But if you tell me you want to argue this on your own and you want to proceed *pro se* from now on, I want to know that."

¶ 24 Defendant again stated that counsel would not name the public defenders on his other case. The court responded that "[h]as nothing to do with this trial."

¶ 25 APD Teague objected to defendant filing his own motion while also being represented by counsel. The following exchange then took place:

"THE COURT [to APD Teague]: I understand that. You're right.

The bottom line is we have gone around and around with this. Mr. Williams is an intelligent man. He's been before the Court. He knows the system. He's argued things before. All I'm saying is I'm going to allow him to say what he wants to say, he has a right of allocution.

You are still his attorneys. You're appointed and you are representing him.

MR. TEAGUE: So he's not supplementing our motions because we wouldn't be adopting anything he says.

THE COURT: Mr. Williams, do you want to go *pro se* from now [on] or do you want Mr. Teague or Ms. Schreiber to proceed for you?

DEFENDANT: I'll just add it to the record."

¶ 26 Defendant then handed the court a *pro se* motion. That document listed four legal topics labeled as "arguments" followed by several pages of case citations. The "arguments" listed were "ineffective assistance of counsel," "prosecutorial misconduct/*Brady* violation," "violation of due process" and "violation of speedy trial." No factual or legal details followed those listings.

¶ 27 When the court asked what the motion was, defendant responded:

"[T]his is what I want to add for purposes of appeal. These are issues that [APD Schreiber has] not heard and she's already decided she's not going to say anything about these issues which means that those issues won't be eligible for me to bring up on appeal."

¶ 28 APD Schreiber objected to defendant's motion, and the court addressed defendant:

"You have 149 cases that you've listed. You've listed prosecutorial misconduct. They'll argue some of that anyway, ineffective assistance of counsel, violation of due process, violation of speedy trial. Those are all going to be part of this posttrial motion anyway."

¶ 29 The court stated that many of the cases listed in defendant's motion were not relevant. The court then asked defendant:

"Do you want them to argue for you, do you want them to represent you, or do you want to go *pro se*?

¶ 30 Defendant responded: "Like I said, I just want to add it." The court stated that defendant's motion was "part of the record."

¶ 31 The court heard arguments and denied APD Schreiber's motion for a new trial. The court proceeded to sentencing, at which the State argued defendant had several prior convictions in

addition to the 2014 burglary case. Before APD Schreiber argued, defendant asked to speak "about my lawyer's arguments." The court noted defendant's counsel was "going to argue mitigation for you," and defendant responded she was "not qualified to defend what [the prosecutor] just said."

¶ 32 The court then addressed defendant:

> "Mr. Williams, you are 1,000 percent wrong. Not only [are] Ms. Schreiber and Mr. Teague well qualified to defend you, they have done so. They have been to this court and before me many times and they have argued these motions. They are prepared lawyers. They know what they are doing. They're eminently qualified to go ahead and argue these issues.
>
> You'll have a right to tell me what you want. Let your lawyers make their argument."

¶ 33 After APD Schreiber argued in mitigation of defendant's sentence, the following exchange took place:

> "THE COURT: [] Mr. Williams, this is your time. You have an absolute right to tell me anything you want. You can proceed.
>
> DEFENDANT: First of all, Judge, let me correct you about what you said about them being qualified and what you misunderstood me to be saying. What I meant was it didn't have anything to do [with] their qualifications as you put it or the way you meant it.
>
> What I meant is [APD Schreiber] could not tell you anything, she could not defend anything that was said by [the State] about my background because she doesn't know anything about my background."

¶ 34 Defendant argued that the court could not consider all of his prior criminal convictions and that the prosecutor was "bringing up a lot of cases that he doesn't know anything about." After further statements, defendant asserted that "the decision is already made and [the court's] mind is already made up whatever it's going to be." Defendant then asked the court for "a copy of this motion to reconsider."

¶ 35 The court told defendant they had not "gotten to that point" and asked defendant if there was anything else he wished to say. Defendant responded he did not want to waste the court's time, to which the court replied that defendant was not wasting the court's time. The court reviewed defendant's prior convictions in detail and found defendant was eligible for an extended term sentence based on that criminal background. The court sentenced defendant to six years in prison.

¶ 36 On appeal, defendant first contends that during his pretrial proceedings, the court violated his right to be represented by counsel of his choosing. The sixth amendment to the United States Constitution, as well as the Illinois Constitution, guarantee that in all criminal prosecutions, the accused has the right to the assistance of counsel, which includes the right to counsel of the defendant's choosing. U.S. Const., amend. VI; Ill. Const. 1970, art. I § 8; see also *U.S. v. Gonzalez-Lopez*, 548 U.S. 140, 147-48 (2006). The right to counsel of choice is distinct from the right to effective representation and does not rely on the quality of representation that a defendant actually received at trial. *People v. Graham*, 2012 IL App (1st) 102351, ¶ 32.

¶ 37 While a defendant has the right to be represented by retained counsel of his own choosing, he does not have the right to choose his appointed counsel. *People v. West*, 137 Ill. 2d 558, 588 (1990); *People v. Abernathy*, 399 Ill. App. 3d 420, 426 (2010). Thus, a defendant

cannot insist on representation by a particular public defender. *Abernathy*, 399 Ill. App. 3d at 426 (citing *People v. Wanke*, 303 Ill. App. 3d 772, 782 (1999)); see also *Gonzalez-Lopez*, 548 U.S. at 151.

¶ 38 The right of a defendant to select his counsel may be restricted "where the exercise of that claimed right would delay or impede the effective administration of justice." *People v. Robinson*, 254 Ill. App. 3d 906, 910-12 (1993) (quoting *West*, 137 Ill. 2d at 588). In determining whether to grant a continuance, the trial court is required to balance the defendant's fundamental right to counsel of his choice against the interests of the State, the court, and the witnesses in the efficient disposition of cases without unreasonable delay. *People v. Basler*, 304 Ill. App. 3d 230, 232 (1999). The granting of a continuance to allow substitute counsel is within the sound discretion of the trial court and must be considered in light of the diligence shown by the defendant-movant. *West*, 137 Ill. 2d at 589. That determination is based on the particular facts of each case. *People v. Tucker*, 382 Ill. App. 3d 916, 920 (2008). The trial court does not abuse its discretion in denying a motion if new counsel is not specifically identified or does not "stand ready, willing and able" to make an appearance on the defendant's behalf. *Id*.

¶ 39 Here, defendant contends that he asked for a continuance to obtain new counsel and the trial court failed to inquire as to the reasons for his claim before denying his request. The State responds that defendant's counsel-of-choice claim "did not exist below" and is now forfeited because defendant never sought to hire private counsel but instead wanted to continue to be represented by his appointed attorney. Defendant asserts his case was continued 28 times over more than two years and he had been assigned four public defenders. Defendant argues that his

request was not made with an intent to delay trial but instead was made in hopes that new counsel would expedite his case to trial.

¶ 40 In arguing the court denied his request to obtain private counsel, defendant focuses on these remarks by the court on May 8, 2015:

> "Now, if you're telling me you want to bring that lawyer in to this case, fine. But if you want another lawyer, no. I think it's a delay, and I'm not going to allow it. Either you have Mr. Zinger come in, who's your lawyer on that case, who's aware of this case, or Ms. Schreiber stays on this case. The only alternative is you represent yourself. I'm not going [to] allow another lawyer to come in because then he's going to say, 'Oh, wait, I need time to find out all the discovery and we're going to build in another six months.' I'm not going to allow it. This is a delay, clearly. We were going to set your case for trial some time ago. So that's the deal. Either you bring Mr. Zinger in, [APD Schreiber] represents you, or you represent yourself. That's it."

¶ 41 Defendant contends he asked the trial court to proceed *pro se* or hire private counsel and the court did not ask about his reasons for requesting new counsel. However, the record reflects that the court inquired into defendant's motives after APD Schreiber reported to the court that defendant wanted a different attorney. The court asked defendant what motion he wanted to file, and defendant responded it was a motion to dismiss. Thus, when given the chance to address the court, which defendant was repeatedly invited to do in these proceedings, defendant did not state that he wanted different counsel.

¶ 42 A review of the entire hearing reveals that after the remarks quoted above, defendant complained that his "right to a speedy trial [was] violated a long time ago." Defendant later

confirmed he wanted to file a motion to dismiss based on a speedy trial violation, which the court denied.

¶ 43 At the close of the pretrial exchange, the court asked defendant: "Do you want to go to trial or do you want to bring Mr. Zinger in? What do you want to do?" Defendant responded: "I want to go to trial." Therefore, the trial court understood defendant's request and allowed him to choose whether he wanted to proceed. We find no abuse of discretion by the trial court. In conclusion on this point, defendant's right to counsel of his choice was not violated where he did not indicate that he wished to substitute another attorney in response to the court's questioning.

¶ 44 Defendant argues this case is comparable to *Tucker*, where the defendant informed the court that he had hired a new attorney and identified him by name. *Tucker*, 382 Ill. App. 3d at 918-19. This court held that the trial court abused its discretion in denying the defendant's motion for a continuance to substitute counsel, noting the trial court did not inquire into the "circumstances and purposes" of the defendant's request. *Id*. at 924. Here, however, defendant did not expressly ask for new counsel. When the court asked defendant if he wanted "to bring Mr. Zinger in," defendant responded that he wanted to "go to trial." Defendant also relies on *Basler*, in which this court reversed and remanded for a new trial because the defendant's request for a continuance to allow substitute counsel to appear was denied. *Basler*, 304 Ill. App. 3d at 232. In *Basler*, however, unlike in the case at bar, the court did not inquire into the defendant's request for a new attorney.

¶ 45 Defendant next contends that if he is not awarded relief on his first point, this case should be remanded for a *Krankel* hearing on the claims raised in his *pro se* posttrial motion. At sentencing, defendant gave the court a *pro se* motion, which included the bare phrase

"ineffective assistance of counsel." He now argues that a remand is necessary because the trial court did not inquire about the substance of his motion.

¶ 46 Pursuant to *Krankel*, when a defendant makes a *pro se* posttrial claim that his trial counsel provided ineffective assistance, the trial court must conduct an inquiry "sufficient to determine the factual basis of the claim." *People v. Banks*, 237 Ill. 2d 154, 213 (2010); see also *Krankel*, 102 Ill. 2d at 188-89. That inquiry can take a variety of forms. *People v. Ayres*, 2017 IL 120071, ¶ 12. The trial court may ask defense counsel about the defendant's allegations, or the court can discuss the allegations with the defendant. *People v. Jolly*, 2014 IL 117142, ¶ 30. A third alternative is that the trial court may resolve the motion based on its knowledge of defense counsel's performance and the "insufficiency of the defendant's allegations on their face." *Id.* (quoting and citing *People v. Moore*, 207 Ill. 2d 68, 79 (2003)). Where the trial court has rendered a decision on the merits of the defendant's ineffective assistance claim and found it unnecessary to appoint new counsel, we reverse only where the court's ruling is manifestly erroneous, meaning that error is "clearly plain, evident, and indisputable." *People v. Willis*, 2016 IL App (1st) 142346, ¶ 18; *People v. Tolefree*, 2011 IL App (1st) 100689, ¶ 25. We further note that the trial court is not obligated in this situation to inquire about "unarticulated facts and issues." *People v. Bolton*, 382 Ill. App. 3d 714, 719 (2008).

¶ 47 Our review of the extended colloquy during the posttrial proceedings reveals that the trial court inquired into and rejected defendant's ineffective counsel claim based on its knowledge of defense counsel's performance and the insufficiency of the defendant's allegations. At the outset of the posttrial hearing, the court was informed by defense counsel that defendant wished to proceed *pro se*. Because this was not defendant's first indication that he was unsatisfied with

counsel, the court told defendant he has been represented by competent attorneys and asked about defendant's desire to act as his own counsel. Defendant complained that he had not been provided with the names of his previous public defenders.

¶ 48 At two additional points in that colloquy, the court asked defendant if he wanted to proceed *pro se,* and defendant did not indicate that he wished to do so, instead returning to his argument. The court received a copy of defendant's *pro se* postrial motion. The court noted the phrase "ineffective assistance of counsel" in defendant's motion and allowed defendant to explain its contents. The court asked defendant if he wished to argue his motion himself or have counsel continue to represent him. Defendant responded that he "just want[ed] to add it."

¶ 49 After APD Schreiber argued her own posttrial motion, the court considered and responded to defendant's arguments that counsel was unqualified to defend him. Defendant later addressed the court, saying the court misunderstood his assertion as being a challenge to his counsel's qualifications. Defendant stated he was instead contending that APD Schreiber could not argue mitigation of his sentence "because she doesn't know anything about my background." The colloquy establishes that the court inquired into defendant's contentions of ineffective counsel and sought further detail from defendant. The court rejected defendant's claims as meritless based on its observation of defense counsel's performance.

¶ 50 Defendant contends the facts in this case are "identical" to those in the supreme court's recent decision in *Ayres*. There, the defendant mailed a *pro se* petition to vacate his sentence to the circuit court; that petition alleged "ineffective assistance of counsel." *Ayres*, 2017 IL 120071, ¶ 6. The defendant's *pro se* petition was mailed the same date that defense counsel's motion to reconsider sentence was filed. *Id*. The trial court denied counsel's motion to reconsider; however,

the court "did not consider or even reference defendant's petition," as noted by the supreme court. *Id*. The appellate court affirmed, holding that the words "ineffective assistance of counsel" in the defendant's petition, absent any explanation or supporting facts, did not trigger the court's duty to inquire into the claim. *Id*. ¶ 6. The supreme court, however, remanded to the circuit court for a *Krankel* inquiry, noting the circuit court "never addressed" the defendant's petition and holding the court erred in "failing to conduct any inquiry into the factual basis of defendant's allegations." *Id*. ¶ 26. The supreme court noted that in such a case, a defendant "need only bring his claim to the court's attention." *Id*. ¶ 24. Here, in contrast to *Ayres*, the trial court was not only aware of the filing of defendant's *pro se* motion, the court addressed defendant's claims of counsel's ineffectiveness.

¶ 51 In conclusion, because defendant did not seek new counsel during his pretrial proceedings, his right to counsel of his own choosing was not violated. Moreover, the court considered defendant's posttrial claim of counsel's ineffectiveness and could base its ruling on its knowledge of counsel's performance at trial.

¶ 52 Accordingly, the judgment of the circuit court of Cook County is affirmed.

¶ 53 Affirmed.