2018 IL App (1st) 170464-U

No. 1-17-0464

Order filed September 28, 2018

Fifth 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 CR 12195
	)	
EDWARD HUTSON,	)	Honorable
	)	Matthew E. Coghlan,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Rochford and Justice Hall concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's remarks at his resentencing hearing, regarding the performance of his trial counsel, were sufficient to require the trial court to conduct a preliminary inquiry pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984). We remand for that purpose.

¶ 2 Following a jury trial in 2014, defendant Edward Hutson was convicted of possessing contraband in a penal institution. Defendant was sentenced, based on his criminal history, to a Class X term of 12 years in prison. After defendant's initial appeal to this court, his case was

remanded for resentencing. See *People v. Hutson*, 2016 IL App (1st) 141819-U, ¶ 6. On remand, defendant was sentenced to 12 years' imprisonment. In this appeal, defendant contends his remarks to the court at his resentencing hearing triggered the court's duty to conduct an inquiry into his claims of ineffective assistance of trial counsel in accordance with *People v. Krankel*, 102 Ill. 2d 181 (1984). We agree and remand for the court to perform a preliminary *Krankel* inquiry into defendant's claim.[1]

¶ 3 Because defendant does not challenge the sufficiency of the evidence to sustain his conviction, we recount the facts to the extent necessary to resolve the issue raised on appeal. At trial, the State presented evidence that, while defendant was in jail awaiting trial on an aggravated domestic battery charge, a "shank" was found under the mattress in his cell. The jury found him guilty of possessing contraband in a penal institution. At defendant's sentencing for the possession of contraband offense, the court was informed that defendant had been convicted and sentenced to 20 years' imprisonment on the aggravated domestic battery charge. The court sentenced him to 12 years in prison for possession of contraband in a penal institution, and stated that defendant would receive 728 days of credit toward his sentence for time spent in custody.

¶ 4 In his initial appeal, defendant asserted, and the State correctly agreed, that the case should be remanded for resentencing because the trial court sentenced defendant under the mistaken belief that 728 days of credit could be applied to his possession of contraband sentence, despite that credit having already been assessed toward his domestic battery sentence. This court vacated defendant's possession of contraband sentence and remanded for resentencing. *Hutson*, 2016 IL App (1st) 141819-U, ¶ 6.

[1] In adherence with the requirements of Illinois Supreme Court Rule 352(a) (eff. July 1, 2018), this appeal has been resolved without oral argument upon the entry of a separate written order.

¶ 5 On remand, the court resentenced defendant to 12 years in prison for possession of contraband in a penal institution. Defense counsel told the court that he planned to file a motion to reconsider defendant's sentence. The following exchange then occurred:

> "THE COURT: The defendant is raising his hand. Something else you want to say?
>
> DEFENDANT: There was a paper like when I was going to trial because I had gave the lady on the third floor to show that I had about a month, and she never brought it up on the trial. That is what I was trying to tell him. I got a copy of the paper. I sent it to my attorney. I got the paper to get my medical records from Cook County.
>
> ASSISTANT PUBLIC DEFENDER: Judge, I have explained to him I think those issues were probably already dealt with on appeal, and the only thing that was remanded back to this court was the issue of sentencing. That was a trial issue that is not before the court basically.
>
> THE COURT: It's only back here for resentencing. I have no knowledge of that. You could attempt to raise that on the appeal of this sentence. I don't know whether or not the appellate court would allow you to raise that. If it was not raised in your original appeal, it may have been forfeited.
>
> Your remedy for something like that would then possibly be to file a postconviction petition. That is something you need to discuss with your attorney. I am not advising you one way or the other."

After hearing the State's argument as to defendant's motion to reconsider sentence, the court denied the motion.

¶ 6 On appeal, defendant contends this case should be remanded because his comments were sufficient to warrant additional inquiry by the trial court as to his trial counsel's performance pursuant to *Krankel*. He argues the court erred in advising him that his claims should be considered in an appeal or a postconviction proceeding.

¶ 7 We initially note that defendant did not raise his claim regarding his trial counsel's performance immediately following the trial, as is the case in most decisions that apply *Krankel*. See *Krankel*, 102 Ill. 2d at 187-89 (cases that require this analysis largely involve claims of ineffective assistance raised by the defendant in a posttrial motion or during sentencing). Here, defendant's remarks came after he had appealed to this court and the case was remanded to the trial court for resentencing. See *People v. Jackson*, 2016 IL App (1st) 133741, ¶¶ 25-27 (the court addressed the defendant's challenge to the effectiveness of his trial counsel when the case was on remand due to the court's failure to admonish the defendant regarding his waiver of counsel as to his posttrial motions).

¶ 8 In this court, the State does not argue that defendant could not raise his ineffective assistance claims on remand for resentencing. Rather, the State responds that defendant's remarks did not require a *Krankel* inquiry because they were vague in nature and did not allege defense counsel's ineffectiveness. The State further asserts that even if additional inquiry was warranted, the court's failure to conduct such questioning was harmless because defendant's statements involved matters of trial strategy.

¶ 9 *Krankel* and its progeny state that when a defendant makes a *pro se* posttrial claim of the deficient performance of trial counsel, new counsel may be appointed for the defendant to argue the claim of ineffectiveness. *People v. Moore*, 207 Ill. 2d 68, 77 (2003). A defendant "is not

required to do any more than bring his or her claim to the trial court's attention." *People v. Ayres*, 2017 IL 120071, ¶ 11 (quoting and citing *Moore*, 207 Ill. 2d at 79).

¶ 10 In *Ayres,* the supreme court recently held that a defendant is entitled to a *Krankel* inquiry when he makes a "clear" complaint, either orally or in writing, pertaining to his trial counsel's performance or the effective assistance of counsel. *Ayres*, 2017 IL 120071, ¶ 18. The supreme court held that the defendant's bare statement of "ineffective assistance of counsel" in a written motion triggered the trial court's duty to ask about the underlying facts and circumstances supporting that claim. *Id*. In *Ayres*, the supreme court clarified that a claim of counsel's ineffectiveness can warrant further inquiry even if the contention is initially devoid of factual support, pointing to the requirement that the court ascertain the "underlying factual basis of the claim." *Id*. ¶ 19.

¶ 11 When the issue is raised, 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). If the court determines the claim lacks merit or pertains only to matters of trial strategy, new counsel need not be appointed and the defendant's *pro se* claim may be denied. *People v. Taylor*, 237 Ill. 2d 68, 75 (2010). However, if the defendant's allegations show possible neglect of the case, new counsel should be appointed to argue the defendant's claim. *Id*. (citing *Moore*, 207 Ill. 2d at 77-78).

¶ 12 The trial court's inquiry into a defendant's claim can take one of three forms. *Ayres*, 2017 IL 120071, ¶ 12. The court may ask defense counsel about the defendant's allegations, discuss the allegations directly with the defendant or resolve the motion based on its knowledge of counsel's performance and the facial insufficiency of the defendant's allegations. *People v. Jolly*,

2014 IL 117142, ¶ 30. That procedure "is intended to fully address a defendant's *pro se* posttrial claims of ineffective assistance of counsel at the trial level, which would serve to potentially limit issues on appeal or, if such issues are raised on appeal, would provide a sufficient record for the reviewing court to consider those claims." *Jackson*, 2016 IL App (1st) 133741, ¶ 69.

¶ 13 If the court fails to conduct the necessary preliminary examination as to the factual basis of the defendant's allegations, the case must be remanded for the limited purpose of allowing the court to do so. *People v. Remsik-Miller*, 2012 IL App (2d) 100921, ¶ 9. The threshold matter of whether the defendant's statement constituted a claim sufficient to trigger the court's duty to conduct a preliminary *Krankel* inquiry is a question of law that we review *de novo*. *Jolly*, 2014 IL 117142, ¶ 28; see also *Moore*, 207 Ill. 2d at 75 (if the trial court has not made a determination on the merits of the defendant's claim, a *de novo* standard of review is applied).

¶ 14 Here, we find that although defendant's remarks were not presented to the court in an artful manner, they were sufficient to trigger the trial court's duty to ask about the underlying facts and circumstances supporting defendant's remarks. Stated differently, the court erred in not conducting an adequate inquiry to ascertain the factual basis of defendant's claim. The record shows that defendant raised his hand and addressed the court. In his remarks to the court, defendant referred to "a paper" that was never brought up on trial and that he had sent to his attorney. Defendant also referenced his medical records. Defense counsel responded and told the court "those issues were probably already dealt with on appeal" and that defendant was referring to a "trial issue that is not before the court basically." Rather than inquiring further and determining the factual basis for defendant's remarks, the court responded the case was "only back here for resentencing" and the court had "no knowledge" of defendant's complaint. The

court admonished defendant to raise the issue on appeal or in a postconviction petition. Contrary to the State's argument that the trial court recognized defendant's claim as involving trial strategy, which would not trigger a *Krankel* inquiry, the colloquy here indicates the court was not aware of the substance of defendant's complaint and did not conduct a sufficient inquiry into defendant's contentions. *People v. Mays*, 2012 IL App (4th) 090840, ¶ 58 (the court should question the defendant if a claim's factual basis is unclear).

¶ 15 In reaching this conclusion, we are not persuaded by the State's contention that any misstep by the trial court constituted harmless error. For this court to perform a harmless error analysis, "there must be enough of a record made concerning the defendant's claims of ineffective assistance for the appellate court to evaluate the trial court's ruling." *People v. McLaurin*, 2012 IL App (1st) 102943, ¶ 42; see also *Jolly*, 2014 IL 117142, ¶¶ 42-44 (harmless-error test can only be applied if the trial court has already performed a preliminary inquiry). Here, the trial court conducted no inquiry into defendant's remarks and instead admonished defendant that his complaint should be "discuss[ed] with his attorney" and should be pursued in a different proceeding. In addition, defendant's remarks seem to reference a matter that cannot be resolved from the record at bar, *i.e.*, an unspecified document that he sent to his attorney that was never brought up at trial. Under these circumstances, we decline the State's invitation to engage in a harmless-error analysis.

¶ 16 In sum, where the trial court fails to conduct an adequate inquiry into defendant's claims of counsel's ineffective assistance, the proper remedy is to remand the case to the trial court to conduct the necessary inquiry. *Id.* ¶ 44. Accordingly, this case is remanded with directions to conduct a preliminary inquiry into the basis of defendant's claim pursuant to *Krankel*.

¶ 17 Remanded with directions.