2019 IL App (4th) 170393-U

NO. 4-17-0393

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
August 2, 2019
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Macon County
STEPHEN D. SMITH,	)	No. 16CF1075
Defendant-Appellant.	)	
	)	Honorable
	)	Robert C. Bollinger,
	)	Judge Presiding.

JUSTICE DeARMOND delivered the judgment of the court.
Presiding Justice Holder White and Justice Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court remanded for further proceedings, finding defendant is entitled to a *Krankel* hearing.

¶ 2 In August 2016, the State charged defendant, Stephen D. Smith, by information with attempted first degree murder, aggravated battery with a firearm, and aggravated discharge of a firearm. In March 2017, a jury found defendant guilty on all charges. In May 2017, the trial court sentenced defendant to 40 years' imprisonment. After the court imposed the sentence, defense counsel filed a notice of appeal upon discussion with defendant. The court directed the clerk to do so and appointed the Office of the State Appellate Defender (OSAD) to represent defendant. Afterward, in a *pro se* motion to reduce his sentence, defendant alleged, *inter alia*, his "attorney only argued some issues not every issue." The court denied a hearing on the motion, finding the court lacked jurisdiction as the notice of appeal was already filed.

¶ 3 On appeal, defendant argues (1) the trial court erred by refusing to consider his motion for a reduction of sentence and (2) he was denied effective assistance of counsel due to counsel's failure to file a motion *in limine* to exclude the photograph lineup. We remand with directions.

¶ 4 I. BACKGROUND

¶ 5 In July 2016, defendant and Justin Przewoznik arranged to meet at the intersection of 21st Street and William Street in Decatur. Przewoznik expected to either talk or fight since defendant was the current paramour of Katrina Allen, the mother of Przewoznik's child, and the two had been trading phone calls that day. When Przewoznik drove up to the location, he saw defendant standing in the alleyway. Although Przewoznik said the location was suggested by defendant, Allen said Przewoznik identified where the meet was to occur. Przewoznick drove to within three to four feet of defendant, rolled down his window, and told defendant if they were going to fight, he was going to pull his car up a little further. According to Przewoznik, defendant's body language in response indicated defendant consented to fight. Przewoznik described defendant as wearing a white T-shirt with a "wife beater underneath of it," athletic shorts, "[l]ow top Air Force [O]ne kind of Nike sneaker[s]," and a solid-colored fitted hat. Allen said defendant was wearing a white T-shirt, black or dark-colored athletic shorts, and Air Force-style shoes when she saw him earlier that day. Przewoznik parked his car down the alley about 50 to 60 feet from defendant's location and put his glasses on the trunk of his car. As Przewoznik approached within 25 to 30 feet of defendant, defendant reached into his waistband, pulled out a black handgun, and started firing at him. Przewoznik said the first shot hit him as he was reaching to jump over a fence in reaction to defendant pulling a gun. He was shot under his left armpit. Defendant continued shooting as Przewoznik ran away, and Przewoznik said he was

able to see the bullets from two shots hit the ground as he ran. Although Przewoznik was able to see the black handgun, he said he was not familiar with firearms and could not identify its make or model. Przewoznik eluded defendant, ran to a house, and asked someone to call the police. He told the police defendant shot him and picked him out of a photograph lineup that day.

¶ 6 As a result, the State charged defendant with attempted first degree murder (720 ILCS 5/8-4(a), 5/9-1(a)(1) (West 2014)), alleging defendant performed a substantial step toward the commission of first degree murder in that he discharged a firearm with the intent to kill which caused great bodily harm. The State also charged defendant with aggravated battery with a firearm (720 ILCS 5/12-3.05 (West 2014)), alleging defendant discharged a firearm which caused injury to Przewoznik. Additionally, defendant was charged with aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2014)), which alleged defendant knowingly discharged a firearm at Przewoznik.

¶ 7 The trial court conducted a jury trial in March 2017. The jury found defendant guilty on all counts. At the hearing on posttrial motions, the court found all counts merged into the first degree murder count, and a conviction was entered on that count. On May 11, 2017, the court sentenced defendant to 15 years' imprisonment with a 25-year firearm enhancement.

¶ 8 After the sentence was imposed and the trial court inquired whether the attorneys had anything further to discuss, defendant's counsel requested a moment to speak with his client. After doing so, counsel indicated:

> "Judge, I was asking my client about what he wanted to do as far as a motion to reconsider before asking for an appeal. At this point, he—we don't see any sentencing issues, so we're going to waive the right to file a motion to reconsider sentence and we'd just ask

the court to direct the clerk to file a Notice of Appeal on [defendant's] behalf and appoint the appellate defender."

¶ 9 The trial court proceeded to admonish defendant according to Illinois Supreme Court Rule 605(a) (eff. Oct. 1, 2001) and asked if he understood those rights. Defendant responded in the affirmative, and the court again offered counsel time to discuss the matter with his client, asking, "Now [defense counsel], do you want to again confer with your client to make sure that he doesn't want to file any other motions before I direct the clerk to file a Notice of Appeal?" After another off-the-record conversation between defendant and his attorney, counsel said, "That's correct, sir. We'd ask for the clerk to be directed to file a Notice of Appeal." The trial court went even further and inquired directly of defendant, "Is that your decision Mr. Smith?" to which he responded, "Yes sir." The court then directed the clerk to file a notice of appeal on defendant's behalf and appointed OSAD for defendant. The clerk's notice of appeal was filed the same date. An amended notice of appeal was filed by OSAD on June 2, 2017, seeking to appeal both the conviction and sentence. On that same date, defendant's *pro se* motion for reduction of sentence and notice of appeal were filed by the clerk after having been placed in the prison's mailing system on May 26, 2017, according to defendant's proof of service. Defendant's motion to reduce his sentence listed the reasons why his sentence should be reduced, as follows: "inconsistent statements of victims, [n]o witnesses, [v]ictim was impeached, [s]uggestive photo array, [v]ictim said [he] was only 50% sure that I was the shooter, [and] attorney only argued some issues not every issue." After reviewing defendant's *pro se* filings, the court entered a docket order finding his motion and notice were not properly before the court since defendant was, at all relevant times, represented by counsel. The court ordered the motion stricken but concluded it was not procedurally proper or necessary to strike his notice of appeal.

Instead, the court directed counsel to determine whether there was any basis to seek a reduction of sentence and, if so, to file a timely motion thereon, at which time the court would strike the notice of appeal. No subsequent motion was filed by defense counsel.

¶ 10 This appeal followed.

¶ 11 II. ANALYSIS

¶ 12 Defendant argues, pursuant to Illinois Supreme Court Rule 606(b) (eff. Dec. 11, 2014), the trial court had jurisdiction to address the motion because it presented a *pro se* claim of ineffective assistance of counsel. Defendant necessarily asserts we do not have jurisdiction in this case, and we should remand for a *Krankel* hearing. See *People v. Krankel*, 102 Ill. 2d 181, 464 N.E.2d 1045 (1984).

¶ 13 Illinois Supreme Court Rule 606(b) (eff. Dec. 11, 2014) provides:

> "When a timely posttrial or postsentencing motion directed against the judgment has been filed by counsel or by defendant, if not represented by counsel, any notice of appeal filed before the entry of the order disposing of all pending postjudgment motions shall have no effect and shall be stricken by the trial court."

The rule applies "whether the timely postjudgment motion was filed before or after the date on which the notice of appeal was filed." Ill. S. Ct. R. 606(b) (eff. Dec. 11, 2014). As such, "when a timely posttrial or postsentencing motion directed against the judgment is filed, even after a notice of appeal is filed, the notice must be stricken." *People v. Darr*, 2018 IL App (3d) 150562, ¶ 90, 95 N.E.3d 10.

¶ 14 In this case, defendant's counsel filed a notice to appeal after consulting with his client on May 11, 2017. On May 26, 2017, defendant filed a *pro se* motion for reduction of his

sentence alleging, among other things, unspecified failures by his attorney, along with a notice of appeal. See *People v. Shines*, 2015 IL App (1st) 121070, ¶ 31, 33 N.E.3d 169 (stating pleadings are considered filed when placed in prison mail system.

¶ 15 A defendant has no authority to file *pro se* motions when he or she is represented by counsel. *People v. Bell*, 2018 IL App (4th) 151016, ¶ 28, 100 N.E.3d 177. "A defendant has the right to proceed either *pro se* or through counsel; he has no right to some sort of hybrid representation whereby he would receive the services of counsel and still be permitted to file *pro se* motions." *People v. Stevenson*, 2011 IL App (1st) 093413, ¶ 30, 960 N.E.2d 739. However, there is an exception to that rule which allows a represented defendant to raise *pro se* claims of ineffective assistance of counsel. *Bell*, 2018 IL App (4th) 151016, ¶ 28.

¶ 16 In *Bell*, addressing a similar issue, we stated Rule 606(b) does not divest jurisdiction from the appellate court. *Bell*, 2018 IL App (4th) 151016, ¶¶ 30-32. Citing our supreme court's decisions in *People v. Ayres*, 2017 IL 120071, ¶¶ 9-24, 88 N.E.3d 732, and *People v. Patrick*, 2011 IL 111666, ¶¶ 28-43, 960 N.E.2d 1114, where the defendants filed *pro se* ineffective assistance of counsel claims which were not considered by the trial courts, we noted the supreme court, in both cases, addressed the merits of the trial court's failure to do so. *Bell*, 2018 IL App (4th) 151016, ¶ 31. This court went on to reject the State's argument that Rule 606(b) impacts the procedure prescribed by *Krankel*. *Bell*, 2018 IL App (4th) 151016, ¶ 32. Instead, we are to review *de novo* whether a defendant's allegations in his or her *pro se* posttrial motion were sufficient to trigger the court's duty to a *Krankel* inquiry. *Bell*, 2018 IL App (4th) 151016, ¶ 36.

¶ 17 "[A] *pro se* defendant is not required to do any more than bring his or her claim to the trial court's attention[.]" *People v. Moore*, 207 Ill. 2d 68, 79, 797 N.E.2d 631, 638 (2003). In

Ayres, 2017 IL 120071, ¶ 9, the issue revolved around whether an allegation simply stating "ineffective assistance of counsel" must be accompanied by some factual support before a *Krankel* inquiry is triggered. The supreme court concluded, "[W]hen a defendant brings a clear claim asserting ineffective assistance of counsel, either orally or in writing, this is sufficient to trigger the trial court's duty to conduct a *Krankel* inquiry." *Ayres*, 2017 IL 120071, ¶ 18; see also *People v. Thomas*, 2017 IL App (4th) 150815, ¶ 26, 93 N.E.3d 664 (noting "[c]ourts have found a defendant is entitled to a *Krankel* inquiry when the defendant makes an explicit or 'clear' complaint of trial counsel's performance or ineffective assistance of counsel"). "[T]he primary purpose of the preliminary inquiry is to give the defendant an opportunity to flesh out his claim of ineffective assistance so the court can determine whether appointment of new counsel is necessary." *Ayres*, 2017 IL 120071, ¶ 20.

¶ 18 Here, defendant's motion for a reduction of sentence listed as one of several reasons why his sentence should be reduced, simply, "attorney only argued some issues not every issue." What we are confronted with is, essentially, the opposite of the situation found in *Ayres*; a factual allegation of something defendant did not like about his attorney's performance with no "clear claim asserting ineffective assistance of counsel," as in *Ayres*, 2017 IL 120071, ¶ 18; "express allegation of ineffective assistance" as in *Bell*, 2018 IL App (4th) 151016, ¶ 36, where the defendant said explicitly he was denied " 'EFFECTIVE ASSISTANCE OF COUNSEL;' " or an "explicit or 'clear' complaint of trial counsel's performance or ineffective assistance of counsel," as in *Thomas*, 2017 IL App (4th) 150815, ¶ 26. While a defendant need not necessarily use the terms "ineffective assistance of counsel," in *Thomas* we said, "for a defendant to make a 'clear claim' of ineffective assistance of counsel, the defendant must at least mention his attorney." *Thomas*, 2017 IL App (4th) 150815, ¶ 31. In *People v. Lobdell*, 2017 IL

App (3d) 150074, ¶ 37, 83 N.E.3d 502, which we found inapplicable to the facts in *Thomas*, 2017 IL App (4th) 150815, ¶ 26, the defendant was found entitled to a *Krankel* hearing where the defendant, in a letter to the trial court, questioned why his attorney did not address what he claimed to be fourth and fifth amendment issues surrounding his arrest. In *People v. Remsik-Miller*, 2012 IL App (2d) 100921, ¶ 17, 966 N.E.2d 1069, the Second District found the defendant was entitled to a *Krankel* hearing where she stated her counsel did not represent her " 'to his fullest ability.' "

¶ 19 Although it seems the barest of allegations, defendant's statement "attorney only argued some issues not every issue" does minimally fulfill our criteria mentioned in *Thomas*—defendant at least mentioned his attorney and claimed something about counsel's performance he did not like. In light of the broad interpretation given *Ayres* in cases throughout this state, the safest approach would be that outlined in *Moore*, 207 Ill. 2d at 77-78. The trial court should first examine the factual basis of defendant's claim by conducting a preliminary inquiry between the court, trial counsel, and defendant regarding the facts and circumstances surrounding the alleged ineffective representation. *Moore*, 207 Ill. 2d at 77-78. This can consist of nothing more than trial counsel simply answering questions about the allegations and a brief discussion with defendant. *Moore*, 207 Ill. 2d at 78. The court is permitted to consider its knowledge of defense counsel's performance at trial along with the insufficiency of defendant's allegations on their face when assessing defendant's claim of ineffective assistance. *Moore*, 207 Ill. 2d at 79. "[T]he trial court does not—and cannot—reach the merits of an ineffective assistance claim; the court simply determines whether it is appropriate to appoint new counsel for the defendant to investigate such claims" in a full evidentiary hearing. *People v. Roddis*, 2018 IL App (4th) 170605, ¶ 47, 119 N.E.3d 52.

¶ 20 For these reasons, we find defendant's *pro se* motion was sufficient to require the preliminary inquiry under *Krankel* and remand the matter to the trial court for a hearing thereon. Therefore, we need not address the other issues of ineffective assistance of counsel, which the court can review on remand. *Bell*, 2018 IL App (4th) 151016, ¶ 37.

¶ 21 III. CONCLUSION

¶ 22 For the reasons stated, we remand for the trial court to conduct a preliminary *Krankel* inquiry into defendant's *pro se* claim of ineffective assistance of counsel.

¶ 23 Remanded with directions.