2019 IL App (4th) 180255-U

NO. 4-18-0255

FILED
August 22, 2019
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. BRYAN RHODES, Defendant-Appellant.	) Appeal from the) Circuit Court of) Coles County) No. 16CF75)) Honorable) Brien J. O'Brien,) Judge Presiding.

JUSTICE CAVANAGH delivered the judgment of the court.
Presiding Justice Holder White and Justice DeArmond concurred in the judgment.

ORDER

¶ 1 *Held*: Because defendant, after firing his privately retained counsel, chose to represent himself in posttrial proceedings and did not request the appointment of counsel, *Krankel* is inapplicable.

¶ 2 Defendant, Bryan Rhodes, appeals on the ground that the circuit court of Coles County omitted a preliminary inquiry into his *pro se* posttrial allegation of ineffective assistance. See *People v. Krankel*, 102 Ill. 2d 181 (1984). Because defendant, after firing his privately retained counsel, chose to represent himself in posttrial proceedings and did not request the appointment of counsel, *Krankel* is inapplicable. Therefore, we affirm the judgment.

¶ 3 I. BACKGROUND

¶ 4 On August 11, 2017, at the conclusion of a bench trial, in which defendant was represented by private counsel, the circuit court found defendant guilty of aggravated driving under the influence of alcohol (625 ILCS 5/11-501(d)(2)(C) (West 2016)).

¶ 5 On September 27, 2017, before sentencing, defense counsel moved for permission to withdraw from representing defendant.

¶ 6 On October 2, 2017, the circuit court held a hearing on defense counsel's motion to withdraw. Defendant told the court he had no objection to the motion. The court asked defendant if he had "a plan for going forward." In answering that question, defendant explained:

> "I just haven't been *** represented that well, so that's why I did not want him to continue representing me, and plus I cannot afford to pay him no more, so I would like with all due respect if you would just allow me to go ahead and do my sentencing myself and allow me an extra week to *** get my sentencing last statements in order ***."

¶ 7 After giving defense counsel permission to withdraw from representing defendant and after defense counsel handed defendant a check for the balance of the retainer fee, the circuit court confirmed with defendant that he was requesting only a week's continuance and that he was waiving the 21-day period a party normally would be allowed to retain a new attorney after the party's attorney withdrew.

¶ 8 Then the circuit court asked defendant some questions to determine whether he had "the capacity to make an intelligent and knowing waiver of [his] right to counsel." The court learned that defendant was 54 years old, had graduated from high school, knew how to read and write, had never been adjudicated as disabled or mentally incompetent, and had never represented himself in court before, although he had appeared in court on at least 15 prior occasions in traffic, misdemeanor, and felony cases. He had never been in a sentencing hearing before, but he had "a good idea" of how a sentencing hearing proceeded, and he was, in his own words, "very confident" that he could represent himself in a sentencing hearing.

¶ 9 The circuit court then warned defendant:

> "THE COURT: And you understand that if I allow you to do that, if I tell you today I'm going to allow you to represent yourself, you can't show up on the day of your sentencing and say, [']Judge, now I want you to appoint counsel for me,['] I mean essentially you're going to be stuck with that decision; do you understand that?
>
> DEFENDANT RHODES: Yes, Your Honor, I do."

¶ 10 Finding that defendant had made "an intelligent and knowing waiver of his right to counsel at the sentencing hearing," the circuit court accepted the waiver. The court canceled the October 4, 2017, date for a sentencing hearing and rescheduled the sentencing hearing for October 11, 2017.

¶ 11 In the rescheduled sentencing hearing, defendant appeared *pro se*, and the circuit court sentenced him to imprisonment for three years.

¶ 12 This appeal followed.

¶ 13 II. ANALYSIS

¶ 14 Defendant hired a private attorney, and after receiving a guilty verdict, he fired the attorney, complaining to the circuit court of the attorney's performance. The only cited case with those facts is *People v. Mourning*, 2016 IL App (4th) 140270, ¶¶ 4-5.

¶ 15 *Mourning* held that the circuit court had erred by failing to make a preliminary inquiry into the defendant's *pro se* posttrial claim of ineffective assistance. *Id.* ¶ 18. In so holding, *Mourning* distinguished *People v. Pecoraro*, 144 Ill. 2d 1 (1991), and *People v. Shaw*, 351 Ill. App. 3d 1087 (2004). The defendants in those cases, like the defendant in *Mourning*, complained of the performance of their privately retained counsel, but they never requested the

appointment of new counsel; hence, the requirement to make a *Krankel* inquiry was never triggered. *Mourning*, 2016 IL App (4th) 140270, ¶ 18. By contrast, the defendant in *Mourning* had "requested new counsel and [had] informed the court that he was financially incapable of hiring a new attorney"; thus, "[u]nder those circumstances," the court should have made "a preliminary inquiry under *Krankel* to determine whether to appoint new counsel to represent [the] defendant." *Id*.

¶ 16 The plain import of *Mourning* is that the defendant's request for the appointment of counsel made all the difference. See *id*.; see also *Shaw*, 351 Ill. App. 3d at 1092 ("Even if it were true that [the] defendant could no longer afford to hire another private counsel, he could have told the court that he wished to fire his then-counsel and asked the trial court to again appoint counsel to represent him."). Defendant in this case never requested the appointment of counsel. Instead, he told the circuit court he wanted to represent himself in the sentencing hearing and that he was "very confident" of his ability to do so.

¶ 17 Defendant accuses the circuit court of failing to inform him of his right to the appointment of counsel. But the court admonished defendant, "[I]f I tell you today I'm going to allow you to represent yourself, you can't show up on the day of your sentencing and say, ['']Judge, now I want you to appoint counsel for me,['] ***; do you understand that?" Defendant answered, "Yes, Your Honor, I do." Defendant could not have given that affirmative answer without understanding that the court could appoint defense counsel to represent him.

¶ 18 Knowing his right to the appointment of counsel, defendant was "very confident" of his ability to represent himself in the sentencing hearing, and he chose to do so. (Defendant does not raise Illinois Supreme Court Rule 401 (eff. July 1, 1984).) Consequently, the conflict of interest that *Krankel* was designed to avert is absent. The purpose of appointing new counsel

after a preliminary inquiry pursuant to *Krankel* is to obtain an independent evaluation of defendant's allegation of ineffective assistance and to "avoid the conflict of interest that trial counsel would experience if trial counsel had to justify his or her actions contrary to [the] defendant's position." *People v. Moore*, 207 Ill. 2d 68, 78 (2003). "It would be inappropriate for trial counsel to argue a motion that is predicated on allegations of counsel's own incompetence." *Id*. at 79. This would be true regardless of whether trial counsel is appointed or privately retained. See *Mickens v. Taylor*, 535 U.S. 162, 168-69 n.2 (2002). If the *Krankel* inquiry reveals a possible neglect of the case, the court should appoint new posttrial counsel rather than expect the criticized counsel to validate his or her client's criticisms. *People v. Moore*, 207 Ill. 2d 68, 78 (2003). There would be no conflict of interest, however, if, after firing trial counsel, defendant argued his own allegations of trial counsel's incompetence. See *Cuyler v. Sullivan*, 446 U.S. 335, 347 (1980) ("Unless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry."). The conflict-of-interest rationale for *Krankel* has no relevance when defendants choose to represent themselves in posttrial proceedings.

¶ 19 III. CONCLUSION

¶ 20 For the foregoing reasons, we affirm the circuit court's judgment.

¶ 21 Affirmed.