

No. 1-12-2269

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 10 CR 5127
)	
ARTHUR WYATT,)	Honorable
)	Carol M. Howard,
Defendant-Appellant.)	Judge Presiding.

JUSTICE EPSTEIN delivered the judgment of the court.
Justices Fitzgerald Smith and Lavin concurred in the judgment.

O R D E R

¶ 1 *Held:* The defendant's allegations of his counsel's ineffective representation, raised during the trial proceedings, did not warrant further inquiry under *People v. Krankel*.

¶ 2 Following a bench trial, defendant Arthur Wyatt was convicted of delivery of a controlled substance and was sentenced to nine years in prison. On appeal, defendant contends this court should remand his case for an initial inquiry pursuant to *People v. Krankel*, 102 Ill. 2d 181

(1984), regarding his allegation that his trial counsel was ineffective in failing to cross-examine the State's witnesses on certain issues. We affirm.

¶ 3 In July 2011, assistant Cook County public defender Colleen Koch represented defendant in a hearing on the State's plea offer, which defendant rejected.¹ At that hearing, defendant told the court he had been "going back and forth to the law library and everything that she's talking about I really need to demand to see to face my accusers." Defendant stated later in the hearing that he "need[ed] answers from his accusers." Defendant told the court he did not think his attorney was correctly advising him as to a plea offer, and the court responded that defendant's counsel had informed defendant as to the possible sentence if he was convicted after a trial.

¶ 4 In June 2012, Koch represented defendant at his bench trial. Koch argued that the evidence would be insufficient to prove defendant's guilt beyond a reasonable doubt. The State presented evidence that defendant delivered 105 grams of heroin to an undercover officer. Illinois State Police Sergeant Gutierrez testified that he had previously arranged narcotics purchases with defendant, and on February 10, 2010, he spoke with defendant in a recorded conversation to arrange a purchase of heroin. Defendant was arrested immediately after that transaction. The recorded conversation was played at trial. Gutierrez identified defendant in court as the person who sold him heroin. Koch cross-examined Gutierrez about the transactions, his prior grand jury testimony as to defendant, and the contents of his report about the transactions.

¹ Assistant public defender Koch also represented defendant in a separate bench trial on drug possession and delivery charges for which defendant received five-year prison sentences that he is serving concurrently to the sentence in the instant case. These convictions were affirmed on appeal. *People v. Wyatt*, 2013 IL App (1st) 131013 (unpublished summary order under Supreme Court Rule 23).

¶ 5 Illinois State Police Sergeant Frank Spizzirri testified that he was part of the narcotics investigation team conducting surveillance of the transaction with defendant. Koch cross-examined that officer as well as the forensic scientist who testified the package delivered to Gutierrez tested positive for 102.5 grams of heroin.

¶ 6 At the close of the State's case, defendant's counsel moved for a directed finding, arguing the State failed to meet its burden. The trial court denied the defense's motion. Defense counsel told the court defendant had decided he would not testify. The following exchange then took place:

THE COURT: Mr. Wyatt, I want you to understand that you have a right to testify and that right is yours and yours alone and no one can waive it.

DEFENDANT: Your Honor, I had questions about certain things to the event.

THE COURT: What we're talking about right now is your decision concerning your testimony, not questions that could have been asked of the witnesses.

DEFENDANT: My questions were never asked because my attorney never asked them.

THE COURT: Mr. Wyatt, right now we're dealing with the issue of your testimony. Your attorney is a good attorney and she knows what issues are meritorious and –

DEFENDANT: Well, she told me I shouldn't testify so –

THE COURT: And she knows what questions should be asked.

You were saying that she told you not to testify, but it is your decision and your decision alone concerning your testimony. Do you want to testify?

DEFENDANT: No.

THE COURT: I find that Mr. Wyatt has knowingly and intelligently waived his right to testify and that waiver will be accepted.

Argument.

MS. KOCH [assistant public defender]: I'm sorry, Judge. We rest. We have no witnesses."

¶ 7 The court then heard closing arguments, after which the court found defendant guilty of delivery of a controlled substance. At a later proceeding, the trial court denied defendant's motion for a new trial. At sentencing, defendant spoke in allocution and apologized to the court. The court imposed a nine-year sentence for the instant offense.

¶ 8 On appeal, defendant contends that this case should be remanded for an initial examination of his trial attorney's performance pursuant to *Krankel*. Defendant argues such a remand is necessary because the court failed to make any inquiry into the factual basis of his allegation that his attorney did not adequately cross-examine the prosecution's witnesses. The State agrees that a preliminary *Krankel* inquiry was not made; however, the State asserts that defendant's complaint about his counsel's trial tactics, made in the middle of his trial, did not trigger the trial court's duty to further investigate defendant's contentions.

¶ 9 At issue is whether defendant's claim of his counsel's deficient representation, which defendant voiced during his trial, invokes the procedures set out in *Krankel*. The

Krankel decision itself involved claims brought after trial, holding that the defendant was entitled to representation by a different attorney on the defendant's *pro se* motion for a new trial asserting his trial counsel's ineffectiveness. *Id.* at 187-88.

¶ 10 The holding of *Krankel* was further developed in *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003), which states:

"[W]hen a defendant presents a *pro se* post-trial claim of ineffective assistance of counsel, the trial court should first examine the factual basis of the defendant's claim. If the trial court determines that the claim lacks merit or pertains only to matters of trial strategy, then the court need not appoint new counsel and may deny the *pro se* motion. However, if the allegations show possible neglect of the case, new counsel should be appointed."

Moore also noted that a *pro se* defendant is not obligated to renew claims of ineffective assistance once they are made known to the circuit court. *Id.* at 79.

¶ 11 The point in time at which a defendant raises claims of counsel's ineffectiveness has been addressed by the supreme court, although those cases have addressed claims brought before and after trial, as opposed to during trial, as occurred in the case at bar. In *People v. Jocko*, 239 Ill. 2d 87, 93 (2010), the supreme court expressly held that the defendant's *pro se* pre-trial motion complaining of his counsel's absence at his arraignment did not require the trial court to consider the claim of counsel's ineffectiveness under *Krankel* prior to trial, noting that "there is no way to determine if counsel's errors have affected an outcome that has not yet occurred." Cases requiring a *Krankel* analysis largely have involved claims of ineffective assistance raised by a

defendant in a post-trial motion or during sentencing. *Krankel*, 102 Ill. 2d at 187-89; see also, *People v. Patrick*, 2011 IL 111666, ¶ 37-38 (a defendant's *pro se* claims of ineffective assistance, brought after trial, were to be considered under the *Krankel* analysis); *People v. Raney*, 2014 IL App (4th) 130551, ¶ 53-56 (case remanded for informal *Krankel* inquiry where trial court did not address defendant's *pro se* post-trial motion for a reduction of his sentence alleging that his counsel at sentencing did not subpoena witnesses on his behalf); *People v. Washington*, 2012 IL App (2d) 101287, ¶ 19 (noting *Moore* and *Jocko* and observing that the supreme court has "explicitly applied *Krankel* only to post-trial motions").

¶ 12 Here, defendant contends that because he raised his claim after his counsel cross-examined the State's witnesses, which he deemed the effective end of his trial, he alleged his counsel's ineffectiveness at an "opportune juncture of the trial proceedings" at which the trial judge was "ideally positioned" to determine whether his attorney's performance prejudiced his defense. However, we find that the timing of defendant's claims in this case is analogous to the claim found to be premature in *Jocko*. Defendant acknowledges, and the record makes clear, that his complaint of ineffective counsel was made before the trial court entered a verdict in his case. A *Krankel* inquiry is designed to determine whether a defendant received ineffective assistance of counsel, *i.e.*, whether counsel committed alleged errors that changed the outcome of the defendant's trial. See also *Strickland v. Washington*, 466 U.S. 668, 694 (1984). Thus, as the supreme court observed in *Jocko*, any claim of ineffectiveness that is raised before a defendant is convicted is premature because in considering the claim of allegedly deficient

representation, the trial judge cannot know if defense counsel's performance affected the outcome of defendant's trial. *Jocko*, 239 Ill. 2d at 92-93.

¶ 13 Notwithstanding the premature assertion of defendant's *pro se* complaint, a circuit court can address "at the conclusion at trial, a *pro se* claim of ineffective assistance that was previously raised by the defendant," and a defendant is not obligated to renew his or her assertions. See *Jocko*, 239 Ill. 2d at 93. As in *Jocko*, however, defendant's remarks in this case did not present a claim of ineffective counsel sufficient to warrant a *Krankel* inquiry. *Id.* ("we cannot fault the circuit court for not pursuing defendant's *pro se* claims further"). Defendant complained to the trial judge that his "questions were never asked" by his attorney, and he asserts on appeal that the trial judge cut him off, thus preventing him from explaining his remarks at that stage. The decision of whether and how to conduct a cross-examination is generally a matter of trial strategy that cannot support a claim of ineffective assistance of counsel. *People v. Tolefree*, 2011 IL App (1st) 100689,

¶ 34. The record establishes that defendant's counsel thoroughly cross-examined each of the State's witnesses. Defendant does not provide any explanation to this court of what line or lines of inquiry were neglected by counsel.

¶ 14 In summary, defendant's comments to the court during trial that his counsel was not providing proper representation were premature because at that stage, the trial court could not consider the effect of defense counsel's representation on defendant's trial. Additionally, the trial court was not required to *sua sponte* address defendant's claims after trial, and even had it done so, defendant's complaints involved a matter of trial strategy that generally does not support a claim of deficient representation.

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¶ 15 Accordingly, the judgment of the trial court is affirmed.

¶ 16 Affirmed.