

No. 1-13-0053

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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. 11 CR 19046
)	
LARONE MURRAY,)	Honorable
)	Clayton J. Crane,
Defendant-Appellant.)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court conducted a sufficient preliminary *Krankel* inquiry into defendant's post-trial claims of his attorney's ineffectiveness; the court relied on its knowledge of defense counsel's performance on one point and requested clarification from defendant and his counsel as to defendant's other contention.

¶ 2 Following a bench trial, defendant Larone Murray was convicted of aggravated arson (720 ILCS 5/20-1.1(a)(1) (West 2010)) for committing arson by damaging a structure while he knew or reasonably should have known that one or more persons were inside. Defendant was sentenced to 11 years in prison. On appeal, defendant contends the trial judge did not conduct an

adequate inquiry into his post-trial claims of his trial counsel's ineffectiveness as required by *People v. Krankel*, 102 Ill. 2d 181 (1984). Specifically, defendant asserts the trial court failed to acknowledge one of his claims and conducted only a brief discussion about his other two contentions. We affirm.

¶ 3 Defendant was charged with setting fire to a house at 732 North Springfield in Chicago on September 11, 2011. The following testimony is relevant to the issues raised on appeal.

¶ 4 At trial, Tasha Gamble testified she lived at that residence with her boyfriend, Anthony Wardlow, and his father, mother and brother. At about 2 a.m., Gamble was watching television with Wardlow in a bedroom when she heard a "big boom" in the back yard. She went to a window overlooking the back yard and saw a "big spark, like a big flame, shot up in the air and I saw a guy back there."

¶ 5 Gamble testified the flame was "right in front" of her and she saw the person clearly and recognized him from "the neighborhood" but did not know his name. Gamble saw defendant's face when the flames were lit and identified him in court as the man she saw in the yard. She testified he was attempting to light a second fire using gasoline that he had poured, creating flames that lasted briefly and then went out. Gamble saw defendant earlier that day driving past their house and had seen him on previous occasions driving and walking nearby.

¶ 6 Gamble said she kept defendant in view as he went to the side of the house, and she looked out a window on another side of the house and "smelled a whole bunch of gas." Gamble saw defendant "right there trying to ignite another fire," which went out quickly. Defendant had matches in his hand. Gamble and Wardlow alerted everyone in the house, and they all went outside. Gamble testified she saw defendant walk through the alley behind their house and walk

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across the street. Police arrived, and Gamble identified defendant to police and saw police approach defendant, question him and put him in handcuffs. Gamble said defendant fled in the handcuffs but was apprehended by police. Gamble viewed photographs of the damage to the house in the areas described in her testimony and said they accurately depicted the scene after the fires.

¶ 7 On cross-examination, Gamble said Wardlow's bedroom was on the first floor. Gamble said she was a "few feet away" from defendant when she initially saw him outside. She and Wardlow watched defendant for several minutes. Someone in the house called the police and fire departments, whose members arrived on the scene shortly.

¶ 8 Defense counsel then questioned Gamble as follows:

"Q. You talked with police officers at some point later on, right?

A. Yes.

Q. You also talked with people from the fire department too, correct?

A. Yes.

Q. Do you remember talking with anyone from the Chicago Police Department indicating you never saw the man's face?

A. No.

Q. Do you remember the names of anybody you spoke with [at] the Chicago Police Department?

A. No.

Q. At some point in time, did you go and provide a signed written statement to the Chicago [p]olice?

A. Yes.

Q. Do you recall when you did that?

A. I don't. Yes. I don't know the date but I do recall that I did."

¶ 9 Gamble said she gave a statement the morning after the crime at a police station.

¶ 10 Wardlow testified he smelled gasoline when he and Gamble were watching television. He and Gamble looked out a back window. Wardlow then looked out a side window and saw a person he knew as "Snug"¹ bending down and setting a fire. Wardlow said that when the flame was lit, it made a noise and "that's when I saw him." The flame was "real high, past the window." Wardlow was not sure if the person had matches or a lighter.

¶ 11 Wardlow identified defendant in court as the person he saw that night and said he knew Snug from the neighborhood, having seen him more than 10 times. He last saw defendant walking up and down the block with a woman 15 or 20 minutes before the fire. After he saw defendant's face, he ran to the front door and saw defendant run into the alley. Gamble spoke to police, and officers detained defendant.

¶ 12 Wardlow said a few hours before the fire occurred, a person named Richard Tolbert told Wardlow's mother he would burn their house down because he was upset that Wardlow refused to sell drugs for him. A week after the fire, Wardlow's brother was killed, and Tolbert was charged with murder. Wardlow testified that defendant associated with Tolbert.

¶ 13 Chicago police officer Clarence McCoy testified that at the scene of the fire, Gamble told him the fire had been set and pointed out defendant as the suspected arsonist. McCoy and other

¹The record reflects that although the witness testified that he knew defendant at "Snug," defendant also claimed that he was known as "Smuck." There is no dispute that both nicknames refer to defendant.

officers detained defendant and noted a strong odor of gasoline on his shoes. When defendant fled, he was apprehended by another officer less than two blocks away.

¶ 14 Gordon Stewart, a Chicago Fire Department investigator, testified that he examined the damage to the residence. Stewart identified fire damage in photographs of the house. Stewart collected paint chips, a charred cigarette box and pieces of charred wood at the scene. A test of those materials revealed evidence of gasoline. The State rested.

¶ 15 Defendant was the sole witness for the defense. In 2011, defendant lived on the same block as Gamble and Wardlow and knew the family but did not have problems with them. Defendant also knew Richard Tolbert but did not "hang out" with him.

¶ 16 After Gamble and Wardlow came out of the house, defendant stood across the street speaking to neighbors as police and fire personnel arrived. Defendant testified that several police officers approached him, and he knew some of the officers from his previous encounters with the law. Defendant denied attempting to light a fire that night.

¶ 17 On cross-examination, defendant responded affirmatively when asked if his nickname was "Smuck." Defendant said he told police his home address was 1328 South Spaulding in Chicago because that was his address "growing up" and it was "the original address from like if anything ever happened to me." Defendant said his girlfriend lived in the 700 block of Springfield and he stayed with her sometimes. Defendant said that after he was handcuffed, he ran from police because an officer had grabbed him by the back of the neck. After he was taken to the police station, police recovered a lighter from him. Defendant was released that night without being charged but was arrested on October 25, 2011. The State introduced evidence of defendant's prior convictions for drug possession and robbery.

¶ 18 The trial court found defendant guilty of aggravated arson. The court noted the testimony of Gamble and Wardlow partially conflicted as to their observations of the person setting the fire; nevertheless, their accounts were more credible than that of defendant.

¶ 19 Defense counsel filed a post-trial motion asserting, *inter alia*, that the testimony of Gamble and Wardlow conflicted as to who heard and who was present for the initial explosion. Defense counsel argued that the conflicts in their testimony created a reasonable doubt as to defendant's guilt, and counsel pointed out that defendant was not arrested until several weeks after the crime.

¶ 20 In response, the State argued defense counsel could have questioned the testifying police officers about the details of the investigation and arrest. The State acknowledged the testimony of Gamble and Wardlow was not in lockstep but noted their accounts were largely corroborated by the police officers' testimony. The State argued the court should disregard the testimony as to Tolbert's threat to Wardlow.

¶ 21 After the State's argument, defendant asked to address the court and stated:

"Your Honor, I don't know too much about law, but the night they had grabbed me, though, [Tasha] Gamble, she made a statement, the fact she was inside the house and they made a statement saying they never saw my face or something."

¶ 22 Defendant said the witnesses and the Tolbert family had a conflict in which he was not involved. He told the court that Gamble "made a statement" to police on the night of the fire saying that she "never saw my face" but later changed her account and said she saw defendant's face.

¶ 23 Defendant continued to address the court:

"That's what made the police double back and grab me. She got four different statements, your Honor, and I got them saying that she [was] saying different stuff.

One, she say she raised up the window and saw my face. And one, she say she don't know me, don't know – she say another say my name out [*sic*]. I think from the streets she even know my name. I just want to share that for you."

¶ 24 The court responded, "Your attorney did raise those issues." The court stated that it had reviewed its notes on defendant's trial in preparation for the hearing on defendant's post-trial motion. The court denied defendant's motion and proceeded to sentencing and noted that defendant would have to serve 85 percent of any sentence, asking the attorneys "it's a Class X sentencing, it's 85 percent, is that correct?" The State responded affirmatively.

¶ 25 The court heard evidence of defendant's prior felony convictions, including previous felony convictions that made defendant eligible for an extended-term sentence in this case. The court heard evidence in aggravation and mitigation of defendant's sentence and asked defendant if he wanted to speak. Defendant then addressed the court:

"Yeah, your Honor. He even told me the case was at 50 percent. The case was at 85 percent through the whole time because he never even came out and talked to me and let me know what was going on with everything. And I leave that to the trial. I didn't know the case – I didn't really know too much about the case, your Honor. That's the only thing I could say. I didn't even know the case was 85 percent at all."

¶ 26 The court responded, "It's an 85 percent case, and it has [been] since the case was filed."

¶ 27 The court sentenced defendant to 11 years in prison and allowed credit for 402 days spent in pre-trial custody.

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¶ 28 At that point, the case was passed and later recalled, and the following exchange occurred:

"THE COURT: As we were in the middle of sentencing in this matter, Mr. Murray was having some difficulty. So we had a short break.

Mr. Murray, do you have any questions about the sentence in this case?

DEFENDANT: Yes, sir.

THE COURT: Sure.

DEFENDANT: I was really misled by the whole thing. I guess it is what it is now.

MR. CARY [defense counsel]: Judge, I ask for the record that [assistant State's Attorney] Lacy and I did have a negotiation conversation regarding this and 85 percent was brought up throughout that conversation.

DEFENDANT: You told me it was 50 percent.

MR. CARY: No, I did not.

THE COURT: Your representations are that he didn't tell you – he told you 50 percent?

DEFENDANT: Look, look, your Honor.

THE COURT: Yes.

DEFENDANT: I came to him several times and asked him, I even asked him to see what the copout was, you know what I'm saying.

Did he ever come to you and ask you anything about a plea bargain or anything?
I came to –

THE COURT: Address that to me.

THE DEFENDANT: My bad. I asked about the plea bargain, whatever, you know. He told me – he been telling me since I had two cases, I had a case downstairs and I had a case up here. He tried to give me the copout for the case upstairs. I'm like, man, forget the case downstairs. Let's worry about the drummer that's upstairs. Let's worry about what's going on upstairs. I said, man, that's at 50 percent or 85 percent? He said the next court date, we going to set it, we will say. He come back there and tell me two, three times that was at 50 percent. So I'm like come on then, you know what I'm saying. That's the only way cracker, you know what I'm saying because I'm thinking 50 percent. He never came out to me. He never came out and talked to me not one time about the case, period, before trial, after trial, nothing like that. I'm waiting on him. But he promise me that he going to come out and see me and let me know everything about the case. I really don't know nothing about the case.

THE COURT: Mr. Cary?

MR. CARY: Judge, I can indicate that each time the defendant has been in court, which has been multiple times prior to the trial, and as the defendant indicated, he has another case pending, that I have spoken with him at length on each of those times regarding these cases. And the defendant was well aware of the circumstances of this case. And at no point in time did I feel he was unaware of what the charges were being held against him.

THE COURT: Okay.

DEFENDANT: Can I file ineffective counsel right now, sir?

THE COURT: That's why I just went through this little question and answer period here to find out what in fact transpired or didn't transpire.

DEFENDANT: Because he never did, it's on record, he never came out and told me nothing about the case. And he has been promising me forever that he [is] going to come out. I've been fighting the case 13 months, and he never came out and let me know about my case. I was unaware –

THE COURT: You indicate you know nothing about the case. He has indicated he kept you up to date in the case. And this conversation occurred after the trial, after the sentencing. I don't find any violations in this matter.

MS. LACY [assistant State's Attorney]: Judge, if I could say for the record, Judge, I've waited here while Mr. Cary has gone in the back numerous court dates to talk to his client. I've waited a half hour or more on numerous times."

¶ 29 The court then admonished defendant as to his right to appeal.

¶ 30 On appeal, defendant contends the trial judge did not conduct an adequate *Krankel* inquiry into his claims that his trial counsel was ineffective. He asserts this case should be remanded for further inquiry into his claims of counsel's deficient performance.

¶ 31 There is no *per se* rule that new counsel must be appointed every time a defendant presents a claim of trial counsel's ineffectiveness. *People v. Nitz*, 143 Ill. 2d 82, 134 (1991). When a defendant presents such a claim, it is the duty of the trial court to examine the factual matters underlying the defendant's assertions. *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003). At this stage, a trial court may conduct a preliminary examination in one of three ways: (1) questioning trial counsel about the facts and circumstances surrounding the defendant's

allegations; (2) requesting more specific information from the defendant, and/or (3) relying on its own knowledge of defense counsel's performance at trial and the insufficiency of the defendant's allegations on their face. *Id.* at 78-79. During a *Krankel* inquiry, "some interchange between the trial court and trial counsel regarding the facts and circumstances surrounding the allegedly ineffective representation is permissible and usually necessary in assessing what further action, if any, is warranted on a defendant's claim." *Id.* at 78.

¶ 32 After that preliminary investigation in the defendant's allegations, if the court determines that the claim lacks merit or pertains only to matters of trial strategy, new counsel need not be appointed and the defendant's motion may be denied. *Id.* A claim lacks merit if it does not bring to the trial court's attention a colorable claim of ineffective assistance of counsel. *People v. Tolefree*, 2011 IL App (1st) 100689, ¶ 22. If the defendant's allegations demonstrate a possible neglect of the case, the court should appoint new counsel to argue the defendant's claim. *Moore*, 207 Ill. 2d at 78.

¶ 33 If the court does not 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. However, if the trial court reached a determination on the merits of a defendant's ineffective assistance of counsel claim in a case involving a *Krankel* inquiry, this court will reverse only if the trial court's action was manifestly erroneous. *People v. McLaurin*, 2012 IL App (1st) 102943, ¶ 41.

¶ 34 Defendant's first *Krankel*-based allegation is that the trial court should have questioned defense counsel about his failure to question Gamble about her statement to police that she did not see the offender's face. He argues the court completely failed to address his argument that

Gamble's earlier statement was inconsistent with her trial testimony that she recognized defendant when the flames illuminated his visage.

¶ 35 In response, the State notes that defense counsel asked Gamble during cross-examination if she talked with "anyone from the Chicago Police Department indicating she never saw the man's face," and Gamble responded no. The State also argues that even if Gamble's testimony was impeached, defendant's conviction could be sustained based on the other evidence of his guilt. Defendant replies that his counsel nevertheless failed to perfect the impeachment by producing Gamble's prior statement or questioning the officers about her statement.

¶ 36 The record reflects that in considering defense counsel's post-trial motion, after defendant voiced his *pro se* contention about Gamble, the court responded that defense counsel "did raise those issues." To the extent that defendant's *pro se* arguments can be considered a complaint about defense counsel's performance, as opposed to a challenge to the sufficiency of the State's evidence, the trial court specifically noted that defense counsel had addressed the issue of Gamble's prior statement. The court therefore relied on its knowledge of defense counsel's performance in rejecting defendant's claim. See *Moore*, 207 Ill. 2d at 78-79. Moreover, whether or not to impeach a witness is a matter of trial strategy which generally will not support a claim of ineffective assistance of counsel. *People v. Pecoraro*, 175 Ill. 2d 294, 326 (1997); *People v. Crane*, 145 Ill. 2d 520, 533 (1991) (no *Krankel* hearing is required when a defendant's claim of ineffective counsel relates to counsel's trial tactics).

¶ 37 Defendant next contends that the trial court did not conduct an adequate inquiry as to whether defense counsel accurately informed him of the terms of his sentence. Defendant argues that after he asserted that his attorney told him he would only have to serve 50 percent of his

sentence, the trial court made only a "superficial inquiry" into his complaint and did not ask counsel if he had explained to defendant any potential plea offer and its effect on his sentence.

¶ 38 At the outset of the sentencing proceeding, the trial court informed defendant that he would have to serve 85 percent of any sentence imposed. When defendant said his counsel told him "the case was at 50 percent," the trial court responded that it was an "85 percent case" and imposed sentence. After passing the case and recalling it, the court asked defendant if he had questions about his sentence. Defendant stated that his attorney had advised him during a plea negotiation that he would only have to serve 50 percent of his sentence.

¶ 39 After allowing defendant to explain his position, the court asked defense counsel to respond, and counsel denied telling defendant that he would only have to serve 50 percent of his sentence. Although defendant contends that the trial court did not comply with *Moore* and "simply brushed off" his contentions, the colloquy in the record indicates that the court asked defendant to explain his claim and then elicited defense counsel's version of events, thus employing two methods set out in *Moore*. See also *People v. McKinney*, 2011 IL App (1st) 100317, ¶ 47 (a *Krankel* hearing is adequate where the trial court reviewed the defendant's allegations, allowed the defendant to explain his position, and allowed defense counsel to respond to the allegations).

¶ 40 Defendant's apparent contention is that his counsel's advice that he only had to serve 50 percent of any sentence, led him to elect a trial as opposed to entering a guilty plea. Defendant asserts that had he been informed before trial that he would have to complete 85 percent of his sentence if convicted, he would have pled guilty and served 50 percent of his sentence, as he alleges was promised by counsel.

¶ 41 Defendant does not argue that he would have been acquitted but for defense counsel's purported advice; instead, he contends that he would have pled guilty and therefore served a shorter prison sentence. Defendant's position is flawed because it cannot be known what the terms of any plea agreement would have been. Aggravated arson is a Class X felony (720 ILCS 5/20-1.1(b) (West 2010)) with a sentencing range of 6 to 30 years in prison (730 ILCS 5/5-8-1(a)(3) (West 2010)). (Although the State presented evidence of defendant's criminal history that would have allowed an extended-term Class X sentence of between 30 and 60 years in prison, the trial judge did not impose a sentence in that range.) Defendant could not know, much less show, that if he had chosen to plead guilty, he would have served a shorter sentence. At the time of the instant offense, the statute governing early release provided that, instead of receiving day-for-day or "50 percent" good conduct credit, a prisoner serving a sentence for aggravated arson "shall receive no more than 4.5 days of good conduct credit for each month of his or her sentence of imprisonment." 730 ILCS 5/3-6-3(a)(2.5) (West 2012) (version of statute effective August 12, 2011 to June 21, 2012). A review of the record in its entirety shows that defendant is not entitled to further proceedings under *Krankel*.

¶ 43 Additionally, we reject defendant's claim that the trial court considered the prosecutor's input in deciding the merits of his ineffective counsel claim. The record demonstrates that the court already determined that defendant had not established any ineffectiveness by the time the assistant State's Attorney remarked on her observations of defendant's conferences with his counsel. Defendant therefore cannot show that the prosecutor's isolated comment had any effect on the court's decision.

¶ 44 Defendant cites *People v. Fields*, 2013 IL App (2d) 120945, which we do not find comparable to the case at bar. There, the trial court asked the State for its position on each of the defendant's claims of the ineffectiveness of his trial counsel, which the defendant presented *pro se*, and on appeal, this court found that process "improperly converted the inquiry into an adversarial evidentiary hearing" and remanded for a new preliminary *Krankel* inquiry. *Id.* at ¶ 37-42. The State's remark in this case, is not similar to the situation in *Fields*. This defendant's reliance is misplaced.

¶ 45 Accordingly, for all of those reasons, the judgment of the trial court is affirmed.

¶ 46 Affirmed.