2012 IL App (1st) 102053-U

THIRD DIVISION
July 18, 2012

No. 1-10-2053

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. 09 C4 41002
	)	
ANTWAN EILAND,	)	Honorable
	)	Noreen V. Love,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE MURPHY delivered the judgment of the court.
Steele, P.J., and Salone, J., concurred in the judgment.

O R D E R

¶ 1 *Held*: Trial court was not required to conduct a preliminary inquiry where defendant failed to sufficiently raise a colorable claim of ineffective assistance of counsel; two possession counts vacated as lesser included offenses; mittimus corrected.

¶ 2 Following a bench trial defendant Antwan Eiland was convicted of three counts of possession (two of a controlled substance and one of cannabis) and two counts of possession with intent to deliver (one of a controlled substance and the other cannabis) and sentenced to an aggregate term of 6 years' imprisonment. On appeal, defendant contends that the trial court erred in failing to conduct a preliminary inquiry into his *pro se* allegations regarding trial counsel's representation to determine whether there was possible ineffective assistance requiring the appointment of "separate counsel." Defendant further contends that two of his possession

convictions should be vacated as violative of the one-act, one-crime rule, and that the mittimus should be corrected.

¶ 3 The record shows that defendant was charged with, and convicted of, one count of possession of a controlled substance with intent to deliver (count 1), one count of possession of cannabis with intent to deliver (count 2), one count of possession of cannabis (count 3), and two counts of possession of a controlled substance (counts 4, 5). These convictions were based on on evidence showing that at 6 a.m. on July 24, 2009, Bellwood police executed a search warrant for the garden west apartment in the six-unit apartment building at 635 Bellwood Avenue, where they found narcotics and drug paraphernalia throughout the apartment in which defendant and another individual were present.

¶ 4 Officer David Martin testified that when he entered the apartment in question, he saw defendant running across the hallway from the northwest bedroom to the southwest bedroom. Officer Martin pursued him into the southwest bedroom where he saw another individual, later identified as Samuel Sims. Officer Martin first testified that he saw defendant at the window in the bedroom and Sims on the bed, but then later testified that he saw both defendant and Sims "grabbing" at the same window and ordered them to get down on the ground.

¶ 5 Investigator Shawn Clark testified that after the two men were detained, he entered the apartment to conduct a search. In the northwest bedroom, he observed a clear knotted plastic bag containing cocaine on a dresser, and found miscellaneous drug paraphernalia, including knotted bags consistent with narcotics sales packaging in a trash receptacle. A ziploc bag containing about $3,800 and cannabis residue was found in a safe in the bedroom. The investigator also found statements from ComEd and Nicor with defendant's name on them. The parties stipulated that the ComEd statement listed defendant's address as 635 Bellwood Avenue, Apartment B West, but the Nicor statement, which also listed defendant's name and the Bellwood address, did not include an apartment number.

¶ 6 Investigator Clark also searched the southwest bedroom in the apartment where a large knotted plastic bag containing suspect cannabis, as well as another ziploc bag containing 93 methylenedioxymethamphetamine (MDMA/ecstacy) pills were found on the bedroom floor. In the kitchen, the investigator found another clear plastic bag containing suspect cannabis, and a digital scale that had cocaine residue on it. In the living room, he found partially burnt hand-rolled cigars containing suspect cannabis in an ashtray. Investigator Clark further testified that the mailbox for the apartment was located in the entryway to the front of the building, and had defendant's last name on it.

¶ 7 Investigator Clark interviewed defendant who initially denied any knowledge of the contraband inside the residence. When Investigator Clark informed defendant that he located official advanced funds used in a controlled buy from the apartment, defendant admitted that he owned the cannabis, which he smoked, and that he owned, sold and smoked the cocaine. He then "admitted to ownership of everything in the apartment, stating, 'Fuck it, you're all going to get the lease anyway, it's all mine.'" Defendant further stated, "it's my apartment, right? It's all mine." Investigator Clark further testified that he was informed that defendant had a lease for the apartment, but that the landlord was unable to produce it.

¶ 8 Investigator Clark interviewed the responding officers, and one of them told him that Sims was trying to open the bedroom window when they entered. He was further told that defendant was taken into custody as he was attempting to run into the southwest bedroom from the northwest bedroom. The parties stipulated that the recovered suspect narcotics tested positive for the presence of cannabis, cocaine, and MDMA.

¶ 9 Roger Perez, the landlord, testified that defendant, his girlfriend, and another man, were staying in the garden west apartment, and that defendant's mother resided in a separate apartment in the same building. Perez testified that he could not find a lease for the garden west apartment and was not sure if he ever "drew one," but that defendant had a month-to-month lease for that apartment, and had lived there for seven months prior to this incident.

¶ 10 Defendant testified that his girlfriend, Shameka Saffold, lived in the garden west apartment, and Sims, her cousin, was visiting her there. When police arrived on July 24, 2009, defendant was in bed in the northwest bedroom, Sims was in the apartment, and Shameka had left for work 30 minutes before that. Defendant denied bringing cannabis or MDMA into the southwest bedroom, and claimed that he did not even know there were narcotics in the apartment until he was at the police station. Defendant stated that his name was on the ComEd and Nicor bills because his girlfriend could have used his name "to get lights and gas in the apartment," but he denied having a lease for the apartment. He also claimed that he was never interviewed by police. In rebuttal, the State introduced defendant's prior felony conviction which was admitted into evidence.

¶ 11 At the close of evidence, the court found defendant guilty on each of the five counts, and defendant's privately retained counsel filed a post-trial motion which was denied. At sentencing, the court asked defendant if he had anything to say before it imposed sentence, and he responded, essentially, that he was not guilty, that he was just visiting his girlfriend at the apartment, that he "had no knowledge of anything that went on in the apartment," that he "had nothing to do with" the narcotics, and that he never had a lease for the apartment. Defendant also stated:

> "I have certain documents that wasn't even presented to the court on my behalf stating that I stayed somewhere else, and which I – I basically presented at trial on my own behalf.
>
> And as I went through my transcripts over here and which I told my lawyer to address the court about, which he just didn't do. I mean there is a lot of discrepancies in the case that could determine maybe your verdict could be different."

¶ 12 Defendant further stated that there were things the court should have heard regarding one of the officer's testimony as to whether Sims was in bed or at the window. Defendant stated that "I feel like those are things that could have changed your judgment on this case." Defendant also

stated that there was no physical evidence showing that he agreed to rent the apartment, such as a lease. The court responded that defendant was essentially asking it to disregard the landlord's testimony and the fact that there was proof found in the residence that he lived there, and that there were narcotics and drug paraphernalia throughout the apartment. The court subsequently sentenced defendant to an aggregate term of six years' imprisonment.

¶ 13 On appeal, defendant first contends that the trial court was required to conduct a "preliminary inquiry" into his *pro se* complaints regarding his trial counsel to determine if there was possible ineffective assistance requiring the appointment of "separate counsel." He thus requests this court to remand his cause for an inquiry. The State responds that the trial court was not required to conduct a *People v. Krankel*, 102 Ill. 2d 181 (1984), hearing because defendant was represented by private counsel, and that, in any event, defendant's oral criticisms of counsel were insufficient to trigger an inquiry. Defendant replies that the State has written its brief as if he is requesting a *Krankel* hearing, when he has requested a remand for a preliminary inquiry; and that, contrary to the State's contention, his complaints regarding his counsel were not general, but rather, "addressed specific things counsel failed to do." We review these questions of law *de novo*. *People v. Taylor*, 237 Ill. 2d 68, 75 (2010).

¶ 14 In *Krankel*, defendant filed a *pro se* motion challenging his appointed counsel's effectiveness at trial, which the trial court denied. On appeal, the parties agreed that the trial court should have appointed new counsel to represent defendant at the post-trial hearing on his *pro se* allegations of ineffective assistance, and the supreme court remanded for a new hearing on defendant's motion with newly appointed counsel. *Krankel*, 102 Ill. 2d at 187-89.

¶ 15 The evolution of the *Krankel* inquiry, has led to a rule that counsel need not be appointed in every case where defendant presents a *pro se* claim of ineffective assistance of counsel. *People v. Vargas*, 409 Ill. App. 3d 790, 801 (2011), citing *People v. Moore*, 207 Ill. 2d 68, 77 (2003). Instead, it is incumbent upon the trial court to examine the claim and its factual underpinnings, *i.e.*, the preliminary inquiry, and where a *pro se* claim is determined to be without

merit or concerns a matter of trial strategy, there is no need to appoint counsel; alternatively, if the allegations demonstrate the possibility of neglect, counsel must be appointed. *Vargas*, 409 Ill. App. 3d at 801, citing *Moore*, 207 Ill. 2d at 77-78. We observe that in both *Moore* and *Krankel*, defendant had appointed counsel when he made his *pro se* claims.

¶ 16 The State maintains that where, as here, defendant has private counsel, the trial court is not required to conduct an inquiry, and that *People v. Pecoraro*, 144 Ill. 2d 1 (1991), is controlling on the matter. Defendant responds that *Pecoraro* is distinguishable from this case because the trial court there conducted an inquiry into defendant's *pro se* claim of ineffective assistance.

¶ 17 In *Pecoraro*, defendant and his private counsel presented post-trial motions on the issue of counsel's effectiveness, and, after hearing the motions, the circuit court found that counsel provided competent representation. *Pecoraro*, 144 Ill. 2d at 13-14. This inquiry was not the preliminary inquiry contemplated by *Moore*, 207 Ill. 2d at 77-78, 81,, *i.e.*, examination of the *pro se* claim of ineffective assistance to determine whether to appoint new counsel, but, rather, was an examination to determine whether there was ineffective assistance. On appeal in *Pecoraro*, defendant maintained that, in accordance with *Krankel*, the matter should be remanded so that he could be appointed new counsel to argue his post-trial claim of ineffective assistance. *Pecoraro*, 144 Ill. 2d at 14. The supreme court found that its case was unlike *Krankel* in that defendant did not ask for new counsel, there was no agreement between the parties that defendant should have new counsel, and defendant was represented by private counsel at trial and post-trial. *Pecoraro*, 144 Ill. 2d at 15. In noting the latter difference, the supreme court explained that where defendant has retained private counsel to represent him at trial and post-trial, it is not within the trial court's rubric of authority to advise or exercise any influence or control over the selection of counsel by defendant, who was able to and did choose counsel on his own accord, and the court could not force him to retain counsel other than the one he had chosen. *Pecoraro*, 144 Ill. 2d at 15.

¶ 18 The supreme court further explained that defendant and his privately retained counsel were the only ones who could have altered their attorney-client relationship, and defendant could have retained other counsel to represent him. *Pecoraro,* 144 Ill. 2d at 15. Based on the circumstances in that case, the supreme court concluded that *Krankel* did not apply. *Pecoraro*, 144 Ill. 2d at 15. Here, as in *Pecoraro*, and unlike *Krankel*, defendant was represented by private counsel and did not request new counsel; and, additionally, never asserted an ineffective assistance claim.

¶ 19 Defendant, however, citing to the special concurrence in *Taylor*, maintains that to hold that having privately retained counsel obviates the trial court's duty to conduct an inquiry ignores the unsettled law in this area, violates the Sixth Amendment (U.S. Const., amend. VI), and conflicts with Supreme Court law. Defendant urges this court to adopt the reasoning of the concurring justice in *Taylor* which noted the contradictory conclusions regarding the appointed/private counsel issue in the appellate court. *Taylor*, 237 Ill. 2d at 78 (special concurrence). We initially observe that this tribunal is bound to follow the majority opinion and not the special concurrence. *Winnebago County Citizens for Controlled Growth v. County of Winnebago*, 383 Ill. App. 3d 735, 749 (2008); *People v. Connor*, 358 Ill. App. 3d 945, 959 (2005).

¶ 20 In *Taylor*, defendant argued that his statement at sentencing was an implicit claim of ineffective assistance of counsel which required the trial court to conduct a *Krankel* inquiry. *Taylor*, 237 Ill. 2d at 75. Defendant specifically stated, *inter alia*, that "I had no idea what I was facing *** The offer that was made to me, I would [have] jumped into it with both feet if I knew that I was facing this type of situation." *Taylor*, 237 Ill. 2d at 73-74. The supreme court noted that nowhere in defendant's rambling statement did he specifically complain about counsel's performance, or expressly state that he was claiming ineffective assistance of counsel. *Taylor,* 237 Ill. 2d at 76-77. The court further noted that defendant's statement was amenable to more than one interpretation, and was insufficient to require an inquiry. *Taylor*, 237 Ill. 2d at 77.

Based on that determination, the supreme court expressed no opinion on the appellate court's decision that a defendant represented by privately retained counsel is not entitled to a *Krankel* inquiry. *Taylor*, 237 Ill. 2d at 77.

¶ 21 Similarly here, regardless of whether defendant is represented by privately retained or appointed counsel, we find that a preliminary inquiry was not required as defendant failed to sufficiently raise an ineffective assistance of counsel claim. *Taylor*, 237 Ill. 2d at 77. Nowhere in defendant's statements to the court did he present a specific claim of ineffective assistance of trial counsel (*Taylor*, 237 Ill. 2d at 76) or allege that he wanted new counsel (*Pecoraro*, 144 Ill. 2d at 15; *People v. Shaw*, 351 Ill. App. 3d 1087, 1092 (2004)). His six-page statement to the court consisted of, at best, a rambling complaint of the trial court's finding of guilt, which, in turn, evoked the court's response regarding the strong evidence of his guilt.

¶ 22 As for his brief complaint that counsel did not point out discrepancies in police testimony, the record shows that during cross examination, counsel addressed certain discrepancies in the police testimony. Defendant's complaint that there was documentation that showed he stayed elsewhere was a vague, conclusory allegation that does not identify a colorable claim of ineffective assistance of counsel where he did not indicate that he brought this documentation to counsel's attention or that counsel was aware of it and refused to use it, and never asked the court for new counsel to represent him on a claim of ineffective assistance. *People v. Burks*, 343 Ill. App. 3d 765, 774-76 (2003); *People v. Reed*, 197 Ill. App. 3d 610, 612 (1990). Thus, as in *Taylor*, 237 Ill. 2d at 77, we find that defendant's statement was insufficient to require an inquiry.

¶ 23 In reaching this conclusion, we have considered *Vargas*, cited by defendant, and find that it does not warrant a contrary result. In *Vargas*, defendant's counsel advised the trial court that defendant wanted him to file a post-trial motion relating to his performance at that time and that of defendant's previous counsel. The court then considered counsel's motion for a new trial, and permitted defendant to speak in allocution. Defendant complained to the court that counsel

failed to procure records and information relating to his defense strategy, failed to allow him to help in his own defense, refused to investigate information helpful for pretrial motions, and refused to ask for a continuance for the purposes of filing a certain motion. The circuit court proceeded to sentencing without regard to defendant's grievances, and commented that it could not understand how defendant could show no remorse, and "jump on his lawyer" as he had done. *Vargas*, 409 Ill. App. 3d at 801. On appeal, this court found that the trial court's statement had minimal relevance to the assessment of counsel's performance, and remanded for the limited purpose for conducting a preliminary *Krankel* inquiry where defendant's comments clearly warranted it. *Vargas*, 409 Ill. App. 3d at 802-03. In this case, defendant made no argument concerning a specific claim of ineffective assistance of counsel nor did he seek new counsel to do so; and, as noted above, his vague allegations could properly be construed as matters directed to the sufficiency of the evidence rather than counsel's representation, and thus insufficient to warrant an inquiry. *Burks*, 343 Ill. App. 3d at 774-75.

¶ 24 Defendant next contends, and the State concedes that two of his possession convictions should be vacated under the one-act, one-crime rule. He specifically maintains that his convictions for possession of cannabis and possession of a controlled substance, cocaine, (counts 3, 4) should be vacated as lesser included offenses of his convictions for possession of a controlled substance with intent to deliver and possession of cannabis with intent to deliver (counts 1, 2). *People v. Davis*, 156 Ill. 2d 149, 153 (1993). We agree, and therefore vacate his convictions under counts 3 and 4 (*People v. Braboy*, 393 Ill. App. 3d 100, 113 (2009)), and, find no need to remand for resentencing since individual sentences were imposed on each of the convictions (*People v. Buford*, 235 Ill. App. 3d 393, 404 (1992)). Pursuant to our authority under Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), we correct the mittimus (*People v. McCray*, 273 Ill. App. 3d 396, 403 (1995)) to reflect the proper convictions.

¶ 25 Defendant finally contends that the mittimus should be corrected to state that he was convicted of possession of cannabis with intent to deliver (count 2) rather than manufacturing or

delivery of cannabis. The State maintains that the mittimus correctly reflects a violation of the statute defendant violated.

¶ 26 We observe that the indictment shows that defendant was charged, in relevant part, with "possession of cannabis with intent to deliver," (count 2) under section 550 of the Cannabis Control Act (720 ILCS 550/5d (West 2010)). The title of this section is "Manufacture or delivery of cannabis; violations; punishment." However, the actual offenses described in that section include not just manufacture or delivery but also possession with intent to deliver or manufacture. 720 ILCS 550/5d (West 2010). We, therefore, order the mittimus to be corrected to accurately reflect the offense of which defendant was convicted, namely, possession of cannabis with intent to deliver (count 2). *McCray*, 273 Ill. App. 3d at 403.

¶ 27 In light of the foregoing, we vacate defendant's convictions for possession of a controlled substance and possession of cannabis (counts 3, 4), correct the mittimus to properly reflect count 2, and affirm the judgment in all other respects.

¶ 28 Affirmed in part; vacated in part; mittimus corrected.