2012 IL App (1st) 102428-U

SIXTH DIVISION
AUGUST 17, 2012

No. 1-10-2428

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.	)	05 CR 05217
	)	
LONIEL KNIGHT,	)	Honorable
	)	Michele M. Simmons,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE GORDON delivered the judgment of the court.
Justices Garcia and Palmer concur in the judgment.

O R D E R

¶ 1 *Held*: We previously remanded so that the trial court could consider defendant's claims of ineffective assistance of counsel. However, we cannot find that the trial court considered any of defendant's ineffective assistance of counsel claims that related to his sentence. We find that defendant's allegations show possible neglect and thus we remand for the appointment of new counsel to argue defendant's ineffective assistance claims. We also amend the mittimus to reflect our prior vacatur of defendant's conviction for aggravated discharge of a firearm.

¶ 2 Following a bench trial, defendant Loniel Knight was convicted of the first-degree murder of Kenneth Mitchell and the attempted first-degree murder of James Barnes. After

hearing aggravation and mitigation, defendant was sentenced to the minimum available sentence of 71 years in the Illinois Department of Corrections. Defendant had previously rejected a plea offer of 36 years after the State, the trial judge, and the defense counsel all incorrectly informed him on the record that the minimum sentence he could receive after a trial was 51 years.

¶ 3 Prior to sentencing, defendant had raised *pro se* ineffective assistance of counsel claims, which the trial judge did not address. On appeal, this court remanded the case to the trial court to conduct a preliminary inquiry into defendant's claims. We also vacated defendant's conviction for aggravated discharge of a firearm. *People v. Knight*, No. 1-07-2254, order at 14-15 (2009). On remand, we cannot find that the trial court considered any of defendant's ineffective assistance claims that related to his sentence, but we did find that the trial court considered and found that defendant's remaining claims of ineffective assistance of counsel which did not relate to sentencing lacked merit. The trial court then held that "[t]he prior order [was] to stand[.]" However, the prior order included the vacated conviction. This appeal followed.

¶ 4 Defendant appeals, arguing three claims. First, defendant claims that the trial court erred when it failed to appoint defendant a new attorney to argue defendant's claim that his trial counsel incorrectly advised him during plea negotiations and thus violated defendant's right to effective assistance of counsel. In other words, trial counsel could not, and would not, argue his own ineffectiveness. Second, defendant claims that the trial court erred by conducting hearing on defendant's claim of ineffective assistance of counsel, rather than the ordered preliminary inquiry, without appointing new counsel. Third, defendant claims that, pursuant to our earlier order, defendant's mittimus must be corrected to reflect that we already vacated his aggravated discharge of a firearm conviction. *Knight*, No. 1-07-2254, order at 14.

¶ 5 For the reasons discussed below, we find first that defendant's claims of ineffective assistance of counsel show "possible neglect" in the case, and we remand for appointment of new counsel to represent defendant in a hearing on his ineffective assistance of counsel claim. *People v. Moore*, 207 Ill. 2d 68, 78 (2003) (remanding to trial court to conduct a preliminary inquiry into defendant's *pro se* ineffective assistance of counsel claim). Second, we order the mittimus corrected to reflect the fact that we previously vacated defendant's conviction for aggravated discharge of a firearm. *Knight*, No. 1-07-2254, order at 14.

¶ 6 BACKGROUND

¶ 7 I. Evidence at Trial

¶ 8 This case concerns the shooting death of Kenneth Mitchell and the wounding of James Barnes in the early morning of February 6, 2005, a winter day with snow on the ground. The bench trial began on June 5, 2007.

¶ 9 The State's first witness was James Barnes, one of the two victims. Barnes testified that he left Bocce's bar and restaurant in Matteson, Illinois, at approximately 2 or 2:30 in the early morning of February 6, 2005. He noticed a crowd and a "loud" and "heated" argument outside. As he walked to his vehicle in the parking lot in front of Bocce's, he was shot in the right leg. He "hobbled" toward Bocce's, hid behind a bush, and eventually made it into the bar, where he was transported by ambulance to a hospital. Barnes did not know anyone else involved in the shooting.

¶ 10 The State later entered a stipulation between the parties that, if Dr. Wendy Marshall was called to testify, she would state that she is the emergency room physician who treated Barnes at St. James Olympia Fields Hospital and that, in her opinion, Barnes sustained a gunshot wound to his right leg.

¶ 11 The State's next witness, Sherrod Chaney, testified that he arrived at Bocce's around 2 a.m. and stayed for 5 or 10 minutes. As he left, he observed an acquaintance, Lloyd Witcliffe, in the parking lot yelling, arguing, and cursing with a man, later identified as Jimmy Armstrong. Witcliffe and Armstrong walked across the parking lot until Witcliffe fell over a snow bank. Chaney then walked with Witcliffe back to Bocce's. A woman and a man appeared from behind Bocce's, and the man and Witcliffe continued to argue. There was no physical confrontation. Witcliffe and Armstrong continued to argue for 5 or 10 minutes until six or seven gunshots rang out. Chaney ran away until it became quiet for two or three minutes. He then noticed a man lying on the ground in front of Bocce's. Chaney went over to the man and realized it was another friend of his, Kenneth Mitchell. Three more shots were fired, and Chaney ran from the scene.

¶ 12 The State's third witness, Lloyd Witcliffe, who was in custody. Witcliffe testified that he was serving a sentence imposed earlier that year for three felony offenses, one for carrying a gun, and two for possessing cannabis. Witcliffe testified that he, Mitchell, and Chaney left Bocce's around 2:30 a.m. As they approached the front door, Jimmy Armstrong began yelling at him. He and Armstrong had a fight a couple of months previously. Witcliffe and Armstrong walked across the parking lot toward defendant's van. Defendant had exited Bocce's after them, but he had already arrived at the van. Witcliffe and Armstrong then returned to Bocce's. Witcliffe was trying to calm Armstrong down. Mitchell invited Witcliffe and Armstrong to return to his house for drinks. Mitchell had his hands up while he was talking. Then the shooting started. Witcliffe heard a woman say: "He has a gun." Witcliffe observed defendant "pull the gun out and raise [the gun] up, start shooting" a couple of feet away from them. Witcliffe observed Mitchell grabbing for his chest. Witcliffe heard seven or eight gunshots and

ran.

¶ 13 Another State's witness, Dr. Ponni Arunkumar, testified that she is the assistant medical examiner at the Cook County Medical Examiner's Office who performed the autopsy on Kenneth Mitchell. Dr. Arunkumar found that Mitchell had two gunshot wounds: one that went through the left side of his head, and one that entered the right side of his back and exited through the right side of his chest. She opined that the cause of death was multiple gunshot wounds, and the manner of death was a homicide.

¶ 14 The State rested, and defendant moved for a directed finding, which the trial court denied. Defendant took the stand in his own defense and testified as follows. Defendant and Armstrong were in Bocce's with two women named Nikki and Quia. When Bocce's closed, they started walking toward his van. A group of men, including Witcliffe, walked out behind them. Witcliffe was being "loud and obnoxious" and was threatening to beat up Armstrong. Armstrong said he did not want any trouble but later also threatened to beat up Witcliffe. When they reached the van, defendant removed his gun from his glove compartment. Witcliffe and Armstrong returned to Bocce's. Defendant put the gun inside his coat pocket, walked over to the men, and tried to convince Armstrong to come back to the van. Defendant was standing next to Armstrong. Mitchell was also "standing there." Defendant observed Mitchell lift his shirt up. Defendant stepped back a few feet and observed Mitchell lift his shirt up again and "pull what seems to be a firearm" from his waistband. Defendant thought Mitchell was going to shoot Armstrong. Defendant pointed the gun at Mitchell and "shot until the gun wouldn't shoot anymore."

¶ 15 On June 7, 2007, after hearing closing arguments, the trial judge rejected defendant's claim of self-defense and found him guilty of the murder of Kenneth Mitchell and the attempted

murder of James Barnes.

¶ 16 II. Plea Offer

¶ 17 Prior to trial, defendant had received a plea offer, which is the subject of defendant's present claim of ineffective assistance of counsel.

¶ 18 On January 10, 2007, the prosecutor asked the trial judge to admonish defendant pursuant to *People v. Curry*, 178 Ill. 2d 509 (1997), regarding a plea offer the prosecutor had previously discussed with defense counsel. The prosecutor had proposed a plea offer that if defendant plead guilty to one count of first-degree murder and one count of attempt first-degree murder, the State would offer 36 years (30 years for the murder and six years for the attempt murder) incarceration in the Illinois Department of Corrections. Later, the State, the trial judge, and defense counsel each advised defendant, incorrectly and on the record, that the minimum sentence defendant could receive would be 51 years in the Illinois Department of Corrections. The prosecutor explained that 51 years was based on "45 years on the first-degree murder count because it involves a firearm and six years on the attempt first-degree murder." All parties agree on this appeal that the correct minimum sentence was actually 71 years.

¶ 19 Defendant rejected the plea offer. The trial judge admonished defendant that the minimum she could sentence defendant if the case proceeded to trial was 51 years: 45 years for first-degree murder with a firearm and a mandatory consecutive sentence of six years for the attempt first-degree murder. Defendant said he understood.

¶ 20 III. Sentencing

¶ 21 On July 11, 2007, before the trial judge sentenced defendant, defendant requested "a continuance to obtain another attorney" and "to file ineffective assistance" because of "a conflict of interest." The trial judge responded, "[Y]ou can [file ineffective assistance] with the appellate

court *** if that's what you wish to do. Right now we are prepared for sentencing." The trial judge then asked defendant, "Do you want me to pass it for a few minutes? Do you want to talk to [your attorneys] a little further?" Defendant said that he did not.

¶ 22 The prosecutor then stated that the minimum sentence on the first-degree murder conviction was 45 years: 20 years for murder and a mandatory 25-year enhancement for personally discharging a firearm. The prosecutor stated that the minimum sentence for attempt first-degree murder was 26 years: 6 years for attempt and a 20-year enhancement for personally discharging a firearm. The prosecution stated that, with mandatory consecutive sentencing for the two offenses, the minimum was 71 years.

¶ 23 Defendant's counsel argued that the firearm enhancements were unconstitutional and should not be applied, especially on the attempt first-degree murder count. Defense counsel stated, "[I]t is our theory that the minimum sentence that your Honor could impose would be a sentence of 51 years." Defense counsel arrived at 51 years as the sum of 45 for first-degree murder with the firearm enhancement, plus six years for the attempt first-degree murder. Defense counsel also argued that, "26 years, a 20 plus six, would be the appropriate sentence and is, in fact, a constitutional sentence."

¶ 24 The trial judge sentenced defendant to the minimum, as stated by the prosecutor, of 71 years. The trial judge stated that for first-degree murder, defendant received 20 years, plus a mandatory additional 25 years for personally discharging a firearm. For attempt first-degree murder, defendant received six years, plus a mandatory additional 20 years for personally discharging a firearm. The trial judge stated that, by law, defendant must serve the sentences consecutively. Finally, the trial judge sentenced defendant to four years for aggravated discharge of a firearm and two years for aggravated battery for shooting Barnes. The four-year

and two-year sentences were to run concurrently with the 45-year sentence for first-degree murder.

¶ 25 IV. First Appeal

¶ 26 Defendant appealed, claiming that the trial court erred when it failed to inquire into his *pro se* ineffective assistance of counsel claim and that two of his convictions must be vacated pursuant to the one-act, one crime doctrine.[1]

¶ 27 We affirmed the conviction for aggravated battery and attempt first-degree murder but vacated defendant's conviction and sentence for aggravated discharge of a firearm. *Knight*, No. 1-07-2254, order at 14. On the ineffective assistance of counsel claim, we held that "the trial court failed to satisfy the preliminary inquiry requirement of *Moore*." *Knight*, No. 1-07-2254, order at 8. We previously stated,

> "Accordingly, we vacate defendant's conviction and sentence for aggravated discharge of a firearm and remand defendant's case for the limited purpose of allowing the trial court to conduct the necessary preliminary investigation into defendant's *pro se* ineffective assistance of counsel claim. If the court finds defendant's claim to be spurious, the court may deny defendant's oral motion and leave his convictions and sentences standing." *Knight*, No. 1-07-2254, order at 14-15.

[1] "The one-act, one-crime doctrine prohibits multiple convictions where the convictions are carved from precisely the same physical act. *People v. Harvey*, 211 Ill. 2d 368, 389 (2004); *People v. King*, 66 Ill. 2d 551, 566 (1977)." *Knight*, No. 1-07-2254, order at 11.

¶ 28 V. Ineffective Assistance of Counsel on Remand

¶ 29 After our ruling, defendant filed a *pro se* posttrial motion for a new trial based on three claims of ineffective assistance of counsel. Defendant alleged that his counsel was ineffective for: (1) incorrectly advising defendant of the minimum possible sentence, which led him to reject the State's plea offer; (2) failing to investigate the prior criminal history of Witcliffe, one of the State's witnesses, which influenced defendant to waive a jury trial; and (3) failing to investigate or interview two witnesses who could corroborate defendant's theory of self-defense. The two witnesses were Jimmy Armstrong and Elaine "Nikki" Moore.

¶ 30 The trial court considered defendant's claims over the course of two court appearances: March 24, 2010, and May 11, 2010. The trial judge stated that she wanted time to review the record after the first day. The trial court then set a date for a "*Krankel* hearing." *People v. Krankel*, 102 Ill. 2d 181 (1984). On the second date, the trial court found that all of defendant's claims lacked merit.

¶ 31 A. Claim #1: Incorrect Minimum Sentence

¶ 32 Defendant's first claim was that his trial counsel was ineffective for wrongly advising defendant that the minimum possible sentence at trial would be 51 years, instead of the actual 71 years, which defendant claims led him to reject the State's plea offer of 36 years.

¶ 33 Defendant signed an affidavit averring that he rejected the State's plea offer because he believed the minimum sentence he could receive at trial was 51 years and that, had he known the minimum was 71 years, he would have accepted the plea. Defendant again stated to the trial judge on May 11, 2010, "I agreed to go to trial because I was told the minimum was 51 years. Never told me the minimum was 71 years. Had I known the minimum was 71 years, I would have took the plea."

¶ 34 On March 24, 2010, defendant's trial counsel said that he discussed the minimum sentence with defendant. Defense counsel stated, "Your Honor, I believe that we discussed with Mr. Knight what the sentencing range was *** ." Defense counsel claimed that defendant was "steadfast in his objection to pleading to first-degree murder" because it was part of defendant's trial strategy to seek a second-degree murder finding or plea offer.

¶ 35 However, on May 11, 2010, defendant's trial counsel contradicted himself and stated that he had not discussed the minimum sentence with defendant. Defense counsel stated, "I wouldn't discuss the minimum sentence" and again, "I would not have advised him on what the minimum sentence was *** ." Defense counsel claimed that he would not have discussed the minimum sentence with defendant because "I wouldn't have believed that your Honor would have given him a minimum sentence *** ." The trial court then asked defense counsel, "Okay. So did you deal with any numbers with regards to your client?" Defense counsel replied, "I couldn't, your Honor, because I would be guessing at what your Honor would do *** ." Defense counsel also explained that it was "our trial strategy *** geared at Mr. Knight's direction" to obtain a second-degree murder conviction and to show that there was no gap between the shooting, but rather that the shooting was a single act, so that defendant could receive concurrent sentences. Defense counsel stated that, since he did not know if the sentences would run consecutively or concurrently, he "would be guessing at that as well." Thus, defense counsel claimed, "[t]here would be no point in me discussing minimum sentences with him *** ."

¶ 36 The trial court then questioned defendant about what his claims were when he brought up ineffective assistance of counsel prior to sentencing. Defendant replied that his claim originally concerned only the failures to investigate Witcliffe's criminal history and to call the two witnesses who could have corroborated defendant's theory of self-defense. Defendant said he

"[didn't] really know" what specific issues he was going to raise under ineffective assistance of counsel, but he "wanted a chance to talk to an attorney." Defendant stated that he became aware that the minimum sentence was 71 years, not 51 years, only when the judge sentenced him, which was after when he had first claimed ineffective assistance of counsel.

¶ 37 The State argued that defendant's claims were trial strategy and thus lacked merit. On May 11, 2010, the State argued:

> "The purpose of this hearing in this case was remanded for just that time period when your Honor would have questioned Mr. Knight, and his first complaint that he would have articulated if he would have been given the inappropriate sentencing range.
>
> His claim of that now is disingenuous and false because as he told you, he couldn't have known he was about to be sentenced to a term of imprisonment that exceeded the *Curry* admonishment of 51 years."

¶ 38 On the same day, May 11, 2010, the trial court found:

> "The issue before this Court is what the Defendant's claims were prior to sentencing when he made the allegations of ineffective assistance when he was indicating he wished to continue the matter, and he had some concerns with his attorneys. Clearly, and the Defendant has indicated, he did not know he was facing 71 years of incarceration.
>
> It's clear to this Court that he learned that later. He learned it after he was sentenced when I pronounced sentence. Therefore

> that issue could not have been addressed at the time when he came out from the lockup prior to this court proceeding to the sentencing hearing.
>
> *** Based on the Defendant not having knowledge, and this Court has been directed by the Appellate Court to address the Defendant's issues, that were his issues at the time of the sentencing, not what he has learned now, but at the time of the sentencing, which was July 11th, 2007.
>
> The court finds that the Defendant, and he has indicated, he did not know that at the time. He did not know he was facing 71 years until I sentenced him to the minimum, which was 71 years. So he could not have raised that issue. He is indicating now he possibly could have, but he could not have raised that issue at the time.
>
> The court finds therefore with regards to the first issue, the Defendant is raising before this Court that it does, it lacks merit to proceed any further."

¶ 39 B. Claim #2: Failure to Investigate Criminal History

¶ 40 Defendant's second claim was that his trial counsel was ineffective for failing to investigate Witcliffe's prior criminal history, which influenced defendant to waive a jury trial. During the trial, Witcliffe disclosed that he had three felony convictions.

¶ 41 On March 24, 2010, defendant's trial counsel stated that he and his co-counsel "advised Mr. Knight of the backgrounds of the witnesses as soon as we became aware of them." Defense

counsel claimed that waiving a jury trial was defendant's decision to have a better chance in a bench trial of receiving a second-degree murder conviction.

¶ 42 On May 11, 2010, the trial court held that this claim lacked merit because it was part of a trial strategy to receive a second-degree murder conviction.

¶ 43 C. Claim #3: Failure to Investigate Witnesses

¶ 44 Defendant's third claim was that his trial counsel was ineffective for failing to investigate or interview two witnesses, Jimmy Armstrong and Elaine "Nikki" Moore, who defendant claimed could corroborate his theory of self-defense.

¶ 45 On March 24, 2010, defendant's trial counsel stated that he did, indeed, investigate the witnesses, but they would have been unable to corroborate defendant's self-defense theory. Defense counsel claimed he discussed this with defendant, and "he agreed after I told him what these witnesses had said to me that we were not going to call these witnesses *** ."

¶ 46 On May 11, 2010, the trial court held that this claim also lacked merit because it was trial strategy.

¶ 47 VI. Mittimus Issue

¶ 48 This court previously ordered that defendant's conviction and sentence for aggravated discharge of a firearm be vacated because it violated the one-act, one crime doctrine. *Knight*, No. 1-07-2254, order at 11, 14. On remand, the trial court held: "The prior order to stand." No amended mittimus was issued.

¶ 49 After the trial court's finding that all three of defendant's claims of ineffective assistance of counsel lacked merit and holding that the prior order was to stand, defendant filed a notice of appeal on August 10, 2010. This appeal followed.

¶ 50 ANALYSIS

¶ 51 Defendant raises three claims on this appeal. First, defendant claims that the trial court erred when it failed to appoint defendant a new attorney to argue defendant's claim that his trial counsel incorrectly advised him during plea negotiations and thus violated defendant's right to effective assistance of counsel. In other words, trial counsel could not, and would not, argue his own ineffectiveness. Second, defendant claims that the trial court erred by conducting a full hearing on defendant's claim of ineffective assistance of counsel, rather than the ordered preliminary inquiry, without appointing new counsel. Third, defendant claims that, pursuant to our earlier order, defendant's mittimus must be corrected to reflect that we already vacated his aggravated discharge of a firearm conviction. *Knight*, No. 1-07-2254, order at 14.

¶ 52 I. Standard of Review

¶ 53 On appeal, the standard of review depends on whether the trial court did or did not determine the merits of defendant's *pro se* posttrial claims of ineffective assistance of counsel. If a trial court has reached a determination on the merits of a defendant's ineffective assistance of counsel claim, we will reverse only if the trial court's action was manifestly erroneous. *People v. McCarter,* 385 Ill. App. 3d 919, 941 (2008). "Manifest error" is error that is clearly plain, evident, and indisputable. *People v. Morgan,* 212 Ill. 2d 148, 155 (2004). However, our supreme court has held that if the trial court made no determination on the merits, then our standard of review is *de novo. Moore,* 207 Ill. 2d at 75. *De novo* consideration means we perform the same analysis that a trial judge would perform. *Khan v. BDO Seidman, LLP,* 408 Ill. App. 3d 564, 578 (2011).

¶ 54 In the case at bar, the trial court reached a determination as a matter of law based on an erroneous interpretation of the scope of this court's remand. Our previous order stated:

> "Accordingly, we *** remand defendant's case for the limited purpose of allowing the trial court to conduct the necessary preliminary investigation into defendant's *pro se* ineffective assistance of counsel claim. If the court finds defendant's claim to be spurious, the court may deny defendant's oral motion and leave his convictions and sentences standing." *Knight*, No. 1-07-2254, order at 14-15.

It was in the interest of judicial economy to review at one hearing all ineffective assistance claims directed at the same attorney. When we remanded for a hearing on ineffective assistance of counsel, our order was limited to a particular type of claim but contained no limit on the time period. The trial court read into our order limits on our mandate that our order did not contain. Since the trial court did not make a determination on the merits, our standard of review is *de novo*.

¶ 55 II. Issue #1: Failure to Appoint Counsel

¶ 56 Defendant first claims that the trial court erred when it failed to appoint defendant a new attorney to argue defendant's claim that his trial counsel incorrectly advised him during plea negotiations and thus violated defendant's right to effective assistance of counsel.

¶ 57 A. Application of *Krankel*

¶ 58 Through *People v. Krankel* and its progeny, the Illinois Supreme Court has provided our trial courts with a clear blueprint for the handling of posttrial *pro se* claims of ineffective assistance of trial counsel. See also *People v. Moore,* 207 Ill. 2d 68, 77–82 (2003) (discussing *Krankel* and its progeny); *People v. Chapman,* 194 Ill. 2d 186, 227–31 (2000) (same); *People v. Johnson,* 159 Ill. 2d 97, 124 (1994) (same). A trial court is not automatically required to appoint new counsel any time a defendant claims ineffective assistance of trial counsel. *Moore,* 207 Ill.

2d at 77; *Chapman,* 194 Ill. 2d at 230; *Johnson,* 159 Ill. 2d at 124. Instead, the trial court must first conduct a preliminary inquiry to examine the factual basis underlying a defendant's claim. *Moore,* 207 Ill. 2d at 77–78; *Chapman,* 194 Ill. 2d at 230; *Johnson,* 159 Ill. 2d at 124.

¶ 59 A trial court may base its *Krankel* decision on: (1) the trial counsel's answers and explanations; (2) a "brief discussion between the trial court and the defendant[;]" or (3) "its knowledge of defense counsel's performance at trial and the insufficiency of the defendant's allegations on their face." *Moore,* 207 Ill. 2d at 78–79; *Chapman,* 194 Ill. 2d at 228–31; *People v. Peacock,* 359 Ill. App. 3d 326, 339 (2005). "If [a] trial court determines that the claim lacks merit or pertains only to matters of trial strategy, then the [trial] court need not appoint new counsel and may deny the *pro se* motion." *Moore,* 207 Ill. 2d at 78; *Chapman,* 194 Ill. 2d at 230; *Johnson,* 159 Ill. 2d at 124. A claim lacks merit if it is " 'conclusory, misleading, or legally immaterial' or do[es] 'not bring to the trial court's attention a colorable claim of ineffective assistance of counsel.' " *People v. Burks*, 343 Ill. App. 3d 765, 774 (2003) (quoting *People v. Johnson*, 159 Ill. 2d 97, 126 (1994)). However, if the defendant's allegations "show possible neglect of the case[,]" the trial court should appoint new counsel. *Moore*, 207 Ill. 2d at 78; *Chapman*, 194 Ill. 2d at 230; *Johnson*, 159 Ill. 2d at 124. If new counsel is appointed, the new counsel would then represent the defendant at a posttrial hearing on the defendant's claims of ineffective assistance of trial counsel. *Moore*, 207 Ill. 2d at 78.

¶ 60 A review of the record of the initial trial, as well as trial counsel's answers and explanations during the preliminary inquiry, reveals "possible neglect of the case ***." *Moore*, 207 Ill. 2d at 78. The Illinois Supreme Court has found that "[a] criminal defendant has the constitutional right to be reasonably informed with respect to the direct consequences of accepting or rejecting a plea offer." *People v. Curry*, 178 Ill. 2d 509, 528 (1997). Thus, for

example, our supreme court in *Curry* found ineffective assistance of counsel where defense counsel incorrectly informed the defendant during plea negotiations about mandatory consecutive sentencing and the minimum sentence possible at trial. *Curry*, 178 Ill. 2d at 529. As a result of the defense attorney's misleading conduct, the defendant's conviction and sentence were reversed and the defendant was given a new trial. *Curry*, 178 Ill. 2d at 536-37. In the case at bar, during the trial and on the record, the defense counsel, like defense counsel in *Curry*, incorrectly informed defendant during plea negotiations of the minimum sentence available at trial. Defense counsel also gave contradictory statements over the course of the two-day inquiry. First, defense counsel said that he discussed the minimum sentence, but on the second date of the inquiry, defense counsel stated that he did not and "would not" discuss the minimum sentence with defendant. This omission, too, shows neglect, for defense counsel has an "obligation of fully informing [defendant] as to the ramifications of accepting or rejecting the plea agreement ***." *People v. Blommaert*, 237 Ill. App. 3d 811, 817 (1992). Thus, the record shows "possible neglect" of the case. *Moore*, 207 Ill. 2d at 78. Therefore, we find that the trial court erred in failing to appoint defendant new counsel to argue his ineffective assistance of counsel claim on the sentencing issue.

¶ 61 B. Harmless Error

¶ 62 Even if we find that a trial court made an error, we will not reverse if we find that the error was harmless. *Moore,* 207 Ill. 2d at 80. "A defendant is entitled to a fair trial but not a perfect one." *Lutwak v. United States*, 344 U.S. 604, 619 (1953). The Illinois Supreme Court has held that "[a] trial court's failure to appoint new counsel to argue a defendant's *pro se* posttrial motion claiming ineffective assistance of counsel can be harmless beyond a reasonable doubt." *Moore*, 207 Ill. 2d at 80.

¶ 63 Affidavits have been held sufficient to establish prejudice. In *Curry*, for example, our supreme court found that the defendant had "established a reasonable probability that he would have accepted the plea offer, absent his attorney's deficient performance" where the defendant stipulated that he would testify that if he had been properly informed of sentencing, he would have accepted the State's plea offer; where there was a $7^{1}/_{2}$ -year disparity between the plea offer and the mandatory minimum sentence; and, "most importantly[,]" where there was "defense counsel's uncontradicted affidavit that defendant rejected the plea offer because of counsel's erroneous advice." *Curry*, 178 Ill. 2d at 533. Even without an affidavit from defense counsel, in *People v. Barkes*, 399 Ill. App. 3d 980, 992 (2010), the appellate court held that the defendant's allegations in his petition and affidavit that he would have accepted a plea offer had defense counsel properly informed him of mandatory consecutive sentencing, were "sufficient to warrant an evidentiary hearing on this issue," since at that stage " 'all well-pleaded facts in the petition and in any accompanying affidavits are taken as true.' " *Barkes*, 399 Ill. App. 3d 980 at 992 (quoting *People v. Towns*, 182 Ill. 2d 491, 503 (1998)).

¶ 64 In this case, like the defendant in *Barkes*, defendant both averred in an affidavit and stated in front of the trial judge that he would have accepted the plea offer of 36 years if he had been correctly informed that the minimum sentence he could receive at trial was 71 years, not 51 years. Defendant has thus " 'demonstrate[d] that there is a reasonable probability that, absent his attorney's deficient advice, he would have accepted the plea offer.' " *People v. Barkes*, 399 Ill. App. 3d 980, 992 (2010) (quoting *Curry*, 178 Ill. 2d at 531). Therefore, the trial court's failure to appoint new counsel to argue defendant's ineffective assistance of counsel claim was not harmless error.

¶ 65 The State argues that defendant has not suffered prejudice because defendant has

received the minimum possible sentence, and the plea offer of 36 years was below the sentencing range required for defendant's crimes. The State cites *People v. White*, 2011 IL 109616, ¶ 29 (2011), in which the Illinois Supreme Court held that the defendant's plea agreement was void because the trial judge did not impose the mandatory firearm enhancement where "the factual basis provided to the court in support of defendant's plea made it clear that a firearm was used in the commission of the offense." We find the State's argument unpersuasive. First, the argument sidesteps prosecutorial discretion. "It has long been recognized by this court that the State's Attorney is endowed with the exclusive discretion to decide which of several charges shall be brought, or whether to prosecute at all." *People v. Jamison*, 197 Ill. 2d 135, 161-162 (2001). Second, the case at bar is distinguishable from *White*. In *White*, the defendant accepted the plea offer and the trial court sentenced the defendant in accordance with the plea agreement. *White*, 2011 IL 109616, ¶ 7 (2011). In the case at bar, defendant never accepted the plea offer; and the remedy, if defendant's case reaches that point, would not be to reinstate the plea offer, but rather to order a new trial with the possibility of renewed plea negotiations. *Curry*, 178 Ill. 2d at 536-37 (ordering a new trial with the possibility of renewed plea negotiations, where the defendant rejected a plea offer based on erroneous advice of defense counsel).

¶ 66 For the foregoing reasons, we reverse the trial court's dismissal of defendant's ineffective assistance of counsel claim and remand to appoint new counsel to argue defendant's claim.

¶ 67 III. Issue #2: Extent of Inquiry

¶ 68 Second, defendant claims that the trial court erred by conducting a full hearing on defendant's claim of ineffective assistance of counsel, rather than the ordered preliminary inquiry, without appointing new counsel. Defendant seeks a remand for appointment of new

counsel. Since we are already reversing and remanding for appointment of new counsel on the first issue, it is not necessary to reach this second claim.

¶ 69 IV. Issue #3: Mittimus

¶ 70 This court previously vacated defendant's conviction for aggravated discharge of a firearm; however, the trial court did not amend the mittimus. Defendant argues, and the State concedes, that this conviction must be vacated pursuant to this court's prior order. *Knight*, No. 1-07-2254, order at 11, 14. We therefore order the trial court to amend defendant's mittimus to reflect the vacatur of defendant's conviction for aggravated discharge of a firearm.

¶ 71 CONCLUSION

¶ 72 For the foregoing reasons, we reverse the trial court's dismissal of defendant's ineffective assistance of counsel claim and remand to appoint new counsel to argue defendant's claim. We also remand to amend defendant's mittimus to reflect the vacatur of defendant's conviction for aggravated discharge of a firearm.

¶ 73 Reversed and remanded with instructions.