FIRST DIVISION
August 27, 2012

No. 1-10-2550

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.	)	04 CR 27498
	)	
YARMALE THOMAS,	)	Honorable
	)	Nicholas R. Ford,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

ORDER

HELD: The trial court erred by failing to conduct an appropriate preliminary inquiry under *People v. Krankel*, 102 Ill. 2d 181 (1984); and the trial court did not abuse its discretion by failing to hold a hearing *sua sponte* into the defendant's fitness for the *Krankel* hearing.

¶ 1 Following a bench trial, defendant Yarmale Thomas was found guilty of first-degree murder and armed robbery in connection with the fatal stabbing and beating of his ex-girl friend Monique Cross. The defense theory at trial was that defendant was temporarily insane at the time he committed the offenses. Defense counsel maintained that defendant suffered from a schizoaffective disorder and that he was experiencing a dissociative mental state which rendered him incapable of appreciating the criminality of his conduct at the time he committed the offenses. The trial court rejected the temporary insanity defense and found defendant guilty of the charged offenses.

¶ 2 After denying defendant's motion for a new trial, the trial court sentenced him to 60 years' imprisonment for first-degree murder to be served consecutively to a 15-year term for armed robbery. The trial court later denied defendant's motion to reconsider sentence.

¶ 3 On direct appeal, we affirmed defendant's conviction for armed robbery finding that the evidence was sufficient to support his conviction for this offense. *People v. Thomas*, No. 1-07-0460 (August 14, 2009) (unpublished order pursuant to Supreme Court Rule 23). However, we remanded for a hearing pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984), and directed the trial court to conduct a preliminary inquiry into the defendant's *pro se* posttrial claims of ineffective assistance of trial counsel after we determined that the record failed to indicate if the trial court was ever made aware of the claims. *Id*. Defendant claimed that defense counsel rendered ineffective assistance by failing to investigate and present certain evidence in support of his temporary insanity defense.

¶ 4 On remand, defendant's defense counsel testified at the *Krankel* hearing. Following the hearing, the trial court denied defendant's request for appointment of new counsel to evaluate his *pro se* posttrial claims of ineffective assistance of counsel. The trial court determined that the

defendant's claims either lacked merit or they pertained to matters of trial strategy and tactics. Defendant now appeals.

¶ 5 ANALYSIS

¶ 6 Defendant first contends that the trial court erred by failing to conduct an appropriate *Krankel* inquiry. *Krankel* and its progeny hold that when a case is remanded for the limited purpose of conducting a hearing on a defendant's *pro se* posttrial claims of ineffective assistance of counsel, before new counsel can be appointed to undertake an independent evaluation of these claims, the trial court should first conduct a preliminary inquiry into the factual basis of the claims to determine if they show possible neglect of the case warranting appointment of new counsel. See generally *People v. Ward*, 371 Ill. App. 3d 382, 430 (2007). The purpose of appointing new counsel to independently evaluate such claims is to avoid the possible conflict of interest that might result if original defense counsel were put in a position of arguing his or her own incompetence. *People v. Phipps*, 238 Ill. 2d 54, 63 (2010).

¶ 7 Before addressing the merits of defendant's claims, we address the State's assertion that this case should not have been remanded for a *Krankel* hearing in the first place because defense counsel was privately retained, rather than appointed. The State relies on the holding in *People v. Pecoraro*, 144 Ill. 2d 1 (1991), in support of this contention.

¶ 8 In *Pecoraro*, both the defendant and his privately retained attorney filed posttrial motions for a new trial alleging, among other things, ineffective assistance of counsel. *Pecoraro*, 144 Ill. 2d at 12. The privately retained attorney argued both motions, which were subsequently denied by the trial court. *Id*. at 13.

¶ 9 On appeal, the supreme court found that defendant failed to prove both elements required to show ineffective assistance of trial counsel. *Pecoraro*, 144 Ill. 2d at 13. The court also rejected the defendant's alternative argument that the matter should be remanded for a *Krankel* hearing.

¶ 10 Defendant claimed that pursuant to *Krankel*, the matter should be remanded for a determination as to whether he was denied the effective assistance of counsel because the trial court should have appointed new counsel other than his privately retained counsel to argue his posttrial allegations of ineffective assistance of counsel. *Pecoraro*, 144 Ill. 2d at 14. The supreme court held that the trial court was not required to appoint new counsel pursuant to *Krankel* and alter the attorney-client relationship where the defendant had retained private counsel to represent him both at trial and at the hearings on his posttrial motions and where he had never requested to be represented by new counsel prior to the hearings. *Id*. at 14-15.

¶ 11 Since *Pecoraro*, our supreme court has implicitly rejected the notion that *Krankel* only applies to appointed counsel. See *People v. Taylor*, 237 Ill. 2d 68, 78 (2010) ("the majority assumes, without deciding, that *Krankel* applies to privately retained counsel since it addresses the merits of defendant's claim on a factual basis") (Burke, J., specially concurring). Moreover, we agree with the holding in *People v. Johnson*, 227 Ill. App. 3d 800, 810 (1992), where the court stated that it did not believe that *Pecoraro* stood "for the proposition that a trial court is free to automatically deny a *pro se* request for new counsel simply because the defense counsel who was allegedly ineffective was privately retained."

¶ 12 Turning to the merits, defendant maintains that the trial court denied his request for appointment of new counsel without first conducting an appropriate preliminary inquiry into the

factual basis of his *pro se* posttrial claims of ineffective assistance of counsel to determine if the claims showed possible neglect of the case warranting appointment of new counsel as required by *Krankel*. We agree.

¶ 13 In *People v. Moore*, 207 Ill. 2d 68, 78 (2003), our supreme court provided guidance as to how a trial court should conduct a *Krankel* inquiry into a defendant's *pro se* posttrial claims of ineffective assistance of counsel, stating:

> "During this evaluation, 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. Trial counsel may simply answer questions and explain the facts and circumstances surrounding the defendant's allegations. [Citations.] A brief discussion between the trial court and the defendant may be sufficient. [Citations.] Also, the trial court can base its evaluation of the defendant's *pro se* allegations of ineffective assistance on its knowledge of defense counsel's performance at trial and the sufficiency of the defendant's allegations on their face. [Citations.]" *Moore*, 207 Ill. 2d at 78-79.

¶ 14 Our supreme court determined that the operative concern for a reviewing court is whether the trial court conducted an adequate inquiry into the defendant's *pro se* allegations of ineffective assistance of counsel. *People v. Johnson*, 159 Ill. 2d 97, 125 (1994); *Moore*, 207 Ill. 2d at 78. This is a question of law we review *de novo*. *People v. Vargas*, 409 Ill. App. 3d 790, 801 (2011).

¶ 15 In this case, our review of the record indicates that the trial judge failed to conduct an adequate and appropriate preliminary inquiry into the factual basis of the defendant's *pro se* posttrial

claims of ineffective assistance of counsel as required by *Krankel*. First, the trial judge who conducted the *Krankel* hearing at issue in this case is not the same judge who presided over the trial and therefore he had no personal knowledge with which to assess defense counsel's trial performance.

¶ 16 And second, and more importantly in the context of this appeal, the record shows that during the *Krankel* hearing, the trial judge never engaged in an interchange or discussion with defense counsel regarding the defendant's *pro se* claims of ineffective assistance of counsel. Instead, the trial judge allowed the same Assistant State's Attorney (ASA) who prosecuted defendant at trial, to question and examine defense counsel. The trial court then permitted the ASA to defend and rationalize defense counsel's trial performance, while at the same time compelling defendant to act as his own counsel in advancing his *pro se* claims and cross-examining defense counsel regarding the claims.

¶ 17 It was error for the trial judge to turn what should have been a preliminary fact-finding judicial inquiry into an adversarial proceeding resembling a formal criminal trial by allowing the ASA to conduct the preliminary *Krankel* inquiry into the factual basis behind the defendant's *pro se* posttrial claims of ineffective assistance of counsel. It was the trial judge's role and not that of the ASA to question defense counsel and conduct this preliminary inquiry, especially since it is logical to assume that the ASA had an interest in upholding defendant's conviction.

¶ 18 In addition, the trial judge put the defendant in the position of acting as his own counsel in requiring him to abide by evidentiary rules and cross-examine defense counsel regarding his alleged incompetence. This format is particularly prejudicial to *pro se* defendants who are generally

unskilled in the rules of evidence and the art of cross-examination. The trial judge's abdication of his role under *Krankel* resulted in the preliminary *Krankel* inquiry being turned into an adversarial inquiry, much like a trial, but one where defendant was denied the due process protections of an adversarial proceeding.

¶ 19 The State contends that since the trial judge who conducted the *Krankel* hearing was not the same judge who presided over the trial, it was not improper for the judge to turn the inquiry over to the ASA who was more familiar with the trial court proceedings. We must disagree. As mentioned, allowing the ASA to conduct the preliminary *Krankel* inquiry effectively turned what should have been a preliminary fact-finding judicial inquiry into an adversarial proceeding more akin to a criminal trial.

¶ 20 The State next argues that even if the trial judge erred by not making a proper inquiry, the error was harmless since all of the defendant's allegations of ineffective assistance of counsel were considered even if the inquiry was conducted by the ASA. Again, we must disagree given the adversarial nature of the proceedings.

¶ 21 Finally, we reject the defendant's contention that he was denied due process of law by the trial court's failure to *sua sponte* hold a fitness hearing prior to the *Krankel* hearing. The due process clause of the fourteenth amendment prohibits the prosecution of a defendant who is not fit to stand trial. *People v. Haynes*, 174 Ill. 2d 204, 226 (1996). In Illinois, a defendant is presumed fit to stand trial and is considered unfit only if his mental or physical condition prevents him from understanding the nature and purpose of the proceedings against him or assisting in his own defense. *People v. Hill*, 345 Ill. App. 3d 620, 625 (2003).

¶ 22 When a *bona fide* doubt of the defendant's fitness exists, the trial court must order a fitness hearing so that the question of fitness may be resolved before the matter proceeds any further. *People v. Williams*, 364 Ill. App. 3d 1017, 1023 (2006). Whether a *bona fide* doubt as to a defendant's fitness has arisen is generally a matter within the discretion of the trial court. *People v. Sandham*, 174 Ill. 2d 379, 382 (1996).

¶ 23 In the instant case, the trial court did not abuse its discretion by failing to hold a hearing *sua sponte* examining the defendant's fitness for the *Krankel* hearing. While defendant was found fit to stand trial with medication at the time of trial which was over six years ago, there is no indication in the record that he still needed to take medication to be fit or that if he needed medication, that he was not receiving it at the time of the *Krankel* hearing. The mere ingestion of psychotropic drugs alone does not create *bona fide* doubt. *People v. Mitchell*, 189 Ill. 312, 330-31 (2000); *People v. Pitsonbarger*, 205 Ill. 2d 444, 472 (2002). Our review of the record indicates that no facts were brought to the attention of the trial court which would have raised a *bona fide* doubt of defendant's fitness for the *Krankel* hearing.

¶ 24 In sum, we find that the trial court erred by failing to conduct an appropriate preliminary inquiry into the factual basis of defendant's *pro se* posttrial claims of ineffective assistance of trial counsel. Therefore, we the vacate denial of appointment of new counsel and remand for a new *Krankel* hearing.

¶ 25 For the foregoing reasons, we remand this cause to the circuit court of Cook County for further proceedings consistent with this order.

Remanded with directions.