2012 IL App (2d) 100755-U
No. 2-10-0755
Order filed May 21, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellee,	)	
v.	)	No. 07-CF-2986
MARK A. DOWNS	)	Honorable Timothy Q. Sheldon,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices Bowman and Schostok concurred in the judgment.

ORDER

Held: Defendant filed *pro se* posttrial motions alleging nearly 50 instances of ineffective assistance of trial counsel. In considering these claims, the trial court erred when it converted the preliminary investigation of the factual bases for defendant's claims into an adversarial hearing on the merits by allowing defendant to read each claim, and then having the trial counsel comment or argue its substance, followed by the State being allowed to comment or argue on the substance of the claim. As a result of this procedural error, we reverse the dismissal of defendant's ineffectiveness claims and remand the cause to its initial position before the trial court, namely, the appointment of a new attorney to represent defendant on his claims of ineffective assistance.

¶ 1 Defendant, Mark A. Downs, appeals from his conviction of first degree murder (720 ILCS 5/9-1(a)(1) (West 1996). Defendant contends that his *pro se* posttrial motions alleging ineffective

assistance of counsel were improperly and unfairly considered, particularly where the court appointed and then rescinded the appointment of new counsel to assist defendant, and where defendant's claims were subjected to adversarial inquiry and argument during what should have been the preliminary hearing on the claims. Defendant also contends that, substantively, the trial court erred in failing to find that defendant's trial counsel possibly neglected this matter in light of defendant's claims that trial counsel did not inform the trial court about defendant's wish to discharge the jurors and proceed with a bench trial, and did not investigate and present an alibi defense. We reverse and remand the cause with directions.

¶ 2 This matter stems from defendant's conviction of the first-degree murder of six-year-old Nico Contreras. Following the trial, defendant filed several *pro se* petitions alleging that his trial counsel, the Kane County public defender, David Kliment, provided ineffective assistance of counsel. In order to better understand the ineffectiveness allegations, we first summarize the salient points of defendant's trial.

¶ 3 This case's genesis appears to be an incident that occurred a week before the murder of the unfortunate Nico. Ruben Davila had recently switched his affiliation from the Latin Home Boys to the Almighty Ambrose gang. Davila had been friends with Robert Saltijeral, a member of the Latin Home Boys and Nico's uncle, and had been at Robert's house almost daily. In addition, Davila had been inside Robert's bedroom at the back of the house and was aware of the sleeping arrangements in the house.

¶ 4 On November 3, 1996, Davila was driving home from his job when he noticed he was being followed. At trial, Davila testified that he thought that the truck that was following him was owned by Jose Virgen, a member of his former gang, the Latin Home Boys, and the person who, according

to Davila, drove him out of the Latin Home Boys gang and into the Ambrose gang. Davila tried to lose the following truck and believed he had succeeded, so he proceeded to his mother's house. As he pulled into his mother's driveway, the truck pulled into the driveway behind him and blocked in Davila's car. Davila testified that he recognized Lorenzo Rios as the driver of the truck, and Daniel Garcia as the passenger. Garcia was getting out of the truck and pointing a gun at Davila. Davila put his car into reverse and tried to ram the truck with his car. Garcia began shooting, and the shots struck Davila's car, but Davila remained unharmed. The truck departed, leaving Davila's car shot up, but Davila himself unscathed. The police were summoned, but Davila obeyed his gang's code and refused to give the names of his assailants to the police. Davila testified at trial that he did not name Garcia and Rios to the police because he wanted to take care of the incident himself.

¶ 5 Davila testified that, the next day, he called defendant and told him who had shot up his car. A few days later, Davila was at a meeting with other gang members, including Alejandro Solis, the local gang leader at the time, Ozzie Cuevas, an overseer for the nation (in other words, he directed the gang operations in the area for the gang leaders who were headquartered in Chicago), Elias Diaz, and defendant. At this meeting, Davila's incident was discussed. It was determined that Davila's friend from his former gang, Robert Saltijeral had been the shooter, and Davila was ordered to "take care of business," meaning to retaliate against his shooter. Davila claimed at trial that he insisted that Robert Saltijeral had not been involved in the incident, and that he was looking into where the actual shooters could be found. In spite of his protestations, Solis ordered Davila to retaliate against Robert Saltijeral.

¶ 6 Because his car was being repaired after being shot up, Davila rented a Geo Prism to tide him over until he could get his car back. Davila testified at trial that, on November 9, 1996, he picked

up defendant, and they drove around Aurora while drinking beer. As they drove around, they were called by Elias Diaz, a member of the Ambrose in Aurora. They picked up Diaz and continued to drive around and drink. At some point, early in the morning of November 10, 1996, Diaz took over and began driving the car because Davila felt he was getting too drunk to drive. Later, Diaz brought up the November 3 incident. Diaz reiterated that Robert Saltijeral was the shooter in the November 3 incident and instructed Davila to "take care of business." Davila testified at trial that he argued with Diaz again, repeatedly stating that Saltijeral had not been involved in the November 3 incident. Davila's and Diaz's argument concluded with Diaz insisting that he knew Robert Saltijeral was the shooter, and instructing Davila to take care of business that night.

¶ 7 Davila told Diaz he did not have a gun; defendant pointed out that Kenny Thomas, another Ambrose gang member, had one, and defendant called Thomas to obtain the gun. They drove to Thomas's house, and defendant went into the house and got a .38 caliber Llama semi-automatic pistol. Davila testified at trial that he had seen the gun before, and that it was a "nation" gun, meaning that it was available to anyone in the gang who needed it.

¶ 8 Diaz drove the group to the Saltijeral house. During the drive, Davila kept arguing with Diaz over the identity of the November 3 shooter. On Edwards Street, behind the Saltijeral residence, Diaz stopped the car, gave Davila the pistol, and ordered him to "go ahead, handle the business," meaning shoot at the Saltijeral house. Davila testified that he and defendant left the car and walked through back yards until they reached the rear of the Saltijeral house.

¶ 9 The Saltijeral house was a two-level house, but it was built into a steep hillside. The first floor held the living room and other common areas; the second floor had the bedrooms. In the back of the property, because the hill was so steep, the second floor was level with the backyard, and one

standing in the backyard could see into the second-floor back bedroom. Abutting the house was a concrete patio on which shell casings were later found.

¶ 10 Davila testified that, when he and defendant reached the rear of the Saltijeral house, they continued to discuss the business at hand and the identity of the November 3 shooter. Davila testified that he made it clear to defendant that Robert Saltijeral was not the shooter and that they should not try to retaliate against him. Davila suggested that they just shoot the pistol into the air or into the ground. Davila testified that defendant, who had been sent along with him to ensure that the retaliation occurred, continued to maintain the official gang line that Robert Saltijeral was the shooter, and defendant told Davila that he had to shoot at the Saltijeral house. Davila suggested that they find another person or the actual shooter to retaliate against, but defendant said no. Defendant insisted that Diaz wanted their actions to be reported in the papers, so they had to shoot Robert Saltijeral.

¶ 11 Davila testified that, after maybe 15 minutes of discussion, defendant took the gun away from him and told him that defendant would do him a favor by doing the shooting, because of all that Davila had done for the Ambrose gang. Davila testified that he did not want any part of the shooting. Defendant asked Davila where Robert Saltijeral slept in the house, and Davila told him he could not remember. It also appears that Davila was aware that Robert Saltijeral had not been staying at the family house for several months, and likely was not present that night. Defendant asked Davila if Robert Saltijeral was in the back bedroom that they were facing, and Davila eventually agreed that he was.

¶ 12 Davila testified at trial that defendant took a few steps forward toward the house, and Davila turned away. Davila heard defendant fire the gun, and Davila began to run away. Davila testified

that, a short distance away, he stopped and waited for defendant to catch up. When he did, they returned to the car in which Diaz was waiting. Defendant got into the front seat, and Davila got into the back seat. Defendant told Diaz to go, and they drove away.

¶ 13 As Diaz was driving away from the scene, a van began chasing them. Eventually, they were able to elude the van, Diaz returned to his house, and defendant and Davila went to defendant's house. As he went to sleep at defendant's house, Davila did not know whether anyone had been injured by defendant's gunshots at the Saltijeral house. In the morning, Davila's ex-wife, Debbie, called him and informed him that Nico Contreras had been killed by the gunfire.

¶ 14 Davila testified that he did not want to perform or participate in the shooting. Instead, he followed Diaz's orders to "take care of business," because Diaz, to him, "was the main guy." Further, Davila testified that he was afraid that, if he did not follow Diaz's orders, he would have been killed.

¶ 15 Several days later, Davila returned to defendant's house. When he arrived, he saw defendant destroying the pistol used in the shooting by hitting it with a hammer. Defendant and Davila then drove around disposing of the parts of the gun. Some parts were thrown onto railroad tracks, and larger pieces were thrown into a pond the two noticed as they were driving around. Davila estimated that the pond was about a 30-minute drive from defendant's house. Years later, when Davila was cooperating with the State in this case, he was unable to locate the pond again, and was unable to show the police where any of the parts of the gun had been thrown.

¶ 16 In November 1996, Davila was questioned about the shooting. Davila did not cooperate or tell police what he knew because he did not "want to be a snitch." Davila also noted that the gang abided by a code of silence when members were confronted by the police (or even outsiders), and

he could have been subject to gang penalties, which included death, had he cooperated with the police.

¶ 17 In exchange for the testimony summarized above, Davila received an extremely lenient plea deal. Davila would not be charged in the death of Nico Contreras. In addition, he would not be charged with murdering Jose Antonio Yepiz, whom he shot five times in the back of the head a few weeks after the Nico Contreras murder. Instead, he would be charged with only aggravated discharge of a firearm in the Yepiz shooting. Further, Davila was to receive a recommendation for boot camp, and would face only an eight-year sentence if he washed out of the boot camp program. In addition to the lenient charging and sentencing portions of Davila's agreement to cooperate, nearly $39,000 was paid to or on Davila's behalf to defray expenses like lodging, transportation, legal fees, and compensation to his family in Mexico.

¶ 18 Davila explained that he decided to cooperate with the police to get the incident off of his chest. He had moved to Mexico for several years, starting a family and no longer participating in the gangbanging lifestyle. In 2007, he approached the authorities to gauge their receptiveness to working out a deal. Davila also claimed that, after 11 years, he was tired of running, and he also wanted to bring closure to Nico Contreras' mother about the murder of her child.

¶ 19 On cross-examination, Davila testified that he had been in the Ambrose gang for only a few months at the time of the Nico Contreras murder. Davila explained that, when defendant told him he would do the shooting because of all that Davila had done for the gang, defendant was referring to up to 10 shootings that Davila had performed on the gang's behalf. Davila admitted to lying to police when, in November 1996, he was questioned about the Contreras murder. Davila also denied

making statements to several people in which he admitted to shooting at the Saltijeral house and killing the little boy.

¶ 20 Solis testified about the crime. He learned of the shooting of Nico Contreras by reading about it in the newspaper. Solis was incensed that an Ambrose member had shot a little boy because he did not want the gang to become known as indiscriminate child killers. Solis resolved to murder Davila for his role in the Contreras murder. He confronted Davila, who was accompanied by defendant, and asked him about his involvement in the murder, and also threatening that the murderer would not be protected in prison by the Ambrose. Defendant told Solis that they did not know that a little boy was sleeping in the room they shot up. Solis realized that, along with Davila, defendant and Diaz were involved. Because he was good friends with Diaz and defendant, and because he would have had to have killed them along with Davila, Solis decided to do nothing further about the Contreras murder.

¶ 21 Solis also testified about a 2002 conversation with defendant. Solis commented to defendant that defendant's daughter was cute, and defendant became emotional and started crying. Solis testified that defendant confided to him that he still had nightmares about the Nico Contreras murder, and that he would see the bullets going through the window.

¶ 22 Solis explained that he decided to cooperate with the State following an incident in which he was arrested (for an unrelated offense) in front of his five-year-old son. Solis claimed that he was cooperating because it was the right thing to do and in order to clear his conscience. After discussing with the police what he knew about the Contreras murder, he felt "set free." While Solis apparently did not have a *quid pro quo* deal to testify about the Contreras murder specifically, his 2½-year sentence for driving under the influence (the crime for which he was arrested in front of his child)

was vacated and he was resentenced to a 30-month term of probation. In addition, the authorities paid $5,000 in missed child support payments so Solis could be released from jail. Further, while he was working as an informant for the FBI, he was paid $3,200, some of which was paid for Solis's information about the Nico Contreras murder.

¶ 23 The State presented numerous other witnesses in support of its case documenting the police investigation into the murder. Additional police witnesses testified about the process of securing Davila's cooperation, generally corroborating Davila's testimony on that issue. The medical examiner testified that Nico succumbed to multiple gunshot wounds, namely, two gunshots that struck him in the back, either of which by themselves would have been fatal. Commander Mike Langston, of the Aurora police department, testified as an expert witness on gangs and gang culture that the shooting was gang-related. He also gave background on the rivalry between the Ambrose and the Latin Home Boys, and their membership totals as of the end of 1996. Langston noted that Robert Saltijeral was, at the time of the shooting, in a leadership position with the Latin Home Boys.

¶ 24 Defendant did not testify on his own behalf. However, defendant presented a number of witnesses who testified about Davila's actions following the November 1996 shooting. For example, Billie Mireles testified that, in November 1996, Davila came to her apartment in an extremely upset state and said to her that "he couldn't believe that he killed a kid when he's got kids of his own." Angelica Gonzalez testified that she attended a party (apparently hosted by Ambrose members in an abandoned house) occurring after the shooting at which she observed Davila to state that he killed a little boy and laugh about it and also to wave around a large silver handgun. Deborah Davila, Davila's ex-wife, testified that he told her that he believed that, on November 3, 1996, Robert Saltijeral had been the shooter.

¶ 25 After the conclusion of evidence, the jury was instructed and sent to deliberate. Several questions were passed to the trial court; none of the jury's questions have been identified as spawning appellate issues. The jury returned a general verdict finding defendant guilty of first-degree murder.

¶ 26 Following his conviction and before sentencing, on June 23, 2009, and August 26, 2009, defendant filed *pro se* motions alleging that his trial counsel had provided ineffective assistance. The second motion repeated the claims of the first motion and raised 34 issues of alleged ineffectiveness on the part of his trial counsel. In between the motions, on July 31, 2009, the trial court appointed a lawyer from the public defender's multiple defendants division, Ronald Haskell, to represent defendant on his ineffective-assistance claims. On September 2, 2009, the new attorney queried the trial court on the scope of his duties. The trial court first indicated that the attorney was to conduct the preliminary inquiry on its behalf:

> "MR. HASKELL: *** so as I understand it, then, what you're saying is that the Court has made a preliminary investigation of a reading of the—
>
> THE COURT: No.
>
> MR. HASKELL: No?
>
> THE COURT: No. I have—I have received [defendant's] Petition and he has made the allegation. I've gone no further than receiving his Petition and appointing you to pursue—"

The court, however, further clarified what it had done and what it expected the new attorney to do:

> "THE COURT: [The trial court recited rules gleaned from *Krankel*, 102 Ill. 2d at188-89, and *People v. Williams*, 224 Ill. App. 3d 517, 523-24 (1992).]

On my review, some of the allegations that he made *pro se*, could be construed as neglect. Sometimes the Court looks at that as, you know, 'weekly visits are my complaint, I have not received my weekly visits'. Does that help you?"

MR. HASKELL: Yes, it does help me. You're making a record that you have reviewed and you think that there are some issues that need to be investigated, therefore it's up to me to investigate."

¶ 27 On October 27, 2009, the new lawyer filed an amended motion alleging ineffective assistance adopting five of defendant's *pro se* claims. On November 25, 2009, defendant filed an additional *pro se* motion, raising 13 more claims of ineffective assistance.

¶ 28 On October 28, 2009, the day after Haskell filed his amended motion, the trial court reconsidered its position regarding defendant's ineffective-assistance claims. The trial court determined that it should have first conducted a preliminary inquiry into defendant's claims before it appointed counsel to work on the claims. Accordingly, the trial court effectively revoked its appointment of Haskell as counsel on the ineffectiveness claims. Over the span of three days, on October 28, November 25, and December 28, 2009, the trial court conducted a hearing on defendant's *pro se* claims of ineffective assistance. During this proceeding, the trial court adopted a procedure of allowing defendant to read his allegation and offer any further explanation defendant deemed necessary, then the trial court would allow trial counsel, followed by the State, to offer comments or arguments as to why the issue did not constitute an instance of cognizable neglect or ineffective assistance. Finally, the trial court allowed defendant to offer a final thought concerning his allegation before proceeding to the next allegation.

¶ 29 Defendant's *pro se* motions alleged a number of instances during which defendant believed that trial counsel failed to adequately cross-examine witnesses, particularly Davila and Solis. Many of the allegations concerned testimony from Diaz's trial, which had not been repeated during defendant's trial, but which defendant wanted used as impeachment of the witness's testimony. In addition, many of the allegations pointed out discrepancies between Davila's and Solis's prior statements to police and prior testimony at the Diaz trial and their testimony at defendant's trial.

¶ 30 Defendant also alleged that, on both the first and second days of trial, he told trial counsel that he wanted to dismiss the jury at that time and proceed with a bench trial. Trial counsel replied that defendant had made that suggestion, but he had tried to talk defendant out of that course of action as unwise because the trial court had conducted a bench trial for the Diaz case which presented substantially similar evidence to that presented in defendant's trial, and counsel believed that such a course would inevitably result in a conviction because the trial court had already accepted similar evidence as true. Counsel further argued that defendant did not become "insistent" about dismissing the jury and proceeding with a bench trial, so counsel continued with the jury trial. Defendant stated that he told counsel that he was "almost 100 percent certain" he wanted to switch from a jury trial to a bench trial.

¶ 31 In another allegation, defendant asserted that trial counsel did not sufficiently investigate or present an alibi defense for him. Defendant stated that, at the time of the Nico Contreras murder, he was at work, because he worked the overnight shift, beginning at 6 p.m. and ending at 6 a.m. Counsel explained that he contacted defendant's employer at that time and was informed that the employer did not retain employment records for seasonal workers from 1996. In addition, counsel asserted that, in 1996, the police had investigated defendant's alibi and had found no evidence to

support it. We note that there is nothing in the record to support or debunk counsel's contention on this point. Defendant stated that trial counsel should have contacted his sister, Patricia Serrano, and his brother, Chris Downs, both of whom had provided written statements in support of defendant's alibi claim. In particular, Patricia stated that both defendant and Chris were living with her at that time, and she remembered that she drove them to work for their seasonal employment at Borg-Warner in West Chicago to begin a shift a 6 p.m. on November 9, 1996, and picking them up the following morning at 6 a.m.

¶ 32 After defendant had enumerated every issue in his *pro se* motions, the trial court addressed each point individually, determining that each claim did not provide a basis to believe that trial counsel was ineffective. As a result of this analysis, the trial court held that there was no basis to appoint counsel to represent defendant on any of the claims raised in defendant's *pro se* motions and effectively dismissed the motions.

¶ 33 On February 24, 2010, trial counsel filed a motion for a new trial. The motion for a new trial argued that defendant had not been proven guilty beyond a reasonable doubt, Diaz's statements were erroneously admitted under the co-conspirator exception, and defendant was prejudiced when he was not allowed to present evidence regarding Solis's specific acts of domestic violence and regarding Davila's specific acts of domestic violence along with details of his shooting of Jose Antonio Yepiz. The trial court denied the motion for a new trial.

¶ 34 The matter proceeded to sentencing. Following the victim impact statements by Nico's mother and father, the parties argued, and defendant stated in allocution that he was not guilty of Nico's murder. The trial court sentenced defendant to an extended term of imprisonment of 70 years. In addition, pursuant to section 5-8-4(b) of the Code of Corrections (730 ILCS 5/5-8-4(b)

(West 2010)), the trial court, in its discretion, ordered that the 70-year sentence be made consecutive to defendant's existing sentences for his convictions for attempted murder and aggravated discharge of a firearm. Defendant filed a motion to reconsider the sentence which, on July 22, 2010, was heard and denied. Defendant timely appeals.

¶ 35 On appeal, defendant contends that the trial court's investigation into his *pro se* claims of ineffective assistance of counsel pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984), was procedurally flawed when the trial court conducted essentially an adversarial hearing on defendant's claims while he was proceeding without representation. In addition, defendant contends that the trial court erred in finding that defendant's claims that he wished to dispense with a jury trial and proceed with a bench trial, and that his trial counsel did not adequately investigate or present an alibi defense failed to show that trial counsel possibly neglected defendant's case. We consider each contention in turn.

¶ 36 Defendant's primary contention on appeal is that the trial court subjected him to an improper adversarial hearing in lieu of a *Krankel* hearing. Defendant contends that there is no provision for such a procedure in any Illinois authority concerning the conduct of a *Krankel* hearing, and, as a result, his ineffective-assistance claims were not properly considered by the trial court. For redress, defendant urges that we return him to the point at which the trial court began, namely, with appointed counsel to assist him in presenting his ineffectiveness claims to the trial court.

¶ 37 The State, for its part, contends that defendant should be deemed to have forfeited his procedural contention because he did not provide a sufficiently detailed argument. Likewise, the State contends that defendant did not point to pertinent authority to support his procedural argument, again resulting in the waiver of his contention. We disagree with the State's forfeiture argument.

¶ 38 Defendant's argument on appeal sufficiently demonstrates the salient points of which he complains, namely, the trial court's procedure of inviting defendant to raise a claim of ineffective assistance, followed by a comment, response, or argument from trial counsel, followed by a comment or argument by the State, and concluded with a final word by defendant. Defendant is clear that the argument provided by both trial counsel and State against his posttrial ineffective-assistance claims is the procedure to which he is objecting on appeal, and we do not see that defendant needed more specificity in this argument. As to the lack of authority, our review of the cases cited by both parties reveals that in no case did any other court adopt the trial court's procedure used in this case. See, *e.g.*, *People v. Moore*, 207 Ill. 2d 68 (2003) (trial court erred when it did not conduct any inquiry into the defendant's ineffectiveness allegations; no State participation); *People v. Chapman*, 194 Ill. 2d 186 (2000) (trial court's proper inquiry into the defendant's ineffectiveness allegations consisted of speaking with defendant and using its knowledge of counsel's performance at trial; State did not participate); *People v. Robinson*, 157 Ill. 2d 68 (1993) (trial court erred when it conducted no inquiry at all into defendant's ineffectiveness allegations); *People v. Nitz*, 143 Ill. 2d 82 (1991) (the State participated in the evidentiary hearing on the defendant's claims of ineffectiveness, but it did not participate in the preliminary investigation in which the trial court listened to the defendant's arguments); *People v. McCarter*, 385 Ill. App. 3d 919 (2008) (the trial court properly questioned defendant, talked with trial counsel, and relied on its knowledge of counsel's representation during preliminary inquiry; the State did not participate); *People v. Bolton*, 382 Ill. App. 3d 714 (2008) (trial court properly asked defendant to expand upon his contentions of ineffectiveness; the State did not participate in the preliminary inquiry); *People v. Ford*, 368 Ill. App. 3d 271 (2006) (the trial court questioned defendant on his oral allegations of ineffective assistance;

the State did not participate in the preliminary inquiry); *People v. Peacock*, 359 Ill. App. 3d 326 (2005) (the trial court erred because it did not investigate the defendant's allegations of ineffective assistance communicated to it by letter; the State did not participate until the defendant's appeal); *People v. Gilmore*, 356 Ill. App. 3d 1023 (2005) (the trial court erred by failing to conduct any preliminary inquiry where it could not solely rely on its knowledge of counsel's performance; the State took no part in the procedure); *People v. Cummings*, 351 Ill. App. 3d 343 (2004) (the trial court conducted an adequate investigation into the defendant's claims of ineffectiveness by asking defendant to elaborate and speaking with trial counsel; the State did not participate in the procedure); *People v. Cabrales*, 325 Ill. App. 3d 1 (2001) (the trial court erred by failing to conduct a preliminary inquiry and allowing the State to participate in a hearing on the merits of the defendant's claims of ineffective assistance). The lack of authority, if any there be, is caused not by defendant's failure to pinpoint pertinent cases, but by the very unusualness of the trial court's procedure and its unprecedented interpretation of *Krankel* and its progeny (by appointing counsel and moving to the evidentiary phase, then rescinding the appointment and conducting a preliminary inquiry that turned into an adversarial hearing on the merits of defendant's claims). Accordingly, we reject the State's forfeiture contention.

¶ 39 We begin our detailed consideration of defendant's procedural challenge by reviewing the requirements of a *Krankel* hearing. It is by now well established that, when a defendant presents a *pro se* posttrial motion alleging ineffective assistance of counsel, the trial court is not automatically required to appoint new counsel to assist the defendant. *Moore*, 207 Ill. 2d at 77. Rather, the trial court should first examine the factual bases of defendant's claims of ineffective assistance. *Moore*, 207 Ill. 2d at 77-78. If the trial court determines that the claims lack merit or pertain only to matters

of trial strategy, then the court does not need to appoint a new counsel, and it may deny the defendant's *pro se* motion; on the other hand, if the claims show that the trial counsel may possibly have neglected the defendant's case, new counsel should be appointed. *Moore*, 207 Ill. 2d at 78. The defendant's new counsel would then represent him or her at the hearing on the defendant's *pro se* motion alleging ineffective assistance of counsel. *Moore*, 207 Ill. 2d at 78. In addition, the new counsel can independently evaluate the defendant's ineffective-assistance claims and would avoid the conflict of interest that the trial counsel would face if the trial counsel were trying to justify his or her actions contrary to the defendant's position. *Moore*, 207 Ill. 2d at 78.

¶ 40 The main concern for the reviewing court in these types of cases is whether the trial court conducted an adequate inquiry into the defendant's *pro se* allegations of ineffective assistance. *Moore*, 207 Ill. 2d at 78. It is expected that the trial court will probably need to discuss the allegations with the defendant or with the defendant's trial counsel. Indeed, while evaluating the defendant's allegations, "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 the defendant's claims. *Moore*, 207 Ill. 2d at 78. The defendant's trial counsel may simply answer the court's questions and explain the facts and circumstances surrounding the allegations; the trial court may hold a brief discussion with the defendant to sufficiently answer its questions; or the trial court may use its knowledge of the performance of defendant's trial counsel as well as the facial insufficiency of the defendant's allegations to evaluate whether the defendant's claims indicate possible neglect of the case. *Moore*, 207 Ill. 2d at 78-79.

¶ 41 Having set forth the rules under which a *Krankel* hearing is conducted, we now briefly consider our standard of review of such a hearing. The State argues that our review of the trial court's determination should be for an abuse of discretion. We disagree. We do not review the point-by-point assessment of each of the defendant's claims by the trial court; rather, we review the manner in which the trial court exercised its discretion, which is a question of law that we review *de novo*. See *Moore*, 207 Ill. 2d at 75.

¶ 42 *Moore* is fairly representative in setting forth the rules to be followed in *Krankel* cases. As we can see, procedurally, the *Krankel* hearing expects that the trial court will have some sort of "interchange" with the defendant, the trial counsel, or both. There is nothing in the cases we have examined that suggest that the State should be actively participating in the trial court's inquiry into the factual bases of the defendant's claims. (We can envision circumstances in which the State may be required to offer concrete and easily verifiable facts, such as an allegation that trial counsel did not subpoena certain documents and the State has received a copy of the subpoena. That said, the State's participation should be *de minimis* and should not venture into adversarial advocacy during the initial investigatory phase of the *Krankel* procedure.)

¶ 43 The upshot from *Moore* is that the trial court's inquiry into a defendant's *pro se* posttrial motion alleging ineffective assistance is flexible—the trial court may talk to the defendant or trial counsel or both, and it may rely on its knowledge of counsel's performance for the defendant in determining the factual bases of the defendant's claims of ineffective assistance. *Moore*, 207 Ill. 2d at 78-79. The question presented by defendant here, however, is whether the trial court exceeded that flexibility when it allowed its preliminary inquiry to become an adversarial proceeding with the State and trial counsel opposing defendant. We believe that it did.

¶ 44 The trial court initially appointed a new attorney to represent defendant on his ineffective assistance claims. New counsel was appointed without any consideration of the factual bases of the claims, but was done in an essentially automatic manner. (We note that the cases generally state that appointment of counsel is not automatically required when a defendant raises *pro se* posttrial claims of ineffective assistance, but the trial court should investigate the claims. See *e.g.*, *Moore*, 207 Ill. 2d at 77-78. However, the parties have not directed us to, and our own research has not discovered a case in which the automatic appointment of counsel upon the allegation of trial counsel's ineffective assistance was deemed to be erroneous. Thus, despite the trial court's fears, had it allowed the newly appointed counsel to proceed on his amended posttrial motion, there would likely have been no valid procedural grounds to claim error on appeal.) At the next hearing, defendant filed additional *pro se* claims of ineffective assistance, and the trial court rescinded the appointment of counsel to assist defendant. This rescission came after defendant's newly appointed counsel had reviewed defendant's original claims and filed an amended motion utilizing only five of defendant's claims. Presumably, defendant's new counsel would have been prepared to conduct an adversarial evidentiary hearing on the amended motion. Instead of proceeding on the attorney's motion, the trial court rescinded the appointment and began going over defendant's *pro se* claims line-by-line, allowing defendant's trial counsel to comment and provide counter-arguments, as well as also allowing the State to provide comment and counter-arguments on defendant's claims. At this point, when the trial court allowed both trial counsel and the State to argue against defendant's claims, the proceedings changed from those contemplated in *Krankel* and its progeny, to an adversarial hearing at which defendant was required, without clearly and formally waiving his right to be represented by an attorney, to represent himself and argue the merits of each of his claims. See *People v. Finley*,

63 Ill. App. 3d 95, 103 (1978) (posttrial motions constitute a critical stage of the prosecution for which defendant is entitled to representation). Further, neither the State's nor our own research has discovered a case in which the preliminary *Krankel* inquiry was properly conducted as an adversarial hearing with the defendant against the State and his trial counsel.

¶ 45 In *People v. Cabrales*, 325 Ill. App. 3d 1, 3-4 (2001), the trial court allowed the defendant to proceed without representation in a posttrial motion after the defendant requested to do so. The trial court appointed the defendant's trial counsel to act as his stand-by attorney, but when the trial court realized that among the allegations in the defendant's *pro se* posttrial motion were allegations of ineffective assistance, it vacated its order appointing the trial counsel as stand-by counsel. The matter proceeded to the inquiry about the factual bases of the defendant's ineffective-assistance claims, and the State was allowed to cross-examine the defendant. Additionally, it appears that the trial counsel was also examined by the defendant and cross-examined by the State. *Cabrales*, 325 Ill. App. 3d at 4. The appellate court concluded that the trial court erred by skipping the preliminary inquiry and turning the proceedings into an adversarial hearing between the defendant and the State. *Cabrales*, 325 Ill. App. 3d at 5-6. The court reversed the trial court and remanded the matter to be picked up at the preliminary factual investigation phase of the *Krankel* hearing. *Cabrales*, 325 Ill. App. 3d at 6.

¶ 46 *Cabrales* presents a factually similar procedural posture to that adopted in this case. There, while the defendant expressly waived his right to representation on his posttrial motion (alleging, among other things, ineffective assistance of trial counsel), the trial court replaced the preliminary inquiry with a full-blown adversarial hearing on the merits. Similarly, here, the trial court replaced the preliminary inquiry with an adversarial hearing that addressed the merits of each of defendant's

claims of ineffective assistance. This error was further compounded by the fact that defendant was required to present and argue his claims without representation even though defendant never expressed a desire to proceed *pro se* in that hearing. Thus, *Cabrales* suggests that the court's procedure here constituted reversible error.

¶ 47 The State argues that the trial court conducted the preliminary inquiry, and notes that the trial court passed upon each issue raised by the defendant, concluding that none of the issues demonstrated that his trial counsel neglected the case, but instead showed that they were issues of trial strategy or simply lacked merit. The State fails to address defendant's contention that the trial court's hearing devolved into an adversarial hearing on the merits of each of his ineffective-assistance claims. Thus, the State's argument is largely unresponsive to defendant's main contention.

¶ 48 Further, the State cites to *Moore*, 207 Ill. 2d at 78, and *Robinson*, 157 Ill. 2d at 86, in this portion of its argument, emphasizing passages that refer to the requirement that the defendant be allowed to specify and support his complaints and the expectation that the court will question the trial counsel regarding the facts and circumstances around the defendant's ineffective-assistance allegations. However, as we have seen, *Moore* (and *Robinson* too) set forth rules without necessarily being remotely factually similar to this case. See *Moore*, 207 Ill. 2d at 79 (the trial court did not conduct any inquiry into the factual basis of the defendant's ineffective assistance allegations before dismissing his claims); *Robinson*, 157 Ill. 2d at 86 (the trial court did not conduct any inquiry into the factual bases for the defendant's ineffective-assistance claims). Indeed, the trial courts in those cases wholly dispensed with conducting a preliminary inquiry; here, by contrast, the preliminary inquiry morphed into an adversarial hearing on the merits of each of defendant's multitudinous

claims. While the basic rules from *Moore* and *Robinson* are valid, the cases offer little guidance to the circumstances of this case. Contrast those cases with *Cabrales*, which presented a fairly similar procedural posture to its hearing, and our choice to rely on *Cabrales* is obvious.

¶ 49 Because the State offers no compelling argument or authority to counter defendant's claim that the trial court procedurally erred by turning the preliminary inquiry into an adversarial hearing on the merits, we accept defendant's contentions and hold that we must reverse the trial court's order and remand the cause. Defendant asks that the matter be returned to the initial position of the trial court, namely, appointment of counsel to represent defendant in additional proceedings on his ineffective-assistance claims. We agree.

¶ 50 As we noted above, at the September 2, 2009, hearing, the trial court indicated that it had looked over defendant's *pro se* petition and concluded that some of the allegations indicated possible neglect on the trial counsel's part. This fulfilled the trial court's preliminary inquiry obligation and justified its appointment of a new attorney to represent defendant on his ineffective-assistance claims. *Moore*, 207 Ill. 2d at 79 (the trial court can evaluate the defendant's *pro se* claims of ineffective assistance based on its knowledge of trial counsel's performance and its evaluation of the defendant's allegations). Our determination is further bolstered by *People v. Phipps*, 238 Ill. 2d 54, 2010). In examining the factual basis of a defendant's claims of ineffective assistance, the trial court must usually question trial counsel, defendant, or both about the allegations. *Phipps*, 238 Ill. 2d at 63; *Moore*, 207 Ill. 2d at 78. In this case, as in *Phipps*, the trial court did not perform the usual examination of the factual basis by questioning trial counsel or the defendant. Instead, the trial court simply reviewed the *pro se* motion, and based upon the allegations and its own knowledge of the case, appointed counsel to determine whether any of the ineffective assistance claims would be

presented for a hearing. *Phipps*, 238 Ill. 2d at 63. In this case, the trial court did the same thing, as evidenced by its further explanation, quoted above, during the September 2, 2009, hearing.

¶ 51 Accordingly, on remand, the trial court is to return to its initial position, namely, the appointment of a new attorney to represent defendant on his claims of ineffective assistance, and allow that attorney to adopt and flesh out any of defendant's contentions that he or she believes to be indicative of potential neglect, much as the new attorney had already done before the trial court rescinded the appointment.

¶ 52 Based on our resolution of this issue, we need not further address defendant's specific contentions regarding possible jury waiver and his alibi defense.

¶ 53 For the foregoing reasons, the judgment of the circuit court of Kane County is reversed and the cause is remanded with directions.

¶ 54 Reversed and remanded with directions.