2015 IL App (2d) 140765-U
No. 2-14-0765
Order filed September 23, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. NATHAN BELL, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Winnebago County. No. 2011-CF-2458 Honorable Joseph G. McGraw, Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Hutchinson and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: Following affirmance of three convictions of aggravated criminal sexual assault and a remand for a proper preliminary inquiry into defendant's *pro se* posttrial allegations of ineffective assistance, the trial court did not err in denying defendant new counsel to further pursue his allegation.

¶ 2 A jury found defendant, Nathan Bell, guilty of three counts of aggravated criminal sexual assault (see 720 ILCS 5/11-1.30(a)(2) (West 2012)) against the complainant, R.D., and the trial court imposed three consecutive 30-year prison terms. On direct appeal, defendant argued, *inter alia*, a remand was necessary for a proper inquiry into his posttrial allegations of ineffective assistance of trial counsel. We affirmed the convictions but remanded the cause for a

preliminary inquiry into defendant's posttrial claims of ineffective assistance. *People v. Bell*, 2014 IL App (2d) 120805-U, ¶ 128. On remand, the trial court concluded that defendant had not adequately alleged ineffective assistance and was not entitled to the appointment of new counsel to pursue the claims under *People v. Krankel*, 102 Ill. 2d 181 (1984). Defendant appeals, and we affirm.

¶ 3 I. BACKGROUND

¶ 4 A. Evidence

¶ 5 At trial, R.D. testified that, at the time of the incident, she was a drug addict and worked as a prostitute to get money for drugs. On the morning of August 21, 2011, R.D. was walking down the street when defendant pulled up in a green truck and asked if she would "get freaky" with him. R.D. and defendant did not discuss any potential sex acts. R.D. got in defendant's truck, he gave her $20, and they rode to buy crack cocaine. Eventually, R.D. and defendant went to his bedroom and got undressed, and defendant got on top of R.D. R.D. stopped defendant to discuss money for specific sex acts. Defendant remained silent, punched her left eye, and choked her. For the next five hours, R.D. followed defendant's orders because she "didn't want to die." The jury heard detailed evidence that defendant repeatedly threatened to kill R.D., forced her to eat his feces, and forced her to engage in oral, vaginal, and anal penetration.

¶ 6 B. Verdict and Sentencing

¶ 7 On April 26, 2012, the jury found defendant guilty of the three charges of aggravated criminal sexual assault, and sentencing was scheduled for June 29, 2012. On May 4, 2012, defendant filed a *pro se* motion for a new trial. The motion alleged that defense counsel failed to investigate the case and refused to have witnesses subpoenaed on his behalf.

¶ 8 On June 28, 2012, defense counsel moved to continue the sentencing hearing because he had "requested but not received information from [defendant] that he believe[d] was necessary to prepare for the sentencing hearing." The court asked defendant if he had given his attorney the medical documents and the biographical information that counsel had requested. Defendant said he had some documents from an insurance claim arising from a car accident but that he did not give counsel those documents because he "didn't feel that [counsel] haven't [*sic*] been doing what he should have been doing for me so I took the time out to do it myself." The court responded, "So he made the request and you just didn't give it to him?" Defendant replied, "Right." The court denied counsel's motion to continue the sentencing hearing. The court also denied the motion for a new trial.

¶ 9 The court sentenced defendant to three consecutive 30-year prison terms. The court admonished defendant of his appeal rights and asked if he was satisfied with his representation. Defendant said that he was not because "if [counsel] brought these issues up when [his] trial was beginning, [he] wouldn't be sittin [*sic*] here facing this garbage that is throwed [*sic*] up on me." The court asked, "Anything else?" Defendant replied, "Yeah, I got a lot to say, but nobody want to hear what I got to say."

¶ 10 Defendant timely appealed, and we held, *inter alia*, that the trial court erred by failing to conduct an appropriate preliminary inquiry into the allegations of ineffective assistance raised in his *pro se* posttrial motion as well as any other areas in which he alleged deficient performance of trial counsel. We remanded the cause for the limited purpose of inquiring into defendant's claims, offering no opinion as to whether new counsel should be appointed to undertake an independent review. We directed the court to conduct a preliminary inquiry into the factual basis of the claims to determine if they showed possible neglect of the case warranting appointment of

counsel. We directed the court to consider the claims in defendant's posttrial motion as well as any other areas in which defendant alleged deficient performance of trial counsel.

¶ 11 C. *Krankel* Inquiry

¶ 12 On July 30, 2014, the same trial judge who presided over defendant's trial also heard defendant's *pro se* claims of ineffective assistance of counsel. Defendant and his former trial counsel were present at the hearing. The court advised defendant that he could "address the court regarding any claims of ineffective assistance" of trial counsel. Defendant raised a number of issues, but on appeal, he renews only the claim that counsel was ineffective for failing to introduce one of R.D.'s statements to the police, where in describing the incident with defendant, she said that "we had sex." Defendant argues that, if defendant had committed the offenses as alleged, R.D. would have used a word like "rape" and not "sex." Defendant concludes that he was prejudiced by counsel's omission because the statement "we had sex" would have impeached R.D.'s trial testimony that the sex acts were non-consensual.

¶ 13 In response to the trial court's inquiry about impeachment, defense counsel stated that he was aware of the statement but did not introduce it at trial because he did not wish to emphasize that defendant and R.D. had engaged in sex any more than already had been brought out at trial. Counsel also recalled that, when viewed in the context of R.D.'s testimony, introducing the statement that she and defendant "had sex" would not have been a "material benefit" to defendant and would have confirmed what R.D. had told the police.

¶ 14 The trial court held that none of defendant's allegations, including the impeachment claim, "amounted to ineffective assistance." The court concluded that counsel's decisions, including the one to leave out R.D.'s statement that "we had sex," were matters of trial strategy, and defendant's disagreement with the strategy did not make counsel ineffective. The court

noted that defendant had not provided "a clear basis alleging why counsel that defendant received was ineffective." Defendant timely appeals from the court's decision to deny him new counsel under *Krankel*.

¶ 15 II. ANALYSIS

¶ 16 Before sentencing, defendant filed a *pro se* motion for a new trial, alleging ineffective assistance. At the sentencing hearing, defendant again expressed his dissatisfaction with counsel's performance. After sentencing, defendant sent a letter to counsel, again alleging his ineffectiveness and asking that counsel present the letter at the next hearing. At the hearing, defendant referred to the letter and asked that counsel read it aloud, but counsel did not. The trial court did not inquire into defendant's posttrial claims of ineffective assistance. On direct appeal from the convictions, the State conceded that a remand was necessary because the trial court made no inquiry into any of defendant's claims of ineffective assistance. On remand, the court made such an inquiry and concluded that defendant is not entitled to the appointment of new counsel to argue his claims.

¶ 17 Both the United States and Illinois Constitutions guarantee a defendant the right to effective assistance of counsel. See U.S. Const., amend. VI; Ill. Const. 1970, art. I, §8. The purpose of this guarantee is to ensure that the defendant receives a fair trial. *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984); *People v. Anderson*, 2013 IL App (2d) 111183, ¶ 52. The ultimate focus of the inquiry is on the fundamental fairness of the challenged proceedings. *Strickland*, 466 U.S. at 696. However, there is a strong presumption of outcome reliability, so to prevail, a defendant must show that counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *Anderson*, 2013 IL App (2d) 111183, ¶ 52.

¶ 18 Claims of ineffective assistance of counsel are generally evaluated under the two-part test set forth in *Strickland*, 466 U.S. at 687, and adopted by our supreme court in *People v. Albanese*, 104 Ill. 2d 504, 525-26 (1984). *People v. Harris*, 225 Ill. 2d 1, 20 (2007). Under *Strickland*, defense counsel is ineffective only if (1) counsel's performance fell below an objective standard of reasonableness; and (2) counsel's error prejudiced the defendant. The failure to establish either prong is fatal to the claim. *Strickland*, 466 U.S. at 687.

¶ 19 We assess counsel's performance using an objective standard of competence under prevailing professional norms. *People v. Ramsey*, 239 Ill. 2d 342, 433 (2010). To establish deficient performance, the defendant must overcome the strong presumption that counsel's action or inaction was the result of sound trial strategy. *Ramsey*, 239 Ill. 2d at 433. Counsel's strategic choices that are made after investigation of the law and the facts are virtually unassailable. *Ramsey*, 239 Ill. 2d at 433. The prejudice prong of the *Strickland* test can be satisfied if the defendant can show that counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair. *People v. Evans*, 209 Ill. 2d 194, 220 (2004).

¶ 20 In this appeal, defendant argues that he made a preliminary showing that trial counsel possibly neglected his case by failing to impeach R.D. with her statement to the police that "we had sex." Defendant concludes that the trial court erred in denying him independent counsel to assist him in his *pro se* claim of ineffective assistance of trial counsel and he seeks another remand for that purpose.

¶ 21 Under *Krankel*, a *pro se* posttrial motion alleging ineffective assistance of counsel can trigger a trial court's obligation to appoint new counsel and set the claims for a hearing. *Krankel*, 102 Ill. 2d at 189. However, when a defendant files such a *pro se* posttrial motion, he

or she is not automatically entitled to the appointment of counsel to assist with the motion. *People v. Moore*, 207 Ill. 2d 68, 77 (2003). Rather, the trial court should first examine the bases of the defendant's claims; if the court determines that the claims lack merit or pertain only to trial strategy, the court may deny the *pro se* motion without appointing counsel. *Moore*, 207 Ill. 2d. at 77-78. If the court determines that the claims demonstrate that counsel possibly neglected the defendant's case, new counsel should be appointed to represent the defendant at the hearing on the *pro se* motion. *Moore*, 207 Ill. 2d. at 78. New counsel may also independently evaluate the defendant's claims. *Moore*, 207 Ill. 2d. at 78.

¶ 22 In conducting the inquiry into the defendant's claims, a trial court will likely need to discuss the allegations with the defendant or with the defendant's trial counsel. "[S]ome 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 ***." *Moore*, 207 Ill. 2d. at 78. Accordingly, to evaluate whether the claims indicate possible neglect, the trial court may consider any facial insufficiency of the defendant's allegations and may (1) ask the defendant's trial counsel questions; (2) briefly discuss the allegations with the defendant; or (3) rely upon its own knowledge of counsel's performance. *Moore*, 207 Ill. 2d. at 78-79. The defendant must raise a specific, discernible claim of ineffective assistance. *People v. Taylor*, 237 Ill. 2d 68, 76-77 (2010).

¶ 23 A reviewing court reviews *de novo* whether the trial court made an adequate inquiry into the defendant's *pro se* claims of ineffective assistance of counsel. *Taylor*, 237 Ill. 2d at 75. Where, as here, the trial court reaches a decision on the merits of the defendant's claim, we will

reverse the decision only if it is manifestly erroneous; a manifest error is clear and indisputable. *People v. Tolefree*, 2011 IL App (1st) 100689, ¶ 25.

¶ 24 Here, the trial court examined the bases of defendant's claim of possible neglect by discussing the allegations with defendant and trial counsel and relying on the court's knowledge of the trial and counsel's performance. We conclude that the trial court was not manifestly erroneous in ruling that counsel's failure to impeach R.D. with her statement that "we had sex" was trial strategy and not ineffective assistance. Trial counsel accurately explained to the trial court that the statement itself would not have, in fact, impeached R.D.'s testimony that the sex acts were nonconsensual. R.D. and defendant did have sex. Counsel also stated that he did not believe that drawing additional attention to the sex acts would assist the defense. The record shows that counsel vigorously cross-examined R.D. and attempted to impeach her with other evidence. Attempting to impeach R.D. with her isolated comment that "we had sex" would have taken the statement out of the broader context of her reporting the offenses, drawn additional attention to the sexual nature of the crimes, and failed to impeach R.D. on the matter of whether the acts were consensual. The trial court was not manifestly erroneous in holding that counsel's decision not to use the statement was a tactical decision that did not rise to the level of possible neglect.

¶ 25 Defendant cites two comments by the trial court to argue that the court used the wrong standard in evaluating his claim of ineffective assistance. At the close of its ruling, the court stated that none of defendant's allegations, including the impeachment claim, "amounted to ineffective assistance." The court also noted that defendant had not provided "a clear basis alleging why counsel that defendant received was ineffective." Defendant concludes that these comments indicate that the court was requiring him to actually prove ineffective assistance rather

than show possible neglect. However, the record refutes defendant's allegation and shows that the court was aware of and implemented the possible-neglect standard. The court recited portions of our prior disposition in which we set forth the procedure for inquiring into a *pro se* claim of ineffective assistance. First, the court stated "[i]f the court determines that the claims demonstrate that counsel possibly neglected the defendant's case, new counsel should be appointed." Second, the court stated "to evaluate whether the claims indicate possible neglect, the trial court may consider any facial insufficiency of the defendant's allegations." The neglect complained of was ineffective assistance in failing to adequately cross-examine R.D., and the court determined that the decision to not do so was a matter of trial strategy. Regardless of whether counsel's decision is reviewed for possible neglect or deficient performance, the result is the same. The trial court was not manifestly erroneous in determining that counsel's decision was a matter of trial strategy, and the court's denial of new counsel was not manifestly erroneous either.

¶ 26 III. CONCLUSION

¶ 27 For the preceding reasons, the decision of the circuit court of Winnebago County to not appoint new counsel to pursue defendant's *pro se* claim of ineffective assistance of trial counsel under *Krankel* is affirmed. As part of our judgment, we grant the State's request that defendant be assessed the State's attorney fee of $50 under section 4-2002(a) of the Counties Code (55 ILCS 5/4-2002(a) (West 2014)) for the cost of this appeal. See *People v. Nicholls*, 71 Ill. 2d 166, 179 (1978).

¶ 28 Affirmed.