2012 IL App (4th) 110275-U

Filed 8/13/12

NO. 4-11-0275

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
DAVID K. ANDERSON,	)	No. 10CF1192
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas J. Difanis,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justice Cook concurred in the judgment.
Justice Pope dissented.

ORDER

¶ 1 *Held*: Because the trial court failed to perform an adequate inquiry into two of defendant's *pro se* posttrial claims of ineffective assistance of counsel, the case is remanded with directions to perform the inquiry.

¶ 2 A jury found defendant, David K. Anderson, guilty of four counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2010)). The trial court sentenced him to 30 years' imprisonment for each count, ordering that the four prison terms run consecutively.

¶ 3 Defendant appeals on a single ground: the trial court violated *People v. Krankel*, 102 Ill. 2d 181 (1984), and its progeny by failing to make an adequate preliminary inquiry into his *pro se* posttrial claims of ineffective assistance. In our *de novo* review (see *People v. Moore*, 207 Ill. 2d 68, 75 (2003)), we agree that the court failed to make an adequate inquiry into the two claims of ineffective assistance that defendant discusses in his brief: the claims in paragraphs 14(I) and (K)

of his *pro se* motion for a new trial. We remand this case with directions to make an adequate inquiry into those two claims.

¶ 4 I. BACKGROUND

¶ 5 In December 2010, in the jury trial, the State called the five-year-old victim, Peyton C., among other witnesses. Peyton testified that defendant, a family friend, had touched her on the vagina and on the buttocks. The State also played a video recording, in which Peyton told an investigator of the Illinois Department of Children and Family Services that defendant had touched her "inside of her body on the back" and that he had rubbed her "pee pee."

¶ 6 The defense called two witnesses: Ella Breeden and defendant. Breeden was defendant's roommate, and she testified that whenever Peyton and her eight-year-old sister, Sadie P., came over to spend the night, there were rules to be observed, and one rule was that doors to rooms had to be kept open at all times. Defendant denied touching Peyton on her privates.

¶ 7 After the jury returned its guilty verdicts, defendant, while still represented by appointed counsel, filed several *pro se* motions, including a motion for a new trial, in which he accused his trial counsel of rendering ineffective assistance.

¶ 8 In a posttrial hearing on January 24, 2011, the trial court questioned trial counsel regarding the *pro se* claims of ineffective assistance, and the prosecutor added his input on the claims. During the court's conversation with trial counsel, defendant ventured to say, "Excuse me, Your Honor?" and the court responded, "Be quiet." The court found no possible neglect of the case and proceeded to the sentencing hearing.

¶ 9 II. ANALYSIS

¶ 10 A trial court does not have to appoint a new defense counsel simply because a

defendant alleges, after trial, that the current defense counsel has rendered ineffective assistance. *Moore*, 207 Ill. 2d at 77. Instead, according to *Krankel* and its progeny, the court "should first examine the factual basis" of the defendant's claims of ineffective assistance, to ascertain whether there was a "possible neglect of the case." *Id.* at 77-78. If there was a "possible neglect of the case," the court should appoint new counsel to represent the defendant in a posttrial hearing on the *pro se* claims of ineffective assistance. *Id.* at 78. If, on the other hand, after "adequate inquiry" into the "factual basis" of the claims, the court "determines that the claim[s] lack[] merit or pertain only to matters of trial strategy," the court may deny the *pro se* motion for a new trial, without appointing new counsel. *Id.* at 77-78.

¶ 11 As the supreme court has explained, the trial court may consult several different sources of information when performing its preliminary inquiry into the *pro se* claims of ineffective assistance. The supreme court has said:

> "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 insufficiency of the defendant's allegations on their face." *Id.* at 78-79.

Thus, the court may talk with trial counsel. The court may talk with the defendant. The court may rely on its own previous observations of trial counsel's performance in the case. The court may, of course, rely on its own legal knowledge of what does and does not constitute ineffective assistance. The supreme court does not say when the trial court should talk with trial counsel and when the court should talk with the defendant. That depends on the claims and the circumstances.

¶ 12 The trial court must do whatever common sense suggests is necessary to an adequate investigation. Essentially, the investigation has two steps, in this order: (1) understanding the defendant's claims and (2) evaluating them for potential merit. Until the court takes the first step, the court is in no position to attempt the second step. Certain of the defendant's claims might be vague, conclusory, and enigmatic. In the wording of the claims, it might be unclear exactly what the defendant means. Probably there is no better person to ask than the defendant. Likewise, if the factual basis of a claim is unclear—if the defendant could be relying on facts that are outside the record—the defendant again is probably the best person from whom to seek clarification. See *People v. Munson*, 171 Ill. 2d 158, 201 (1996) ("The [trial] court made every effort to ascertain the nature and substance of defendant's ineffectiveness claim."); *People v. Byron*, 164 Ill. 2d 279, 304-05 (1995) (noting that the trial court heard the defendant describe in detail the factual basis of the claim).

¶ 13 In paragraph 14(I) of his *pro se* motion for a new trial, defendant asserted that his trial counsel had rendered ineffective assistance by "flatly refus[ing] to take steps necessary to defend this case when [the] State changed its intended course of prosecuting the case, depriving defendant [of]

the right to confront witnesses against him[] and to present his defense to the jury." How did the State "change its intended course of prosecuting the case"? And what "necessary steps to defend this case" should trial counsel have taken in view of this change of course? We do not know, and we do not see how the trial court could have known, either—because the court never asked defendant. The only words the court uttered to defendant in the posttrial hearing were the words "Be quiet."

¶ 14 Also, in paragraph 14(K) of his *pro se* motion for a new trial, defendant said that "[c]ounsel failed to sufficiently prepare the called witnesses for testifying at trial." How, specifically, in defendant's view, could the witnesses have been better prepared? What does defendant believe these witnesses would have said in their testimony if they had been better prepared? Again, we do not know, and we do not see how the trial court could know, either—because the court talked only with the prosecutor and trial counsel and refused to talk with defendant.

¶ 15 In short, the trial court left some dangling threads in its *Krankel* inquiry, namely, paragraphs 14(I) and (K) of defendant's *pro se* motion for a new trial. We remand this case for a preliminary investigation of those two paragraphs.

¶ 16 III. CONCLUSION

¶ 17 For the foregoing reasons, we remand this case with directions to perform a preliminary investigation of paragraphs 14(I) and (K) of defendant's *pro se* motion for a new trial.

¶ 18 Remanded with directions.

¶ 19 JUSTICE POPE, dissenting:

¶ 20 I respectfully dissent. As the majority points out, the law does not require a trial court to speak to a defendant to resolve a *Krankel* issue. Oftentimes though, I agree, it is helpful to having a complete record if the trial court allows a defendant to state his concerns.

¶ 21 In this case, the trial court spent seven pages of transcript discussing with counsel the various allegations of ineffective assistance of counsel and found they were without merit. The majority focuses on paragraphs 14(I) and (K) of defendant's motion in ruling the defendant is entitled to remand and a *Krankel* hearing. Paragraph 14(I) states, "Counsel flatly refused to take steps necessary to defend this case ***." The judge handling the *Krankel* hearing also presided over the trial and noted defense counsel appropriately cross-examined the State's witnesses, and the record supports this determination. The record reflects counsel called defendant and his roommate as defense witnesses. Thus, the record itself refutes the claim counsel "flatly refused" to defend the case and, in my opinion, remand for a further *Krankel* hearing is not necessary.

¶ 22 Paragraph 14(K) of defendant's motion alleges counsel failed to sufficiently prepare the called defense witnesses for testifying at trial. This allegation refers to defendant and his roommate. They are not experts who need to be "prepared" by defense counsel. Defendant fails to state what "preparation" was necessary or how the lack thereof prejudiced him. The trial testimony reflects counsel called defendant's roommate who testified she was present in the home when the children spent the night. She also testified there was a rule in the household that no doors to the rooms were to be closed. She answered every question put to her and her answers were responsive to the questions asked. Likewise, defendant testified at length and often was allowed to narrate his responses without objection or interruption.

¶ 23 In light of the allegations made and the *Krankel* hearing held by the trial court, I do not believe remand for any further hearing is necessary.