2013 IL App (4th) 110915-U

NO. 4-11-0915

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
March 8, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
JERRY W. SIMS,	)	No. 11CF103
Defendant-Appellant.	)	
	)	Honorable
	)	Robert L. Freitag,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Presiding Justice Steigmann and Justice Turner concurred in the judgment.

ORDER

¶ 1 *Held*: Because the trial court still had subject-matter jurisdiction to consider, and to investigate the factual basis of, defendant's *pro se* motion for a new trial on the ground of ineffective assistance of counsel, the court erred by striking the motion.

¶ 2 Defendant, Jerry W. Sims, who is serving 2 concurrent terms of 22 years' imprisonment for unlawful delivery of a controlled substance within 1,000 feet of a church (720 ILCS 570/407(b)(2) (West 2010)), appeals from the trial court's judgment. He makes five arguments on appeal.

¶ 3 First, he argues that the trial court erred by concluding it lacked subject-matter jurisdiction to perform a preliminary inquiry, pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984), into his *pro se* motion for a new trial on the ground of ineffective assistance of counsel.

¶ 4 Second, he argues that trial counsel rendered ineffective assistance by neglecting to file a motion to suppress his statements on the ground that the police had failed to give all the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966).

¶ 5 Third, he argues that the statute under which he was convicted, section 407(b)(2) of the Illinois Controlled Substances Act (720 ILCS 570/407(b)(2) (West 2010)), is unconstitutional as applied to him.

¶ 6 Fourth, he argues that the State failed to prove, beyond a reasonable doubt, that he delivered a controlled substance within 1,000 feet of a church.

¶ 7 Fifth, he argues that the trial court violated *Apprendi v. New Jersey*, 530 U.S. 466 (2000), by using the procedure in section 5-9-1.1(a) of the Unified Code of Corrections (730 ILCS 5/5-9-1.1(a) (West 2010)) to determine a street value fine.

¶ 8 Because we agree with the first of those arguments, we do not reach the remaining four arguments. When defendant filed his *pro se* motion for a new trial on the ground of ineffective assistance, the trial court still had subject-matter jurisdiction over the case and should have held a *Krankel* hearing. The time limitation in section 116-1(b) of the Code of Criminal Procedure of 1963 (725 ILCS 5/116-1(b) (West 2010)) was inapplicable, given that the reason for defendant's request for a new trial was ineffective assistance. Therefore, we remand this case with directions to perform the preliminary inquiry required by *Krankel* and its progeny.

¶ 9 I. BACKGROUND

¶ 10 On May 17, 2011, the jury returned its guilty verdicts, and the trial court entered judgment on the verdicts.

¶ 11 On June 8, 2011, defense counsel filed a motion in arrest of judgment or for a new trial.

¶ 12 On July 1, 2011, the trial court denied the motion in arrest of judgment or for a new trial and sentenced defendant to 2 concurrent terms of 22 years' imprisonment.

¶ 13 On August 1, 2011, according to the circuit clerk's date stamp, defendant filed a *pro se* pleading entitled "Motion Ineffective Assistance of Counsel or for a New Trial," in which he cited section 116-1 (725 ILCS 5/116-1 (West 2010)). Essentially, defendant alleged that his trial counsel had provided ineffective assistance in five ways, entitling him to a new trial. First, defendant alleged that, by neglecting to perform a reasonable investigation, trial counsel had failed to discover that defendant's apartment, in which the drug sales allegedly had occurred, was in fact more than 1,000 feet away from the church. Second, defendant faulted trial counsel for failing to adopt a *pro se* bill of particulars that defendant had filed. Third, defendant alleged that trial counsel had failed to show him all the discovery and that, as a result, defendant had been inadequately prepared for trial and had lost the opportunity to present an "effective defense." Fourth, defendant alleged that, by neglecting to perform a reasonable investigation, trial counsel had failed to discover that, contrary to the testimony of Detective Edward Shumaker, defendant was in a video store for more than four minutes, actually shopping for videos instead of arranging a drug sale. Fifth, defendant criticized trial counsel for accepting the State's emailed amendment to discovery on the second day of trial.

¶ 14 On August 18, 2011, the trial court wrote defendant a letter, with copies to the State's Attorney and the public defender. The letter said:

"I have received and reviewed your pro so Motion Ineffective Assistance of Counsel Or For A New Trial which was filed with the McLean County Circuit Court on 1 August 2011. The motion seeks a new trial and indicates it was filed pursuant to Section 116-1 of the Illinois Code of Criminal Procedure (725 ILCS 5/116-1).

This court is without jurisdiction to hear and decide the motion you have filed. The section under which you have filed this motion requires that it be filed within 30 days of the return of a verdict, which in your case was on 17 May 2011. Additionally, the record reflects that your attorney did timely file a Motion for New Trial on 8 June 2011, and that motion was heard and denied by the court on 1 July 2011[.]

Accordingly, your motion is stricken."

¶ 15 II. ANALYSIS

¶ 16 The facts relevant to determining the timeliness or untimeliness of the "Motion Ineffective Assistance of Counsel or for a New Trial" are undisputed. All we have to do is apply the law to the undisputed facts, a task we perform *de novo* (*People v. Sims*, 192 Ill. 2d 592, 615 (2000)).

¶ 17 We will begin with an explication of the law. The supreme court has held: "[O]nce cases are heard and determined, [t]he jurisdiction of trial courts to reconsider and modify their judgments is not indefinite. [Citation.] Generally, a circuit court loses jurisdiction to vacate or modify its judgment 30 days after entry of judgment" (internal

quotation marks omitted) (*People ex rel. Alvarez v. Skryd*, 241 Ill. 2d 34, 40 (2011) (citing both criminal and civil cases)), which, in a criminal case, is the sentence (*People v. Lopez*, 129 Ill. App. 3d 488, 491 (1984)). The supreme court said "generally" because, under Illinois Supreme Court Rule 606(b) (eff. Mar. 20, 2009), a circuit court has jurisdiction beyond the 30-day period if, when the period expires, a "timely posttrial or postsentencing motion directed against the judgment" remains pending. The motion must be timely. A posttrial motion must be filed within 30 days after the return of a guilty verdict or the entry of a finding of guilt. 725 ILCS 5/116-1(b) (West 2010). A motion to reduce the sentence must be filed within 30 says after the imposition of the sentence. 730 ILCS 5/5-4.5-50(d) (West 2010).

¶ 18 In the present case, defendant never filed a motion to reduce his sentence, but he did file two posttrial motions, two motions for a new trial. The question is whether the filing of the second posttrial motion, the *pro se* motion complaining of ineffective assistance, was timely so as to avert the trial court's loss of jurisdiction. See *Skryd*, 241 Ill. 2d at 40; Ill. S. Ct. R. 606(b) (eff. Mar. 20, 2009). Defendant filed his *pro se* motion for a new trial more than 30 days after the return of the guilty verdicts. See 725 ILCS 5/116-1(b) (West 2010). The jury returned its guilty verdicts on May 17, 2011, and defendant's "Motion Ineffective Assistance of Counsel or for a New Trial" has the date August 1, 2011, stamped on it by the circuit clerk, with no proof of mailing.

¶ 19 Even so, defendant's motion requested a new trial *because of ineffective assistance*, and therefore, under *People v. Patrick*, 2011 IL 111666, ¶ 42, issued four months after the trial court's decision in this case, defendant's motion came within an exception to

section 116-1(b) (725 ILCS 5/116-1(b) (West 2010)). The supreme court said in *Patrick*:

> "It is true that section 116-1(b) says a defendant must file a written motion for a new trial within 30 days of the entry of a finding or the return of a verdict. However, an exception to that rule is if a defendant is seeking a new trial based on claims of ineffective assistance of counsel and the claim is raised before a notice of appeal is filed. In that case, the defendant may have a *Krankel* hearing to determine if his claims have any merit and warrant the appointment of separate counsel." *Patrick*, 2011 IL 111666, ¶ 42.

This is because the right to a *Krankel* hearing comes from the common law, *i.e.*, from *Krankel* and its progeny, not from section 116-1. *Id.* It is true that defendant's motion purported to be pursuant to section 116-1, but we should look beyond this citation and treat the motion as what it substantially is: a *pro se* complaint of ineffective assistance, triggering the trial court's duties under *Krankel*. See *id.*, ¶ 34.

¶ 20 Does it follow there is *no* deadline for filing a *pro se* motion for a new trial on the ground of ineffective assistance? May a defendant file such a motion one year, two years, three years after the imposition of the sentence? We conclude there is indeed a deadline, namely, the trial court's loss of jurisdiction. If there is no other pending posttrial or postsentencing motion that was filed on time, the deadline for filing a motion for a new trial on the ground of ineffective assistance of counsel is within 30 days after the imposition of the sentence (assuming the trial court has not sooner lost jurisdiction because of the filing of a notice of appeal (*id.*, ¶ 39)). Our reasons for this conclusion are that, in *Patrick*, the

supreme court did not rescind the statement it made, more than 10 months earlier in *Skryd*, that a circuit court lost jurisdiction over a case 30 days after entry of judgment (*Skryd*, 241 Ill. 2d at 40) and if a court lacks jurisdiction, it can consider nothing. (It is worth noting that, in *Patrick*, a timely postsentencing motion was pending when the defendant filed his *pro se* allegations of ineffective assistance. *Patrick*, 2011 IL 111666, ¶¶ 11-12.)

¶ 21 So, given that no other timely motions were pending, we are left with the question of whether defendant filed his "Motion Ineffective Assistance of Counsel or for a New Trial" within the trial court's jurisdictional window: within 30 days after the entry of the judgment, that is, within 30 days after the imposition of the sentence. Again, the court imposed the sentence on July 1, 2011. From July 1, 2011, we count forward 30 days, "excluding the first day and including the last, unless the last day is Saturday or Sunday or is a holiday as defined or fixed in any statute now or hereafter in force in this State, and then it also shall be excluded" (5 ILCS 70/1.11 (West 2010)). The 30th day is Sunday, July 31, 2011. We exclude that day since it is a Sunday (see *id.*), and, consequently, we arrive at Monday, August 1, 2011, as the final day on which defendant could have filed his motion—because the trial court otherwise would have lost its subject-matter jurisdiction at the end of that day. According to the date stamp of the circuit clerk, defendant filed his motion on August 1, 2011, and therefore the court had subject-matter jurisdiction to consider the motion.

¶ 22 III. CONCLUSION

¶ 23 For the foregoing reasons, we remand this case with directions to perform the preliminary investigation and to proceed in the manner that *Krankel* and its progeny require.

See *People v. Moore*, 207 Ill. 2d 68, 77-79 (2003).

¶ 24 Remanded with directions.