2016 IL App (4th) 140351-U

No. 4-14-0351

FILED
March 18, 2016
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from |
| Plaintiff-Appellee, | ) | Circuit Court of |
| v. | ) | Macon County |
| BARRY A. MABRA, | ) | No. 13CF70 |
| Defendant-Appellant. | ) | |
| | ) | Honorable |
| | ) | Thomas E. Griffith, Jr., |
| | ) | Judge Presiding. |

PRESIDING JUSTICE KNECHT delivered the judgment of the court.
Justices Steigmann and Pope concurred in the judgment.

**ORDER**

¶ 1 *Held*: The appellate court affirmed, concluding the trial court conducted an adequate inquiry into defendant's posttrial ineffective-assistance-of-counsel claims.

¶ 2 Following a September 2013 bench trial, the trial court found defendant, Barry A. Mabra, guilty of burglary (720 ILCS 5/19-1(a) (West 2012)). In October 2013, defendant, *pro se*, filed multiple posttrial motions, raising claims regarding the effectiveness of his trial counsel, David Ellison. At a hearing that same month, the court conducted an inquiry into defendant's claims, as required by *People v. Krankel*, 102 Ill. 2d 181, 464 N.E.2d 1045 (1984), and its progeny. Based on that inquiry, the court found defendant failed to allege a credible claim to entitle him to the appointment of new counsel. In November 2013, the court sentenced

defendant to four years' imprisonment. Defendant appeals, arguing the trial court failed to conduct an adequate inquiry into his ineffective-assistance-of-counsel claims. We affirm.

¶ 3 I. BACKGROUND

¶ 4 A. Information

¶ 5 In January 2013, the State charged defendant by information with burglary (720 ILCS 5/19-1(a) (West 2012)). The State alleged, on January 11, 2013, defendant, without authority, knowingly entered a building located at 704 West Wood Street, Decatur, Illinois, with the intent to commit a theft therein.

¶ 6 B. Bench Trial

¶ 7 In a September 2013 bench trial, Officer Lonny Lewellyn testified, at approximately 9:04 a.m. on January 11, 2013, he was dispatched to a vacant apartment building based on information from an anonymous caller, who saw two males entering the building. Within two minutes of being dispatched, Officer Lewellyn arrived at the building. A second officer arrived within a few minutes of Officer Lewellyn's arrival.

¶ 8 On arrival, Officer Lewellyn began walking the perimeter of the building. He first discovered the front doors were locked. He then proceeded to the back of the building, where he discovered locked back doors and an opened window. When Officer Lewellyn looked through the window, he observed an individual inside, carrying large pieces of metal. The individual made eye contact with Officer Lewellyn, dropped the pieces of metal, and fled toward the front of the building. Officer Lewellyn followed.

¶ 9 After the fleeing individual was apprehended, Officer Lewellyn pried the front doors open and yelled into the building several times: " 'Decatur Police. If there's anybody in

there, show yourself.' " With no response, Officer Lewellyn requested assistance from the K-9 unit, which arrived approximately 50 minutes later. After the K-9 unit entered the building, announced its presence, and caused the dog to start barking, defendant appeared at the top of the stairs on the second floor. Officer Lewellyn spoke with defendant, who stated he entered the building because he was homeless and wanted a place to sleep. Defendant was arrested and transported to the police station. Officer Lewellyn searched the building and observed drywall, plumbing, and baseboards had been removed, exposing copper pipes and wiring.

¶ 10 While at the police station, Officer Lewellyn again spoke with defendant, who stated he entered the building with another individual through unlocked front doors to look for work. After Officer Lewellyn indicated he did not believe defendant's story, defendant added, once he was inside the building he observed a large quantity of scrap metal and believed it was okay if he took some as others had previously done the same.

¶ 11 On cross-examination, Officer Lewellyn acknowledged he was uncertain whether an officer secured the building's back door while he followed the fleeing suspect to the front of the building. Officer Lewellyn also indicated he believed the anonymous caller claimed the two individuals had entered through the front of the building.

¶ 12 Pamela Robinson, the owner of the building, testified she did not give defendant permission to enter the building.

¶ 13 The defense played a 9-1-1 recording in open court. The recording included in the record on appeal indicates the caller (1) was the same individual who had previously reported seeing individuals entering the building; and (2) observed the police speaking with one of the

men she had seen enter the building. We note the initial 9-1-1 recording was not included in the record on appeal.

¶ 14 Defendant testified, after being unable to obtain work from "Labor Ready," he was walking down the street when he noticed a door to the building was open, with a key hanging from it. At approximately 9:16 a.m., defendant removed the key and entered the building, hoping to find someone from whom he could solicit work. Upon entering the building, defendant announced his presence and thought he heard something upstairs. He walked up to the third floor but did not see anyone. While on his way out of the building, he heard "Decatur Police Department." Defendant panicked and went back upstairs. Defendant testified he was in the building for approximately two minutes before the police arrived. Approximately 37 minutes after the police's arrival, defendant was apprehended. Defendant testified he told the police he went into the building looking for work; he did not tell the police he (1) was looking for somewhere to sleep, (2) knew others had taken scrap metal from the building, or (3) was there to collect scrap metal.

¶ 15 On cross-examination, defendant indicated the police removed the key from his pocket, and an officer acknowledged he had a key to the building.

¶ 16 During closing argument, trial counsel initially highlighted "[defendant] [was] charged with burglary, not just an unauthorized entry into a building." Trial counsel argued the State failed to prove defendant entered the building intending to commit a theft. Specifically, trial counsel asserted defendant's statements reflected he (1) entered the building looking for work, and (2) could not have caused the damage to the building in the short period he was inside.

¶ 17 Following closing arguments, the trial court found defendant guilty of burglary.

¶ 18 C. Posttrial *Pro Se* Claims of Ineffective Assistance

¶ 19 On October 8, 2013, defendant, *pro se*, filed a "Motion for Ineffective Couns[e]l" and "Motion for Misrepresentation of couns[e]l". Defendant's motion for ineffective counsel alleged, (1) trial counsel refused to obtain evidence such as "photo[]s, 911 call, finger prints, [and] any and everything the State was 'not going to use' "; (2) trial counsel failed to address "what the caller said" in the 9-1-1 recording; (3) he was told by trial counsel, "he could not fire counsel"; (4) he filed a motion to dismiss on July 15, 2013, and he "thought the necessary process would begin"; (5) trial counsel disclosed privileged information to the State and the trial court by reading a letter from defendant to counsel in open court; (6) trial counsel refused to represent him to his fullest capability; and (7) trial counsel advised defendant he could not file any motions until he was sentenced. As to his motion for misrepresentation of counsel, defendant alleged similar claims as those contained in his motion for ineffective counsel, as well as a claim trial counsel failed to cross-examine the State's witnesses regarding the 9-1-1 recording or the ownership of the building.

¶ 20 On October 10, 2013, defendant, *pro se*, filed a motion for a new trial, alleging, in addition to various claims previously raised, trial counsel failed to (1) disclose to defendant part of his argument was defendant did not have time to commit the crime and (2) assert defendant's lack of intent to commit the crime.

¶ 21 D. Motion for a New Trial

¶ 22 On October 21, 2013, defendant, through counsel, filed a motion for a new trial, alleging the evidence was insufficient to prove him guilty beyond a reasonable doubt.

¶ 23 E. *Krankel* Inquiry Hearing

¶ 24 At an October 29, 2013, hearing, the trial court conducted an inquiry into defendant's ineffective-assistance-of-counsel claims as required by *Krankel* and its progeny to determine whether it should appoint new counsel to assist defendant in presenting his claims. At the start of the hearing, the court indicated it reviewed defendant's "motion for ineffective counsel."

¶ 25 The trial court addressed defendant, asking whether he wished to add to his motion. Defendant added trial counsel (1) made no objections at trial, (2) failed to conduct cross-examination, and (3) failed to inform defendant prior to trial the sole evidence he intended to introduce was the 9-1-1 recording.

¶ 26 The trial court gave trial counsel the opportunity to respond to defendant's claims. Trial counsel responded as follows:

> "I think I've represented [defendant] to the best of my abilities. It's been a contentious relationship since the beginning. Part of it says that he fired me and trying to talk with him has been rather difficult. I told him he could not fire me, that would be something the [c]ourt would have to decide to do, as I was appointed. He has a right to represent himself if he wanted to, I mentioned that before in the past as well. I haven't violated any privileges or anything like that and, basically, deny the allegations."

Following Mr. Ellison's statement, the court examined trial counsel as follows:

> "THE COURT: And Mr. Ellison, just refresh my recollection a little bit. You did review all of the discovery with [defendant], correct?

MR. ELLISON: Correct. They're given a copy of the discovery whenever—at times they were reviewed by them over in the jailhouse as to the 911 call. It was played for him.

THE COURT: How many times do you think you've met with [defendant], Mr. Ellison?

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MR. ELLISON: Five or six times, Your Honor. I don't know exactly how many times.

THE COURT: As I recall, you also played the 911 tape?

MR. ELLISON: That's correct, Your Honor.

THE COURT: As I recall, against—it was my take on, against your advice, [defendant] also testified; is that correct, Mr. Ellison?

MR. ELLISON: That's correct, Your Honor.

THE COURT: As I recall the evidence from this case, there was the 911 call into the police that two people were seen entering kind of an abandoned building. The police arrived and [defendant] was actually found inside the building. Inside the building, there was also some loose copper piping and so; is that correct?

MR. ELLISON: That's correct. He had made a statement to the police concerning the piping.

THE COURT: What was the statement, I don't recall that?

MR. ELLISON: He was looking—initially, he stated he was going in there looking for work. When he was in there, he said he saw some stuff that he was going to look at for scrap.

THE COURT: That's the one thing I did recall. I don't have any notes in front of me.

MR. ELLISON: And his idea or his thinking on the 911 tape was that his tape stated that one white person and one black person entered the building. The codefendant in this case was African-American."

¶ 27 The trial court addressed the State, asking whether it had anything it briefly wished to add. The State responded: "The only thing I can say, Your Honor, as Mr. Ellison and I spoke about the case on several occasions, there were different offers that were made. He was always attentive with asking about the case."

¶ 28 The trial court allowed defendant an opportunity to make a statement. Defendant stated as follows:

"[T]he 911 call stated that two individuals entered an abandoned building across the street. Officer Lewellyn's testimony stated that two suspicious looking people entered an abandoned building. He suggested that the door was secure, the window was open. Never, never questioned by Mr. Ellison here. The 911 call stated seeing two people entering, not climbing into a window, not breaking into a door, but entering. My testimony—my statement said I went into the building looking for work. Nothing else. All the rest of these

> statements are said that I said, are said by the officer saying that I said—I made these statements. If I made any of these statements, I would—why would I plead not guilty. Not guilty. I sat in this courtroom for ten months pleading not guilty. I never made those statements, other than the fact that I went into the building looking for work. That was the only statement I made."

¶ 29 Following its inquiry, the trial court found "no basis for the defendant's allegations of ineffective assistance of counsel and that the defendant has been very well represented by Mr. Ellison to this point in time." The court struck defendant's *pro se* motion for misrepresentation of counsel as it was duplicative of his motion for ineffective counsel and his October 10, 2013, *pro se* motion for a new trial as he continued to be represented by counsel.

¶ 30 The trial court proceeded to address defendant's October 21, 2013, motion for a new trial. Prior to discussing the motion, defendant addressed the court, stating he had fired trial counsel on multiple occasions, yet counsel continued to fail to inform the court of the termination of his services. In response, the court indicated that day was the first time the issue was brought to its attention, and it considered defendant's statement to be an oral motion to terminate trial counsel's services. The court directed defendant to reduce his motion to writing.

¶ 31 F. *Pro Se* Motion To Fire Counsel and Hearing on Pending Motions and Sentencing

¶ 32 In November 2013, defendant, *pro se*, filed a "motion to fire counsel." That same month, the trial court held a hearing on defendant's motion to fire counsel, motion for a new trial, and sentencing. During the hearing, defendant withdrew his motion to fire counsel. The court denied defendant's motion for a new trial and sentenced him to four years' imprisonment.

¶ 33 G. *Pro Se* Motion for Reduction of Sentence

¶ 34 In December 2013, defendant, *pro se,* filed a motion to reduce his sentence. Following a May 2014 hearing, the trial court denied defendant's motion.

¶ 35 This appeal followed.

¶ 36 II. ANALYSIS

¶ 37 On appeal, defendant argues the trial court failed to conduct an adequate inquiry into his ineffective-assistance-of-counsel claims.

¶ 38 Under *Krankel* and its progeny, when a defendant files a colorable *pro se* posttrial motion alleging claims of ineffective assistance, the trial court must conduct an inquiry into the defendant's claims to determine whether new counsel should be appointed. See *Krankel,* 102 Ill. 2d at 189, 464 N.E.2d at 1049; *People v. Johnson*, 159 Ill. 2d 97, 126, 636 N.E.2d 485, 498 (1994); *People v. Moore*, 207 Ill. 2d 68, 77-78, 797 N.E.2d 631, 637 (2003). In making its inquiry, the trial court should examine the factual basis of the defendant's claims to ascertain whether there was "possible neglect of the case." *Moore*, 207 Ill. 2d at 78, 797 N.E.2d at 637. If there was a possible neglect, the court should appoint new counsel to represent the defendant in a posttrial hearing on the *pro se* claims of ineffective assistance. *Moore*, 207 Ill. 2d at 78, 797 N.E.2d at 637. If, after "adequate inquiry" into the factual basis of the claims, the court determines the claims "lack[ ] merit or pertain[ ] only to matters of trial strategy," the court may deny the *pro se* motion without appointing counsel. *Moore*, 207 Ill. 2d at 78, 797 N.E.2d at 637.

¶ 39 "On review, '[t]he operative concern *** is whether the trial court conducted an adequate inquiry into the defendant's *pro se* allegations of ineffective assistance of counsel.' " *People v. Shaw*, 2015 IL App (4th) 140106, ¶ 44 (quoting *Moore*, 207 Ill. 2d at 78, 797 N.E.2d at

638). An adequate inquiry involves the court understanding a defendant's claims and evaluating them for potential merit. *People v. Mays*, 2012 IL App (4th) 090840, ¶ 58, 980 N.E.2d 166. "[A] trial court's method of inquiry at a *Krankel* hearing is somewhat flexible." *People v. Fields*, 2013 IL App (2d) 120945, ¶ 40, 997 N.E.2d 791. The court may (1) question trial counsel, (2) question the defendant, (3) rely on its own knowledge of trial counsel's performance in the trial, or (4) rely on its own legal knowledge of what does and does not constitute ineffective assistance. *Mays*, 2012 IL App (4th) 090840, ¶ 57, 980 N.E.2d 166. "The trial court must do whatever common sense suggests is necessary to an adequate investigation." *Mays*, 2012 IL App (4th) 090840, ¶ 58, 980 N.E.2d 166. Whether the trial court conducted a proper *Krankel* inquiry is a question of law, subject to *de novo* review. *People v. Jolly*, 2014 IL 117142, ¶ 28, 25 N.E.3d 1127.

¶ 40 As an initial matter, defendant suggests the trial court conducted an inadequate inquiry as it failed to specifically address each claim on the record, raising a question of whether the court did in fact consider all of his claims. Defendant presents this court with no authority in support of his proposition *Krankel* requires a trial court to address each individual claim on the record rather than deny all claims outright after an inquiry. While addressing each claim individually is the better practice, we find *Krankel* and its progeny do not mandate such action. See *People v. Patrick*, 2011 IL 111666, ¶ 41, 960 N.E.2d 1114 ("The common law procedure developed in *Krankel* and subsequent cases is intended to promote consideration of *pro se* ineffective assistance claims in the trial court and to limit issues on appeal.").

¶ 41 We presume the trial court knew and followed the law unless the record affirmatively demonstrates otherwise. *People v. Lewis*, 2015 IL App (1st) 122411, ¶¶ 82-83, 28

N.E.3d 923. The trial court, with the same judge who presided over defendant's bench trial, found no basis to support defendant's claims after having reviewed defendant's motion for ineffective counsel, allowed defendant to supplement his motion, allowed trial counsel to respond to defendant's claims, examined trial counsel, and allowed defendant to make a statement. Following its decision, the court struck defendant's additional *pro se* motion for misrepresentation of counsel, finding it was duplicative, and his motion for a new trial. Defendant has failed to rebut the presumption the trial court knew and followed the law by inquiring into any colorable claim brought to the court's attention. See *People v. Johnson*, 159 Ill. 2d 97, 126, 636 N.E.2d 485 (1994) (allegations that are conclusory, misleading, legally immaterial, or do not identify a colorable claim of ineffective assistance of counsel do not require further inquiry by the trial court).

¶ 42 Defendant further asserts the trial court conducted an inadequate inquiry as it relates to two of his ineffective-assistance-of-counsel claims. Defendant argues the court conducted an inadequate inquiry into his claim trial counsel provided ineffective assistance when he told defendant he could not fire him. Specifically, defendant asserts (1) the court's statement following the *Krankel* hearing demonstrates the court "may" have failed to consider his claim, and (2) the court should have inquired further into whether trial counsel misinformed defendant of the law.

¶ 43 In support of his contention the trial court "may" have failed to consider his claim, defendant cites to the trial court's statement immediately following the *Krankel* inquiry hearing, indicating that day was the first time defendant brought to the court's attention the termination of trial counsel's services. We find the court's statement correctly noted October 29, 2013, was the

first time it addressed defendant's claim and had before it a request to terminate trial counsel's services. When read in context, the cited portions of the transcript do not rebut the presumption the trial court knew and followed the law by considering defendant's claim during its *Krankel* inquiry. See *Lewis*, 2015 IL App (1st) 122411, ¶¶ 82-83, 28 N.E.3d 923.

¶ 44 As to his second contention, defendant asserts the trial court should have inquired further to determine whether trial counsel misadvised him of the law. In his motion, defendant alleged he was told by trial counsel "he could not fire counsel." Trial counsel responded to defendant's claim, informing the court he advised defendant (1) of his right of self representation; and (2) he could not be "fired," as he was appointed, and only the court had such authority. The court allowed defendant the opportunity to respond to trial counsel's statement, during which defendant did not address trial counsel's assertions. We find the trial court conducted an adequate inquiry into defendant's claim by reviewing defendant's motion, allowing trial counsel to respond to defendant's claim, and allowing defendant the opportunity to respond to trial counsel's assertions. See *People v. Cummings*, 351 Ill. App. 3d 343, 352-53, 813 N.E.2d 1004, 1012-13 (2004) (trial court conducted an adequate inquiry as it read defendant's motion and gave defendant the opportunity to argue, explain, and support his allegations). Based on the inquiry conducted, the factual basis of defendant's claim was clear such that the court could determine no credible basis existed to support it.

¶ 45 Defendant further argues the trial court conducted an inadequate inquiry into his claim trial counsel provided ineffective assistance by failing to argue he did not enter the building intending to commit a theft. Contrary to defendant's claim, the record indicates trial counsel asserted during closing argument the State failed to prove the requisite intent to find

defendant guilty of burglary. The court's knowledge of trial counsel's argument at trial was sufficient to determine no credible basis existed to support defendant's claim. See *Moore*, 207 Ill. 2d at 79, 797 N.E.2d 631.

¶ 46 Defendant asserts his allegation trial counsel failed to argue he did not enter the building intending to commit a theft necessarily incorporates the allegation of ineffective assistance for exposing him to greater criminal liability when counsel decided not to argue the State only proved the lesser-included offense of criminal trespass to real property. While defendant acknowledges trial counsel's defense theory is generally considered a matter of trial strategy, he asserts, had the court inquired further into the matter, it may have concluded trial counsel misapprehended the law as to whether a lesser-included offense existed. See *People v. Walton*, 378 Ill. App. 3d 580, 589, 880 N.E.2d 993, 1000-01 (2007) ("Counsel's decision to advance an 'all-or-nothing defense' has been recognized as a valid trial strategy *** and is generally not unreasonable unless that strategy is based upon counsel's misapprehension of the law.").

¶ 47 The record does not reflect the trial court was presented with a claim placing it on notice it should inquire into whether trial counsel's decision to advance an all-or-nothing defense was due to trial counsel's defense strategy or a misapprehension of the law. While we recognize the relaxed pleading requirements for *pro se* allegations of ineffective assistance of counsel (see *Moore*, 207 Ill. 2d at 79, 797 N.E.2d 631 (to trigger an inquiry under *Krankel*, "a *pro se* defendant is not required to do any more than bring his or her claim to the trial court's attention")), a defendant must still meet the minimum requirements to trigger a preliminary inquiry by the trial court—a defendant must raise specific claims with supporting facts before the

trial court may consider the allegations. *People v. Bobo*, 375 Ill. App. 3d 966, 984-85, 874 N.E.2d 297, 315 (2007). Defendant's allegation he received ineffective assistance due to trial counsel's failure to argue he lacked the requisite intent is insufficient to require the court to inquire into whether trial counsel failed to argue a lesser-included offense because of trial strategy or a misapprehension of the law. Based on the claim presented, the court conducted an adequate inquiry.

¶ 48 Even if, *arguendo*, such a claim could be incorporated into defendant's allegation, the record indicates trial counsel specifically highlighted in closing argument "[defendant] [was] charged with burglary, not just an unauthorized entry into a building." The court's knowledge of trial counsel's statement at trial would be sufficient to refute defendant's allegation trial counsel misapprehended the law when he did not assert the State merely proved the lesser-included offense of criminal trespass to real property (720 ILCS 5/21-3(a)(1) (West 2010) ("[a] person commits criminal trespass to real property when he *** knowingly and without lawful authority enters or remains within or on a building")). See *Moore*, 207 Ill. 2d at 79, 797 N.E.2d 631.

¶ 49 III. CONCLUSION

¶ 50 We affirm the trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2014).

¶ 51 Affirmed.