

No. 1-10-2326

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	Nos. 09 CR 9173
)	09 CR 9174
)	
THAER ELLO,)	Honorable
)	John J. Moran, Jr.,
Defendant-Appellant.)	Judge Presiding.

JUSTICE GARCIA delivered the judgment of the court.
Justices Cahill and Lampkin concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant was not denied the effective assistance of counsel such that his knowing and voluntary guilty plea violated due process where the advice given to defendant that he faced violations of the terms of his pretrial release if he chose not to accept the State's offer in exchange for his plea of guilty was accurate and appropriate, which precludes any finding that he suffered prejudice from counsel's alleged failure to investigate witnesses.

¶ 2 Following a guilty plea, defendant Thaer Ello was found guilty of two counts of theft by deception and sentenced to two years of probation. On appeal, defendant argues that his timely motion to withdraw his plea should have been granted because he was denied the effective assistance of counsel. We affirm.

¶ 3 Only a brief recitation of the facts is necessary for an understanding of the offenses alleged here. Defendant worked as an independent contractor, leasing apartments for a property management company. When he found a renter, he was allowed to retain the first month's rent as his commission. In April 2009, he negotiated leases for two separate apartments with five individuals, one individual renter and a group of four roommates. He accepted money representing the first month's rent and security deposits for each apartment. The renters subsequently spoke to another leasing agent from the management company, who informed them that defendant's actions were unauthorized. Defendant was subsequently charged with felony theft by deception.

¶ 4 The parties' respective positions turn on a single operative fact. The State argues that defendant's relationship with the management company had been terminated, and that he was no longer authorized to accept the rent payments. Defendant argues that he was the victim of a misunderstanding and that at all relevant times he was authorized to accept the payments.

¶ 5 Ultimately defendant was arrested, identified in a lineup, charged by information, and released on bond. Defendant retained private counsel to represent him. At the second court appearance defendant indicated that in accordance with the results of a pretrial conference, he wished to plead guilty in exchange for a sentence of probation. The trial court admonished him that the offense of theft carried potential sentences of two to five years' imprisonment, a possible fine of \$25,000 and one year of parole following release from the penitentiary. The trial court further admonished defendant that he was giving up his right to a trial, where he would have the right to bring in any witnesses or evidence that defendant might have. Defendant stated that he had not been threatened into pleading guilty and that no one had promised him anything. Private counsel agreed that the charging instruments and police reports discussed in the conference set forth a sufficient factual basis for the plea. However, the factual basis was not stated for the

record and the police reports are not included in the record. Defendant signed a jury waiver, and a judgment was entered on his plea of guilty.

¶ 6 Defendant filed a timely *pro se* motion to withdraw his guilty plea. Defendant alleged that he was "improperly and poorly represented by retained counsel" and that since his plea he had obtained proof of his innocence. Thereafter, defendant retained different counsel who filed a memorandum of law in support of the motion to withdraw defendant's plea. In the memorandum defendant argued that initial defense counsel advised him that he would likely face an increased bond and spend time in jail if he persisted in pleading not guilty, but that he would likely be released immediately if he accepted the State's offer and changed his plea.

¶ 7 The matter proceeded to a hearing. At the hearing the parties presented extensive testimony on the issue of whether defendant was, in fact, authorized to accept the rent payments. Defendant testified that he was authorized to act as a leasing agent; he accepted written leases for each unit from the renters and filed them in the leasing company office. He retained the first month's rent as his commission, and used some of the security deposit funds for repairs to one of the apartments. On cross-examination, defendant testified that he had receipts for the repairs, but that he did not have them with him. He also testified that he did not know whether Zishan Alvi, the owner of the management company, knew that the lease had been placed in the filing cabinet.

¶ 8 Zishan Alvi testified that defendant was an independent contractor that was authorized to lease apartments. Defendant was allowed to retain the first month's rent as his commission for renting the apartments. On cross-examination, Alvi admitted that even after he learned that defendant had been arrested for theft he never looked for the leases for the apartments. Alvi testified that he did not recall telling police officers that defendant had been terminated during the first week of March 2009 and did not have authority to rent the apartments.

Alvi further testified that he did not recall making a similar statement to the assistant State's Attorney assigned to the case. The State did not perfect this impeachment.

¶ 9 Marcella Corrales was called by the State and testified that she was the property manager at the management company. On April 24, 2009, she was visiting one of the properties and encountered a woman in one of the apartments. Corrales was surprised because her list indicated that the apartment was vacant. The woman told Corrales that she had rented the apartment from defendant. Corrales checked the office but was unable to locate a lease. Corrales then contacted the purported renter again, because she believed that defendant was no longer with the company. The renter moved out of the apartment. Corrales then contacted Alvi to verify that defendant was still working for the company. Alvi stated that he did not know.

¶ 10 Defendant also testified regarding his guilty plea and that he chose to plead guilty because "from [his] understanding, [he] didn't have a choice but either to do that or go to jail or be taken in at the time."

¶ 11 Defendant's initial defense counsel testified that he was retained by defendant to represent him in the theft case. Counsel met defendant at defendant's home and was given the names of defendant's employer and the owner of the rental properties. Counsel did not "have the opportunity" to contact those individuals prior to the court appearance scheduled for June 29, 2009, the second court date in the case. On that day, counsel met with the prosecutor who "kind of blew up on" him about defendant's pretrial services violations. Defense counsel did not recall the exact conversation, but recalled that defendant had twice violated a pretrial services curfew and that the judge "wasn't going to be too happy." Counsel advised defendant that the judge would possibly increase the bond to as much as \$100,000. Defendant responded that he could not post that much bond, and counsel discussed the option of pleading guilty. Defendant decided to plead guilty.

¶ 12 Following argument by the parties, the trial court denied defendant's motion to withdraw his guilty plea. Defendant timely appealed.

¶ 13 A defendant has no absolute right to withdraw a guilty plea. *People v. Hirsch*, 312 Ill. App. 3d 174, 179 (2000). A defendant must demonstrate to the trial court the necessity of withdrawing his plea, and whether to grant a defendant's request is a matter committed to the discretion of the trial court. *Id.* We will not disturb that decision on review absent an abuse of that discretion. See *People v. Manning*, 227 Ill. 2d 403, 412 (2008).

¶ 14 A guilty plea must be voluntarily and understandingly made. *Boykin v. Alabama*, 395 U.S. 238 (1969). A defendant who pleads guilty has a right to be properly and fully admonished. *People v. Whitfield*, 217 Ill. 2d 177, 188 (2005). Here, defendant contends that he should be allowed to withdraw his guilty plea because it was made without the effective assistance of counsel. The question before us is not simply whether defendant's plea was the result of counsel's erroneous advice or omissions, but rather whether any error rose to the level of ineffective assistance of counsel as defined by the *Strickland* standard. See *People v. Edmonson*, 408 Ill. App. 3d 880, 884 (2011), citing *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

¶ 15 To establish ineffective assistance of counsel under *Strickland*, a defendant must show that 1) counsel's performance fell below an objective standard of reasonableness, and 2) defendant suffered prejudice as a result. *Edmonson*, 408 Ill. App. 3d at 884. If either prong of the *Strickland* standard is not met, the defendant's claim fails, and a court need not consider the other prong. See *Id.* at 885.

¶ 16 Here there can be little doubt that defendant's plea was knowing and voluntary. The trial court carefully admonished defendant, informing him of the minimum and maximum penalties for the offenses, verifying his citizenship, describing the right to trial, and defendant's right to call witnesses on his own behalf. Defendant stated that he understood his rights, that no

one had threatened him or forced him to plead guilty, and that no one had promised him anything in exchange for his guilty plea. His initial counsel indicated that the police reports set forth an adequate factual basis to support the plea, and because they are absent from the record, we must presume that his analysis was correct. Although defendant presented Alvi's testimony which, if found credible, strongly supported his defense, Alvi was impeached with prior inconsistent statements¹, and there is no legal impediment to a defendant pleading guilty while still maintaining his innocence. See *North Carolina v. Alford*, 400 U.S. 25 (1970). Accordingly, we will not disturb the trial court's order denying defendant leave to withdraw his guilty plea, unless we find that the alleged failure to investigate witnesses constituted deficient performance and that the deficiency prejudiced defendant.

¶ 17 In support of his ineffective assistance claim, defendant argues that *People v. Butcher*, 240 Ill. App. 3d 507 (1992) and *People v. Young*, 355 Ill. App. 3d 317 (2005) are factually similar. We do not find sufficient factual similarity to make a useful comparison.

¶ 18 In *Butcher*, the defendant contended that trial counsel was ineffective for failing to subpoena two witnesses and secure their testimony *at trial*. *Butcher*, 240 Ill. App. 3d at 510. We find little useful comparison with the case at bar, because although clearly an attorney should interview exonerating witnesses before trial, that insight lends little guidance to the question of whether the failure to interview a witness at a much earlier stage in the proceedings constitutes ineffective assistance.

¶ 19 The *Young* case involved a guilty plea. However, the issue in that case was whether trial counsel was ineffective when he informed the defendant that he would serve less

¹ We note that this impeachment was not perfected as would be expected if this matter proceeded to trial. However, we also note that the hearing on defendant's motion to withdraw his guilty plea, was intended only to determine whether defendant would receive a trial and not intended as a substitute for such a trial.

actual prison time by pleading guilty to a Class 1 felony with a 12-year prison term than he would serve by pleading guilty to a Class X felony with a 10-year term. *Young*, 355 Ill. App. 3d at 321. We find defendant's reliance on this case misplaced because, here, we have no affirmative misstatement of the consequences of a guilty plea. Rather, defense counsel's statement that defendant could face pretrial incarceration if violations of the terms of his pretrial release were proved should the case not end that day, but the case could end that day if he chose to accept the State's offer by pleading guilty was accurate. Accordingly, the *Young* case is not analogous to the instant case.

¶ 20 Instead, we find the recent case of *People v. Clark*, 2011 IL App (2d) 100188 instructive on the showing required to establish ineffectiveness of trial counsel. In *Clark*, the defendant alleged in a postconviction petition that he had been denied the effective assistance of counsel during his guilty plea hearing when his attorney informed him that there were no witnesses available to support his defense of insanity. In support of his claim, the defendant attached the affidavit of the victim, who averred that defendant was schizophrenic and had not been taking his medications at the time of the offense, that he heard voices telling him to stab her, and that she knew he did not mean to harm her. The reviewing court found that the defendant made a substantial showing that counsel was ineffective for failing to investigate the witness, and that he was prejudiced because counsel told him that there were no witnesses available to support his defense. *Clark*, 2011 IL App (2d) 100188, ¶ 28-29.

¶ 21 Here, we cannot reach the same conclusion. As best we can tell the case was not set for trial on the second court appearance date. Defendant's compliance with the terms of his pretrial release would of course be subject to review on even a status date. Even if we assume that it was unreasonable for counsel to fail to contact these witnesses before engaging in a plea conference—an arguable issue given that defendant elected to plead guilty at only the second court

date, and defense counsel testified that he intended to interview the witnesses but simply had been unable to make contact—we cannot find that defendant was prejudiced. Unlike in *Clark*, defendant was never misled into believing that the witnesses he asked counsel to investigate would not support his defense. Instead, he elected to plead guilty before counsel had completed his investigation.

¶ 22 Apparently defendant decided it was better to plead guilty to an offense for which he believed himself innocent rather than to face the prospect of being taken into custody should his bail be increased for violating the terms of his pretrial release. We are not unsympathetic to the dilemma with which defendant was faced, but that sympathy is tempered by noting that it was a dilemma of his own creation—defendant would not have faced the prospect of pretrial incarceration if he had complied with the terms of his pretrial release. When faced with the prospect of jail time, defendant acted to avoid that prospect entirely by pleading guilty and being placed on probation. However, when he was no longer facing the prospect of pretrial incarceration, defendant reconsidered his position and asked to withdraw his plea. The criminal justice system is not so easily manipulated. Defendant was informed accurately by counsel that he was facing pretrial incarceration unless he accepted the State's plea. Having accepted the State's offer and the corresponding benefit, we find no reason to allow defendant to attempt to improve his position by now demanding a trial when doing so appeared advantageous. Given these circumstances we cannot conclude that the trial court abused its discretion when it denied defendant's motion to withdraw his guilty plea.

¶ 23 For the reasons discussed above, we affirm the judgment of the circuit court of Cook County.

¶ 24 Affirmed.