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SIXTH DIVISION
April 15, 2011

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.)	No. 09 MC 200 1757
)	
HUBERT SUTTON,)	The Honorable
)	Callie Lynn Baird,
Defendant-Appellant.)	Judge Presiding.

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

ORDER

HELD: Where the misinformation given to the defendant by the circuit court at the time defendant pled guilty related solely to the possible charge that might arise from a violation of an order of protection, the trial court did not err in denying the motion to vacate the plea of guilty because the consequence arising from such a violation was collateral to the voluntariness of the plea; nor was defense counsel ineffective for failing to correct the misinformation given by the circuit court. We modify certain fines and fees.

Defendant Hubert Sutton pleaded guilty to domestic battery and was sentenced to one year of probation, 15 days time served, drug, alcohol, and domestic violence evaluations and

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counseling, and a three-year order of protection. He was also assessed certain fines and fees. Defendant contends the trial court erred in refusing his request to withdraw his guilty plea where the circuit court misinformed him of the consequences of violating the order of protection. Alternatively, defendant contends his trial counsel was ineffective for failing to provide him with the correct information. Defendant also contends that the trial court erred in assessing certain fines and fees. For the reasons that follow, we reject defendant's contentions that the misinformation affected the voluntariness of the plea of guilty because the misstatement concerned collateral consequences, which means the circuit court did not abuse its discretion in denying the defendant's motion to withdraw his guilty plea. Defense counsel was not ineffective for failing to correct the circuit court's misstatement. We modify the fines and fees.

BACKGROUND

Defendant was charged with domestic battery following an altercation with his former girlfriend. The State and defendant presented a plea agreement for the trial court's approval. In exchange for his plea of guilty, the State proposed that defendant receive one year's probation and 15 days time served. He would also be subject to certain fines and fees. The parties agreed to a two-year plenary order of protection to begin after his one year's probation. The trial court indicated it would approve the plea agreement if it included domestic violence counseling and drug and alcohol evaluations. The defendant agreed to the additional conditions. The new agreement between the State and defendant was for one year's probation, time served, the additional conditions dictated by the trial court, and a two-year no-contact order of protection.

At the plea hearing, defendant indicated he wished to plead guilty pursuant to the plea

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agreement. The trial court admonished defendant, accepted the plea, and reiterated the terms of the agreement, this time stating, "And there will be a three-year no-contact order of protection." According to the trial court, this was an "agreed order of protection" with the criminal case as its underlying basis. The trial court admonished defendant that if he violated the order of protection, he could be charged with a Class A misdemeanor. After some discussion, the trial court made clear that the no-contact order would be for a total of three years, the year's probation plus an additional two years.

Nine days later, defendant was arrested for violating the order of protection. At his initial appearance before the same trial judge, the State indicated defendant faced a felony charge. In response, defense counsel pointed out that even though "the offense" was captioned as a felony, the body of the complaint indicated the violation was a misdemeanor. The trial court set bond on the State's petition to revoke defendant's probation.

On the next court date, the trial court found probable cause that the defendant had violated the order of protection. Defendant informed the court that the complainant had contacted his family and was going to drop the order of protection. Defendant also claimed "the whole purpose" of dropping the order of protection was to allow him to the withdraw his guilty plea. The trial court informed defendant to talk to his attorney about filing such a motion.

About a week later, defendant was once again before the same trial judge on a new violation of probation petition based on an arrest for retail theft. Defendant informed the court he wanted to withdraw his original guilty plea. The trial court responded that his attorney would have to file such a motion. Later that day, defense counsel filed a motion to vacate the guilty

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plea, which counsel later amended.

At the hearing on the motion to vacate the guilty plea, defense counsel indicated defendant would also be seeking to vacate the order of protection. The trial court advised counsel that he would have to file a separate motion for such relief, which counsel did. The matter was continued.

On the next court date, the trial court denied the separate motions to vacate the guilty plea and to vacate the order of protection. The trial court ruled it had substantially complied with Supreme Court Rule 402 before accepting defendant's plea to domestic battery. The trial court rejected defendant's contention that his guilty plea was invalid based on being told that should he violate the order of protection he would face a misdemeanor rather than the felony charge he now faced. The court noted that Supreme Court Rule 402 does not require that a defendant be admonished as to the possible consequences of future criminal conduct while on probation. The trial court acknowledged it went a "step further" than the rule provided by admonishing defendant of the possible consequences of violating the order of protection. In the court's words, "I don't think that the law require[d] me to do so."

On the next court date, the trial court denied defendant's motion to reconsider his requests to vacate the guilty plea and the order of protection. The court reiterated that it was not required by Supreme Court Rule 402 to admonish defendant with regard to a possible violation of the order of protection. Any error in such an admonishment was insufficient to sustain the motions to vacate. This appeal followed.

Analysis

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Defendant first contends the trial court erred in denying his request to withdraw his guilty plea. He contends his plea was not voluntarily or intelligently entered because the trial court misinformed him about the consequences should he violate the order of protection; the trial court told him he would face a misdemeanor charge when in fact he was charged with a felony. According to defendant, the order of protection was bargained-for in the course of his plea negotiations and the court's failure to admonish him correctly regarding matters flowing from the entry of the order of protection breached the plea agreement, which should have entitled him to withdraw his plea of guilty.

Defendant contends our review of the denial of his motion to vacate should be *de novo*, citing *People v. Bilelunge*, 381 Ill. App. 3d 292, 295 (2008). The State counters the proper standard of review is abuse of discretion, citing *People v. Harris*, 384 Ill. App. 3d 551, 560 (2008). We look to our supreme court's decision to resolve the conflict between *Bilelunge* and *Harris*. In *Redmond v. Socha*, 216 Ill.2d 622, 837 N.E.2d 883 (2005), our supreme court made clear that where the trial judge "has the benefit of his previous observation of the appearance of the witnesses, their manner in testifying, and of the circumstances aiding in the determination of credibility" a deferential standard of review applies. (Internal quotations omitted.) Though such observations are generally made in the context of a trial, we have little doubt that at the time the trial judge accepted defendant's plea of guilty, similar observations were made by the trial judge in deciding whether to accept defendant's plea. We follow the abuse of discretion standard in *Harris* consistent with the recent decision of our supreme court in *People v. Delvillar*, 235 Ill. 2d 507, 519 (2009) ("The decision to grant or deny a motion to withdraw a guilty plea rests in the

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sound discretion of the circuit court and, as such, is reviewed for an abuse of discretion.").

Admonishment by Trial Court

Failure to properly admonish a defendant regarding a guilty plea does not automatically render the plea invalid. *Delvillar*, 235 Ill. 2d at 520. Rather, a plea is subject to attack when it cannot be affirmatively shown that it was made voluntarily and intelligently. *Id.*

With respect to the voluntariness of plea, a trial court must provide a defendant with relevant information that concerns direct consequences of the plea. *Id.* "Direct consequences of a plea are those consequences affecting the defendant's sentence and other punishment that the circuit court may impose." *Id.*

In contrast, collateral consequences arising from a defendant's plea of guilty do not affect the voluntariness of the plea. See *People v. Williams*, 188 Ill. 2d 365, 371 (1999) ("the defendant's knowledge of the collateral consequences of a guilty plea is not a prerequisite to the entry of a knowing and intelligent guilty plea"). "Collateral consequences *** are effects upon the defendant that the circuit court has no authority to impose." *Delvillar*, 235 Ill. 2d at 520.

We have no doubt that the classification of the charge arising from a violation of an order of protection is a collateral consequence because the charging decision is outside the trial court's control; it is the State that decides the charge to be filed against a defendant. *Id.*; *Williams*, 188 Ill. 2d at 372. As made clear by our supreme court, admonishment of possible collateral consequences of a guilty plea is not required by due process. *Delvillar*, 235 Ill. 2d at 520-21. It necessarily follows that a mistaken admonishment, standing alone, is insufficient to require that

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an otherwise voluntary and intelligent plea of guilty be vacated. See *Delvillar*, 235 Ill. 2d at 521-22 ("the failure to admonish defendant of *** [collateral] consequences does not call into question the constitutional voluntariness of his guilty plea").

Defendant argues that in the instant case, the order of protection was an expected and necessary result of his guilty plea. This, according to the defendant, makes the order of protection so intertwined with the criminal process that the consequences of a violation of the order of protection cannot be properly characterized as collateral.

That the order of protection was inexorably tied to the criminal charge of domestic battery cannot be disputed. However, that uncontested fact does not frame the issue before us. The existence of the order of protection is not the key to determining the nature of the consequences that flow from its violation; rather, it is whether the trial court has authority to control the classification of the charge arising from the *violation* of that order. There is no dispute that it is for the State to decide the charge to be filed against a defendant for violating an order of protection. The circuit court has no say in the matter.

We note the State was also a party to the agreement and was present when the circuit court made its misstatement. No argument is or can be made that the State is bound by that misstatement. Under the terms of the plea agreement, defendant agreed to abide by the order of protection, that is, not to violate it. Both the trial court and the State were entitled to expect compliance. We cannot agree that the trial court's misstatement as to the possible charge arising from a violation of the order of protection somehow calls into question the validity of his guilty plea.

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Under the facts of this case, the consequences of defendant's violation of the order of protection is unquestionably a collateral consequence of his plea of guilty. See *Delvillar*, 235 Ill. 2d at 520; *Williams*, 188 Ill. 2d at 372. The defendant will not be heard to complain that the mistaken admonishment as to the possible consequences of violating the order of protection makes his guilty plea involuntarily. The trial court did not err in denying defendant's motion to withdraw his guilty plea.

Our supreme court in *Delvillar* noted other avenues a defendant may follow to challenge admonishments by the circuit court. "[A]s with other imperfect admonishments, ***, reversal may yet be required if real justice has been denied or if the defendant has been prejudiced by the inadequate admonishment." We understand defendant's fallback argument of ineffective assistance of counsel, placing blame on defense counsel for not correcting the circuit court's misstatement, seeks to invoke a claim of prejudice.

Ineffective Assistance of Counsel

Challenges to guilty pleas that allege ineffective assistance of counsel are subject to the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984); *People v. Rissley*, 206 Ill. 2d 403, 457 (2003). Under *Strickland*, a defendant must show (1) that his counsel's representation fell below an objective standard of reasonableness; and (2) but for counsel's errors, there is a reasonable probability that the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687. In the context of a guilty plea, counsel's conduct is considered deficient if counsel failed to ensure that the defendant entered the plea voluntarily and intelligently. *Rissley*, 206 Ill. 2d at 457. Prejudice is established where the defendant shows a

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reasonable probability that but for counsel's errors, he would not have pleaded guilty but would have insisted on going to trial. *Rissley*, 206 Ill. 2d at 457. Defendant makes such a claim here.

However, defendant offers only a bare allegation to support his claim that he would not have pleaded guilty, and therefore was prejudiced, had he been properly informed by defense counsel of the legal consequences of his own future criminal conduct. "[A] bare allegation that had counsel not been deficient during plea discussions, defendant 'would have pleaded differently and gone to trial' is not enough to establish prejudice." *People v. Rissley*, 206 Ill. 2d 403, 458 (2003), quoting *Key v. United States*, 806 F.2d 133, 139 (7th Cir.1986). Nor are we presented with authority that prejudice can arise from defendant's own criminal conduct that he seeks to tie to misinformation he faults defense counsel for not correcting. We reject such a claim of prejudice out-of-hand. See *People v. Cora*, 238 Ill. App. 3d 492, 501 (1992) (defendant's contention "that the State failed to prove beyond a reasonable doubt that he knew that he was violating a law when he committed aggravated criminal sexual abuse [rejected] *** out of hand").

We concluded above that defendant's mistaken impression that a violation of the order of protection would result only in a misdemeanor charge raised a claim of collateral consequences arising from his plea of guilty. In other words, that defendant was not told he would face a felony charge were he to violate the order of protection did not make his guilty plea to the charge of domestic battery either involuntarily or unintelligently entered. Based on that conclusion, the defendant cannot claim prejudice based on a contention that he violated the order of protection premised on information that defense counsel should have corrected; that is, he should have been

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told he would face a felony charge rather than a misdemeanor.

We agree with the State, that under the circumstances present in his case, defendant cannot establish prejudice to support his claim of ineffective assistance of counsel. See *Rissley*, 206 Ill. 2d at 460-61, citing *United States v. LaBonte*, 70 F.3d 1396, 1413 (1st Cir. 1995) (no prejudice is demonstrated following a plea of guilty, in the absence of "either a claim of innocence or the articulation of any plausible defense that [defendant] could have raised had he opted for a trial").

Fines and Fees

Defendant's final contention is that the trial court erred in assessing certain fines and fees. He argues the \$25 Court Services fee was wrongly assessed because domestic battery "is not a qualifying conviction under the *** statute;" the \$20 "Violent Crime Victims Assistance" fine was incorrectly calculated; and that he's entitled to presentence custody credit in an amount sufficient to offset the correct fines.

We find defendant's challenge to the assessment of a \$25 Court Services fee (55 ILCS 5/5-1103 (West 2008)) foreclosed by our decision in *People v. Adair*, 406 Ill. App. 3d 133, 940 N.E.2d 292 (2010) ("the [\$25] court services fee will be assessed upon a finding of guilt [in all criminal cases]").

Defendant's claim that the \$20 "Violent Crime Victims Assistance" fine was incorrectly calculated and should be reduced to \$8 is well taken. The State agrees. The violent crime victims assistance fine is reduced to \$8.

Finally, defendant argues he is entitled to a \$5-per-day credit against the remaining fines

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of \$60 for the 15 days he spent in custody prior to sentencing. 725 ILCS 5/110-14 (West 2008). Again, the State agrees, as do we. See 725 ILCS 5/110-14(a) (West 2006) (\$5-per-day credit for presentence custody may not exceed the total amount of the fines imposed by the trial court).

CONCLUSION

The circuit court did not err in denying the defendant's motion to vacate his guilty plea because his motion asserted a collateral consequence arising from the circuit court's misstatement; defense counsel was not ineffective for failing to correct the circuit court's misstatement. The fines and fees assessed against defendant are modified. The judgment of the circuit court is affirmed in all other respects.

Affirmed as modified.