

THIRD DIVISION
February 23, 2011

No. 1-09-0410

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.)	No. 03 CR 7027
)	
CHARLES ARMSTRONG,)	Honorable
)	Mary Margaret Brosnahan,
Defendant-Appellant.)	Judge Presiding.

JUSTICE STEELE delivered the judgment of the court.
Presiding Justice Quinn and Justice Murphy concurred in the judgment.

O R D E R

HELD: The circuit court was not required to appoint new counsel before conducting a preliminary investigation into defendant's allegation that he was under duress when he entered his guilty plea. The court properly denied defendant's *pro se* motion to "recant" his guilty plea when the motion did not allege ineffective assistance of counsel.

Defendant, Charles Armstrong, entered a negotiated plea of guilty to first degree murder and was sentenced to 45 years in prison. His *pro se* motion to "recant" the guilty plea was subsequently denied. On appeal, defendant contends the trial

court erred when it did not appoint new counsel to represent him at the hearing on his *pro se* motion to recant the plea because his counsel was laboring under a conflict of interest. He further contends that the court abused its discretion by denying the motion because counsel coerced him into accepting a plea. We affirm.

Defendant and codefendant (Bree Williams) were charged by indictment with, among other charges, first degree murder, armed robbery, and home invasion after a September 2002 incident during which the victim, Melvin Gillard, was killed. The State subsequently filed a notice of intent to seek the death penalty if defendant was convicted of first degree murder.

On December 18, 2008, the parties informed the circuit court that defendant would be pleading guilty to murder in exchange for a recommended sentence of 45 years in prison. Before accepting the plea, the court asked defendant if this was his understanding, and defendant indicated that it was. The court admonished defendant that by pleading guilty, he gave up his right to a trial. Defendant indicated that he understood. The court then asked defendant if anyone had made any threats or promises in order to induce him to plead guilty. Defendant responded in the negative and indicated that his plea was free and voluntary.

The State then gave the factual basis for the plea. The parties stipulated that Assistant State's Attorney Nancy Nazarian, if called to testify, would testify that defendant admitted in a videotaped statement that he and codefendant: (1) agreed they would rob the victim; (2) lured the victim into the basement of his home; (3) threw things at and hit the victim causing the victim's death; and (4) subsequently pawned items taken from the victim's home. The parties further stipulated that Latonya Ingram, if called to testify, would testify that defendant and codefendant had given her money that she believed came from the victim's life insurance policy. The parties also stipulated that Medical Examiner Cogan, if called to testify, would testify that the cause of the victim's death was multiple blunt trauma.

After finding there was a factual basis to support the plea, the court asked defendant if he wanted to say anything before sentence was imposed. Defendant declined. The court then sentenced defendant to 45 years in prison.

Counsel subsequently filed a motion to withdraw the plea alleging that defendant did not fully understand the ramifications of the guilty plea. Defendant also filed a *pro se* "motion to recant the plea of guilt." No grounds for withdrawal were listed in defendant's *pro se* motion.

At the hearing on the motion to withdraw the plea, counsel gave the court a letter from defendant, which the court read into the record. The letter indicated that defendant pleaded guilty under duress because his counsel told him that if the case went to trial and defendant was convicted, counsel would be forced to subpoena defendant's nine-year-old daughter in order to have her beg for defendant's life. The letter further stated that counsel told defendant that the State would show his daughter pictures of the victim and ask her if she thought defendant was a good person. The letter finally admitted that defendant would probably lose at trial, but that he wanted to tell his story and be eligible for an appeal.

The court then reviewed the procedural history of the case and asked counsel about the frequency of his contact with defendant.

Counsel indicated that he and his trial partner frequently met with defendant to prepare for trial. The visits ranged from once or twice a week to "almost once a week." Counsel also met with defendant twice on the weekend. There were extensive discussions regarding trial, sentencing, and mitigation in order to give defendant "the fullest picture of what the trial and sentencing hearing would be." With regard to the plea, counsel indicated that the State made the offer in the summer of 2008.

The court then asked defendant to explain how he was under duress when he entered his guilty plea. Defendant explained that counsel told him that his daughter would be the key witness at a mitigation hearing. Counsel further told defendant that his daughter would be put on the stand, shown a picture of the victim, and asked whether she thought defendant was a good man. Defendant did not want to expose his daughter to that situation.

Counsel responded that there had been lengthy discussions regarding what would happen if the case reached the mitigation phase because this was a death penalty case. Counsel described the mitigation evidence in this case as not "very significant." He planned to call defendant's mother, ex-wife, daughter, and a former teacher to testify in mitigation if the case reached that stage. Counsel told defendant that he would subpoena these witnesses and that the State might confront them with photographs and facts from the case during their testimony. Although their conversations focused on trial preparation, counsel had suggested to defendant that he might not want to put himself or his family through a trial and possible sentencing hearing. Counsel was surprised when defendant indicated that he wished to plead guilty, but thought it was a "good decision."

In rebuttal, defendant stated that counsel did not give him time to fully grasp the plea because counsel told defendant that he had to decide "now" or go to trial.

The court indicated that duress was the only specific issue raised in defendant's letter. The court then stated that its review of the transcript, defendant's *pro se* motion to recant the plea, and the motion to withdraw the plea filed by counsel revealed that defendant (1) was properly admonished as to his appellate rights, (2) had indicated he had not been forced to make the plea and that he did so freely and voluntarily, and (3) did not say anything when given the chance before sentence was imposed. The court found that defendant was not forced to make a snap decision; rather, he was given ample opportunity to make up his mind, as by the court's estimate, plea negotiations had been ongoing for at least 18 months. The court did not believe that defendant was under any duress when he pleaded guilty and found no basis upon which to permit withdrawal of the plea.

On appeal, defendant contends that a *per se* conflict of interest was created when the circuit court did not appoint new counsel to represent him during the hearing on his *pro se* motion to recant the guilty plea. He further contends that the court abused its discretion by denying his *pro se* motion to recant the guilty plea because counsel confirmed telling defendant that his daughter would be subpoenaed to testify in mitigation. Defendant makes no arguments regarding the motion to withdraw the guilty plea filed by counsel.

Defendant first contends that the court should have appointed new counsel to present the arguments in his *pro se* motion to recant the plea when the motion alleged that he was "coerced into pleading guilty by threats from his attorney." Specifically, defendant alleges that a *per se* conflict of interest was created when counsel was forced to defend himself at the hearing.

This court has held there is no *per se* rule entitling a defendant to a new attorney when he files a *pro se* motion alleging his trial counsel was ineffective; rather, the circuit court should conduct a preliminary investigation in order to determine whether the defendant's claim is valid. *People v. Cabrales*, 325 Ill. App. 3d 1, 5 (2001). During this preliminary investigation, the court should examine the factual basis for the defendant's allegations and determine whether the claims concern trial strategy or show possible neglect of the defendant's case. *Cabrales*, 325 Ill. App. 3d at 5. When the factual basis for the defendant's claims show possible neglect of the defendant's case, the court should appoint new counsel to independently analyze the defendant's claims and present them to the court "in a detached yet adversarial manner." *Cabrales*, 325 Ill. App. 3d at 5.

This court's decision in *People v. Allen*, 391 Ill. App. 3d 412 (2009), is instructive. In that case, this court found that the circuit court did not err by conducting a preliminary

investigation in order to determine whether to appoint new counsel when the defendant made *pro se* claims of ineffective assistance in a postplea motion. *Allen*, 391 Ill. App. 3d at 417. As a conflict was not created by the mere filing of a defendant's *pro se* motion, the court was not required to appoint new counsel before the preliminary investigation. *Allen*, 391 Ill. App. 3d at 418. This court further found that the defendant's counsel was not arguing a motion alleging his own ineffectiveness during the preliminary investigation; rather, counsel was engaged in an interchange with the court during which he answered questions and explained the circumstances surrounding the defendant's claims. *Allen*, 391 Ill. App. 3d at 418.

The record reflects that the court conducted a preliminary inquiry into the factual basis of defendant's claim that he was under duress when he entered his plea. Counsel was not forced to argue his own ineffectiveness during this hearing. Instead, he had a conversation with the court, answered the court's questions, and explained the facts surrounding defendant's claims. *Allen*, 391 Ill. App. 3d at 418. At the conclusion of the hearing, the court rejected defendant's claim, as defendant had previously denied being forced to plead guilty and stated that his plea was voluntary. The court did not err when it conducted a preliminary investigation into defendant's claims without appointing new counsel. *Cabrales*, 325 Ill. App. 3d at 5.

Defendant next contends that the circuit court abused its discretion when it denied his *pro se* motion to recant the guilty plea because his plea was involuntary based on counsel's coercive misleading statements that defendant's "only options" were to plead guilty or face his daughter being called to testify in mitigation after a conviction. Defendant highlights counsel's statement during the hearing that he told defendant he would call defendant's daughter as a mitigation witness.

Although a defendant does not have the absolute right to withdraw his guilty plea, he should be allowed to withdraw the plea when it was not constitutionally entered. *People v. Manning*, 227 Ill. 2d 403, 412 (2008). A defendant may challenge the constitutionality of his guilty plea by alleging either that he did not receive the benefit of his bargain with the State or that the plea was not made voluntarily or with full knowledge of the consequences. *Manning*, 227 Ill. 2d at 412. We review the circuit court's ruling on a defendant's motion to withdraw the guilty plea for an abuse of discretion. *Manning*, 227 Ill. 2d at 411-12.

A defendant should be allowed to withdraw his plea when it was entered based on a misapprehension of the facts or the law or a misrepresentation by counsel, or where there is a doubt of the defendant's guilt, the defendant has a defense worthy of consideration or the ends of justice will be better served by

submitting the case to a jury. *People v. Williams*, 328 Ill. App. 3d 879, 884 (2002). However, without substantial objective proof showing that a defendant's mistaken belief was reasonably justified, a defendant's subjective impressions are not sufficient grounds upon which to vacate a guilty plea. *People v. Harris*, 384 Ill. App. 3d 551, 567 (2008). A defendant has the burden to establish, based on objective standards, that the circumstances at the time of the plea justified his mistaken impressions. *Harris*, 384 Ill. App. 3d at 567. The determination of whether a defendant's plea, made based upon counsel's advice, was voluntarily and knowingly made turns on whether the defendant received effective assistance of counsel. *Harris*, 384 Ill. App. 3d at 567-68.

Challenges to guilty pleas which allege ineffective assistance of counsel are subject to the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Manning*, 227 Ill. 2d at 412. In order to satisfy *Strickland's* prejudice prong within the context of a plea proceeding, a defendant must show that but for counsel's errors, he would have rejected the plea and gone to trial. *Harris*, 384 Ill. App. 3d at 368. Whether an alleged error is prejudicial largely depends on whether the defendant is likely to have succeeded at trial. *Harris*, 384 Ill. App. 3d at 568.

Here, the record reflects that counsel planned to call defendant's daughter, among others, to testify in mitigation if defendant was convicted of first degree murder and the case proceeded to a death penalty sentencing hearing. Defendant contends that counsel's characterization of his daughter as a key witness in mitigation should defendant be found guilty coerced him into choosing to plead guilty.

This court questions defendant's characterization on appeal that his counsel's strategy for the mitigation hearing "coerced" him into pleading guilty, as an attorney has the duty to inform his client of possible and probable outcomes if a defendant chooses to proceed to trial (see *People v. Bien*, 277 Ill. App. 3d 744, 751 (1996)). In counsel's opinion, this case did not have significant mitigation evidence, and the complained of statement was counsel's explanation of his strategy should the case reach the mitigation phase. Counsel's "honest assessment" of his client's case cannot be the basis for finding that a defendant's plea was involuntary. *Bien*, 277 Ill. App. 3d at 751. The mere fact that counsel's strategy if defendant was convicted and proceeded to a death penalty hearing was unpleasant to defendant does not turn counsel's honest assessment of the mitigation evidence available into coercion.

Defendant's claim must fail, as he has not established, based on objective standards, that the circumstances at the time

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of his plea justified his mistaken belief that the only way to prevent his daughter from being exposed to the details of this case was to plead guilty. *Harris*, 384 Ill. App. 3d at 567.

For the foregoing reasons, the judgment of the circuit court is affirmed.

Affirmed.