

No. 1-11-0135

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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 C5 50723
)	
ERICA CHRISWELL,)	Honorable
)	Colleen McSweeney-Moore,
Defendant-Appellant.)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Lavin and Justice Sterba concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court did not err in denying defendant's motion to reconsider its dismissal for want of prosecution (DWP) of her *pro se* motion to withdraw her guilty plea. Defendant was acting *pro se* on her motion when she failed to timely attend court, and she failed to provide a reason for that absence in her reconsideration motion. The court also did not abuse its discretion where her motion to withdraw her plea failed to show that her plea was involuntary or that counsel rendered ineffective assistance.
- ¶ 2 Pursuant to a negotiated guilty plea, defendant Erica Chriswell was convicted of aggravated battery and aggravated fleeing or attempting to elude a peace officer and was

sentenced to two years' probation and fines. She appeals *pro se* from the dismissal for want of prosecution of her *pro se* motion to withdraw her plea. For the reasons stated below, we affirm.

¶ 3 On December 2, 2009, defendant was issued traffic citations for the offenses of reckless driving, driving on a suspended or revoked license, failure to wear a seatbelt, operating an uninsured vehicle, and displaying false proof of insurance. She was later charged with aggravated battery, aggravated fleeing or attempting to elude a peace officer, and resisting or obstructing a peace officer for acts on that same day. In particular, the aggravated battery counts alleged that she drove a vehicle while police officer James O'Brien was holding onto it.

¶ 4 On September 17, 2010, defense counsel asked the court for a plea conference under Supreme Court Rule 402(d) (eff. July 1, 1997). When the court explained to defendant the nature of a plea conference and asked her if she wanted such a conference, she agreed. After the conference was held, counsel told the court that defendant wanted to enter a guilty plea "in both counts." The court admonished defendant that aggravated battery is a Class 3 felony punishable by probation or by two to five years' imprisonment. The court described the trial rights defendant would be waiving with her guilty plea, which she replied that she understood, and she signed a jury waiver and a waiver of a pre-sentencing investigation report. The court determined from defendant that she had not been made any promises "other than the agreement with regard to what your sentence will be."

¶ 5 The assistant State's Attorney described the factual basis for the plea, to which defense counsel stipulated. Officer O'Brien would have testified that when he stopped defendant for driving without a seatbelt, she did not produce a valid driving license. When he learned that her license was suspended, he returned to her car to arrest her. He let her make a call on her mobile phone but she refused to end the call despite his "efforts to get her off the phone," so he tried to take the phone from her. She put the car in "drive" and started to drive away while Officer

O'Brien was partially inside her car, but he shifted the gears. Defendant re-engaged the "drive" gear and drove away, and Officer O'Brien sprained his knee as he fell from her car. Officer O'Brien called for back-up and defendant fled, disobeying several stop signs and "at least one" red traffic light until she stopped illegally in front of a health club, ran inside, and hid in the sauna until she was arrested.

¶ 6 The court accepted the guilty plea and sentenced defendant for aggravated battery and aggravated fleeing to two years' probation with 240 hours' community service in the Sheriff's Work Alternative Program (SWAP) and \$650 in net fines and fees (after credit for two days of presentencing detention). The court admonished her pursuant to Supreme Court Rule 605(c) (eff. Oct. 1, 2001) regarding her appeal rights from a negotiated guilty plea.

¶ 7 In October 2010, defendant filed a motion seeking to serve her community service outside SWAP as she could not attend SWAP in light of her work and care for her elderly and severely-ill father and grandmother. She also requested permission to travel to Indiana where her personal trainer is located, which she argued was necessary as her "employment as an entertainer and care giver duties require that [she] stay fit." In support of the latter, she stated that her employer pays for her sessions with the trainer who is "the best in the business which is why I travel such distance." On November 1, 2010, the court held defendant's "30 days of SWAP" in abeyance.

¶ 8 In October 2010, defendant timely filed a *pro se* motion to withdraw her guilty plea alleging ineffective assistance of counsel. She alleged that counsel advised her to plead guilty when she repeatedly told counsel she wanted to go to trial. She stated that she had no motive to commit the charged offenses and alleged that counsel told her that the State need not prove motive to convict and that the court "would not likely 'approve' of my defense," to which defendant took umbrage. She alleged that "an Officer Duffy was hollering 'Black equals crack' at me" while she was at the police station but counsel did not subpoena "the lock up recordings or

booking recordings." She also alleged that counsel did not provide her with all the evidence produced by the State in discovery. Defendant explained her guilty plea despite the court's admonishments by characterizing those admonishments as "legal jargon that spilled from [the judge's] mouth [as] simply a routine speech."

¶ 9 In December 2010, defendant twice amended *pro se* her motion to withdraw her guilty plea. In the first amended motion, she repeated that counsel "failed to present all the evidence to" her and that she would not have pled guilty otherwise, explaining that she saw only one of three videos from the police "dash-cam" and could not properly hear the audio for that video. She also expanded upon her claim that counsel told her that her defense would have to be approved, alleging that counsel also told her that if she went to trial the court would likely give her the maximum sentence. She characterized this as "threatening" and thus rendering her plea involuntary. Defendant argued that "it is foolish of the court system to ask the defendant to rely on a lawyer to argue on their behalf because of ignorance of the law [but] then expect the defendant to understand what they are agreeing to during the sentencing and admonishment."

¶ 10 In her second amendment to the motion to withdraw her plea, defendant alleged that she had since viewed the other "dash-cam" videos and found several points that could have been raised in her defense. She claimed that the videos would show that she did not flee but was "pulling off from an officer who's [*sic*] behavior was excessive and she freely parked" in the fire lane of a health club where she was a member "and waited for officers to detain her" inside the club because she "was afraid." She also claimed that the videos would show that (1) Officer O'Brien was "not touched" by her car, (2) one officer told another that his siren was not working, thus disproving the element of aggravated fleeing that police signaled her to stop, and (3) an officer referred to her over the police radio using a racial slur. She claimed as a point of error that the State suppressed evidence because trial counsel "was informed [that] lock up tapes did

not exist." She alleged that counsel did not research Officer O'Brien's history for any excessive behavior, telling her that there was no means to track such a history in the suburbs. She also alleged that counsel "tried to convince me [that] I was a crazy person," suggesting that counsel as a non-physician had no business opining on her mental health. She reiterated her claim that her plea resulted from counsel engaging in "coercion" that she was "unprepared mentally to fight" because of her work and caring for her father and grandmother. Defendant also argued that, as she is a college-educated degreed and licensed professional in financial services studying for her master's degree, her felony conviction would "destroy my professional career, nullify my licenses, and make it impossible for me to ever work in the financial services industry again."

¶ 11 On January 7, 2011, the court noted that "the case has been continued four times for [defendant] to proceed on the motion and determine whether she was going to represent herself or hire a private attorney." As defendant was not in court, the court dismissed the motion with prejudice for want of prosecution. Later that day, defendant appeared *pro se* on her motion before another judge. The court informed defendant of the DWP, where the court had "called the case at 10:25 and you weren't here," and told her that she would have to motion the case to be heard before the judge that issued the DWP. The record does not state the time of either of these court sessions.

¶ 12 On January 11, 2011, the case appeared upon defendant's *pro se* "re-motion" of her motion to withdraw her plea, before the judge who had issued the DWP. The court stated that defendant was before it "on another motion to withdraw her plea of guilty," to which defendant disagreed. She asserted that she had been in court at 10:30 a.m. on January 7 but the judge had already left, and she argued that the court should have continued the case as "I only came thirty minutes late and you weren't here," while the judge was "usually in court until twelve o'clock." Defendant did not provide a reason for her tardiness but argued that the court should have

continued the case in her absence. The court replied that "I was here because I" issued the DWP, stated that "[t]here is one court call in this courtroom and it is at 9:30" a.m., and explained that "[w]hen you are representing yourself on a motion and you don't appear in court, then the court has really nothing else to do but dismiss the motion. Courts don't just continue defendant's *pro se* motions to try to find out *** the reason that they failed to appear." The court ordered that the DWP would stand, and this appeal timely followed.

¶ 13 On appeal, defendant contends that the court erred in dismissing with prejudice for want of prosecution her motion to withdraw her guilty plea. She contends that the court abused its discretion when it dismissed her motion without a hearing on its merits and that her motion should have been granted on the merits because her guilty plea was not made voluntarily and counsel rendered ineffective assistance. She also asks that any further proceedings in this case be transferred to the State courts of Georgia, where she owns a residence.

¶ 14 We may briefly dispose of the latter point by denying a transfer of this case to Georgia. As does this State (*see* 720 ILCS 5/1-5 (West 2010)), the State of Georgia vests its courts with jurisdiction over criminal cases where some conduct, breach of duty, or result of an alleged crime occurs within the State. Ga. Code Ann. § 17-2-1 (2010). The crimes at issue here involve conduct and effects wholly within Illinois. Moreover, defendant's brief indicates that she has applied for transfer of her probation to Georgia under the Interstate Compact for Adult Offender Supervision. 45 ILCS 170/1 *et seq.* (West 2010).

¶ 15 The circuit court has the authority to plan and control its own docket. *People v. Ramirez*, 214 Ill. 2d 176, 185-86 (2005). Both the dismissal of an action for want of prosecution and the reinstatement of an action after a DWP are matters within a court's discretion. *People v. Aliwoli*, 60 Ill. 2d 579, 581-82 (1975) (DWP of direct criminal appeal). The factors relevant to reviewing an exercise of such discretion are the subject matter under litigation, the reason for the dismissal,

and the consequences thereof. *Id.* Direct criminal appeals should be reinstated where the DWP is attributable to the negligence or malfeasance of defense counsel rather than the defendant personally. *People v. Ross*, 229 Ill. 2d 255, 269-70 (2008). For purposes of reviewing DWPs and motions to vacate a DWP, we consider a motion to withdraw a guilty plea to be substantively similar to a direct criminal appeal, as both are the prescribed method for examining or reviewing a conviction and sentence rather than a collateral challenge.

¶ 16 Here, defendant was proceeding *pro se* on her motion to withdraw her plea, and it was defendant personally who was not in court on that motion when the court issued the DWP of her motion. While she timely moved to reconsider or set aside the DWP, she did not provide the court with a reason for her absence from the courtroom when her case was called. On appeal, she maintains that she has an absolute and unqualified right to a hearing on her motion to withdraw her plea, citing the provision in Supreme Court Rule 604(d) (eff. July 1, 2006) that a motion to withdraw a guilty plea "shall be heard promptly." We are not aware of any cases holding that the right to a hearing on a Rule 604(d) motion bears no exceptions, nor does defendant apprise us of any. She also argues that the court "was to begin [its] case call in the morning at 9:00 a.m. and finish [the] call at 4:00 p.m.," so that it was reasonable for her to arrive at court when she did and expect the judge for her case to be on the bench. However, she provides neither a legal nor factual basis for this bald assertion. Judges of the circuit court do not perform all their duties in the courtroom during scheduled public sessions. Instead, a judge must have sufficient time off the bench to – for the many cases pending before that judge – read motions and pleadings, consider arguments and evidence presented in court, conduct legal research, and reach decisions on pending matters both procedural and substantive.

¶ 17 Moreover, as stated above, we review a DWP and the denial of vacatur of a DWP in light of the proceeding that was dismissed. Here, that was defendant's motion to withdraw her guilty

plea, as amended, upon which she bears the burden of showing that a manifest injustice occurred. *People v. Baez*, 241 Ill. 2d 44, 110 (2011). We will not set aside the trial court's ruling on such a motion unless the plea was entered through a misapprehension of fact or law or there is doubt as to the defendant's guilt so that justice would be better served by conducting a trial. *Id.* For the reasons stated below, the motion as amended failed to meet that burden.

¶ 18 First and foremost, there is no fundamental contradiction between the stipulated testimony of Officer O'Brien and defendant's account of events preceding and immediately following her flight. Upon learning that her license was suspended, Officer O'Brien decided to arrest her but allowed her to make a phone call. When she would not end that call, he tried to take the phone from her but she drove away, then stopped in the fire lane of a health club and went inside, where she was arrested. In short, she admits "pulling off" and driving away from Officer O'Brien but argues that this was justified by his actions. However, section 7-7 of the Criminal Code provides that a "person is not authorized to use force to resist an arrest which he knows is being made either by a peace officer or by a private person summoned and directed by a peace officer to make the arrest, even if he believes that the arrest is unlawful and the arrest in fact is unlawful." 720 ILCS 5/7-7 (West 2010). While this statute does not bar a self-defense claim where an officer uses excessive force, an officer does not employ excessive force when he uses the force required to effect an arrest and protect himself. *People v. Agnew-Downs*, 404 Ill. App. 3d 218, 230 (2010).

¶ 19 Defendant claims that counsel provided ineffective assistance and rendered her plea involuntary by telling her that she could face the maximum sentence and that the court would likely not approve her defense. However, it is counsel's duty to inform a defendant of the possibility and probability of outcomes if defendant chooses to proceed to trial, so that counsel's honest assessment of the case – including that the defendant faces a higher sentence if she goes to

trial – cannot be the basis for holding a guilty plea involuntary. *People v. Hobson*, 386 Ill. App. 3d 221, 243-45 (2008); *People v. Bien*, 277 Ill. App. 3d 744, 751 (1996). Counsel's assessment that the court would not approve her defense – it probably would have been more artful to say that the finder of fact would not likely accept the defense as justification following trial – is supported by the aforementioned law and by the fact that the court accepted her guilty plea with the knowledge that Officer O'Brien reached into defendant's car to take her phone away, then struggled with her for control of the car.

¶ 20 Defendant argued in her motion to withdraw her plea, as amended, that her sentence of probation is excessive and will ruin her career and her life. However, aggravated battery of a peace officer is a Class 2 felony punishable by up to seven years' imprisonment or up to four years' probation. 720 ILCS 5/12-4(e)(2); 730 ILCS 5/5-4.5-35(a), (d) (West 2010). Thus, defendant's sentence of two years' probation, with fines but with her community service held in abeyance, is not excessive. Moreover, she was advised by the court during the guilty plea proceedings of the rights she was waiving and the sentence she was facing, and she replied that she understood both. Against these admonishments and her replies, she argued in her motion that there is an inherent contradiction between the right to counsel in a criminal case and the court admonishing a defendant personally. We categorically reject this assertion, as there is a fundamental difference between counsel explaining the subtleties of the law and its consequences so a defendant can reach informed decisions and the court making clear and unsubtle admonishments in plain language once a defendant has reached a decision. In this case, the court's admonishments to defendant were not esoteric or laden with "legal jargon" as she has claimed. Moreover, she is a college-educated professional who concretely demonstrated comprehension of the court's admonishments by preparing and timely filing a written motion to withdraw her guilty plea.

¶ 21 In her motion as amended, defendant raised several issues that counsel allegedly could have raised by employing all the "dash-cam" videos. However, the record on appeal does not include any videos. Defendant as appellant is obligated to present us with a sufficiently complete record to support her claims of error, so that any doubts raised by the incompleteness of the record are resolved against her. *People v. Hunt*, 234 Ill. 2d 49, 58 (2009). Moreover, only two of these issues concerned Officer O'Brien's stop and defendant's flight therefrom. Defendant alleges that the video would show that "he was not touched by" her car, but the State did not allege, nor did the stipulated factual basis of the plea state, that the car struck Officer O'Brien but that she drove away while Officer O'Brien was holding onto, or partially inside, the car. Defendant also alleges that an officer told another officer that his siren was not working, which allegedly disproves an element of aggravated fleeing. However, a person commits the offense of aggravated fleeing or attempting to elude a peace officer when, as a "driver or operator of a motor vehicle" she "flees or attempts to elude a peace officer, after being given a visual *or* audible signal by a peace officer." (Emphasis added.) 625 ILCS 5/11-204.1(a) (West 2010).

¶ 22 Defendant contends on appeal that counsel rendered ineffective assistance by not presenting evidence that her license was not suspended. However, she is raising this claim for the first time on appeal: nowhere in her motion as amended did she allege that she had a valid license on the day in question. Under Supreme Court Rule 604(d), a claim not raised in a motion to withdraw one's plea is waived for appeal. She also alleges that counsel was ineffective for not subpoenaing medical records "to challenge the State's allegation that a 5'4, 145 pound female caused great bodily harm to Officer" O'Brien. However, the State did not allege that Officer O'Brien suffered great bodily harm, and his injury was alleged to have been caused by her car, or more precisely her act of driving away with him partially inside it.

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¶ 23 We conclude that the court did not abuse its discretion when it denied defendant's motion to reconsider the DWP of her motion to withdraw her guilty plea. Accordingly, the judgment of the circuit court is affirmed.

¶ 24 Affirmed.