

2013 IL App (1st) 111652-U

THIRD DIVISION
June 28, 2013

No. 1-11-1652

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. 08 CR 14635
)	
TRACEY BOLDEN,)	Honorable
)	James M. Obbish,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE NEVILLE delivered the judgment of the court.
Justices Sterba and Hyman concurred in the judgment.

ORDER

- ¶ 1 *Held:* Trial court's denial of defendant's motion to withdraw his guilty plea affirmed over claim of ineffective assistance of counsel.
- ¶ 2 Defendant, Tracey Bolden, entered a negotiated guilty plea to one count of aggravated driving under the influence, and was sentenced to 15 years' imprisonment. Defendant subsequently filed a motion to vacate his guilty plea, contending that the plea was based on the incorrect advice of his counsel that he would be able to challenge his negotiated sentence on appeal. The motion

was denied, and defendant appeals, arguing that his guilty plea was not knowing and voluntary, and that this court should remand to allow defendant to withdraw his guilty plea.

¶ 3 Defendant was charged with 27 counts of aggravated driving while under the influence and one count of reckless homicide stemming from a January 31, 2008, incident during which defendant, while driving under the influence of cocaine, was involved in a car accident which resulted in the death of one victim and great bodily harm to another. Defendant had seven prior felony convictions, which mandated that, if found guilty, he would be sentenced as a Class X offender, which carried a sentencing range between 6 and 30 years. After a Supreme Court Rule 402 conference, the trial court indicated that it would sentence defendant to 15 years' imprisonment, and defendant informed the court that he wished to plead guilty. Pursuant to the agreement, defendant pleaded guilty to one count of aggravated driving while under the influence, and the State dismissed the remaining counts. Defendant stated that his guilty plea was entered of his own free will, and was not due to any promises beyond those specified in the plea agreement. In conformance with its statements at the Rule 402 conference, the trial court sentenced defendant to 15 years' imprisonment. After sentencing, the trial court informed defendant that, to preserve his appellate rights, he was required to file a motion to withdraw his guilty plea or a motion to reconsider his sentence within 30 days.

¶ 4 On May 9, 2009, defendant filed a *pro se* motion to reconsider his sentence. In the motion, he challenged the Class X sentencing scheme, arguing that it constituted an impermissible double enhancement. Defendant's previous counsel was reappointed to represent him on the motion.

¶ 5 At the hearing, defense counsel offered no argument and stood on his client's motion. The trial court denied the motion, finding that there were no double enhancement concerns because defendant's prior convictions were used only to trigger a mandatory enhanced sentencing range, not to extend the sentence. Defendant filed a notice of appeal, and on August 20, 2010, this court

granted defendant's agreed motion to remand for admonitions in compliance with Supreme Court Rule 605(c) and to permit him to file a motion to vacate his guilty plea.

¶ 6 On October 22, 2010, the court provided new admonishments, and thereafter, defendant filed a motion to vacate his aggravated DUI guilty plea. In his motion, defendant asserted that his plea was not knowing and voluntary as a result of ineffective assistance of counsel. He alleged that his counsel had advised him that it was in his best interest to accept the plea deal, and he would later be able to challenge his sentence. Defendant contended that he relied on this incorrect advice, and otherwise would not have accepted the plea agreement.

¶ 7 A hearing on defendant's motion was held on May 6, 2011. Defendant testified in support of the motion, and asserted that he had spoken to his counsel one week prior to entering his guilty plea. His counsel advised him that "emotions were running high" and it would be in defendant's best interest to accept the plea agreement, and later come back and file a motion to reconsider his sentence. Defendant testified that the only reason he accepted the plea was because his counsel told him that "if I take this time now, I could come back later on and the sentence would be modified." Defendant additionally testified that his counsel had provided him with a generic motion to reconsider that could be filed after his plea, which he did in fact use when filing his *pro se* motion.

¶ 8 Defendant's previous counsel testified that he represented defendant during his guilty plea. He stated that initially, the State offered defendant a plea agreement with a recommended sentence of 18 years' imprisonment. Defense counsel conveyed that offer to defendant, and told him that he had three options: (1) he could accept the State's offer; (2) he could request a Rule 402 conference with the trial judge; or (3) he could reject the offer and proceed to trial. Defendant decided that he would like to have a Rule 402 conference. In that conference, the parties presented what they expected the evidence to show at trial, and defense counsel presented several letters of support for defendant in mitigation. Following the Rule 402 conference, the trial court stated that it would

sentence defendant to 15 years' imprisonment. Defendant and his counsel discussed the offer, and defendant decided to plead guilty.

¶ 9 Defense counsel testified that he and defendant had "a lot of discussions" about how they could get his sentence reduced. Counsel told defendant that the only way he could have his sentence modified is if he withdrew his guilty plea, but defendant did not want to withdraw his plea. Counsel testified that they discussed filing a motion to reconsider his sentence, but he maintained that the discussion was in the context of first withdrawing his plea. He testified that at one point, defendant wanted him to file a motion to reconsider his sentence, but counsel refused because his understanding was that such a motion needed to be preceded by the withdrawal of defendant's plea. Counsel admitted that he gave defendant a form motion to reconsider, and told defendant that if he was going to file it, he could use language from the form. He could not remember if, at that time, he repeated to defendant that he needed to withdraw his guilty plea, but he had told him "many, many times." Counsel testified that he never changed or wavered on his advice, and that there was never a question about defendant's understanding. They had many discussions about whether it was in defendant's best interest to go to trial, and defendant ultimately decided, with counsel's consultation, that it was not.

¶ 10 After argument, the trial court denied defendant's motion to withdraw his guilty plea. In so ruling, the court found that defendant was "lying" and that it did "not believe for a second that [his counsel] lied and told the defendant something absurd [like] oh, yeah, plead guilty, then appeal, then somehow your motion to reduce the sentence will come about. It belies the transcript. It belies my assessment of the credibility of witnesses."

¶ 11 Defendant now appeals that judgment, arguing that the trial court erred in denying his motion to vacate his guilty plea, because the record supported his contention that he had been misadvised

by counsel that a motion to reconsider his sentence was a viable option to pursue an appeal and challenge his sentence.

¶ 12 A trial court's decision whether to allow a defendant to withdraw a guilty plea is within the sound discretion of the trial court and will not be disturbed unless it was an abuse of discretion. *People v. Hughes*, 2012 IL 112817, ¶ 32. There is no absolute right to withdraw a guilty plea; rather, defendant must show a manifest injustice under the facts involved. *Hughes*, 2012 IL 112817 at ¶ 32.

¶ 13 A challenge to a guilty plea which alleges ineffective assistance of counsel is subject to the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Hughes*, 2012 IL 112817 at ¶ 44. Under the *Strickland* standard, a defendant can establish ineffective assistance of counsel only if he is able to show that: (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *Hughes*, 2012 IL 112817 at ¶ 44.

¶ 14 Defendant's failure to satisfy either prong defeats a claim of ineffective assistance. *People v. Edwards*, 195 Ill. 2d 142, 163 (2001). Therefore, a court considering a claim of ineffective assistance need not determine whether counsel's performance was deficient before examining the prejudice suffered by defendant as a result of the alleged deficiencies, and if no prejudice is found, the court need not decide whether counsel's performance was constitutionally deficient. *Edwards*, 195 Ill. 2d at 163. Accordingly, we begin our analysis of defendant's claim under the second prong of *Strickland*.

¶ 15 Defendant cites *People v. Edmonson*, 408 Ill. App. 3d 880, 884 (2011), and argues that the only showing necessary to establish prejudice under the second prong of *Strickland* is that defendant would not have pleaded guilty if he had realized that he could not challenge his sentence. The State disagrees, citing *People v. Hall*, 217 Ill. 2d 324, 335 (2005), and *People v. Hughes*, 2012 IL 112817,

¶ 64, to illustrate the firmly established rule that such an allegation is not sufficient—defendant also must assert either a claim of actual innocence, or articulate a plausible defense that could have been raised at trial. We note that *Edmonson* is a second district appellate court decision while *Hall* and *Hughes* were supreme court decisions decided, respectively, before and after *Edmonson*. *Edmonson* does not attempt to distinguish *Hall*, and in fact, it makes no mention of that supreme court decision. We question the reasoning of *Edmonson* and its validity, especially in light of *Hughes*'s reaffirmation of the requirement of an allegation of actual innocence or a plausible defense. In any event, we are bound to follow our supreme court precedent, and accordingly, we follow *Hughes* as the Supreme Court's most recent pronouncement on the subject.

¶ 16 Defendant does not claim to have asserted a claim of actual innocence or a plausible defense, but contends that the court in *Hughes* "signaled the possibility of case-by-case exceptions by specifically excluding from the scope of prejudice a 'bare allegation' or a 'mere assertion' that the defendant would have pleaded not guilty and insisted on going to trial if counsel had not been deficient." By contrast, he argues, his claims are not "bare" or "mere" but are "well-supported[.]" We are not persuaded by this argument. The supreme court's use of the words "bare" and "mere" does not refer to the strength of the evidence to support that allegation, but instead describes the inadequacy of the allegation itself when it is not accompanied by a claim of actual innocence or a plausible defense. Therefore, under the second prong of *Strickland*, the allegation that a defendant would not have pleaded guilty if not for counsel's alleged deficient performance is not sufficient to establish prejudice. Because we find that defendant has failed to establish that he suffered prejudice from his counsel's alleged deficient performance, we need not determine whether counsel's representation fell below an objective standard of reasonableness. *Edwards*, 195 Ill. 2d at 163.

¶ 17 Affirmed.