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2013 IL App (3d) 110697-U

Order filed November 6, 2013

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2013

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 14th Judicial Circuit,
Plaintiff-Appellee,	)	Rock Island County, Illinois,
	)	
v.	)	Appeal No. 3-11-0697
	)	Circuit No. 09-CF-812
	)	
JOHNNY D. ANGEL IV,	)	Honorable
	)	Walter D. Braud,
Defendant-Appellant.	)	Judge, Presiding.

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PRESIDING JUSTICE WRIGHT delivered the judgment of the court.  
Justices Holdridge and Schmidt concurred in the judgment.

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**ORDER**

¶ 1 *Held:* (1) Defendant was not denied his right to a fair hearing on his motion to withdraw his guilty plea. (2) Matter is remanded for the trial court to vacate the DNA fee and re-examine whether any additional fines, fees, or costs specifically challenged by defendant on appeal should be modified.

¶ 2 Pursuant to an open plea agreement, defendant, Johnny D. Angel IV, pled guilty to unlawful use or possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2008)), and was sentenced to 8½ years' imprisonment. The trial court denied defendant's motion to withdraw his



the rear seat passenger. The police discovered a .45-caliber handgun with one round in the chamber and a loaded magazine underneath the front passenger seat, where defendant was seated. Fisk testified that based on the design of the vehicle, the handgun would have to have been placed under the seat from the front. When Fisk spoke with the occupants of the vehicle, Myrick and defendant both said they were unaware of the gun located under the seat.

¶ 8 After hearing the factual basis for the guilty plea, the trial court informed defendant that the range of punishment included a term of probation or conditional discharge of up to 30 months with the possibility of up to 180 days in jail as a condition of probation. In addition, the court advised defendant if he did not receive probation, conditional discharge, or periodic imprisonment, he would be subject to an extended-term sentence of 2 to 10 years' imprisonment in the Department of Corrections. Defendant acknowledged he understood the range of possible penalties.

¶ 9 After further admonishments, defendant stated he was pleading guilty because he was guilty of the offense. The trial court accepted defendant's guilty plea as knowing and voluntary and ordered a presentence investigation report. By agreement with the State, the court released defendant from custody on a recognizance bond pending the sentencing hearing to facilitate defendant's cooperation with the police in other ongoing investigations.

¶ 10 On April 8, 2011, the court allowed Durbin to withdraw as counsel for defendant. Thereafter, the court appointed Nate Nieman to represent defendant for purposes of sentencing. The sentencing hearing was scheduled for July 27, 2011 and on that date, Nieman informed the court that after defendant pled guilty, negotiations with the State produced an offer by the State to recommend a sentence of seven years' imprisonment. Based on this offer, Nieman stated

defendant wanted to verbally request to withdraw his guilty plea. Nieman stated he learned of defendant's intent to withdraw his guilty plea that morning. The court denied defendant's oral motion to withdraw the guilty plea and proceeded to sentencing.

¶ 11 Defendant presented the testimony of police officer Matthew DeSmyter in mitigation. DeSmyter testified that after defendant's release on recognizance bond, defendant assisted the police in one controlled drug buy. DeSmyter believed defendant was making an effort to assist the police initially, but then defendant "got comfortable and started skidding [him] along." DeSmyter stated that defendant's efforts to assist the police were not operationally useful.

¶ 12 The court also learned that defendant was arrested for an unrelated offense while out on the recognizance bond and subsequently returned to jail pending his sentencing hearing. After his return to custody, defendant informed the police about statements a fellow inmate made regarding his pending murder case. Defendant offered to provide testimony to a grand jury regarding information he obtained while in jail but was not called as a witness by the State.

¶ 13 The State indicated defendant was eligible for an extended-term sentence and recommended a sentence of nine years' imprisonment. The State informed the court of defendant's criminal record, which included convictions for aggravated battery, battery, domestic battery, aggravated assault on a peace officer, criminal damage to property, drug offenses, and numerous traffic offenses. The State argued that defendant continued to offend while he was out on recognizance bond.

¶ 14 Based on defendant's criminal history and the nature of the offense, the court found probation would be inappropriate and sentenced defendant to 8½ years' imprisonment. The sentencing order required defendant to pay various fines and fees totaling \$702.02.

¶ 15 After receiving his appeal admonishments, defendant stated that attorney Durbin assured him that if he did not receive a sentence of probation, he would be allowed to withdraw his guilty plea. The court informed defendant that he would have to file a written motion to withdraw his guilty plea before the court could consider this issue.

¶ 16 On August 11, 2011, Nieman made an oral motion to withdraw as counsel based on irreconcilable differences with defendant. Defendant asserted that Nieman lied to the court at his sentencing hearing when Nieman claimed he just found out that morning that defendant wanted to withdraw his plea. Defendant claimed he previously informed Nieman of his intention to withdraw his guilty plea.

¶ 17 The trial court informed defendant it would be difficult to convince the court that Nieman misrepresented himself to the court. The court explained that Nieman dedicated the last 10 years of his life to get his job, and he was respected. The court allowed Nieman to withdraw as counsel, but noted that it did not believe anything defendant said about Nieman. The court appointed attorney Donovan Robertson to represent defendant for posttrial proceedings.

¶ 18 Thereafter, on August 16, 2011, defendant filed a written *pro se* motion to withdraw his guilty plea alleging Durbin told defendant if his open guilty plea did not result in a sentence of probation, he could withdraw his plea at sentencing. The *pro se* motion also claimed Nieman lied to the trial court during sentencing by stating to the court that Nieman just learned that defendant wanted to withdraw his plea on the date of sentencing.

¶ 19 On August 23, 2011, defense counsel filed an amended motion to withdraw defendant's guilty plea, asserting that defendant's plea was not voluntarily or intelligently made because he was under the impression he could withdraw his guilty plea if he received a sentence other than

probation. The motion further asserted that defendant relied on the promises of his prior attorneys and believed he had a valid defense to the charge.

¶ 20 The trial court held a hearing on defendant's amended motion on September 21, 2011. Before testimony was presented, the trial court informed the parties that it had presided over Myrick's case and understood the gun discovered under defendant's car seat was not the gun used in the hospital shooting. Defense counsel agreed with the court's recollection.

¶ 21 Durbin testified that prior to the guilty plea, defendant offered his assistance to the State in exchange for leniency toward his case. Durbin informed defendant that cooperating with the State may be helpful when seeking a lenient sentence. Durbin discussed defendant's possible cooperation with the State, but he did not communicate any formal guarantees to defendant.

¶ 22 During negotiations with the State, Durbin did not advise defendant to enter an open guilty plea with no assurance regarding the nature of his sentence, but that was what the State offered. In relation to this offer, Durbin informed defendant that there were no specific guarantees made based upon his cooperation with the State. According to Durbin, defendant decided to take the State's offer after learning the State was only going to make a favorable sentencing recommendation based upon the level of defendant's actual cooperation with the authorities. Durbin informed defendant that if he did not get what he bargained for or was not given any favorable consideration for his cooperation, it may become a basis to request to withdraw his guilty plea. As part of the open plea, the State agreed only to release defendant on a recognizance bond prior to sentencing for the purpose of assisting the police.

¶ 23 Nieman testified that he represented defendant following his plea of guilty in the case. Nieman stated that defendant wanted to withdraw his guilty plea if the State was not going to

recommend probation. Thereafter, Nieman spoke with Durbin to determine if such an agreement had been made with the State and learned from Durbin that no formal agreement for probation existed. However, Durbin advised Nieman that Durbin understood defendant's cooperation with the police could be offered for the court's consideration at sentencing.

¶ 24 Nieman stated that during ongoing negotiations after the guilty plea and prior to sentencing, the State first offered a seven-year sentence of imprisonment, but then agreed not to make any sentencing recommendation. During these negotiations, the State did not agree to recommend probation. Nieman kept defendant informed of these negotiations and told him that if he was dissatisfied, there was a possibility he could withdraw his plea.

¶ 25 The trial court stated that defendant, as an experienced criminal, knew exactly what he bargained for when he pled guilty. The court stated that Myrick was involved in the drug business and her boyfriend had previously been shot and killed over a drug-related crime. Soon after, Myrick was out with defendant and Wilson in the instant case. The three of them were drinking in the parking lot of a hospital when Wilson harassed and then shot a man waiting for an injured person in the hospital. The court then stated he could not recall if the victim died. In response, both the State and defense counsel informed the court he had not died.

¶ 26 The court went on to state that as defendant and Wilson fled the scene, Myrick picked them up in her vehicle. Myrick drove over 100 miles per hour to get away. Once Myrick's vehicle was stopped, defendant was caught "red handed."

¶ 27 The court noted that defendant had a "terrible" criminal record and an indefensible case. The court asserted that as a result, defendant became an informant to gain leniency in this case. The evidence at defendant's sentencing hearing revealed that defendant did very little to assist the

police while out on bond. The court found it unreasonable for defendant to believe he could withdraw his plea if he did not receive probation because probation was unlikely under the facts and circumstances of the instant case. The court found defendant incredible and noted that it was absurd for defendant to reasonably believe he could withdraw his plea. The court denied defendant's motion. Defendant appeals.

¶ 28

## ANALYSIS

¶ 29

### I. Hearing on Motion to Withdraw Guilty Plea

¶ 30 Defendant first argues he was denied a fair hearing on his motion to withdraw his guilty plea because the trial court relied, in part, on matters outside of the record. He maintains that the court's conduct deprived him of a fair hearing with respect to the written motion to withdraw his guilty plea.

¶ 31 As an initial matter, defendant acknowledges he failed to preserve this issue for review. See *People v. Nevitt*, 135 Ill. 2d 423, 441 (1990). While it has been held that the forfeiture rule should be relaxed when the basis for the objection is the conduct of the trial judge (*People v. Sprinkle*, 27 Ill. 2d 398 (1963)), our supreme court recently clarified that this exception applies only in extraordinary circumstances, such as when the trial court makes inappropriate remarks to the jury (*People v. McLaurin*, 235 Ill. 2d 478, 485-88 (2009)). Here, defendant has not presented any extraordinary reason to relax the forfeiture rule, and we decline to expand this limited doctrine on this basis.

¶ 32 Alternatively, defendant asks this court to review the issue under the plain error doctrine. Under the plain error rule, a reviewing court may consider errors when either: (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against defendant; or

(2) the error is so serious that it denied defendant a fair trial and challenged the integrity of the judicial process. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). However, before addressing whether defendant's claim satisfies the plain error doctrine, we must first determine whether a clear or obvious error occurred. *Id.*

¶ 33 Defendants have a due process right to a fair hearing on a motion to withdraw a guilty plea. *People v. Harris*, 384 Ill. App. 3d 551, 560 (2008). A determination made by the trial judge based upon private investigation or private knowledge, untested by cross-examination or the rules of evidence, may result in the denial of due process of law. *People v. Cunningham*, 2012 IL App (3d) 100013, ¶ 14. However, there is a presumption that a trial judge considered only competent evidence in reaching its decision and this presumption is rebutted only when the record affirmatively demonstrates the contrary. *Id.* Whether a defendant's due process right has been violated based on the trial court's use of material outside of the record is reviewed *de novo*. *People v. Dameron*, 196 Ill. 2d 156, 171 (2001).

¶ 34 First, we focus on the allegations set out in defendant's written motion to withdraw his guilty plea prepared by attorney Robertson. Defendant's motion alleges his decision to enter a guilty plea was not voluntarily or intelligently made because defendant believed he could withdraw his guilty plea if the court did not sentence him to probation. The motion further asserted that defendant believed he had a valid defense to the charge. Now on appeal, defendant additionally contends the court's previously expressed views concerning attorney Nieman's credibility should also be considered by this court..

¶ 35 We begin with the court's comments regarding attorney Nieman's credibility with respect to counsel's motion to withdraw as counsel. Defendant seems to imply the court was

predisposed to find Nieman credible when Nieman later testified before the court concerning defendant's motion to withdraw his guilty plea. The basis of the written motion to withdraw the guilty plea primarily focuses on discussions between attorney Durbin and defendant prior to defendant's decision to enter an open guilty plea. Defendant claims Durbin caused him to believe his guilty plea could be withdrawn if the court did not sentence him to probation.

¶ 36 This assertion focuses on Durbin's credibility concerning events prior to the entry of the guilty plea. Nieman's credibility was not at issue with respect to the promises Durbin communicated to defendant prior to defendant's guilty plea. Durbin, who was present when defendant entered his guilty plea, rebutted defendant's version of the events.

¶ 37 The court determined defendant's stated belief that he could withdraw his guilty plea if he did not receive probation was not credible after receiving Durbin's testimony. See *People v. Cohn*, 91 Ill. App. 3d 209 (1980) (holding that defendant's mistaken subjective impression that she would receive a sentence of probation was not supported by necessary substantial objective proof that it was reasonably justified). Hence, we conclude any previous comments regarding Nieman's credibility did not impact the court's decision with respect to any purported assurances communicated to defendant prior to his decision to enter an open guilty plea .

¶ 38 Next, defendant argues the trial court improperly relied on the facts from Myrick's case, before announcing the decision to deny defendant's motion to withdraw his guilty plea. We agree the trial court began the hearing by reciting facts relating to Myrick's case, which were not part of the record before the court. The court first disclosed his familiarity with Myrick's case and then noted the gun found in defendant's possession on the night in question had *not* been involved in the shooting of the man in the hospital parking lot. This comment would seem to benefit the

defendant since the court knew defendant's gun was not linked to the serious crime being investigated at the time of the traffic stop. The court also commented on Myrick's lifestyle and prior relationships before the date of this occurrence.

¶ 39 However, the factual basis recited to the court at the time of defendant's guilty plea mirrored some of the facts that overlapped information the court learned in connection with Myrick's case. For example, during the factual basis recited when defendant entered his guilty plea, the court learned defendant and Wilson were together in a hospital parking lot when Wilson shot a man in the stomach. The court was also informed that following the shooting, Myrick drove both men away from the scene and became involved in a high speed chase as the driver of the vehicle. These facts were presented to the court prior to the guilty plea and properly noted by the court. The court also properly noted defendant's extensive experience with the criminal courts as it related to the reasonableness of his belief that he could receive probation in light of these "terrible" circumstances.

¶ 40 The trial court is presumed to have considered only competent evidence in deciding defendant's motion to withdraw his guilty plea. *Cunningham*, 2012 IL App (3d) 100013, ¶ 14. The court's brief reference to the facts of Myrick's case, the driver of the getaway car, does not contradict this presumption. The court observed that once Myrick's vehicle was disabled, defendant was discovered seated in the passenger seat and caught "red handed" with a hand gun hidden under the seat. The court's statement is supported by the record since the factual basis recited to the court indicated defendant was the only person in the vehicle who could have placed the gun below the passenger seat.

¶ 41 Under the circumstances of this case, we conclude the trial court's comments regarding

Myrick's case did not deprive defendant of a fair hearing concerning the motion to withdraw the guilty plea. The record reveals ample justification for the court's decision to deny defendant's motion to withdraw his guilty plea based on the testimony of attorney Durbin.

¶ 42

## II. Fines and Fees

¶ 43 Defendant next argues that certain fines and fees imposed by the trial court must be adjusted or vacated. The State claims the costs sheet provided by defendant was not part of the record on appeal, preventing a fair review of these financial consequences. However, subsequent to the submission of the State's brief, the record was supplemented to incorporate defendant's costs sheet from the trial court. We have reviewed the recitation of costs now contained in the record on appeal simply to verify the imposition of these financial consequences which defendant disputes. Nonetheless, we are mindful that the State has not had an opportunity to address this court with respect to the propriety of the specific fines, fees, and assessments challenged by defendant on appeal and identified below.

¶ 44 Defendant argues he was improperly ordered to pay a \$200 deoxyribonucleic acid (DNA) analysis fee imposed on defendant since the record reveals that defendant was ordered to submit a DNA sample for a previous conviction. See 730 ILCS 5/5-4-3(a), (j) (West 2008); *People v. Marshall*, 242 Ill. 2d 285 (2011). Defendant disputes the propriety of the \$200 clerk fee by asserting the maximum fee authorized by statute for a felony conviction was \$100. See 705 ILCS 105/27.1a(w)(1)(A) (West 2008). Next, defendant claims the \$50 state's attorney fee should be reduced to \$40, because the statute only authorized a \$30 fee for imprisonment in the penitentiary and a \$10 fee for entering a guilty plea. 55 ILCS 5/4-2002(a) (West 2008). Defendant claims the \$25 violent crime fee included in his court costs should be reduced to \$4.

725 ILCS 240/10(b) (West 2008).

¶ 45 Defendant also argues the \$10 police services fee was not authorized in the instant case, because the statute relates only to controlled substances convictions. After reviewing the statute authorizing this fine, it appears this fine did not take effect until 2010 and arguably would not apply to an offense committed in 2009. See 730 ILCS 5/5-9-1.1(d) (West Supp. 2009); Pub. Act 96-402 (eff. Jan. 1, 2010); See *People v. Devine*, 2012 IL App (4th) 101028, ¶ 10 (finding that the imposition of fines that do not become effective until after a defendant commits an offense violates *ex post facto* principles). Similarly, defendant's \$15 state police operations fine did not take effect until 2010. 705 ILCS 105/27.3a(1.5), (5) (West 2010).

¶ 46 In addition, defendant requests a \$5-per-day credit against any fines for the time he spent in custody before sentencing. See 725 ILCS 5/110-14(a) (West 2008). Defendant was incarcerated for 82 days prior to sentencing. Accordingly, defendant is entitled to \$410 credit against any fine properly imposed by the trial court.

¶ 47 We note the State concedes the \$200 DNA fee must be vacated. Therefore, we remand the matter to the trial court with directions to vacate the \$200 DNA fee and set the matter for rehearing to re-examine the propriety of the other fines, fees, and costs specifically challenged by defendant in this appeal and vacate or recalculate those amounts, if necessary, as required by statute. Therefore, we remand the matter to the trial court to recalculate the monies due, with respect to the specific funds identified by defendant on appeal, and properly apply the \$5-per-day credit against any fines imposed by the court as part of defendant's sentence.

¶ 48 **CONCLUSION**

¶ 49 For the foregoing reasons, the judgment of the circuit court of Rock Island County is affirmed in part, and remanded with directions.

¶ 50 Affirmed in part, and remanded with directions.