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2013 IL App (3d) 110728-U

Order filed June 3, 2013

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 10th Judicial Circuit,
	)	Peoria County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-11-0728
v.	)	Circuit No. 10-CF-1182
	)	
STANLEY CATCHINGS,	)	Honorable
	)	Stephen A. Kouri,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Justices Carter and Lytton concurred in the judgment.

ORDER

¶ 1 *Held:* (1) Defendant's claim of ineffective assistance of counsel during plea bargaining was inapplicable because the only plea agreement offered by the State included a void sentence; (2) defendant is entitled to a $1,580 credit toward his drug assessment fine for time spent in pretrial custody.

¶ 2 Defendant was charged by a four-count indictment. The State offered a negotiated guilty plea under which defendant would plead guilty to one count and be sentenced to 8 years' imprisonment. Acting upon counsel's erroneous advice that the sentencing range for the offered

count was 6 to 30 years' imprisonment, defendant rejected the offer and proceeded to a stipulated bench trial on the count included in the plea offer. Defendant was found guilty. At sentencing, the court informed defendant that the sentencing range for the offense in question was actually 9 to 40 years' imprisonment, extendable to 80 years. The court sentenced defendant to 10 years' imprisonment. Defendant appeals.

¶ 3 FACTS

¶ 4 Defendant was charged by a four-count indictment with: unlawful possession of between 100 and 400 grams of cocaine with intent to deliver (count I) (720 ILCS 570/401(a)(2)(B) (West 2010)); unlawful possession of between 100 and 400 grams of heroin with intent to deliver (count II) (720 ILCS 570/401(a)(1)(B) (West 2010)); unlawful possession of cocaine (count III) (720 ILCS 570/402(a)(2)(B) (West 2010)); and unlawful possession of heroin (count IV) (720 ILCS 570/402(a)(1)(B) (West 2010)). The sentencing range for a violation of count I or count II was 9 to 40 years' imprisonment, extendable to 80 years, to be served at a minimum of 75%.

¶ 5 The State offered defendant a negotiated plea agreement, under which defendant would plead guilty to count I and be sentenced to eight years' imprisonment. At the time of the offer, both the State and defense counsel were under the mistaken impression that the sentencing range for a conviction on count I was 6 to 30 years' imprisonment with the possibility for 50% good time credit. The offer was contingent on defendant not filing a motion to suppress evidence. Defendant rejected the plea and filed a motion to suppress, which was denied. Defendant and the State agreed to proceed to a stipulated bench trial on count I only. During defendant's jury waiver hearing, the trial court admonished defendant that count I was a Class X felony carrying a possible sentence of between 6 and 30 years' imprisonment.

¶ 6 Defendant was found guilty after a stipulated bench trial. At the sentencing hearing, the State explained that it had recently discovered that the sentencing range for defendant's conviction was actually 9 to 40 years' imprisonment, extendable to 80 years, with the possibility for 25% good time credit. The trial court continued sentencing so that the parties and the court could ensure that they were operating under the proper sentencing range. At a subsequent sentencing hearing, defendant was sentenced to 10 years' imprisonment.

¶ 7 Defendant appeals.

¶ 8 ANALYSIS

¶ 9 I. Ineffective Assistance of Counsel

¶ 10 Defendant claims that his trial counsel provided ineffective assistance when advising defendant to reject the State's plea offer. Defendant asserts that trial counsel informed him that the sentencing range for a conviction on count I was 6 to 30 years' imprisonment, when in actuality, the range was 9 to 40 years' imprisonment, extendable to 80 years. Defendant argues that had he been advised of the correct sentencing range, he would have accepted the State's offer instead of proceeding to trial, where he received a lengthier sentence than that offered in the negotiated plea. Defendant asks this court to vacate defendant's conviction and sentence and remand the cause to the trial court with instructions that the State reoffer defendant the eight-year plea agreement.

¶ 11 The right to effective assistance of counsel extends to the decision to reject a plea offer. *Lafler v. Cooper*, ___ U.S. ___, 132 S. Ct. 1376 (2012); *People v. Curry*, 178 Ill. 2d 509 (1997). Claims of ineffective assistance of counsel at the plea negotiation stage are evaluated under the traditional two-prong standard set out in *Strickland v. Washington*, under which a defendant must

establish that counsel's performance was deficient and that the deficient performance prejudiced defendant's defense. See *Strickland v. Washington*, 466 U.S. 668 (1984). To establish prejudice, a defendant must show a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

¶ 12 To establish prejudice in the specific context of a rejected plea offer, a defendant must show a reasonable probability that, but for his attorney's deficient advice, there is a reasonable probability that: (1) the plea offer would have been presented to the court, *i.e.*, that the defendant would have accepted the offer and the State would not have withdrawn it; (2) the trial court would have accepted the terms of the offer; and (3) either the conviction or the sentence, or both, under the offer would have been less severe than under the judgment and sentence that were actually imposed. *Lafler*, ___ U.S. ___, 132 S. Ct. 1376.

¶ 13 In the present case, defendant has established the first prong of the *Strickland* test: that his trial counsel's performance was deficient. Counsel have an obligation to inform their clients of the potential sentencing range of any charged offense(s). *Curry*, 178 Ill. 2d 509. Because defendant's trial counsel failed to inform defendant of the applicable sentencing range, counsel's performance was deficient, and the first prong of the *Strickland* test is satisfied.

¶ 14 However, defendant has not established the second *Strickland* prong: prejudice. The negotiated offer presented by the State included a sentence outside the sentencing range for the offer's corresponding offense, unlawful possession of between 100 and 400 grams of cocaine with intent to deliver. 720 ILCS 570/401(a)(2)(B) (West 2010). Thus, the sentence offered in the agreement was void, making the entire plea agreement void. See *People v. Gregory*, 379 Ill.

App. 3d 414 (2008). Practically speaking, there is not a reasonable probability that both: (a) the State would not have realized its mistake and withdrawn the offer; and (b) the court would not have realized the parties' mistake and accepted the offer and its void sentence. But more fundamentally, and as a matter of law, defendant could not have legally accepted the void plea offer. Defendant cannot establish *Strickland* prejudice based upon his rejection of a plea offer that he by law could not have validly accepted.

¶ 15 Criminal defendants do not have a constitutional right to engage in plea bargaining. *Lafler*, ___ U.S. ___, 132 S. Ct. 1376. As a result, a defendant's constitutional right to counsel during plea bargaining is triggered only if and when the State chooses to initiate plea negotiations. Thus, the protections of the right to counsel demand that counsel provide effective assistance in relation only to plea agreements actually offered by the State. See *Id.* In the present case, the only plea agreement actually offered by the State was void. As a result, defendant's constitutional right to effective assistance of counsel was not implicated during the plea bargaining process.

¶ 16 Defendant does not claim that counsel provided ineffective assistance in relation to any other potential plea offer or at trial. Therefore, defendant's conviction and sentence are affirmed.

¶ 17 II. $5 Per Day Sentencing Credit

¶ 18 Defendant claims that he is entitled to a $1,580 credit against his $3,000 drug assessment fine for time he spent in pretrial custody. Under section 110-14 of the Code of Criminal Procedure of 1963 (725 ILCS 5/110-14 (West 2010)), a defendant is entitled to a credit of $5 for each day spent in presentence incarceration, to be applied against any fines, including a drug assessment. See, *e.g.*, *People v. Chambers*, 391 Ill. App. 3d 467 (2009).

¶ 19 In the present case, the trial court imposed a $3,000 drug assessment fine against defendant. The court also awarded defendant sentencing credit for the 316 days he spent in presentence custody. However, the court did not award defendant $5-per-day credit for that time. The State concedes that defendant is entitled to a $1,580 credit against his drug assessment fine, corresponding to the 316 days he spent in pretrial custody. We agree and direct the trial court to credit defendant $1,580 to be applied toward his $3,000 drug assessment fine.

¶ 20 CONCLUSION

¶ 21 For the foregoing reasons, the judgment of the circuit court of Peoria County is affirmed in part, modified in part, and remanded with instructions.

¶ 22 Affirmed as modified and remanded with instructions.