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2014 IL App (3d) 120618-U

Order filed April 4, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of the 14th Judicial Circuit,
)	Whiteside County, Illinois,
Plaintiff-Appellee,)	
)	Appeal No. 3-12-0618
v.)	Circuit No. 10-CF-109
)	
DANIEL S. POIERIER,)	Honorable
)	Stanley B. Steines,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE CARTER delivered the judgment of the court.
Presiding Justice Lytton and Justice Schmidt concurred in the judgment.

ORDER

- ¶ 1 *Held:* (1) The trial court did not abuse its discretion in denying defendant's request to proceed *pro se*. (2) The trial court improperly dismissed defendant's motion to withdraw his guilty plea as untimely. (3) In the event that defendant's motion to withdraw his guilty plea is denied on remand, we direct the trial court to modify defendant's fines and fees as directed herein.
- ¶ 2 Pursuant to an open plea agreement, defendant, Daniel S. Poierier, pled guilty to aggravated driving under the influence (DUI) (625 ILCS 5/11-501(a)(5), (d)(1)(C) (West 2010)) and aggravated fleeing and eluding (625 ILCS 5/11-204.1(a)(2) (West 2010)). He was sentenced to concurrent terms of 12 and 6 years' imprisonment, respectively. On appeal, defendant argues

that: (1) the trial court abused its discretion by denying his request to proceed *pro se* during postplea proceedings; (2) his motion to withdraw his guilty plea should have been found timely; and (3) certain fines and fees assessed against him should be adjusted or vacated. We affirm in part, reverse in part, and remand for further proceedings.

¶ 3

FACTS

¶ 4

On June 2, 2012, defendant was charged by information with two counts of aggravated DUI (625 ILCS 5/11-501(a)(5), (6), (d)(1)(C) (West 2010)) and two counts of aggravated fleeing and eluding (625 ILCS 5/11-204.1(a)(1), (2) (West 2010)), for his involvement in a motor vehicle accident. Defendant was initially appointed a public defender, but on July 19, 2010, defendant hired attorney Jack Schwartz to represent him. On August 30, 2010, Schwartz filed a motion for an independent fitness examination, asserting that defendant's mental competency was in question. Schwartz noted that defendant had been under psychiatric care for bipolar disorder and depression from August 2009 until two weeks before the accident.

¶ 5

On December 1, 2010, Schwartz was allowed to withdraw because defendant hired Janet Buttron to represent him. On March 8, 2011, Buttron filed a motion for a fitness examination, asserting that defendant was unable to comprehend the proceedings in his case. Counsel noted defendant's history of psychiatric hospitalizations for his mental illness. Counsel also noted that defendant had significant memory, concentration, and neurological problems since the accident.

¶ 6

On March 28, 2011, the court held a hearing. Defendant testified that he had a history of mental illness. Defendant had been receiving psychiatric treatment since 2000 and was prescribed medications for depression, anxiety, and bipolar disorder. In November 2009, defendant was involuntarily hospitalized due to a suicide attempt where he attempted to asphyxiate himself. Defendant was similarly hospitalized 15 years prior. At the time of the hearing, defendant claimed he was only taking medication at the jail for his anxiety. Defendant

stated that before the instant accident, he had suffered a head injury that he described as a sickness, not an injury. Defendant also stated that he had no recollection of the night of the accident in question. Defendant acknowledged that he did not completely understand the various motions that his attorney discussed with him. In response to questioning by the State, defendant explained that he understood the court proceedings and the roles of the attorneys and the court.

¶ 7 The trial court found that despite defendant's history of mental health issues, defendant showed that he understood the role of all parties and that his attorney was there to help him. The court also found that defendant's inability to recall the night of the accident did not affect his fitness to stand trial. The court found no *bona fide* doubt as to defendant's fitness and denied the motion for a fitness examination.

¶ 8 On April 4, 2011, defendant entered into an open plea of guilty to one count of aggravated DUI (625 ILCS 5/11-501(a)(5), (d)(1)(C) (West 2010)) and one count of aggravated fleeing and eluding (625 ILCS 5/11-204.1(a)(2) (West 2010)). In exchange, the State dismissed the remaining two counts.

¶ 9 On April 29, 2011, defendant filed a *pro se* motion, asserting numerous instances of Buttron's ineffective assistance. On May 4, 2011, defendant filed two more *pro se* motions, which sought to withdraw his guilty plea and also alleged Buttron's ineffectiveness. Defendant asserted that he had been suffering from a brain injury, which caused psychosis, dementia, delirium, and amnesia, and thus was unable to participate in his defense. Accordingly, defendant argued that he should be allowed to withdraw his guilty plea because he was not of sound mind at the time he pled guilty and did not understand the proceedings.

¶ 10 Buttron filed a motion to withdraw as defense counsel, which was argued on May 16, 2011. Defendant initially objected to Buttron's motion, but following a recess to converse with Buttron, defendant no longer objected. The trial court granted Buttron's motion to withdraw.

¶ 11 The trial court then advised defendant that he was currently representing himself, but that he could hire another private attorney or have a public defender appointed. Defendant asked if he could proceed *pro se* with standby counsel, but the court said that if he chose to proceed *pro se*, standby counsel would not be appointed. The court asked if defendant would like the appointment of the public defender. Defendant responded that no one knew his case better than he did and that based on new medical records evidence, he would like to speak with the State's Attorney. The court advised defendant that the State's Attorney could not speak with defendant while he was represented by an attorney. In response, defendant said, "Okay, I'll go *pro se*. I don't know--."

¶ 12 The court admonished defendant in accordance with Illinois Supreme Court Rule 401(a) (eff. July 1, 1984). Following these admonitions, defendant asserted that he still wanted to represent himself. The court warned defendant of the difficulties of self-representation and questioned him about his courtroom experience. Defendant explained that he had never represented himself before, but he had hired two attorneys with whom he was not satisfied. Defendant had been reviewing case law for the past six months and believed that he could represent himself.

¶ 13 The prosecutor voiced his concern regarding defendant's request, noting that defendant was pursuing self-representation in an attempt to speak directly with the State's Attorney. Additionally, the prosecutor pointed to defendant's assertion that he had a brain injury. Defendant responded that within the last month, his brain function had returned, explaining that he did not realize what was occurring in this case until after his guilty plea. In response to questioning by the court, defendant stated that he was only taking pain medication for the head injuries he received during a physical altercation at the jail. Defendant admitted that he had

recently been prescribed medication for his depression, but he had not taken that medication for approximately two months.

¶ 14 The trial court denied defendant's request to proceed *pro se* and appointed a public defender to represent defendant. The court stated that,

"[g]iven the nature of the charges, given defendant's own acknowledgment with regard to not being on prescribed medications with regard to depression; his head injuries that are obvious to the Court today; his own statements that at the time of the guilty plea, which was just back on April 4th of this year, just a month and a half ago, if even that, that he is saying he was not of sound mind and did not understand what was happening, I can't find in good conscience that [defendant] is able to adequately represent himself."

¶ 15 On June 10, 2011, defense counsel filed a motion to withdraw defendant's guilty plea, arguing that defendant was not of sound mind when he entered his plea. On August 3, 2011, defendant informed the court that he wished to withdraw the motion. The trial court granted defendant's request and proceeded to sentencing.

¶ 16 Defendant was sentenced to concurrent terms of 12 and 6 years' imprisonment and ordered to pay various fines and fees. The court awarded defendant 446 days of presentence custody credit and credited him \$200 against his deoxyribonucleic acid (DNA) analysis fee. The State also requested that defendant reimburse the county for the services of his public defender. The trial court denied the request, finding that defendant did not have the ability to pay such a fee.

¶ 17 On August 9, 2011, defense counsel filed a motion to reconsider sentence. On September 18, 2011, the court received an *ex parte* letter from defendant, requesting a court date for his previously filed motion to withdraw guilty plea. On October 23, 2011, the court received another *ex parte* letter from defendant, which included a copy of defendant's previously filed *pro*

se motion to withdraw guilty plea and motion for ineffective assistance of counsel. In the letter, defendant stated that he mailed a motion to withdraw guilty plea on August 30, 2011, from Stateville Correctional Center, and attached proof of service and a notarized affidavit from the same date. Defendant explained that he was not of sound mind when he pled guilty because he suffered from carbon monoxide poisoning resulting from his suicide attempt in 2009, which caused brain damage. Defendant also claimed that because he was taking psychotropic medication and a narcotic, he did not recall his sentencing hearing.

¶ 18 On February 14, 2012, defense counsel filed a motion to withdraw defendant's guilty plea and adopted defendant's *pro se* motion filed October 23, 2011. On June 26, 2012, counsel filed an amended motion to withdraw defendant's guilty plea and an amended motion to reconsider sentence in order to incorporate additional *pro se* filings from defendant.

¶ 19 The court held a hearing on both of defendant's amended motions on July 18, 2012. The State objected to defendant's motion to withdraw guilty plea, claiming it was untimely. Defense counsel argued that defendant mailed his *pro se* motion within 30 days of sentencing, but when it was not received by the court he resubmitted it on October 23, 2011. The court found defendant's motion to withdraw his guilty plea untimely. Additionally, following defendant's testimony, the court denied his motion to reconsider sentence.

¶ 20 ANALYSIS

¶ 21 I. Right to Self-Representation

¶ 22 Defendant first argues that the trial court abused its discretion by denying his request to proceed *pro se* because the record failed to show that he suffered from a severe mental illness that made him incompetent to represent himself.

¶ 23 We initially note that defendant has failed to preserve this issue for appeal. Defendant admits that he did not raise this issue before the trial court, but requests that we review the issue

for plain error. Under the plain error doctrine, 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 (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.*

¶ 24 Criminal defendants have a constitutional right to self-representation under both the United States and Illinois Constitutions. U.S. Const., amend. VI; Ill. Const. 1970, art. I, § 8; *Faretta v. California*, 422 U.S. 806 (1975). For a defendant to invoke the right of self-representation, he must knowingly and intelligently relinquish the right to counsel, and the waiver of counsel must be clear and unequivocal, not ambiguous. *People v. Baez*, 241 Ill. 2d 44 (2011). The context in which a defendant makes such a request is important, as courts must indulge in every reasonable presumption against waiver of the right to counsel. *Id.* Additionally, a court may deny a defendant's request to represent himself where a defendant may be fit to stand trial, but there is evidence that defendant suffers from a "severe mental illness" to the point where he is not competent to conduct trial proceedings on his own behalf. *Indiana v. Edwards*, 554 U.S. 164, 178 (2008). A trial court's decision concerning a defendant's request to represent himself is reviewed for an abuse of discretion. *Edwards*, 554 U.S. 164.

¶ 25 In this case, we find no abuse of discretion by the trial court in denying defendant's request to proceed *pro se*. The record reflects that defendant initially stated he would like to proceed with standby counsel following his attorney's withdrawal from the case, but the trial court denied his request. It was not until the court informed defendant that he could not speak directly with the State's Attorney while represented by counsel that defendant voiced his desire to proceed *pro se*. Even after the court admonished defendant about waiving his right to counsel,

defendant reiterated his request to represent himself, but did so in the context of his unhappiness with the two attorneys he previously hired. Based on the context of defendant's request, it appears that he only had a conditional willingness to proceed *pro se*. See *People v. Burton*, 184 Ill. 2d 1 (1998) (finding that defendant did not clearly and unequivocally invoke his right to self-representation because his request was based on his desire to obtain access to court records). In light of this court's need to indulge in every reasonable presumption against waiver of the right to counsel, we conclude that defendant did not make an unmistakable demand to represent himself. See *Baez*, 241 Ill. 2d 44; *Burton*, 184 Ill. 2d at 22 (quoting *United States v. Weisz*, 718 F.2d 413, 426 (1983)) ("A defendant waives his right to self-representation unless he 'articulately and unmistakably demands to proceed *pro se*' ").

¶ 26 Nevertheless, even if we were to find that defendant's statements could be construed to be a clear and unequivocal demand to proceed *pro se*, we would still conclude that the trial court did not abuse its discretion in denying defendant's request for self-representation. Throughout the proceedings, defendant admitted having been diagnosed with depression, anxiety, and bipolar disorder. Defendant also admitted at the time he requested to proceed *pro se*, he was not taking his prescribed medication for depression. More importantly, only 12 days prior to his request to proceed *pro se*, defendant asserted that he had been suffering from a brain injury, which caused psychosis, dementia, delirium, and amnesia. Due to this brain injury, defendant claimed that when he pled guilty on April 4, 2011, he was not of sound mind and did not understand the proceedings. At other points in the proceeding, defendant also claimed that he suffered from a brain injury resulting from carbon monoxide poisoning that affected his competency. Thus, the record reveals that defendant suffered from mental illness that rendered him unable to carry out the basic tasks needed to conduct posttrial proceedings without the assistance of counsel.

¶ 27 Based on the record before us, we cannot say that the trial court abused its discretion in

denying defendant's request to represent himself. Since we find no error in the trial court's decision, the plain error exception does not apply, and we must therefore honor defendant's forfeiture of this issue. See *Thompson*, 238 Ill. 2d 598.

¶ 28

II. Timeliness of Motion

¶ 29

Defendant next argues that the trial court erroneously dismissed his motion to withdraw his guilty plea as untimely because he placed the motion in the mail within 30 days of sentencing.

¶ 30

Illinois Supreme Court Rule 604(d) (eff. July 1, 2006) states that "[n]o appeal from a judgment entered upon a plea of guilty shall be taken unless the defendant, within 30 days of the date on which sentence is imposed, files in the trial court *** a motion to withdraw the plea of guilty and vacate the judgment." When a motion is received after the due date, the time of mailing shall be deemed the time of filing. Ill. S. Ct. R. 373 (eff. Dec. 29, 2009); *People v. Tlatenchi*, 391 Ill. App. 3d 705 (2009) (providing that the origin of the date of mailing rule is found in Rule 373). Proof of mailing must be established by certificate of the attorney or affidavit of a person other than the attorney, who deposited the paper in the mail, stating the time and place of mailing or delivery, the complete address which appeared on the envelope or package, and the fact that proper postage or the delivery charge was prepaid. Ill. S. Ct. R. 12(b)(3) (eff. Dec. 29, 2009).

¶ 31

Defendant argues that since his *pro se* motion to withdraw his plea was placed in the prison mail system on August 30, 2011, his motion should be considered timely filed. We agree. A court will consider an incarcerated defendant's motion to withdraw a guilty plea timely filed if it is placed in the prison mail system within the 30-day period and complies with Rule 12(b)(3), regardless of the date on which the motion is received by the court or file-stamped. *Tlatenchi*, 391 Ill. App. 3d 705.

¶ 32 Here, the State does not dispute that defendant's proof of mailing complied with Rule 12(b)(3). Instead, the State argues that the date of mailing rule should not apply to defendant's *pro se* motion because the motion was never received by the court, and thus was not made a part of the trial record. Although the State is correct that defendant's original *pro se* motion was never received by the court, a copy of that motion was file-stamped by the court on October 23, 2011. Defendant sent a copy of his motion after he had requested a court date and was informed that the motion was never received by the court. See *People v. Saunders*, 261 Ill. App. 3d 700 (1994) (finding that an incarcerated defendant's only option is to deposit a pleading in the prison mail system, and he cannot control the movement of the document after it is placed in the mailing system). As such, we find that defendant's motion was received by the court and properly made a part of the record.

¶ 33 Moreover, defendant's proof of service and notarized affidavit stated that he placed the original motion in the prison mail on August 30, 2011. It appears from the record before us that defendant took all the necessary steps to ensure that his motion was timely mailed in compliance with Rule 12(b)(3). See *Saunders*, 261 Ill. App. 3d 700 (finding that a defendant's use of the incarcerating institution's notary public minimizes the risk of false affidavits). Therefore, we hold that defendant's motion to withdraw his plea was timely filed when he deposited the original motion in the mail.

¶ 34 The State further argues that defendant's motion should not be considered timely filed because defendant had no authority to file his *pro se* motion while represented by counsel. Generally, it is true that a trial court has no responsibility to entertain a defendant's *pro se* motions during the time he is represented by competent counsel. *People v. Stevenson*, 2011 IL App (1st) 093413. However, in the instant case, defendant's second public defender specifically adopted defendant's *pro se* motion. Furthermore, although counsel did not adopt defendant's

motion until February 14, 2012, defendant's *pro se* motion was timely filed on August 30, 2011, and thus, counsel's amended motion was timely. Accordingly, the cause must be remanded for a hearing on defendant's timely motion to withdraw his guilty plea.

¶ 35

III. Fines & Fees

¶ 36

Lastly, defendant argues that certain fines and fees assessed against him must be adjusted or vacated. As discussed above, we have remanded this cause to the trial court to consider defendant's motion to withdraw his guilty plea. In the event that defendant's motion is granted, his arguments regarding these fines and fees would be rendered moot. However, if defendant's motion is denied on remand, we direct the trial court to correct the fines and fees as addressed below.

¶ 37

Defendant first argues that he was improperly assessed a \$608 public defender fee. The State concedes that the fee must be vacated, and we agree. The record reveals that at sentencing, the trial court denied the State's request to impose this fee on defendant, finding that defendant did not have the ability to pay such a fee. Contrary to the court's order, however, defendant was assessed a \$608 public defender fee. Since this fee was erroneously imposed, we direct the trial court to vacate it and modify defendant's mittimus accordingly. See *People v. Gutierrez*, 2012 IL 111590 (holding that the circuit clerk lacked the authority to impose the public defender fee).

¶ 38

Defendant next requests a \$5-per-day credit against his \$500 DUI equipment fee and \$15 State Police Operations Assistance Fund fine for the time he spent in custody before sentencing. See 725 ILCS 5/110-14(a) (West 2010). The trial court awarded defendant 446 days of presentence custody credit. Thus, defendant has up to \$2,230 in credit available against these fines. See *People v. Weiser*, 2013 IL App (5th) 120055; *People v. Millsap*, 2012 IL App (4th) 110668. Therefore, we direct the trial court to modify defendant's mittimus to reflect a credit of \$515 against his fines.

