

NOTICE
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2014 IL App (4th) 121036-U

NO. 4-12-1036

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
June 17, 2014
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
BRIAN S. CANARD,)	No. 12CF492
Defendant-Appellant.)	
)	Honorable
)	Heidi N. Ladd,
)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Presiding Justice Appleton and Justice Turner concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly denied defendant's motion to (1) reconsider sentence where he entered into a negotiated plea agreement, and (2) withdraw his plea where the record demonstrated the plea was entered knowingly and intelligently.

¶ 2 This case comes to us on the motion of the office of the State Appellate Defender (OSAD) to withdraw as appellate counsel on the ground no meritorious issues can be raised in this case. We grant OSAD's motion to withdraw and affirm the trial court's judgment.

¶ 3 I. BACKGROUND

¶ 4 In April 2012, the State charged defendant by information with retail theft (subsequent offense), a Class 4 felony (720 ILCS 5/16-25(a)(1), (f)(2) (West 2012)). Because of defendant's criminal history, extended-term sentencing applied to this offense.

¶ 5 In June 2012, the State and defendant entered into a plea agreement. The agreement provided defendant would plead guilty to retail theft (subsequent offense). In

exchange for defendant's guilty plea, the State agreed to cap its sentencing recommendation at three years' imprisonment. The State also agreed it would have no objection to a sentence of drug-court probation if defendant was found eligible for such a disposition. Finally, the State agreed it would dismiss charges brought against defendant in Champaign County case No. 12-CF-545.

¶ 6 At the June 2012 hearing on the guilty plea, the trial court advised defendant of the nature of the charge and the range of possible penalties, including the applicability of extended-term sentencing, for the offense. The court advised defendant he had the right to plead not guilty and persist in that plea. The court advised defendant that by pleading guilty, he would give up his right to trial. The court further explained that by pleading guilty, defendant would relinquish his right to be confronted with the witnesses against him and to cross-examine those witnesses.

¶ 7 Defendant told the trial court he understood the nature of the charge against him and the range of possible penalties for the offense of retail theft (subsequent offense). Defendant also informed the court he understood the rights he would be waiving by pleading guilty. Defendant stated the choice to plead guilty was made of his own free will and that no person forced, threatened, or pressured him to enter such a plea.

¶ 8 The trial court then explained it would set the matter for sentencing and order a Treatment Alternatives for Safe Communities (TASC) and drug court suitability evaluation to be completed with the presentence investigation report (PSI). The court explained to defendant it would make the ultimate determination regarding his eligibility for drug-court probation, and it "would not guarantee that [defendant] would get it." Defendant stated he understood everything

the court explained and that the agreement as described accurately stated what defendant expected to result from his guilty plea.

¶ 9 The State then presented the following factual basis for the plea:

"Your Honor, in this case, Wal-Mart loss prevention officers observe [*sic*] the defendant select a pair of headphones and place them in his cart. The defendant then moved a backpack to cover the headphones. He removed the headphones from the package and hid them in a shopping bag. Then he paid for some items, but then passed all points of sale and exited the store without attempting to pay for the headphones he had taken off the shelf. He was apprehended by loss prevention officers where he admitted to both them and the Champaign Police that he had stolen the headphones.

* * *

His priors include the 11-CF-1450, a felony retail theft with a prior here in Champaign County, as well as a 2010 felony retail theft in Edgar County and a 2002 forgery in Howard County, Indiana."

¶ 10 Thereafter, the trial court found defendant had knowingly, understandingly, and voluntarily entered the plea and the factual basis supported the plea of guilty. The court entered judgment on the plea and set the matter for sentencing. The court ordered court services to prepare a PSI and include with that report a TASC and drug-court suitability evaluation. Per the

parties' agreement, the court ordered the charge brought against defendant in Champaign County case No. 12-CF-545 dismissed.

¶ 11 At the September 2012 sentencing hearing, the State recommended defendant be sentenced to three years' imprisonment and stated it did not object to defendant being sentenced to drug-court probation. Defense counsel argued defendant's recent criminal behavior was attributable to his "terrible heroin problem." Defense counsel explained his concern was tailoring defendant's sentence to allow him to enter a rehabilitation program. To this end, defense counsel recommended a sentence of six months' imprisonment, followed by a term of probation.

¶ 12 After permitting defendant to make a statement in allocution, the trial court admonished defendant of his right to appeal and the prerequisites for doing so. See Illinois Supreme Court Rule 604(d) (eff. July 1, 2006) (delineating the requirements of perfecting an appeal following a guilty plea). The court then sentenced defendant to three years' imprisonment, followed by one year of mandatory supervised release (MSR), and awarded defendant 14 days' credit against his sentence. As part of its sentence, the court ordered defendant to "participate in drug treatment at the Department of Corrections," and stated defendant was "to receive no good time credit until he successfully completes that program or has otherwise been excused by the Department of Corrections."

¶ 13 In October 2012, defendant filed motions to reconsider his sentence and withdraw his guilty plea. Defendant's motion to withdraw his guilty plea alleged, in pertinent part:

"4. The Defendant pled guilty because of a belief that he would be accepted into the Drug Court Program.

5. The Defendant further asserts that had he known that he would have been sentenced to three (3) years in the Illinois Department of Corrections, that he would not have entered a guilty plea in this case.

6. The Defendant asserts that he did not intelligently enter a guilty plea in this case."

That same month, the trial court entered a docket entry denying defendant's motion to reconsider his sentence because defendant entered a negotiated plea agreement and set defendant's motion to withdraw his guilty plea for hearing.

¶ 14 At the November 2012 hearing on defendant's motion to withdraw his guilty plea, the trial court denied defendant's motion. The court found the guilty plea had been knowingly, voluntarily, and intelligently entered, and defendant's disappointment with the sentence imposed was no basis for withdrawing the plea. The court thereafter ordered a correction of the written sentencing judgment to show defendant received 23 days' credit for time served, instead of the 14 days originally ordered.

¶ 15 This appeal followed. The trial court appointed OSAD to represent defendant on appeal. In February 2014, OSAD moved to withdraw as counsel on appeal, including in its motion a brief in conformity with the requirements of *Anders v. California*, 386 U.S. 738 (1967). On its own motion, this court granted defendant leave to file additional points and authorities on or before March 17, 2014. Defendant filed none.

¶ 16

II. ANALYSIS

¶ 17 On appeal, OSAD contends no colorable argument can be made that the trial court erred by denying defendant's motion to (1) reconsider sentence or (2) withdraw his guilty plea.

We agree with OSAD.

¶ 18 In *People v. Evans*, 174 Ill. 2d 320, 332, 673 N.E.2d 244, 250 (1996), the supreme court held that a defendant seeking to challenge the sentence imposed pursuant to a negotiated guilty plea "must (1) move to withdraw the guilty plea and vacate the judgment, and (2) show that the granting of the motion is necessary to correct a manifest injustice." The *Evans* court further held "the motion-to-reconsider provisions of Rule 604(d) apply only to open guilty pleas." *Id.* A plea agreement in which the defendant pleads guilty in exchange for the State's agreement to cap its sentencing recommendation is a negotiated plea for purposes of *Evans* and Illinois Supreme Court Rule 604(d) (Ill. S. Ct. R. 604(d) (eff. July 1, 2006)). *People v. Lumzy*, 191 Ill. 2d 182, 186-87, 730 N.E.2d 20, 22 (2000).

¶ 19 In this case, the State and defendant agreed that in exchange for defendant's guilty plea, the State agreed to cap its sentence recommendation at three years in the Illinois Department of Corrections. Because this agreement was a negotiated plea agreement (*id.*), the motion-to-reconsider-sentence provisions of Rule 604(d) did not apply and defendant could only seek to challenge the sentence by withdrawing his guilty plea. *Evans*, 174 Ill. 2d at 332, 673 N.E.2d at 250. Thus, no colorable argument can be made that the trial court erred by denying defendant's motion to reconsider sentence.

¶ 20 OSAD also contends no colorable argument can be made that the trial court erred by denying defendant's motion to withdraw his guilty plea. Defendant's motion to withdraw his guilty plea alleged three grounds for relief: (1) defendant would not have entered a guilty plea had he known he would not be "accepted into the Drug Court Program"; (2) defendant would not

have pleaded guilty had he known he would be sentenced to three years' imprisonment; and (3) defendant did not intelligently enter the plea of guilty. Defendant's motion to withdraw his guilty plea boils down to a claim he did not knowingly or intelligently enter the plea of guilty because he believed he would receive a community-based sentence as opposed to a prison sentence.

¶ 21 Illinois Supreme Court Rule 402 (Ill. S. Ct. R. 402 (eff. July 1, 1997)) was adopted to safeguard the rights of the accused by assuring a guilty plea was entered knowingly, intelligently, and voluntarily. *People v. Daubman*, 190 Ill. App. 3d 684, 693, 546 N.E.2d 1079, 1085 (1989). When a trial court substantially complies with Rule 402, we will infer the plea was entered knowingly, intelligently, and voluntarily. *Id.*; see also *People v. Johns*, 229 Ill. App. 3d 740, 742, 593 N.E.2d 594, 596 (1992) (the constitutional requirement that a plea be voluntary and intelligent is satisfied when the court substantially complies with Rule 402(b)).

¶ 22 In this case, the record shows the trial court admonished defendant in accordance with Rule 402 before accepting his guilty plea. At the June 2012 hearing on the guilty plea, the court explained to defendant (1) the nature of the charge against him, (2) the possible range of penalties for the offense, (3) the right to plead not guilty and persist in that plea, and (4) the rights he would give up by pleading guilty. Defendant stated he understood these admonishments and, in fact, did not challenge those admonishments as insufficient in his motion to withdraw his plea.

¶ 23 Further, the State, when it presented the terms of the agreement to the court, specified it would cap its sentencing recommendation at three years' imprisonment and would not object to drug-court probation if defendant was found eligible. Defendant confirmed the agreement as described by the State accurately reflected the parties' agreement. Moreover, the

court explained to defendant it would not guarantee he would receive drug-court probation, and defendant stated he understood.

¶ 24 Defendant cannot now claim his plea was unknowingly and unintelligently entered into on this basis. Defendant stated he understood the terms of the agreement and the rights he would give up with his guilty plea. Nothing in the record indicates otherwise. Defendant's case of buyer's remorse is no basis for allowing him to withdraw his guilty plea. *People v. Cunningham*, 286 Ill. App. 3d 346, 350, 676 N.E.2d 998, 1001 (1997). Thus, no colorable argument can be made that the trial court erred by denying defendant's motion to withdraw his guilty plea.

¶ 25 III. CONCLUSION

¶ 26 We grant OSAD's motion to withdraw and affirm the trial court's judgment.

¶ 27 Affirmed.