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2014 IL App (4th) 130032-U

NO. 4-13-0032

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

**FILED**  
June 17, 2014  
Carla Bender  
4<sup>th</sup> District Appellate  
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
JUAN MICHAEL VILLARREAL,	)	No. 12CF123
Defendant-Appellant.	)	
	)	Honorable
	)	Robert L. Freitag,
	)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.  
Justices Turner and Steigmann concurred in the judgment.

**ORDER**

¶ 1 *Held:* We grant counsel's motion to withdraw under *Anders v. California*, 386 U.S. 738 (1967), and affirm, as we agree (1) the trial court did not err in denying defendant's motion for substitution of judge, (2) the court sufficiently inquired into defendant's ineffective-assistance-of-counsel claim, and (3) the court did not err in denying defendant's motion to withdraw his guilty plea.

¶ 2 This appeal comes to us on the motion of the office of the State Appellate Defender (OSAD) to withdraw as counsel on appeal because any request for review would be without merit. Specifically, OSAD asserts it can make no meritorious argument that the trial court (1) erred in denying defendant's motion for substitution of judge, (2) did not sufficiently inquire into defendant's ineffective-assistance-of-counsel claim, or (3) erred in denying defendant's motion to withdraw his guilty plea. We grant OSAD leave to withdraw as counsel and affirm the trial court's judgment.

¶ 3

## I. BACKGROUND

¶ 4 On February 4, 2012, a McLean County grand jury indicted defendant, Juan Michael Villarreal, on one count of violation of an order of protection—subsequent offense. On February 10, 2012, in McLean County, defendant was charged by information with one count of violation of an order of protection—subsequent offense. The one-count indictment and the information alleged defendant knowingly committed an act prohibited by the order of protection, in that he contacted Mariah Folks, the person protected by the order, between January 19, 2012, and February 4, 2012, and defendant had been previously convicted of domestic battery. 720 ILCS 5/12-3.4(d) (West 2012). Although initially brought as separate causes of action, the State successfully moved to consolidate defendant's cases.

¶ 5

### A. Motion for Substitution of Judge

¶ 6 On June 6, 2012, defendant filed a *pro se* motion for substitution of judge, alleging Judge Robert L. Freitag was prejudiced against him. At the July 25, 2012, hearing on the motion before Judge James E. Souk, defendant testified Judge Freitag was a prosecutor in a 1997 case against him and presided over cases against defendant in 2009 and 2011. Defendant claimed that during his 2011 jury trial, Judge Freitag made rulings adverse to defendant, including allowing a police officer to testify about and attribute to defendant statements defendant denied making. Defendant also testified Judge Freitag acted as prosecutor in prior cases against defendant's Latin Kings gang-affiliated family members.

¶ 7

The State presented evidence Judge Freitag's involvement in the prosecution of defendant's 1997 case was Freitag's appearance at two hearings and his signature on the plea agreement, which was presented by a different prosecutor who was counsel of record. In defendant's 2009 case, Judge Freitag's involvement was presiding over the plea agreement and

imposing the agreed-upon sentence. In 2011, Judge Freitag presided over defendant's jury trial, and upon the jury finding defendant guilty, Judge Freitag sentenced defendant to five years in prison. Following the hearing, Judge Souk denied defendant's motion for substitution of judge.

¶ 8                                    B. Ineffective-Assistance-of-Counsel Claim

¶ 9                                    On September 17, 2012, the morning of jury selection, defendant told the trial court his attorney was not prepared for trial. Defendant claimed Mariah Folks, a protected person under an order of protection, filed a motion to dismiss the order of protection, which was granted on January 31, 2012, and his attorney did not have that evidence to present at trial. The court asked the clerk to get the record of the order-of-protection proceeding in order to determine if it was in effect at the time of the alleged contact. Defendant also claimed Folks tried to visit him in the county jail and told officers she loved him. Defendant argued this evidence demonstrated Folks violated the order of protection. Defense counsel responded his impression was this evidence would be irrelevant but stated he would look at the evidence.

¶ 10                                   The trial court informed defendant Folks had been subpoenaed to testify, and his attorney would have a chance to cross-examine her. The court suspected defense counsel was correctly assessing the relevance of the evidence defendant wanted to present. The court stated it was aware of defense counsel's preparation, as counsel "practices in this court all the time," and if "he tells me he's ready for trial, I believe he is." The court concluded defendant and counsel "disagree over what you think is relevant, but he's the lawyer; and it's his professional judgment as to what is relevant evidence and what he ought to present."

¶ 11                                   The clerk then returned with the file on the order of protection, showing the order of protection was in effect between January 19, 2012, and February 4, 2012, the dates of the alleged contact. The trial court explained to defendant there was no evidence counsel could have

presented showing the order was not in effect. The court found defendant's ineffective-assistance-of-counsel claim lacked a factual basis.

¶ 12 C. Guilty Plea

¶ 13 Defense counsel then represented defendant would enter a plea of guilty pursuant to a fully negotiated plea agreement. In accordance with the fully negotiated plea, defendant pleaded guilty to one charge of violation of an order of protection in exchange for a sentence of one year in the Illinois Department of Corrections (DOC), to be served concurrently to the sentence defendant was already serving. Additionally, the State agreed to dismiss the one-count indictment for violation of an order of protection.

¶ 14 Prior to accepting defendant's plea, the trial court went over the terms of the agreement, explaining (1) the charge was elevated to a Class IV felony because defendant had previously been convicted of domestic battery, (2) it could impose any term between one and six years, (3) it was required to sentence defendant to a four-year term of mandatory supervised release (MSR), (4) defendant could be fined up to \$25,000, and (5) it was required to impose mandatory fines, fees, and assessments. The court asked defendant if he had any questions, at which time defendant asked if the four-year MSR term would be consecutive to the two-year MSR term he was already required to serve on another case. The court explained defendant would serve a four-year MSR term, as he must serve the longest of the MSR terms imposed.

¶ 15 The trial court admonished defendant of his right to a trial. Defendant was also informed he was not required to plead guilty, and in the absence of his plea of guilty, the State would be required to prove him guilty beyond a reasonable doubt. It was explained that by entering a plea of guilty, defendant would waive (1) his right to trial, (2) his right to confront the witnesses called against him, and (3) the right to present evidence in his own defense. When

questioned by the court, Defendant indicated he understood. The court then asked if anyone forced, threatened, or coerced defendant to plead guilty. Defendant answered, "no." The court also asked whether anyone promised him anything other than what was in the agreement with the State in exchange for his guilty plea. Defendant indicated no one had.

¶ 16 The State presented the factual basis for defendant's plea, explaining Folks obtained an order of protection on December 21, 2011, which was served on defendant January 26, 2011. From January 26, 2011, to February 4, 2011, officers at McLean County jail, where defendant was being held, noted 256 calls from the jail to Folks' phone number. The officers listened to the calls and determined 17 calls had substantiated conversation. Defendant and Folks referred to each other by name, discussed his case, and defendant asked if Folks was pregnant and stated he wanted to marry her. The officer listening to the calls recognized the voices of defendant and Folks.

¶ 17 The trial court then asked defendant, "now that we've gone over your plea, talked about the rights you give up by pleading guilty and those penalties that could have been imposed, understanding all of that, how do you plead to the charge of violating an order of protection?" Defendant answered, "plead guilty." In accepting defendant's plea, the court found the existence of a factual basis and concluded defendant's plea was an "understanding and voluntary waiver." As agreed, the court sentenced defendant to one year in DOC and admonished defendant as to his appeal rights.

¶ 18 D. Motion To Withdraw His Guilty Plea

¶ 19 On October 19, 2012, defendant filed a *pro se* petition to withdraw his guilty plea and vacate the sentence. Defendant's petition raised six issues: (1) his plea was the result of coercion, force, and threat; (2) he was not mentally competent to enter his guilty plea due to

medications he was taking; (3) he had inadequate representation of counsel; (4) he was never informed his sentence was going to be enhanced due to a prior conviction; (5) the prior conviction used to enhance his sentence was more than 10 years old; and (6) he did not recall being admonished as to the rights he was surrendering and the fines he would owe.

¶ 20 At the December 31, 2012, hearing on the motion to withdraw the guilty plea, defendant was represented by defense counsel. The trial court first addressed defendant's ineffective-assistance claim, asking defendant why he felt he received inadequate representation. Defendant explained he and his counsel disagreed on how the law applied to his case. Specifically, defendant wanted to demonstrate Folks violated the order of protection by contacting him while the order of protection was in effect. Defendant also alleged counsel refused to do a background check on Folks or present evidence Folks lied about her criminal record when she attempted to visit him in prison, resulting in a six-month denial of her visiting privileges.

¶ 21 Defense counsel responded he had reviewed the transcripts and defendant's complaints had been previously addressed by the trial court. The court agreed, explaining the fact that Folks contacted defendant was not a defense to the charge and counsel was "just doing his job" by telling defendant this was not a defense. The court found nothing defendant said suggested counsel was ineffective and allowed counsel to proceed.

¶ 22 Defense counsel explained he could not adopt certain allegations in defendant's motion to withdraw his guilty plea because they were contradicted by the record. Counsel told the trial court defendant's claim he was forced, coerced, or threatened into pleading guilty was directly contradicted by defendant's statement at the guilty-plea hearing. The indictment notified defendant the charge was elevated to a Class IV felony due to his prior domestic-battery

conviction. Also, defendant's previous conviction for domestic battery was appropriately used to enhance his current charge even though it was more than 10 years old. Counsel also explained the guilty-plea transcripts demonstrated defendant was admonished of the rights he was surrendering and the fines that would be imposed.

¶ 23 As to defendant's final allegation that he lacked mental competency to plead guilty, defense counsel explained this issue was not addressed on the record. Counsel told the trial court defendant had records demonstrating he was prescribed Prozac, had a history of emotional disturbance, and DOC had suspended the medication a couple of months before the plea hearing. Counsel stated defendant's favorite uncle died and he was depressed at the time of the hearing. Counsel reviewed the transcripts and did not find that the court inquired whether defendant was taking psychotropic medications or felt emotionally fit to plead guilty. Counsel stated he did not have a *bona fide* doubt as to defendant's fitness when he pleaded guilty.

¶ 24 The State agreed with defense counsel that many of defendant's complaints were directly contradicted by the record. The State argued the trial court was not required to ask if defendant was on psychotropic medication or if he felt competent, as the record showed defendant asked specific questions regarding some of the credit and the MSR required in the case, demonstrating he understood the effect of his guilty plea.

¶ 25 The trial court agreed with the State, concluding it was not required to inquire about defendant's competency because it had carefully reviewed the record and found "nothing here to suggest that there was any *bona fide* doubt as to the defendant's fitness at the time he entered the plea." The court noted defendant's ability to communicate and ask questions at the plea hearing refuted his claim he was incompetent to plead guilty. The court denied defendant's motion, finding his plea was knowingly and voluntarily entered. This appeal followed.

¶ 26

## II. ANALYSIS

¶ 27 OSAD moves to withdraw as counsel pursuant to the Supreme Court's decision in *Anders v. California*, 386 U.S. 738 (1967), because it can raise no arguable claims. The record shows service on defendant. On its own motion, this court granted defendant leave to file additional points and authorities by February 10, 2014. He filed none. After reviewing the record, consistent with our responsibilities under *Anders*, we agree defendant's claims are without merit.

¶ 28 A. Defendant's Motion for Substitution of Judge

¶ 29 OSAD first argues it can make no colorable argument the trial court erred in denying defendant's motion for substitution of judge. We agree.

¶ 30 Illinois Supreme Court Rule 63(C)(1) (eff. Apr. 16, 2007) states, "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: (a) the judge has a personal bias or prejudice concerning a party \*\*\* [or] (b) the judge served as a lawyer in the matter in controversy." The "matter in controversy" referenced in Rule 63(C)(1) means the case currently pending before the court. *People v. Storms*, 155 Ill. 2d 498, 504, 617 N.E.2d 1188, 1190 (1993). Further, "[m]erely having a previous involvement with a defendant does not, *per se*, require disqualification." *People v. Del Vecchio*, 129 Ill. 2d 265, 277, 544 N.E.2d 312, 318 (1989). Here, defendant claims Judge Freitag was a prosecutor in a prior case, not the matter in controversy.

¶ 31 Further, a trial judge's prior adverse ruling against a defendant does not disqualify the judge from hearing a later case involving the same defendant. *People v. Jones*, 48 Ill. 2d 410, 413, 270 N.E.2d 409, 410 (1971). Judge Freitag's adverse evidentiary ruling in a previous

case does not show he was biased against the defendant. Consequently, we agree OSAD can make no colorable argument the trial court erred in denying defendant's motion for substitution of judge.

¶ 32 B. Defendant's Ineffective-Assistance-of-Counsel Claim

¶ 33 OSAD next argues it can make no colorable argument the trial court failed to sufficiently investigate defendant's claim he received ineffective assistance of counsel. We agree.

¶ 34 "The law requires the trial court to conduct some type of inquiry into the underlying factual basis, if any, of a defendant's *pro se* posttrial claim of ineffective assistance of counsel." *People v. Moore*, 207 Ill. 2d 68, 79, 797 N.E.2d 631, 638 (2003). "In cases in which the defendant has filed a *pro se* posttrial motion alleging ineffective assistance of counsel, we ask 'whether the trial court conducted an adequate inquiry' into the allegations." *People v. Peacock*, 359 Ill. App. 3d 326, 339, 833 N.E.2d 396, 407 (2005) (quoting *Moore*, 207 Ill. 2d at 78, 797 N.E.2d at 638). In conducting this inquiry, the trial court "examine[s] the factual basis of the defendant's claim" to determine if the claim has merit or if the alleged errors pertain only to matters of trial strategy. *Moore*, 207 Ill. 2d at 77-78, 797 N.E.2d at 637. The trial court need only appoint new counsel for a hearing on defendant's allegations if they "show possible neglect of the case." *Id.* at 78, 787 N.E.2d at 637.

¶ 35 Here, defendant first alleged he received ineffective assistance of counsel on the morning of his scheduled trial. The trial court listened to defendant's allegations and questioned him regarding his allegations. Defendant claimed his attorney refused to present evidence the order of protection was dismissed. The court investigated this claim and determined the order was in effect when the State alleged defendant contacted Folks. The court found defendant's

other claims lacked a factual basis, as they amounted to defendant and counsel disagreeing about what facts were legally relevant. Defendant reiterated the same allegations at the hearing on his motion to withdraw his guilty plea. Again, the court listened to defendant's allegations, asked follow-up questions, and questioned counsel. The court explained the fact Folks may have contacted defendant was not a defense, and counsel was not ineffective for not pursuing this evidence.

¶ 36 The record clearly demonstrates the trial court adequately investigated defendant's allegations before concluding they lacked a factual basis. Therefore, we agree with OSAD no colorable argument can be made the court did not sufficiently investigate defendant's claims.

¶ 37 C. Defendant's Motion To Withdraw His Guilty Plea

¶ 38 Next, OSAD maintains no colorable argument can be made the trial court abused its discretion in denying defendant's motion to withdraw his guilty plea. Defendant asked the court to withdraw his guilty plea for six reasons: (1) his plea was the result of coercion, force, and threat; (2) he was not mentally competent to enter his guilty plea due to medications he was taking; (3) he had inadequate representation of counsel; (4) he was never informed his sentence was going to be enhanced due to a prior conviction; (5) the prior conviction used to enhance his sentence was more than 10 years old; and (6) he did not recall being admonished as to the rights he was surrendering and the fines he would owe.

¶ 39 "[T]here is no absolute right, on the part of a defendant, to withdraw a guilty plea." *People v. Feldman*, 409 Ill. App. 3d 1124, 1127, 948 N.E.2d 1094, 1098 (2011). Rather, the defendant has the burden to demonstrate to the trial court the necessity of withdrawing a plea. *Id.* "We review the trial court's decision to deny a defendant's motion to withdraw guilty plea for an abuse of discretion." *People v. Chavez*, 2013 IL App (4th) 120259, ¶ 14, 998 N.E.2d 143. We

review *de novo* whether the trial court properly admonished defendant and complied with Rule 402(a). See *People v. Hayes*, 336 Ill. App. 3d 145, 147, 782 N.E.2d 787, 789 (2002).

¶ 40 First, defendant was properly admonished under Illinois Supreme Court Rule 402(a) (eff. July 1, 2012). Rule 402(a) states:

"The court shall not accept a plea of guilty or a stipulation that the evidence is sufficient to convict without first, by addressing the defendant personally in open court, informing him or her of and determining that he or she understands the following:

(1) the nature of the charge;

(2) the minimum and maximum sentence prescribed by law, including, when applicable, the penalty to which the defendant may be subjected because of prior convictions or consecutive sentences;

(3) that the defendant has the right to plead not guilty, or to persist in that plea if it has already been made, or to plead guilty; and

(4) that if he or she pleads guilty there will not be a trial of any kind, so that by pleading guilty he or she waives the right to a trial by jury and the right to be confronted with the witnesses against him or her; or that by stipulating the evidence is sufficient to convict, he or she waives the right to a

trial by jury and the right to be confronted with any witnesses against him or her who have not testified." Ill. S. Ct. R. 402(a) (eff. July 1, 2012).

¶ 41 In this case, the record shows the trial court admonished defendant in accordance with Rule 402 before accepting his guilty plea by explaining (1) the nature of the charge against him, (2) the possible range of penalties for the offense, including fines, fees, and assessments, (3) the right to plead not guilty and persist in that plea, and (4) the rights he would give up by pleading guilty. Defendant indicated on the record he was not forced, coerced, or threatened into pleading guilty and the State presented a factual basis for the plea. We agree defendant's claim his plea was the result of coercion, force, and threat is inconsistent with the record and must fail.

¶ 42 Second, the trial court must order a fitness hearing if a *bona fide* doubt exists as to the defendant's fitness to plead guilty. *People v. Williams*, 364 Ill. App. 3d 1017, 1023, 848 N.E.2d 254, 259 (2006). "A defendant is fit to plead guilty, stand trial, or be sentenced if he is able to understand the nature and purpose of the proceedings against him or to assist in his defense." *Id.* Here, no *bona fide* doubt existed as to defendant's ability to understand the proceedings and assist in his own defense. Defendant asked the court appropriate questions, indicating he understood the ramifications of his guilty plea. The fact that defendant had been taking Prozac a few months before the proceedings did not require the court to conclude the record showed a *bona fide* doubt as to defendant's competency to plead guilty. See *People v. Mitchell*, 189 Ill. 2d 312, 330, 727 N.E.2d 254, 266 (2000) (taking psychotropic medication does not automatically create a *bona fide* doubt of defendant's fitness).

¶ 43 Third, defendant did not receive ineffective assistance of counsel. Defendant wanted counsel to present evidence Folks had contacted him and lied about her criminal past.

Folks' criminal past was not relevant to whether defendant had contact with her, and the fact Folks may have contacted defendant was not a defense to the charge. Counsel properly exercised his professional judgment in refusing to pursue this evidence.

¶ 44 Fourth, the indictment informed defendant his prior conviction for domestic battery would enhance his sentence. Fifth, it was irrelevant that defendant's conviction for domestic battery was more than 10 years old, as the sentencing statute does not place any time limitation on previous convictions. See 720 ILCS 5/12-3.4 (d) (West 2012). Sixth, the record clearly indicates the court admonished defendant as to potential fines.

¶ 45 We agree OSAD can make no colorable argument the trial court abused its discretion in denying defendant's motion to withdraw his guilty plea.

¶ 46 III. CONCLUSION

¶ 47 For the foregoing reasons, we grant OSAD's motion for leave to withdraw as counsel and affirm the trial court's judgment.

¶ 48 Affirmed.