

No. 1-13-2792

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 11 CR 14669
)	
KENON SCULLARK,)	Honorable
)	Evelyn B. Clay,
Defendant-Appellant.)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Justices Cunningham and Harris concurred in the judgment.

O R D E R

¶ 1 *Held:* The trial court did not abuse its discretion in denying defendant's motion to withdraw his guilty plea when it found no evidence that defendant's trial counsel misinformed defendant about his sentence or that defendant's psychotropic medication affected his ability to give a knowing and voluntary plea of guilty.

¶ 2 Defendant Kenon Scullark entered a negotiated guilty plea to aggravated criminal sexual assault and was sentenced to 30 years in prison with a mandatory supervised release term of 3 years to life. Defendant timely moved to withdraw his guilty plea, arguing his trial counsel provided ineffective assistance of counsel by informing him that he would only serve 50% of his

sentence rather than 85% and that he was on psychotropic medication that affected his ability to enter a valid plea of guilty. The trial court denied his motion. On appeal, defendant contends that the trial court abused its discretion when it did not allow him to withdraw his guilty plea.

¶ 3 Defendant was arrested and charged with 20 counts of aggravated criminal sexual assault, 2 counts of armed robbery, 2 counts of aggravated kidnapping, 2 counts of aggravated vehicular hijacking, 4 counts of criminal sexual assault and 1 count of reckless discharge of a firearm.

¶ 4 On August 21, 2012, defendant entered a negotiated guilty plea to a single count of aggravated criminal sexual assault. The following colloquy occurred between the trial court and defendant:

"[Trial court]: [Defendant], you just heard the [S]tate relate the agreement, the terms of the agreement that you have reached, the two sides have reached. Do you wish to accept the prosecutor's offer?

[Defendant]: Yes.

[Trial court]: This is – the court will endorse this agreement and I will accept your plea under this agreement. This is Count 10 that you agree to plead guilty to and this is a Class X felony offense and the charge is aggravated criminal sexual assault.

In Illinois, the penalty for violation of a Class X criminal statute ranges from 6 to – the range of the penalty is from 6 to 30 years for the average Class X penalty. 6 to 30 years. However, this Count, Class [sic] 10, carries 15 additional years for a violation on this particular statute.

So that's the range of sentencing on this count. This type of charge is 6 to 45 years in the Illinois Department of Corrections, followed by three years *** [p]arole. Three

years minimum to life as parole. And that's now called parole. Parole is called[,] now called[,] mandatory supervised release. This is an eighty-five percent sentence.

Do you understand now, [defendant], the nature of this charge?

[Defendant]: Yes.

[Trial court]: It's a Class X felony offense. And you understand the range of penalty is from 6 to 45 years on this particular charge?

[Defendant]: Yes.

[Trial court]: You also understand that the period of parole, that this is an eighty-five percent sentence. Do you understand this?

[Defendant]: Yes.

[Trial court]: You have to serve eighty-five percent of this sentence. And that this will be followed by a period of parole from three years to life and that's called mandatory supervised release now. Do you understand that?

[Defendant]: Yes.

[Trial court]: Now, do you understand everything that I have just told you?

[Defendant]: Yes.

[Trial court]: With that understanding, do you still wish to plead guilty?

[Defendant]: Yes.

* * *

[Trial court]: Are you pleading guilty voluntarily, [defendant]?

[Defendant]: Yes.

[Trial court]: Did anyone force you in any way to accept the prosecutor's offer?

[Defendant]: No.

[Trial court]: Did anyone threaten you in any way to have you accept the prosecutor's offer?

[Defendant]: No.

[Trial court]: Did your attorney threaten you or in any form or fashion to have you accept the prosecutor's offer?

[Defendant]: No.

[Trial court]: Did the prosecutor promise you anything other than this recommended sentence?

[Defendant]: No."

After the State presented the factual basis to support defendant's plea of guilty, the trial court accepted defendant's plea of guilty.

¶ 5 Twenty-three days after his plea of guilty, defendant filed a timely *pro se* motion to withdraw his guilty plea and vacate his sentence alleging that his trial counsel "misinformed [him] as to the law" by telling him that his 30-year sentence would be served at 50% instead of 85%. Defendant also alleged that he was on several psychotropic medications that affected his ability to voluntarily and intelligently plead guilty.

¶ 6 Thirty-one days after defendant's plea of guilty, his trial counsel filed an untimely motion to vacate defendant's sentence as being unconstitutional due to various alleged errors.

Defendant's trial counsel subsequently admitted he miscalculated the days in which his motion to vacate defendant's sentence could be timely filed. Because of this admission and because defendant's *pro se* motion alleged ineffective assistance of counsel, the trial court allowed

defendant's trial counsel to withdraw and appointed the public defender to represent defendant on both motions.

¶ 7 Thereafter, new privately retained counsel appeared on defendant's behalf and the public defender withdrew its representation of defendant. At a subsequent court date, the State told the trial court that it received a behavioral clinical examination of defendant that the court had ordered. The report indicated that defendant "was mentally fit to stand trial with medication and mentally fit to plead [guilty] with medication" on the date of his guilty plea.

¶ 8 At the hearing on defendant's motions, defendant's new counsel adopted defendant's timely filed *pro se* motion to withdraw his guilty plea and vacate his sentence and withdrew the untimely motion filed by his trial counsel. Defendant testified that his trial counsel told him on August 20, 2012 – the day before he pled guilty – that the State was "offering [him] 30 years at 50 percent." The following day, his trial counsel told him the State made him a good offer and that he would "come home when [he was] still young." Defendant's trial counsel again told him the agreement was "30 years at 50 percent." On cross-examination, defendant admitted the trial court transcript indicated that the trial court told defendant multiple times that his sentence was to be served at 85%. However, he stated he did not hear the trial court because he was talking to his trial counsel at the time and only answered "yes" to the trial court during his admonishment because his trial counsel told him to do so.

¶ 9 The trial court denied defendant's motion to withdraw his guilty plea and vacate his sentence. The court stated that "[d]efendant only demonstrates today that he wasn't paying attention when he was given his rights." Furthermore, the court stated that there was no

corroboration of any conversation defendant had with his trial counsel in regard to serving the sentence at 50% and "in fact, the record rebuts that [allegation]."

¶ 10 On appeal, defendant contends that the trial court abused its discretion when it denied his motion to withdraw his guilty plea because it was not made knowingly and intelligently where his trial counsel was ineffective in telling him that his sentence would be served at 50% rather than 85%. Defendant further argues that he was not paying attention during the trial court's admonishment because he was talking with his trial counsel, and his trial counsel told defendant how to respond to the trial court. Finally, defendant argues that when he pled guilty, he was on psychotropic medication which rendered him unable to comprehend the proceedings.

¶ 11 A defendant's decision to enter a plea of guilty is a decision that belongs only to the defendant. *People v. Medina*, 221 Ill. 2d 394, 403 (2006). The defendant's ability to withdraw his guilty plea, however, is not an absolute right. *People v. Manning*, 227 Ill. 2d 403, 412 (2008). Rather, the decision of whether to allow a defendant to withdraw his guilty plea is within the discretion of the trial court and will not be reversed absent an abuse of discretion. *People v. Davis*, 145 Ill. 2d 240, 244 (1991).

¶ 12 The parties agree that misinforming a defendant about the length of a sentence or the percentage of time that must be served would constitute ineffective assistance of counsel. See *Manning*, 227 Ill. 2d at 412; *Davis*, 145 Ill. 2d at 244. Thus, the key question presented is whether trial counsel misinformed defendant that he would have to serve his 30-year prison sentence at 50% rather than 85%.

¶ 13 The trial court heard the testimony of defendant where he claimed he was misled by his trial counsel and told what to say. However, the trial court noted that defendant's testimony was

contradicted by the record of the proceedings of his plea agreement where at least three times defendant was told that his 30-year sentence would be served at 85%. While the trial court did not expressly make a credibility determination, it inherently rejected defendant's testimony as incredible when it found that there was no factual basis for his allegations and that they were contradicted by the record of the plea proceedings. When judging a trial court's decision against an abuse of discretion standard, we must recognize the trial judge's superior position to assess the credibility of any testimony given. See *People v. Harris*, 384 Ill. App. 3d 551, 568-69 (2008). Here, we cannot find that the trial court's determination, which was based in part on a consideration of defendant's credibility, constituted an abuse of discretion.

¶ 14 Defendant argues that the trial court abused its discretion when it refused to allow him to withdraw his guilty plea because his statements concerning the alleged misinformation were either "unrebutted" or "uncontradicted." In support of his argument, defendant cites to three cases. One case, *Davia v. Star Inc.*, 2011 IL App (2d) 101150-U, is unpublished and "may not be cited by any party except to support contentions of double jeopardy, *res judicata*, collateral estoppel or law of the case." Ill. S. Ct. R. 23(e)(1) (eff. July 1, 2011). However, defendant did not cite *Davia* for any of the above-mentioned purposes, and we have given it no consideration. The other two cases, *Nibco, Inc. v. Johnson*, 98 Ill. 2d 166 (1983) and *Prudential Property & Casualty Insurance Co. v. Dickerson*, 202 Ill. App. 3d 180 (1990), are inapposite civil cases where the procedural posture and proceedings in question were completely unrelated to a hearing on a motion to withdraw a guilty plea.

¶ 15 Finally, defendant argues that his psychotropic medication caused his plea to be "unintelligible and involuntary." However, the record indicates that defendant was subject to a

behavioral clinical examination, which revealed that defendant "was mentally fit to stand trial with medication and mentally fit to plead [guilty] with medication." Furthermore, section 104-21 of the Code of Criminal Procedure of 1963 states "[a] defendant who is receiving psychotropic drugs shall not be presumed to be unfit to stand trial solely by virtue of the receipt of those drugs or medications." 725 ILCS 5/104-21(a) (West 2010). The behavioral clinical examination clearly indicates that the psychotropic medication did not affect his ability to intelligently and voluntarily plead guilty.

¶ 16 Because there is no factual basis to support defendant's allegations that his trial counsel misinformed him of his plea sentence and no evidence that defendant's use of psychotropic medication prevented him from giving a knowing and voluntary guilty plea, we cannot conclude that the trial court abused its discretion in denying defendant's motion to withdraw his guilty plea.

¶ 17 For the reasons stated above, we affirm the judgment of the circuit court of Cook County.

¶ 18 Affirmed.