2015 IL App (2d) 150189-U
No. 2-15-0189
Order filed December 24, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. STEVEN L. MANSON, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of McHenry County. Nos. 09-CF-932 09 CF-975 Honorable Gordon E. Graham, Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Burke and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err by failing to conduct an evidentiary hearing on defendant's postplea motion: by standing on the motion, defense counsel validly waived, on defendant's behalf, any right to such a hearing, and, given that waiver, the court's failure to conduct one was not plain error.

¶ 2 Defendant, Steven L. Manson, entered a nonnegotiated guilty plea in the circuit court of McHenry County to a single count each of aggravated driving under the influence of alcohol (DUI) (625 ILCS 5/11-501(d)(2)(D) (West 2008)) and aggravated intimidation (720 ILCS 5/12-6.2 (West 2008)). The trial court sentenced defendant to consecutive prison terms of 13 years for

aggravated DUI and 7 years for aggravated intimidation. Defendant moved, *pro se*, to reconsider his sentences and the trial court appointed counsel, who filed an "Amended Motion to Reconsider and Motion to Withdraw Guilty Plea." The trial court denied the motion, but, because the record did not show that defendant's attorney had complied with Illinois Supreme Court Rule 604(d) (eff. July 1, 2006), we remanded the case for further proceedings. *People v. Manson*, No. 2-12-1393 (Aug. 8, 2013) (minute order). On remand, defendant's attorney filed a second amended motion. The trial court denied the motion and this appeal followed. Defendant argues that the trial court erred by failing to conduct an evidentiary hearing on the motion. We affirm.

¶ 3 In his second amended motion, defendant argued, *inter alia*, that when he entered his plea he was under the impression that the State had agreed to a sentencing cap and that he could not receive prison terms totaling 20 years. Defendant was not present at the hearing on the motion. His attorney stated that defendant "indicated his desire not to be writted up." After indicating that he would be "proceeding in [defendant's] absence," defendant's attorney elected to "stand on the pleadings," whereupon the trial court denied the motion. Citing *People v. Norris*, 46 Ill. App. 3d 536 (1977), defendant argues that "when [a postplea motion] is grounded in facts not of record, an evidentiary hearing must follow where a defendant has alleged sufficient facts to challenge the correctness of the plea proceedings." Defendant contends that the allegations set forth in his motion satisfy that standard.

¶ 4 Defendant's reliance on *Norris* is misplaced. In that case, the attorney who represented the defendant in the postplea proceedings had also represented him when he entered his plea. In his postplea motion, the defendant argued that he had not received the effective assistance of counsel in connection with his plea. At the hearing on the motion, defendant's attorney stated,

" 'I obviously am not going to be a witness against Mr. Norris on his behalf.' " *Id.* at 538. In *Norris*, the reason that no evidence was presented was that the defendant's attorney labored under a disabling conflict of interest. Here, in contrast, defendant's attorney labored under no such conflict of interest. No evidence was presented in this case because, for whatever reason, defendant's attorney chose not to present any. Nothing in *Norris* suggests that that choice is grounds for reversal.

¶ 5 Defendant argues that, to the extent he chose not to appear in court on the date his postplea motion was heard, that choice should not operate as a waiver of his right to an evidentiary hearing. Defendant contends that he might have done so with the expectation that an evidentiary hearing would be scheduled for a later date. Defendant cites nothing in the record that would support such speculation about his reason for failing to attend the hearing. More importantly, however, counsel's decision to stand on the motion, without offering defendant's testimony or any other evidence and without seeking a continuance to do so, operated as a waiver on defendant's behalf. It is firmly established that, in a criminal proceeding, "an attorney is authorized to act for his client and determine for him procedural matters and decisions involving trial strategy and tactics." *People v. Phillips*, 217 Ill. 2d 270, 280 (2005). Certain *constitutional* rights may be waived only by the defendant personally, including the constitutional right to testify. *People v. Campbell*, 208 Ill. 2d 203, 210 (2003). Although a defendant enjoys a fundamental constitutional right to testify *at trial* (*Rock v. Arkansas*, 483 U.S. 44, 51 (1987)), we are unaware of any corresponding constitutional right applicable in postplea proceedings that do not involve the determination of guilt or innocence. Accordingly, assuming, *arguendo*, that defendant had a right to an evidentiary hearing, the right was subject to waiver by defendant's attorney.

¶ 6 Defendant also argues that the trial court's failure to conduct an evidentiary hearing is reviewable under the plain-error rule. See Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967) ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court."). Acknowledging that his attorney "stood on his pleadings and did not expressly urge the judge to set an evidentiary hearing," defendant argues that the "pleadings" and defense counsel's remarks at the hearing "placed [the court] on notice that there was more that needed to be developed—testimony from the defendant, his guilty plea counsel, and the prosecutor—before a just ruling on the post-plea motion could be made." The argument overlooks both the deliberate nature of defense counsel's decision to "stand on the pleadings" (rather than offer evidence) and the ambit of plain-error review.

¶ 7 In *People v. Williams*, 2015 IL App (2d) 130585, ¶ 6, we stated as follows:

> "[W]e must stress the important distinction between the concepts of 'forfeiture' and 'waiver.' In *People v. Blair*, 215 Ill.2d 427, 444 n.2 (2005), our supreme court stated as follows:
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> > 'As explained by the United States Supreme Court in *United States v. Olano*, 507 U.S. 725 *** (1993), "Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of the right, waiver is the 'intentional relinquishment or abandonment of a known right.' [Citation.]" '
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> Although a forfeited error may qualify for review under the plain-error rule, *waiver* of a right forecloses review of a claim of error predicated on the waived right. [Citation.] 'Deviation from a legal rule is "error" *unless the rule has been waived*.' [Citation.]" (Emphases in original.)

Defendant's attorney did not merely fail to request an opportunity to present evidence. Standing on the "pleadings" denotes an intentional decision to forgo the opportunity to present evidence and thereby amounts to a waiver of any right to do so.

¶ 8 For the foregoing reasons, the judgment of the circuit court of McHenry County is affirmed. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2014); see also *People v. Nicholls*, 71 Ill. 2d 166, 179 (1978).

¶ 9 Affirmed.