

NOTICE
Decision filed 06/09/15. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2015 IL App (5th) 140146-U

NO. 5-14-0146

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Jackson County.
)	
v.)	No. 13-CF-148
)	
ADRAIN DAVIS,)	Honorable
)	William G. Schwartz,
Defendant-Appellant.)	Judge, presiding.

JUSTICE SCHWARM delivered the judgment of the court.
Justices Goldenhersh and Chapman concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court's denial of the defendant's motion to withdraw guilty plea is affirmed, but the sentence imposed is vacated and remanded, as the circuit court did not make findings regarding the defendant's prior criminal history.

¶ 2 **BACKGROUND**

¶ 3 On April 2, 2013, the defendant was charged with two counts of aggravated discharge of a firearm, a Class 1 felony, and one count of unlawful possession of weapons by a felon, a Class 3 felony. On August 22, 2013, the circuit court held a plea and sentencing hearing regarding these charges. At the hearing, the court asked if the defendant had a criminal history, and the prosecuting attorney stated that the defendant

"has a prior felony for Obstructing Justice in 2011" and "a prior misdemeanor Resisting in 2011." The prosecuting attorney stated that these priors were "the extent of the criminal history of which I am aware." The circuit court did not make a finding regarding the defendant's criminal history on the record. At the hearing, the defendant pleaded guilty to one count of aggravated discharge of a firearm, with the other charges being dismissed. Under the terms of the agreement, the defendant was sentenced to 8 years with no more than 15% good-time credit, and he would receive credit for 84 days served. Upon his release, the defendant was to serve two years of mandatory supervised release. The defendant indicated that he had read and understood the plea of guilty form, that he intended to plead guilty, and that no one had threatened him or promised him anything outside of the agreement to get him to plead guilty.

¶ 4 On September 12, 2013, the defendant sent a letter to the circuit court stating he wished the court to reconsider his sentence and alleging that his counsel, Margaret J. Degen, had misled him about the charge that the defendant pled to and the sentence that was imposed. On October 15, 2013, attorney Degen, on behalf of the defendant, filed a motion for leave to file motion to withdraw guilty plea, attaching to it the defendant's September 12, 2013, letter and a proposed motion to withdraw guilty plea. The motion for leave asked the court to allow the motion as the defendant's letter was timely filed within 30 days. Also on October 15, 2013, Degen filed a motion to withdraw as counsel and to appoint new counsel for the defendant due to the defendant's allegations. On October 29, 2013, the circuit court granted the motion to withdraw as counsel and appointed attorney Celeste Hanlin to represent the defendant.

¶ 5 On February 24, 2014, the circuit court heard the defendant's motion to withdraw guilty plea. At that hearing, the defendant testified that he felt he was coerced into taking a plea deal by Degen. On direct examination, the defendant stated he "was aware that *** if [he] wasn't going to get probation with a Class 1, that [he] was pleading guilty to the Class 3 because it was a less sentence." He also testified that Degen had told him that, if the matter went to trial, the circuit court could sentence him to anywhere from 15 to 30 years. He also testified that Degen had called him a "liar" and had failed to contact numerous witnesses whom he had told her would testify. He testified that, at the August 22, 2013, plea hearing, he thought he would be pleading guilty to a Class 3 felony since it would carry less of a sentence. He further testified that Degen told him he would be receiving a 10-year sentence with no less than 50% served, but then shortly thereafter Degen told him the offer would be an 8-year sentence with no less than 85% served. He testified that he wanted to seek his mother's advice before deciding, but Degen told him he "didn't need [his] mother to tell [him] what [he] should do" and that he should take it. The defendant testified that he thought he was pleading to unlawful possession of a firearm, though he admitted the circuit court had advised him that he was pleading to aggravated discharge of a firearm. Defendant testified that he "felt like [he] didn't have a choice" because of Degen's representation.

¶ 6 Degen also testified at the hearing. She testified that the prosecuting attorney never offered a 10-year sentence with no less than 50% served if the defendant would plead guilty to the unlawful possession of a firearm charge. In fact, she testified that she had begged the prosecuting attorney to offer that plea, but he only offered an eight-year

sentence with no less than 85% served if the defendant would plead guilty to one aggravated discharge of a firearm charge. She testified that she relayed this offer to the defendant and that, to her understanding, the defendant understood and intended to plead guilty as was presented to the circuit court at the August 22, 2013, hearing. She testified that the defendant never indicated to her that he did not want to plead guilty. She lastly testified that she never indicated to the defendant that he had to plead guilty and that she had told him on numerous occasions that she would do her best if they went to trial, though she thought he would lose.

¶ 7 At the end of the February 24, 2014, hearing, the circuit court denied the defendant's motion to withdraw his plea of guilty. The circuit court noted that the defendant was "clearly informed" as to the nature of his plea and to what charges would be dismissed as part of the plea agreement. The present appeal followed.

¶ 8 ANALYSIS

¶ 9 The defendant argues that he did not knowingly or intelligently enter into his plea because of the ineffective assistance of Degen. He claims that her erroneous advice led him to believe he was pleading to the Class 3 felony count of unlawful possession of weapons by a felon instead of a Class 1 felony count of aggravated discharge of a firearm. While the defendant does state that he apparently discussed pleading to the Class 1 felony count with Degen, he claims that they did not have sufficient discussions on the matter to make it clear to him that he was pleading to the Class 1 felony count. He argues that Degen's performance fell below an objective standard of reasonableness. The defendant argues that the trial court's admonitions at the plea hearing did not overcome

his erroneous impressions caused by Degen's alleged ineffective assistance. Further, he also claims to be prejudiced because he claims he had a defense to the aggravated discharge of a firearm count. Lastly, the defendant argues that he suffered prejudice from Degen's performance because, by pleading to a more serious offense than what he believed he was pleading to, he will have to serve two years instead of one year of supervised release and will receive less good-time credit.

¶ 10 "A trial court's decision on a motion to withdraw a guilty plea is reviewed under the abuse of discretion standard." *People v. Guzman*, 2014 IL App (3d) 090464 ¶ 19. "A challenge to a guilty plea alleging ineffective assistance of counsel is subject to the standard set forth in *Strickland v. Washington*, 466 U.S. 668 *** (1984)." *People v. Hall*, 217 Ill. 2d 324, 334-35 (2005). "Under *Strickland*, a defendant must establish that counsel's performance fell below an objective standard of reasonableness and the defendant was prejudiced by counsel's substandard performance." *Id.* at 335. To satisfy the first prong, "the defendant must prove that counsel made errors so serious, and that counsel's performance was so deficient, that counsel was not functioning as the 'counsel' guaranteed by the sixth amendment." *People v. Richardson*, 189 Ill. 2d 401, 411 (2000). "To establish deficiency, the defendant must overcome the strong presumption that the challenged action or inaction might have been the product of sound trial strategy." *Id.* Thus, "counsel's strategic choices that are made after investigation of the law and the facts are virtually unassailable." *People v. Davis*, 205 Ill. 2d 349, 364 (2002). "An attorney's conduct is deficient if the attorney failed to ensure that the defendant's guilty plea was entered voluntarily and intelligently." *Hall*, 217 Ill. 2d at 335.

¶ 11 "Claims of ineffective assistance of counsel may be disposed of on the ground that the defendant suffered no prejudice from the claimed errors, without deciding the first prong, whether the errors were serious enough to constitute less than reasonably effective assistance." *People v. Johnson*, 128 Ill. 2d 253, 271 (1989). "To establish prejudice, a defendant must show that there is a 'reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" *People v. Rissley*, 206 Ill. 2d 403, 457 (2003) (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)). "A bare allegation that the defendant would have pleaded not guilty and insisted on a trial if counsel had not been deficient is not enough to establish prejudice." *Hall*, 217 Ill. 2d at 335. "Rather, the defendant's claim must be accompanied by either a claim of innocence or the articulation of a plausible defense that could have been raised at trial." *Id.* at 335-36. "[T]he question of whether counsel's deficient representation caused the defendant to plead guilty depends in large part on predicting whether the defendant likely would have been successful at trial." *Id.* at 336. Thus, "[i]n order to satisfy the 'prejudice' requirement in a plea proceeding, the defendant must show that there is a reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial." *People v. Pugh*, 157 Ill. 2d 1, 15 (1993).

¶ 12 The defendant argues that he believed he was pleading guilty to unlawful possession of a weapon by a felon and that he would be sentenced to 10 years with no less than 50% served. However, Degen testified that the prosecuting attorney never offered such a deal, and that the best offer she could get for the defendant was to plead guilty to aggravated discharge of a firearm for a sentence of eight years with no less than

85% served. The defendant argues that Degen made him believe he had no choice but to accept the plea. Degen testified that she never told the defendant he had to accept the plea. Further, when the defendant entered his plea, he confirmed that he wanted to plead guilty and never indicated that Degen had forced the plea. At the hearing on the motion to withdraw guilty plea, the defendant even testified that Degen "came [back from the prosecuting attorney] with 8, 85" and advised him that he "should just go ahead and take it because if [he didn't] take it and it goes to trial, [he] would receive 15 to 30 years." The circuit court explicitly found that the defendant had been "clearly informed" and therefore did not find ineffective assistance of counsel. Based on the record, we cannot say the circuit court's finding was an abuse of discretion.

¶ 13 The defendant also claims ineffective assistance of counsel in part because Degen did not call numerous witnesses from a list that he claims to have given her. As the State notes, however, the defendant has not explained what these alleged witnesses would have said to help his defense, nor has he shown that they would be willing to testify. In order to claim ineffective assistance of counsel because of counsel's failure to contact witnesses, "a defendant must demonstrate how a witness, who was not called, would have aided him and also whether defense counsel did not try to contact the witness." *People v. Fountain*, 179 Ill. App. 3d 986, 996 (1989). Here, the defendant has presented no evidence of what the witnesses would have said. Without such evidence, "a reviewing court cannot assess whether defense counsel's alleged omission was prejudicial." *Id.*

¶ 14 The defendant further argues that he was prejudiced because he had a meritorious defense to aggravated discharge of a firearm. He claims that he did not knowingly or

intentionally discharge a firearm in the direction of another person and, therefore, can defend against this charge. However, "the question of whether [an alleged error] prejudiced the defendant by causing him to plead guilty rather than to go to trial depends in large part on a prediction of whether the defendant likely would have succeeded at trial." *Pugh*, 157 Ill. 2d at 15. The record indicates that the State was prepared to introduce overwhelming evidence at trial suggesting that the defendant knowingly discharged a firearm at several people. Degen, as noted above, warned the defendant that he would therefore likely lose if the case went to trial. Nonetheless, she stated that she "would do [her] best at trial" if the defendant chose not to plead guilty. Based on the evidence available, we cannot say the circuit court abused its discretion in finding no prejudice suffered by the defendant.

¶ 15 Lastly, the defendant argues that, by pleading to a Class 1 felony instead of a Class 3 felony, he is eligible for less good-time credit. Therefore, he claims, Degen's ineffective assistance of counsel prejudiced him. However, the Director of the Illinois Department of Corrections, and not the courts, awards good-time credit. The defendant has no right to good-time credit, and the defendant cannot claim prejudice because he is eligible for less good-time credit. As such, the circuit court's decision to deny the motion to withdraw guilty plea is affirmed. See *Lee v. Godinez*, 2014 IL App (3d) 130677; *People v. Castano*, 392 Ill. App. 3d 956 (2009); *People ex rel. Braver v. Washington*, 311 Ill. App. 3d 179 (1999).

¶ 16 Nevertheless, we must vacate the sentence imposed and remand for further proceedings, as the State has brought to our attention that there were no findings made

regarding the defendant's criminal history at the plea hearing. Generally, "[a] defendant shall not be sentenced for a felony before a written presentence report of investigation is presented to and considered by the court." 730 ILCS 5/5-3-1 (West 2012). "However, *** the court need not order a presentence report of investigation where both parties agree to the imposition of a specific sentence, provided there is a finding made for the record as to the defendant's history of delinquency or criminality, including any previous sentence to a term of probation, periodic imprisonment, conditional discharge, or imprisonment." *Id.* It is mandatory that a circuit court consider a presentence report or make a finding on the record regarding a defendant's criminal history because "[a] complete disclosure of a criminal defendant's history of criminality leaves no excuse for the court to state it was not aware of that record prior to deciding whether to accept a plea agreement." *People v. Evans*, 273 Ill. App. 3d 252, 255 (1994).

¶ 17 At the plea hearing, the State informed the court that the defendant had a prior felony for obstructing justice in 2011 and a prior misdemeanor resisting in 2011. The State now notes that the defendant's criminal history may not have been complete, citing potential charges for possession of liquor by a minor in 2006, domestic battery in 2006, and obstructing justice in 2001. Further, at the plea hearing, the circuit court did not make a finding regarding the defendant's criminal history. We thus must vacate the defendant's sentence under *Evans* and "remand for a hearing whereby the sentencing judge is to be informed of the history of the delinquency and criminality of defendant." *Evans*, 273 Ill. App. 3d at 259. "The sentencing judge is then to make an independent decision as to the acceptability of the negotiated sentence and, if such negotiation is

acceptable, make the proper findings for the record required by section 5-3-1 of the Unified Code of Corrections." *Id.*

¶ 18

CONCLUSION

¶ 19 For the reasons stated, we affirm the circuit court's decision to deny the motion to withdraw guilty plea. However, we vacate the sentence imposed and remand to the circuit court of Jackson County for further proceedings.

¶ 20 Affirmed in part, vacated in part, and remanded with instructions.