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2017 IL App (3d) 170340-U

Order filed December 4, 2017

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2017

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 13th Judicial Circuit, La Salle County, Illinois,
Plaintiff-Appellee,)	
v.)	Appeal No. 3-17-0340 Circuit No. 15-CF-310
)	
SCOTT J. WILKINSON,)	Honorable Cynthia M. Raccuglia,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justices Carter and McDade concurred in the judgment.

ORDER

- ¶ 1 *Held:* The circuit court properly granted the State’s motion for directed finding on defendant’s motion to withdraw guilty plea because defendant failed to make a *prima facie* case of either a prosecutorial discovery violation or ineffectiveness of defense counsel.
- ¶ 2 Defendant, Scott J. Wilkinson, pled guilty to aggravated discharge of a firearm but later moved to withdraw his guilty plea. At the hearing on defendant’s motion to withdraw his plea, the circuit court granted the State’s motion for directed finding and denied defendant’s request to withdraw the guilty plea. We affirm.

¶ 3

FACTS

¶ 4

On August 19, 2015, the State filed an information charging defendant with aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2014)), aggravated battery (720 ILCS 5/12-3.05(d)(1) (West 2014)), and unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2014)). At defendant's first court appearance, the State alleged as probable cause for defendant's arrest, that defendant had been engaged in an altercation with his father, Glenn Wilkinson. The State alleged defendant drew a pistol and "then discharged the pistol over Mr. Glen [sic] Wilkinson's head, discharging it, obviously, in his direction." The criminal information was later supplanted by a three-count indictment, alleging, *inter alia*, that defendant "knowingly discharged a firearm in the direction of Glenn Wilkinson."

¶ 5

On September 18, 2015, the State filed a document detailing the discovery materials it had tendered to defendant as required by Illinois Supreme Court Rule 412 (eff. Mar. 1, 2001). The discovery materials disclosed that the State intended to call Investigator Pocivasek as a witness, and included a "1 page supplemental report of Investigator Pocivasek." At the parties' next court date, the State told the court that discovery had been tendered.

¶ 6

On February 19, 2016, the parties informed the court defendant had agreed to plead guilty to aggravated discharge of a firearm in exchange for the State's dismissal of the remaining two counts of the indictment. There was no agreement concerning sentencing. Prior to admonishing defendant, the court advised defendant as follows:

"Now, it alleges here that on or about August 18, 2015, in LaSalle County, that you committed the offense of aggravated discharge of a firearm, a Class 1 felony, in that you knowingly discharged a firearm in the direction of Glenn Wilkinson, in violation of the laws of the State of Illinois."

Defendant indicated that he understood his rights, was not coerced, and was satisfied with the performance of his attorney, John Fisher.

¶ 7 The State explained as part of the factual basis for the guilty plea that deputies with the La Salle County sheriff's department responded to a "shot fired" call at Glenn's residence on August 18, 2015. The prosecutor further stated:

"Glenn Wilkinson was found to be the defendant's father and when the deputies arrived there he was bleeding from the side of his face. He informed them that the defendant had been at his residence and had been confronting him ***, at which point the defendant pulled a gun out of a box that he was carrying and discharged the firearm over his head into the wall.

The bullet was later dug out of the wall by Sheriff's deputies."

When the court asked defense counsel if he concurred in the factual basis, the following colloquy ensued:

"[DEFENSE COUNSEL]: Judge, I would like to clarify as to the factual basis. The gun was discharged over my client's head, not the head of the purported victim.

[THE STATE]: The victim in this case would testify that the gun was discharged past his head.

THE COURT: Well, we have a dispute.

[DEFENSE COUNSEL]: We will stipulate to the factual basis as outlined by the State."

The court found that defendant understood his rights, and asked defendant how he pled.

Defendant replied: “Guilty.” At the sentencing hearing held on April 1, 2016, the court sentenced defendant to a term of 6½ years’ imprisonment.

¶ 8 Defendant filed a *pro se* motion for reduction of sentence on April 27, 2016. In a typed addendum submitted to the circuit court with that motion, defendant wrote:

“While in front of the judge, [defense counsel Fisher] stated that I fired the gun over my head! My brain went into ‘shock mode,’ I could not believe what I just heard. In this confusion I had to whisper in his ear what really happened. This was a confusion/diversion tactic to confuse me while the State’s Attorney was saying the sentence would be 85% not 50%!”

¶ 9 After submitting his *pro se* motion for reduction of sentence, defendant hired private counsel, Michael Coghlan. The circuit court granted defense counsel’s request for a continuance. Thereafter, on May 23, 2016, defense counsel filed a motion for discovery pursuant to Rule 412. Defense counsel also served subpoenas on seven members of the La Salle County sheriff’s department seeking the production of relevant materials.

¶ 10 The State filed a motion to quash the postconviction subpoenas. In support of the motion to quash, the State pointed out that most of the discovery sought had previously been tendered to trial counsel before the guilty plea. The State further averred that “The State turned over new copies to [defendant’s] new counsel of the same materials, and any supplemental materials, to aid in getting them up to speed for the purpose of the postconviction issues.”

¶ 11 On July 21, 2016, the State filed a second detailed list of information provided to defendant in discovery pursuant to Rule 412. This list contained more written or recorded documents than the document filed on September 18, 2015. It included the one-page

supplemental report from Pocivasek, as well as a separate one-page report from Pocivasek. The State withdrew its motion to quash.

¶ 12 On February 6, 2017, defendant filed an amended motion to withdraw his guilty plea, vacate sentence, and dismiss all charges. In the motion, defendant alleged he pled guilty “based on incomplete discovery from the prosecution withholding exculpatory evidence.” Defendant asserted the State’s failure to meet its discovery obligations was sanctionable.

¶ 13 Defendant also alleged ineffective assistance of plea counsel, in that he “was incorrectly informed by [Fisher] that the evidence supported a conviction for the offense of Aggravated Discharge.” Defendant alleged he would not have pled guilty had he been “properly advised by [Fisher] that Aggravated Discharge requires that the firearm be discharged ‘in the direction’ of another.” Relatedly, defendant also accused Fisher of failing to “obtain the police report showing that the gun was not discharged in the direction of Complainant.” Finally, defendant asserted that the factual basis for his plea failed to “contain the essential element of the charge of Aggravated Discharge of a Firearm that the gun was fired ‘in the direction’ of Glenn Wilkinson.”

¶ 14 Defendant attached a three-page handwritten affidavit to the amended motion submitted by defense counsel. In the affidavit, defendant explained in great detail that he pointed the gun in a direction that did not endanger Glenn. Specifically, defendant asserted that the trajectory of the bullet was well above Glenn’s head since Glenn was seated, not standing, when the shot was fired. Because the bullet was lodged in the wall near the ceiling, defendant claimed the physical evidence supported this defense. Defendant accused police and the prosecutor of withholding reports showing his innocence. Defendant continued:

“The withheld police report said the bullet hole was ‘in the west wall and above the door.’ The report also said the bullet was ‘a few inches above the

entrance door on the left side.’ Using the directions left and right, the gun and bullet where [sic] to the left of my father, NOT to the right in his direction. If I fired above his head and in his direction the bullet would have struck above the picture window to the south of the front door. There was no bullet hole above the picture window to the south that night.”

Defendant did not attach the purportedly withheld police reports to his amended motion for the court’s consideration.

¶ 15 The State filed a response to defendant’s amended motion. Defendant attached a one-page report compiled by Pocivasek to his reply to that response. The report detailed Pocivasek’s meeting with Glenn, in which Glenn showed him a bullet hole “in the west wall above the door in the livingroom [sic].” The report also indicated the hole “was a few inches above the entrance door on the left side.” It is not apparent from the face of this report whether the report prepared by Pocivasek was included in the original discovery tendered to the defense prior to the guilty plea.

¶ 16 The circuit court held a hearing on defendant’s amended motion to withdraw his guilty plea. At the hearing, defendant testified to the veracity of the statements in his affidavit. On cross-examination, the State asked defendant which police reports were withheld from his previous attorney. Defendant responded:

“What I said in my affidavit is based on the reports that I saw after my second attorney obtained all the reports.

[THE STATE:] Which reports do you allege at this point your previous attorney did not have?

[DEFENDANT:] I think the amount of withheld evidence was massive.

[THE STATE:] Can you list one specific thing that you believe was withheld?

[DEFENDANT:] No, I cannot. Yes, I never saw the report that stated that I aimed the gun at him and that I shot over his head. I did not see that report until after my attorney Coghlan received all of the reports. This was after I had pleaded.

[THE STATE:] Which report? Do you remember which officer's report you're referring to?

[DEFENDANT:] Nope. no sir."

¶ 17 Following defendant's testimony, the State moved for a directed finding on the amended motion to withdraw the guilty plea. The circuit court granted the State's motion for a directed finding. Defendant subsequently filed a motion to reconsider, which the court also denied.

¶ 18 ANALYSIS

¶ 19 On appeal, defendant raises several issues supporting his position that the circuit court erred by denying defendant's amended motion to withdraw his guilty plea. Defendant argues the court erred by granting the State's motion for directed finding because defendant made a *prima facie* showing that: (1) the State committed a discovery violation; (2) plea counsel was ineffective; and (3) the factual basis recited to the court did not support defendant's guilty plea.

¶ 20 Generally, the circuit court's judgment on a motion to withdraw a guilty plea is a matter of the court's discretion. *People v. Delvillar*, 235 Ill. 2d 507, 520 (2009). However, where the court's ruling comes via directed finding, the issue is whether defendant presented a *prima facie* case that would shift the burden to the State. *People v. Presley*, 2012 IL App (2d) 100617, ¶ 24.

Whether a party has made a *prima facie* case is an entirely legal question, which we review *de novo*. E.g., *People ex rel. Sherman v. Cryns*, 327 Ill. App. 3d 753, 763 (2002).

¶ 21 Defendant contends that he made the required *prima facie* showing as to three distinct grounds for withdrawing his guilty plea: (1) a discovery violation by the State; (2) ineffective assistance of plea counsel; and (3) lack of sufficient factual basis. We address each argument in turn.

¶ 22 I. Discovery

¶ 23 First, defendant argues he made a *prima facie* showing that in the period leading up to his guilty plea, the State knowingly withheld a police report that demonstrated his innocence. Defendant maintains that the purported withholding of the Pocivasek report¹ violated Illinois Supreme Court Rule 412(c) (eff. Mar. 1, 2001), which mandates that the State disclose to the accused, *inter alia*, any “any material or information within its possession or control which tends to negate the guilt of the accused as to the offense charged or which would tend to reduce his punishment therefor.”² Defendant also argues the State violated his constitutional right to the timely disclosure of exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963).

¶ 24 The United States Supreme Court held in *United States v. Ruiz*, 536 U.S. 622, 629 (2002), that *Brady* does not require the State to disclose so-called *Brady* material before a defendant pleads guilty. See also *People v. Gray*, 2016 IL App (2d) 140002, ¶ 13 (“[U]nder *Ruiz*,

¹ Though defendant has never actually explicitly identified the report he alleges was withheld, we may infer from his attachment of the Pocivasek report to his reply (see *supra* ¶ 15) that it is that report to which he refers.

² Defendant also argues that the State’s withholding of the Pocivasek report violated Rule 3.8 of the Illinois Rules of Professional Conduct, which instructs prosecutors to “make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense.” Ill. Rs. Prof’l. Conduct R. 3.8(d) (eff. Jan. 1, 2016). Because this obligation is identical to that set forth in Rule 412—and because it is unclear that a rule of professional conduct would provide an independent ground for relief for a defendant—we address defendant’s arguments as a single claim.

Brady does not require the disclosure of potential impeachment evidence before a defendant pleads guilty. Thus, with no *Brady* violation, defendant's plea was not tainted."). Accordingly, defendant clearly failed to make a *prima facie* showing of a *Brady* violation.

¶ 25 Rule 412 is the codification of the due process requirements set forth in *Brady*. *People v. Tyler*, 2015 IL App (1st) 123470, ¶ 206. The rule, however, does not explicitly contain an exception for guilty pleas. Thus, we will proceed under the assumption that Rule 412 applies in the present case. The elements a defendant must satisfy to demonstrate a Rule 412 violation are identical to the elements of a *Brady* claim: "(1) the undisclosed evidence is favorable to the accused because it is either exculpatory or impeaching; (2) the evidence was suppressed by the State either willfully or inadvertently; and (3) the accused was prejudiced because the evidence is material to guilt or punishment." *People v. Beaman*, 229 Ill. 2d 56, 73-74 (2008).

¶ 26 Defendant failed to establish that the information in Pocivasek's report was either exculpatory or impeaching. The brief report at issue documented only where the bullet landed, above a door frame on the west wall. To sustain a conviction for aggravated discharge of a firearm, the State needed to prove that defendant fired the gun "in the direction of" Glenn. 720 ILCS 5/24-1.2(a)(2) (West 2014).

¶ 27 Defendant claims that a bullet hole lodged high in the wall constitutes exculpatory evidence because it proves that the shot was fired well above Glenn, rather than in his direction. This is a distinction without a difference for the purposes of aggravated discharge. See *People v. Ellis*, 401 Ill. App. 3d 727, 731 (2010) ("[N]ot every aggravated discharge of a firearm threatens the same amount of harm. Compare the 'warning shot' that is intended to go and does go six feet over someone's head to a shot that sends a bullet flying within an inch of someone's ear."). Moreover, the State averred at defendant's plea hearing that Glenn would testify that defendant

fired the gun in his direction. The information in Pocivasek's report could not undermine that testimony of defendant's father. Defendant also failed to establish prejudice, for the same reasons.

¶ 28 Finally, defendant failed to make any showing that the State actually withheld any information. Neither in his myriad of circuit court filings, nor his testimony at the hearing on the motion to withdraw plea, nor in his appellate briefs has defendant explicitly identified the document or documents omitted from discovery that would have been exculpatory or impeaching. Even if the information in the Pocivasek report could be considered exculpatory, which it cannot, defendant presented no testimony from his original attorney regarding whether that report had been tendered in discovery.

¶ 29 Defendant failed to make a *prima facie* showing of a *Brady* violation, and failed to make a *prima facie* showing on each of the three elements of a Rule 412 discovery violation. Accordingly, the circuit court properly granted the State's motion for directed finding with respect to that issue.

¶ 30 II. Ineffective Assistance of Counsel

¶ 31 Second, defendant contends that he made a *prima facie* showing that plea counsel was ineffective on two grounds. First, defendant argues that he "would not have pled guilty to Aggravated Discharge if [defendant] had been properly advised that Aggravated Discharge requires evidence that the firearm be discharged 'in the direction' of another." Additionally, defendant argues that plea counsel "failed to timely obtain or relay the police report showing that the gun was discharged in a safe direction up and away from the direction of the Complainant who was sitting in his chair."

¶ 32 Claims of ineffective assistance of counsel are analyzed under the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). See *People v. Manning*, 241 Ill. 2d 319, 326 (2011). In order to prevail on such a claim, “[a] defendant must show that counsel’s performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* In the context of a guilty plea, a defendant may demonstrate prejudice by showing a reasonable probability that, but for counsel’s errors, he would not have pled guilty and proceeded to trial. *People v. Unzueta*, 2017 IL App (1st) 131306-B, ¶ 15. “Courts *** may resolve ineffectiveness claims under the two-part *Strickland* test by reaching only the prejudice component, for lack of prejudice renders irrelevant the issue of counsel’s performance.” *People v. Coleman*, 183 Ill. 2d 366, 397-98 (1998).

¶ 33 Defendant failed to make a *prima facie* showing of prejudice on each of his ineffectiveness claims. First, defendant asserts that he would not have pled guilty had counsel informed him that the State must prove that he discharged a firearm “in the direction of” Glenn. See 720 ILCS 5/24-1.2(a)(2) (West 2014). Even assuming, *arguendo*, that plea counsel did not correctly advise defendant about the elements of the offense to which he was pleading guilty, the record affirmatively shows that defendant was well aware of these elements due to the circuit court’s carefully constructed record for purposes of appeal. At defendant’s first appearance, the State alleged defendant “discharged the pistol over Mr. Glen [*sic*] Wilkinson’s head, discharging it, obviously, in his direction.” More importantly, at the plea hearing, the circuit court informed defendant that he was charged with “knowingly discharge[ing] a firearm in the direction of Glenn Wilkinson.” Defendant knew that he was specifically charged with firing his gun in Glenn’s direction, as stated in the indictment, and still pled guilty. Defendant’s claim that he

would not have pled guilty had he been aware of that element must fail where the record plainly shows that he was made aware of the element on numerous occasions by the trial court.

¶ 34 In this case the report at issue does not contain definitive evidence regarding Glenn's position in relation to the trajectory of the discharged bullet. Therefore, it is unclear how that report could have impacted defendant's decision to plead guilty. Additionally, defendant has failed to cite any authority to support the claim that the State's alleged discovery violation translates to deficient performance on the part of plea counsel.

¶ 35 Due to defendant's inability to make a *prima facie* showing that he suffered prejudice as a result of plea counsel's alleged ineffectiveness, defendant failed to shift the burden to the State at the hearing on defendant's amended motion to withdraw his guilty plea. Accordingly, the circuit court properly granted the State's motion for directed finding with respect to defendant's ineffectiveness claims.

¶ 36 III. Factual Basis

¶ 37 Finally, defendant argues that he made a *prima facie* showing that the circuit court accepted his guilty plea without an adequate factual basis. Specifically, defendant asserts: "Evidence of direction was missing from the factual basis for the plea."

¶ 38 The amount of evidence sufficient to form the factual basis of a guilty plea is less than is required for proof beyond a reasonable doubt or even a preponderance of the evidence. *People v Calva*, 256 Ill. App. 3d 865, 872 (1993). "All that is required to appear on the record is a basis from which the judge could reasonably reach the conclusion that the defendant actually committed the acts with the intent (if any) required to constitute the offense to which the defendant is pleading guilty." *People v. Barker*, 83 Ill. 2d 319, 327-28 (1980). A reviewing court

will not disturb the circuit court's finding of a sufficient factual basis unless there was an abuse of discretion. *Calva*, 256 Ill. App. 3d at 871.

¶ 39 In the present case, defendant pled guilty to aggravated discharge of a firearm. Accordingly, the State was obligated to prove that defendant knowingly “discharge[d] a firearm in the direction of another person.” 720 ILCS 5/24-1.2(a)(2) (West 2014). For the factual basis of defendant's plea, the State averred that Glenn would testify “that the gun was discharged past his head.” Defendant stipulated to that fact. The circuit court could reasonably conclude from that fact that defendant discharged the firearm in the direction of Glenn. Accordingly, defendant failed to make a *prima facie* showing that the court abused its discretion in finding a sufficient factual basis for defendant's plea.

¶ 40 Since defendant did not make a *prima facie* showing on any of the three grounds supporting a request to withdraw his guilty plea, we conclude the circuit court properly granted the State's motion for directed finding on defendant's motion. *Presley*, 2012 IL App (2d) 100617, ¶ 24.

¶ 41 CONCLUSION

¶ 42 The judgment of the circuit court of La Salle County is affirmed.

¶ 43 Affirmed.