2018 IL App (3d) 170169-U

Order filed July 17, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 14th Judicial Circuit, Rock Island County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-17-0169
v.	)	Circuit No. 16-CF-230
	)	
DAN E. SYLVESTER,	)	Honorable Frank R. Fuhr,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Justices O'Brien and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant did not receive ineffective assistance of plea counsel. The circuit court did not abuse its discretion in imposing the maximum sentence.

¶ 2 Defendant, Dan E. Sylvester, appeals his convictions for aggravated driving under the influence of alcohol (DUI). Specifically, defendant argues that his plea counsel was ineffective for (1) advising defendant that he should not accept a plea offer with a sentencing range of four to eight years' imprisonment, (2) failing to advise defendant that he would be required to serve 85% of any sentence he received, and (3) failing to present evidence in mitigation during

sentencing. Defendant also argues that the court abused its discretion in sentencing him to 12 years' imprisonment. We affirm.

¶ 3 FACTS

¶ 4 Defendant was charged with two counts of aggravated DUI (625 ILCS 5/11-501(a)(2), (d)(1)(C) (West 2014)) in that he drove a vehicle while under the influence of alcohol and was involved in a motor vehicle collision which proximately caused great bodily harm to two victims. Defendant was also charged with an additional count of aggravated DUI (*id.* § 11-501(a)(2), (d)(2)(D)) in that defendant drove a vehicle while under the influence of alcohol and had previously been convicted of DUI on four prior occasions. The public defender's office was appointed to represent defendant.

¶ 5 Defendant pled guilty to the first two counts of aggravated DUI in exchange for the State's agreement to dismiss the third count. The parties agreed that the sentences would not run consecutively and that defendant would not receive probation. Otherwise, the plea deal contained no agreement as to sentencing. As a factual basis for the plea, the State said that defendant crashed his vehicle into a vehicle driven by a woman and her son, causing the victims to sustain serious injuries. Defendant had a blood alcohol content of 0.275. Prior to accepting defendant's plea, the court asked defendant if he understood the offenses were punishable by 1 to 12 years' imprisonment. Defendant said yes. The court accepted defendant's plea, and the matter was continued for sentencing.

¶ 6 At a later hearing, the State advised the court that it was mandatory that defendant serve 85% of any sentence the court imposed. The prosecutor stated that she was not sure that had been mentioned during the plea hearing. Plea counsel said he believed he had discussed the 85% requirement with defendant. The court asked defendant if he understood when he pled guilty that

he would have to serve 85% of any sentence the court imposed. Defendant replied: "I suppose. I don't—I don't think I've been told that, but… Maybe you did. I don't know."

¶ 7 At the next hearing, the following exchange occurred between the court and defendant:

"[THE COURT]: [T]here had been an issue discussed with the attorneys earlier about whether or not [defendant] was admonished when we took his plea that this case requires any time served in the penitentiary to be served at 85 percent.

[Defendant], do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Do you have any questions about that?

THE DEFENDANT: No, sir.

THE COURT: And your attorney had already advised you of that earlier?

THE DEFENDANT: Yes.

THE COURT: Okay. So I just want to make that perfectly clear so that you understand that.

THE DEFENDANT: Yes.

THE COURT: And you're still requesting to go ahead with the sentencing today?

THE DEFENDANT: Yes."

¶ 8 The matter then proceeded to sentencing. Prior to the sentencing hearing, a presentence investigation report (PSI) was prepared. The PSI indicated that defendant was 63 years old and had four prior DUI convictions, the most recent of which was from 2007. Defendant reported that he consumed alcohol a couple nights a week until the night of the present offense. Defendant stated that he believed he had an alcohol problem. Defendant indicated that he did not desire

alcohol treatment because he had undergone treatment before. Defendant said that he knew the 12-step process, but he had not listened in the past. Defendant stated that he also occasionally used marijuana before the present offense. The PSI also indicated that defendant was receiving treatment from doctors for a prosthetic eye.

¶ 9 A letter from an acquaintance of defendant was attached to the PSI. The letter stated that the author was an older woman with low income. Defendant had helped her by mowing her lawn for free. A letter from defendant explaining his background and saying that he was sorry about the accident was also attached to the PSI. The letter discussed the injuries that defendant sustained as a result of the motor vehicle collision. Specifically, the letter stated that defendant had sustained fractures in his leg, ankle, hip, and forearm. Defendant used a cane to walk. Defendant also had 11 broken ribs and a punctured lung. Doctors had reconstructed one side of defendant's face, removed one of his eyes, and replaced it with a prosthetic eye.

¶ 10 At the sentencing hearing, the State called the victim of the motor vehicle collision as a witness. The victim testified that she was 50 years old and that she and her son were injured in a head-on collision with defendant's vehicle. The victim testified that as a result of the injuries she sustained in the collision, she could not walk and could only stand for a few minutes at a time. She had multiple surgeries on her ankles and had very little movement in them. The victim was in the hospital for 17 days after the collision and was then in a nursing home for several months. She lived at home with her children at the time of the sentencing hearing.

¶ 11 The victim testified that she now had to depend physically and financially on other individuals. The victim had a very active job prior to the collision, and she had not been able to work since the collision. The victim's medical bills totaled approximately $645,000, and her insurance had covered approximately $520,000. The victim's medical bills were introduced into

evidence. The victim testified that she felt very angry after the accident. She suffered from depression and rarely left her house. The State introduced photographs of the victim's injuries and her vehicle.

¶ 12 Defendant made a statement in allocution apologizing to the victims of the motor vehicle collision and to his family and friends.

¶ 13 During argument, the State requested that the court impose the maximum sentence of 12 years' imprisonment. Plea counsel requested that the court impose the minimum sentence of one year's imprisonment. Plea counsel argued that defendant was a good man with an alcohol problem who was 63 years old and not in good health. Plea counsel asserted that defendant was no longer a threat to the community because he was less mobile than he had previously been. Plea counsel stated that he had represented a different client in a DUI case before the court a few years earlier where a victim had died as a result of a motor vehicle collision. That particular defendant received a sentence of eight years' imprisonment. Plea counsel argued that a sentence of more than eight years would be excessive in this case.

¶ 14 The court sentenced defendant to 12 years' imprisonment on each count, to be served concurrently. The court stated that it had considered the PSI and the factors in aggravation and mitigation. The court stated that it had also considered the testimony of the victim and the arguments of the parties. The court stated that it would not consider the injuries sustained by the victims as an aggravating factor because the great bodily harm sustained by the victims was inherent in the offenses to which defendant pled guilty. The court reasoned that defendant was a danger to society, as this was his fifth DUI conviction. The court also reasoned that defendant's sentence was necessary to deter others from engaging in similar conduct.

¶ 15 Defendant filed a motion to withdraw his plea and vacate his sentence, which was prepared by a different attorney in the public defender's office. The motion alleged, *inter alia*, that defendant's plea counsel was ineffective for "promising defendant a sentence of one (1) year, and not more than four (4) years, with day-for-day eligibility" and for failing to present evidence in mitigation at sentencing. Approximately two weeks later, the public defender's office filed a motion to withdraw as counsel. Defendant then filed a *pro se* motion to withdraw his guilty plea and vacate his sentence and a *pro se* motion to reconsider sentence. The court granted counsel's motion to withdraw and appointed new counsel to represent defendant. Appointed counsel filed an amended motion to withdraw defendant's guilty plea or, in the alternative, to reconsider his sentence, stating that defendant was adopting the claims in the first motion to withdraw defendant's guilty plea and vacate his sentence.

¶ 16 A hearing was held on the amended motion. Defendant testified that he understood when he pled guilty that there was a possibility that he would receive a sentence of twelve years' imprisonment, but plea counsel told him he would probably receive one to three years' imprisonment. Defendant said that his plea counsel told him the court would "have the chance to sentence [him] to twelve years, but that won't happen." Defendant explained:

> "The public defender told me that, you know, he had worked a case a couple years ago where a man was killed and *** [the defendant] got less than *** eight years or he got eight years, less than twelve and [the public defender] pretty much guaranteed me that you will get, you know, probably three years."

¶ 17 Defendant testified that the State had made a plea offer of four to eight years' imprisonment. Defendant rejected the offer because his plea counsel "pretty much" told him to. Defendant explained:

> "[Four to eight years' imprisonment] sounds better than one to twelve to me, because if—if eight was the top and it was a bad day in court, it would be eight and if [plea counsel] changed it to where they could give me twelve and it was a bad day in court, they'd give me twelve. I didn't want to give [the court] that option, but [plea counsel] said that's what [he would] do."

¶ 18 Defendant testified that he believed his plea counsel advised him that he would have to serve 85% of his sentence when counsel was discussing the plea offer of four to eight years' imprisonment. However, defendant did not believe counsel mentioned the 85% requirement when he was discussing the option of pleading guilty with a sentencing range of 1 to 12 years' imprisonment.

¶ 19 Defendant testified that his plea counsel failed to present mitigating evidence at sentencing. Defendant had told his plea counsel that neighborhood children would come to defendant's house after school, and he would watch them until their parents returned home. Defendant would also work on his neighbors' vehicles and help with their lawn care for free. Plea counsel initially told defendant he would go to defendant's neighborhood and talk to his neighbors, but he later told defendant he was too busy. Defendant stated: "[Plea counsel] wanted me to have my friends run around and get people to write letters for me to send to The Court and he never—as far as I'm concerned he wasn't doing a very good job for me whatsoever."

¶ 20 Defendant's plea counsel testified over the telephone that he did not promise defendant he would receive one to four years' imprisonment if he pled guilty. Plea counsel explained: "I cannot make promises for what a judge will sentence. I, certainly, for defendants will often give a ball park of what I think might happen, but I'm always clear to say that the final decision is up to The Court." Plea counsel said that he never promised defendant he was facing regular Class 4

sentencing with day-for-day eligibility. Plea counsel said that he did not believe that the State ever offered four to eight years' imprisonment as a plea deal, but he was not certain.

¶ 21 The court denied defendant's amended motion to withdraw his guilty plea or, in the alternative, to reconsider his sentence. The court found that plea counsel did not make any promises to defendant regarding his plea and that defendant was advised of the possible penalties.

¶ 22 ANALYSIS

¶ 23 I. Ineffective Assistance of Counsel

¶ 24 Defendant argues that his plea counsel was ineffective for (1) encouraging him to reject a plea deal of four to eight years' imprisonment, (2) failing to advise defendant that he would be required to serve 85% of his sentence, and (3) failing to present mitigating evidence at the sentencing hearing. We address each argument in turn.

¶ 25 1. Rejecting the Plea Offer

¶ 26 Defendant contends that his plea counsel provided ineffective assistance in advising him to reject a plea offer of 4 to 8 years' imprisonment and instead to enter a plea without a sentencing cap, leaving him with a range of 1 to 12 years' imprisonment. We find that defendant has not shown that his counsel was deficient in advising him to reject the plea offer.

¶ 27 "The sixth amendment guarantees a criminal defendant the right to effective assistance of trial counsel at all critical stages of the criminal proceedings, including the entry of a guilty plea." *People v. Brown*, 2017 IL 121681, ¶ 25. To state a claim of ineffective assistance of counsel, a defendant must show "that his counsel's performance fell below an objective standard of reasonableness and that he was prejudiced by counsel's deficient performance." *Id.*; see *Strickland v. Washington*, 466 U.S. 668 (1984). "A defendant is entitled to reasonable, not

perfect, representation, and mistakes in strategy or in judgment do not, of themselves, render the representation incompetent." *People v. Fuller*, 205 Ill. 2d 308, 331 (2002). "[T]he fact that another attorney might have pursued a different strategy, or that the strategy chosen by counsel has ultimately proved unsuccessful, does not establish a denial of the effective assistance of counsel." *Id.*

¶ 28 Here, defendant has established only that plea counsel's strategy was unsuccessful. Defendant testified at the hearing on his amended motion to withdraw his guilty plea that plea counsel advised him to reject the State's offer of 4 to 8 years' imprisonment and plead guilty with an uncapped sentencing range of 1 to 12 years' imprisonment.[1] Defendant said that plea counsel told him that he would likely receive a sentence of less than four years. Defendant also stated that plea counsel told him about an old DUI case where the victim died, and the defendant received a sentence of eight years' imprisonment. We note that plea counsel mentioned this case during his argument at the sentencing hearing. Defendant's testimony indicates that plea counsel advised defendant to reject the plea offer because he believed defendant would likely receive a sentence of less than four years' imprisonment. While plea counsel's strategy was ultimately unsuccessful, it was not unreasonable. Thus, defendant has not established that his counsel's performance was deficient.

¶ 29 2. Failing to Advise of the 85% Requirement

¶ 30 Defendant also argues that plea counsel was ineffective for failing to advise him that he was required to serve at least 85% of his sentence and would not be eligible for day-for-day good conduct credit. We find that the record does not establish that counsel failed to advise defendant about the 85% requirement. We also find that, assuming counsel failed to advise defendant as to

[1]Plea counsel testified that he did not recall receiving a plea offer of four to eight years' imprisonment. In addressing defendant's argument, we assume that such an offer existed.

the 85% requirement and that this constituted deficient performance, defendant has failed to establish that he was prejudiced.

¶ 31 First, defendant has failed to meet his burden of showing that counsel's performance was deficient because the record does not establish that plea counsel actually failed to advise defendant that he was required serve at least 85% of his sentence. See *People v. Hughes*, 2012 IL 112817, ¶ 62 ("It is defendant's burden to establish that his plea was not knowing due to counsel's deficiency."). Plea counsel stated at a hearing after the plea that he believed he had advised defendant about the 85% requirement. Defendant gave inconsistent accounts as to whether he had been advised of the 85% requirement. At a hearing after he pled guilty, defendant said that he did not think he had been advised of the 85% requirement, but he may have. At the next hearing, the judge asked defendant if his plea counsel had advised him of the 85% requirement earlier, and defendant said yes. At the hearing on the amended motion to withdraw defendant's guilty plea, defendant testified that his counsel advised him of the 85% requirement when discussing the plea offer of 4 to 8 years' imprisonment but not when discussing pleading guilty with a range of 1 to 12 years' imprisonment.

¶ 32 Even if we were to assume that plea counsel failed to advise defendant about the 85% requirement and that this constituted deficient performance, defendant's claim of ineffective assistance of counsel would still fail because defendant has not shown that he was prejudiced. "In order to show prejudice, a defendant must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *People v. Valdez*, 2016 IL 119860, ¶ 29 (quoting *Strickland*, 466 U.S. at 694). Defendant contends that he was prejudiced in that he would have accepted the plea offer of four to eight years' imprisonment had he known about the 85% requirement. However, defendant testified that plea

counsel advised him to reject the plea offer because counsel thought the court would sentence defendant to less than four years' imprisonment, and defendant took this advice. Defendant did not testify that his purported lack of knowledge of the 85% requirement influenced his decision to reject the plea offer. Thus, defendant has not shown that he would have accepted the plea offer *but for* counsel's failure to advise him regarding the 85% requirement.

¶ 33 3. Failing to Present Mitigating Evidence at Sentencing.

¶ 34 Defendant argues that his plea counsel was ineffective for failing to present mitigating evidence at his sentencing hearing. Specifically, defendant contends that plea counsel should have conducted a reasonable investigation and gathered witnesses from defendant's community to testify that defendant was a trustworthy, caring, thoughtful, and generous individual. Defendant contends that such testimony would have shown that he was not at a high risk to reoffend.

¶ 35 Even assuming that plea counsel failed to conduct a reasonable investigation, as defendant claims, defendant has failed to show that he was prejudiced by plea counsel's alleged failings. "In order to show prejudice, a defendant must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *Id.* (quoting *Strickland*, 466 U.S. at 694). At the hearing on his amended motion to withdraw his guilty plea, defendant did not call any witnesses from his community that would have testified on his behalf at his sentencing hearing. During defendant's own testimony, defendant did not identify any specific individuals who he believed should have been called as witnesses at sentencing. Also, other than defendant's own self-serving testimony, there was no evidence of what anyone in defendant's community would have said if they had testified. On this record, it is impossible to determine whether it is reasonably probable that the result of the

proceeding would have been different if plea counsel had presented witnesses from defendant's community.

¶ 36 II. Excessive Sentence

¶ 37 Defendant argues that the 12-year sentence imposed by the court was excessive in light of his advanced age and poor health. We find that the court did not abuse its discretion in sentencing defendant to 12 years' imprisonment given his criminal history and the need for deterrence.

¶ 38 "The trial court has broad discretionary powers in imposing a sentence, and its sentencing decisions are entitled to great deference." *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). " 'A reviewing court gives great deference to the trial court's judgment regarding sentencing because the trial judge, having observed the defendant and the proceedings, has a far better opportunity to consider these factors than the reviewing court, which must rely on the "cold" record.' " *Id.* at 212-13 (quoting *People v. Fern*, 189 Ill. 2d 48, 53 (1999)). "Consequently, the reviewing court must not substitute its judgment for that of the trial court merely because it would have weighed these factors differently." *People v. Stacey*, 193 Ill. 2d 203, 209 (2000).

¶ 39 "A reviewing court may not alter a defendant's sentence absent an abuse of discretion by the trial court." *Alexander*, 239 Ill. 2d at 212. "[A] sentence within statutory limits will be deemed excessive and the result of an abuse of discretion by the trial court where the sentence is greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense." *Stacey*, 193 Ill. 2d at 210.

¶ 40 Here, the court's finding that defendant was a danger to society was supported by the evidence. Defendant had four prior convictions for DUI. Despite these convictions and his advanced age, defendant continued to drive while under the influence of alcohol. The PSI

showed that defendant had acknowledged that he had a problem with alcohol but did not desire treatment. Also, the court was within its discretion in finding that a lengthy sentence was necessary to deter others from committing similar offenses. Accordingly, the 12-year sentence imposed by the circuit court was not "greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense." *Id*.

¶ 41 We reject defendant's argument that the court failed to seriously consider defendant's age and health in imposing its sentence. "When mitigating factors are presented to the court, there is a presumption that the trial court considered them, absent some contrary evidence." *People v. Payne*, 294 Ill. App. 3d 254, 260 (1998). The PSI indicated defendant's age and contained some information about defendant's health. Defendant discussed his health in his letter to the court, which was attached to the PSI. During sentencing, plea counsel argued that defendant should receive a low sentence due to his age and poor health. The court indicated that it had read the PSI and considered the arguments of the parties. Thus, we presume that the court considered this mitigating evidence. We note that "[t]he existence of mitigating factors does not obligate the trial court to reduce a sentence from the maximum sentence allowed." *Id.*

¶ 42 CONCLUSION

¶ 43 The judgment of the circuit court of Rock Island County is affirmed.

¶ 44 Affirmed.