

NOTICE

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2018 IL App (4th) 160382-U

NO. 4-16-0382

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

August 20, 2018

Carla Bender

4th District Appellate Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
GERRETT C. WILLIAMS,)	No. 15CF347
Defendant-Appellant.)	
)	Honorable
)	Heidi N. Ladd,
)	Judge Presiding.

JUSTICE DeARMOND delivered the judgment of the court.
Justices Holder White and Knecht concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court vacated the trial court’s judgment, finding defendant was prejudiced by trial counsel’s ineffectiveness during his guilty-plea proceedings. The court also remanded with directions and for further proceedings.

¶ 2 In November 2015, defendant, Gerrett C. Williams, pleaded guilty to one count of aggravated discharge of a firearm. The trial court sentenced him to 12 years in prison and imposed various fines. Defendant filed an amended motion to withdraw his guilty plea and to vacate the judgment or, in the alternative, to reconsider the sentence, which the court denied.

¶ 3 On appeal, defendant argues (1) his postplea counsel was ineffective for failing to raise trial counsel’s ineffectiveness, (2) his judicially imposed fines were satisfied by his presentence credit, and (3) the fines imposed by the circuit clerk must be vacated. We vacate the trial court’s judgment and remand with directions and for further proceedings.

¶ 4 I. BACKGROUND

¶ 5 On March 12, 2015, the State charged defendant by information with one count of aggravated discharge of a firearm (count I) (720 ILCS 5/24-1.2(a)(2) (West 2014)), alleging he knowingly discharged a firearm in the direction of Laporsha Bailey. The State also charged defendant with one count of reckless discharge of a firearm (count II) (720 ILCS 5/24-1.5(a) (West 2014)), alleging he endangered the bodily safety of Bailey in that, while acting in a reckless manner, he discharged a firearm and in so doing caused projectiles to strike glass and floor tiles near where Bailey was standing. The State alleged the offenses occurred on March 10, 2015.

¶ 6 On September 11, 2015, the State filed two additional charges against defendant pertaining to the same conduct that occurred on March 10, 2015. In count III, the State alleged defendant committed the offense of armed violence (720 ILCS 5/33A-2(a) (West 2014)), in that he, while armed with a category I dangerous weapon, a handgun, committed the felony offense of domestic-battery-with-a-prior-domestic-battery conviction when he knowingly and without legal justification made physical contact of an insulting or provoking nature with Bailey, a family or household member, in that he shoved her and defendant had a prior conviction for domestic battery. In count IV, the State alleged defendant committed the offense of possession of a firearm without a firearm owner's identification (FOID) card (430 ILCS 65/2(a)(1), 14(c)(3) (West 2014)), in that he knowingly possessed a firearm without having in his possession a FOID card and he was not otherwise eligible for the issuance of one.

¶ 7 In November 2015, defendant indicated his desire to plead guilty to count I. The State indicated the agreement called for defendant to enter an open guilty plea to the offense of aggravated discharge of a firearm in exchange for the dismissal of the three remaining charges. In its factual basis, the State indicated defendant was inside a convenience store when Bailey and

some of her friends entered, spoke to him, and then began shoving him. Defendant removed a handgun from his pocket, pushed Bailey, and ran down an aisle. Defendant then fired two or three shots down the aisle in Bailey's direction. Bailey was not struck by any of the bullets, but bullet fragments were recovered and appliances within the store were damaged. The trial court found defendant knowingly, understandingly, and voluntarily pleaded guilty. The court later sentenced defendant to 12 years in prison. The court also imposed various fines and awarded defendant sentence credit for his time spent in pretrial custody.

¶ 8 In February 2016, defendant filed a *pro se* motion to withdraw his guilty plea. The following month, newly appointed counsel, Lindsey Yanchus, filed a motion to withdraw the guilty plea and to vacate the judgment. The motion alleged trial counsel, Amanda Riess, was ineffective for failing to inform defendant of the maximum penalty of 15 years in prison but instead informing him he would not receive more than 10 years. Defendant also alleged trial counsel pressured him to plead guilty by repeatedly informing him he would not win a trial because "he was a young black guy" and "a jury would ignore the jury instructions as to the State's burden of proof and convict him." Had he known he could receive more than 10 years in prison, and had he known the jury would follow the law and the State would have had to prove each element of the offense beyond a reasonable doubt, he would not have pleaded guilty. Yanchus later filed an amended motion to withdraw the guilty plea and to vacate the judgment or, in the alternative, to reconsider the sentence, arguing the 12-year sentence was excessive.

¶ 9 At the hearing on the amended motion, defendant testified Riess did not inform him he could receive up to 15 years in prison. Instead, she told him privately he would not be sentenced to more than 10 years. Defendant had a conversation with Riess and attorney George Vargas, who stated defendant would lose at trial because a particular witness would testify.

Defendant claimed Riess told him the jurors would perceive him negatively because he is a young black male and they would not have to follow the law.

¶ 10 Amanda Riess testified the State made an offer for defendant to plead guilty to aggravated discharge of a firearm with a sentencing cap of no more than 10 years in prison. The State later revoked the offer after a deadline had passed. Another offer and a second deadline were extended by the State, but defendant did not accept the offer. Riess noted that, prior to the deadline of the 10-year cap, the State proposed filing additional charges if defendant rejected the offer. When defendant did not accept the offer, the State filed counts III and IV. After being arraigned on the armed-violence charge that carried a minimum 15-year sentence, Riess negotiated an open plea to the offense of aggravated discharge of a firearm with a maximum of 15 years in prison. Riess stated she informed defendant of the possible sentence. Defendant then asked her to seek the previous 10-year offer, but the State declined. Riess explained to defendant “his chances at trial were not very good and, given the weight of the evidence, he would most likely be convicted.” She denied ever stating the jury would ignore the instructions.

¶ 11 George Vargas, an assistant public defender, testified he reviewed the surveillance video from the convenience store and believed defendant would be found guilty if he proceeded to trial. Vargas told defendant he would be going “in front of one of the harshest sentencers [*sic*] in this county” and, since it was a given he was going to prison, pleading guilty would allow defendant more control over the situation.

¶ 12 The trial court denied the amended motion to withdraw the guilty plea, finding trial counsel was not ineffective and the record refuted any claim that defendant did not understand the nature of his plea. Also, finding the 12-year sentence was “absolutely appropriate,” the court denied the motion to reconsider the sentence. This appeal followed.

¶ 13

II. ANALYSIS

¶ 14 Defendant argues postplea counsel provided ineffective assistance when she failed to amend his postplea motion to argue trial counsel was ineffective for not moving to dismiss the September 11, 2015, charges on speedy-trial grounds and for advising him instead that he should enter an open guilty plea to aggravated discharge of a firearm in exchange for the dismissal of those charges. The State concedes trial counsel was ineffective for failing to obtain dismissal of the additional charges before negotiating a plea of guilty to aggravated discharge of a firearm with open sentencing.

¶ 15 In the case *sub judice*, defendant discharged a firearm in a convenience store on March 10, 2015. He was arrested on March 11, 2015. The following day, the State charged him with single counts of aggravated discharge of a firearm and reckless discharge of a firearm. Based on the same occurrence, the State filed the additional charges of armed violence and possession of a firearm without a FOID card on September 11, 2015. Thus, 185 days passed between defendant's arrest and the State's filing of the additional charges.

¶ 16 The State concedes defendant's possession of a firearm without a FOID card was based on the same physical act as discharging the firearm in the direction of the victim. The State notes the prosecutor stated at defendant's initial appearance that he had a prior conviction for domestic battery in 2014, and a person with a domestic-battery conviction is ineligible for a FOID card. See 430 ILCS 65/4(a)(2)(ix) (West 2014). Thus, the FOID-card offense was subject to compulsory joinder. See 720 ILCS 5/3-3(b) (West 2014) (stating multiple offenses, based on the same act and known to the prosecutor at the time of commencing the prosecution, must be prosecuted in a single prosecution unless severed). As the FOID-card charge was filed 185 days after defendant was arrested, it violated his right to a speedy trial. See 720 ILCS 5/103-5 (West

2014) (stating every person in state custody must be tried within 120 days unless any delay is occasioned by the accused); *People v. Moody*, 2016 IL App (1st) 130071, ¶ 41, 54 N.E.3d 183 (noting “continuances obtained in connection with the trial of the original charges cannot be attributed to defendants with respect to new and additional charges when these new and additional charges were not before the court when those continuances were obtained”).

¶ 17 The State also concedes the armed-violence charge was subject to pretrial dismissal because it did not state the offense of armed violence. In count III, the State alleged defendant committed the offense of armed violence (720 ILCS 5/33A-2(a) (West 2014)) in that he, while armed with a handgun, committed the felony offense of domestic-battery-with-a-prior-domestic-battery conviction.

¶ 18 Section 33A-2(a) of the Criminal Code of 2012 (720 ILCS 5/33A-2(a) (West 2014)) states a person commits the offense of armed violence when, while armed with a dangerous weapon, he commits any felony, subject to certain exceptions. Domestic battery is a Class A misdemeanor, although it becomes a Class 4 felony if the defendant has a prior conviction for a similar offense. 720 ILCS 5/12-3.2(b) (West 2014). However, while defendant had a prior domestic-battery conviction, it could not be used to increase the classification of his misdemeanor domestic-battery offense to a felony such that it would support a charge of armed violence. See *People v. Lucas*, 231 Ill. 2d 169, 183, 897 N.E.2d 778, 786 (2008) (finding the defendant’s prior convictions were impermissibly used “for the purpose of increasing the classification of defendant’s driving while license revoked offense to a felony so that it would support a conviction of armed violence”).

¶ 19 Having conceded the FOID-card offense violated defendant’s speedy-trial rights and the armed-violence charge failed to state an offense, the State agrees a reasonable probability

exists that, but for counsel's errors, defendant would not have pleaded guilty and would have insisted on going to trial.

¶ 20 A defendant's claim of ineffective assistance of counsel is analyzed under the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Veach*, 2017 IL 120649, ¶ 29, 89 N.E.3d 366; see also *People v. Brown*, 2017 IL 121681, ¶ 26, 102 N.E.3d 205 (stating the *Strickland* standard applies to counsel's performance during the guilty-plea process). To prevail on such a claim, "a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant." *People v. Petrenko*, 237 Ill. 2d 490, 496, 931 N.E.2d 1198, 1203 (2010). To establish deficient performance, the defendant must show "counsel's performance 'fell below an objective standard of reasonableness.'" *People v. Valdez*, 2016 IL 119860, ¶ 14, 67 N.E.3d 233 (quoting *Strickland*, 466 U.S. at 688). Prejudice is established when a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v. Evans*, 209 Ill. 2d 194, 219-20, 808 N.E.2d 939, 953 (2004) (citing *Strickland*, 466 U.S. at 694). A defendant must satisfy both prongs of the *Strickland* standard, and the failure to satisfy either prong precludes a finding of ineffective assistance of counsel. *People v. Clendenin*, 238 Ill. 2d 302, 317-18, 939 N.E.2d 310, 319 (2010).

¶ 21 Here, we find trial counsel's failure to move to dismiss the September 11, 2015, charges was objectively unreasonable. Thus, it must be determined whether defendant was prejudiced by counsel's performance, *i.e.*, whether a reasonable probability exists that, but for counsel's error, he would have proceeded to trial rather than entered an open plea of guilty to aggravated discharge of a firearm. *Brown*, 2017 IL 121681, ¶ 26. Our supreme court has found "it is appropriate to compare the consequences of a defendant's conviction following a trial to

the consequences of the defendant entering the guilty plea.” *Brown*, 2017 IL 121681, ¶ 36.

“ ‘When those consequences are, from the defendant’s perspective, similarly dire, even the smallest chance of success at trial may look attractive. For example, a defendant with no realistic defense to a charge carrying a 20-year sentence may nevertheless choose trial, if the prosecution’s plea offer is 18 years.’ ” *Brown*, 2017 IL 121681, ¶ 36 (quoting *Lee v. United States*, 582 U.S. ___, 137 S. Ct. 1958, 1966-67 (2017)).

¶ 22 In this case, the State’s charge of aggravated discharge of a firearm was a Class 1 felony (720 ILCS 5/24-1.2(a)(2), (b) (West 2014)), and it carried a sentencing range of 4 to 15 years in prison (730 ILCS 5/5-4.5-30(a) (West 2014)). The State’s offer of an open guilty plea effectively subjected defendant to a maximum 15-year term, the same as he would have faced had he gone to trial. Defendant had nothing tangible to gain from pleading guilty to the most serious charge with open sentencing. Thus, a reasonable probability exists that, but for counsel’s errors, defendant would not have pleaded guilty and would have insisted on going to trial. We therefore vacate defendant’s guilty plea and sentence and remand for further proceedings, including the dismissal of the State’s armed-violence and FOID-card charges. Given this decision, we need not address defendant’s claims his judicially imposed fines were satisfied by his presentence credit or other assessments were improperly imposed by the circuit clerk.

¶ 23 III. CONCLUSION

¶ 24 For the reasons stated, we vacate the trial court’s judgment and remand with directions and for proceedings.

¶ 25 Vacated; cause remanded with directions and for further proceedings.