

NOTICE
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2018 IL App (5th) 150168-U

NO. 5-15-0168

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,)	St. Clair County.
)	
v.)	No. 12-CF-1744
)	
ANDREW McKINNON,)	Honorable
)	Zina R. Cruse,
Defendant-Appellant.)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Justices Goldenhersh and Overstreet concurred in the judgment.

ORDER

¶ 1 *Held:* Appointed appellate counsel is granted leave to withdraw, and the judgment of the circuit court is affirmed, where the circuit court did not abuse its discretion in denying the defendant's motion to withdraw guilty plea, and any argument to the contrary would lack merit.

¶ 2 The defendant, Andrew McKinnon, pleaded guilty to a felony and was sentenced to imprisonment. He filed a motion to withdraw the guilty plea, but the circuit court denied the motion. From that judgment, the defendant now appeals. The defendant's court-appointed attorney on appeal, the Office of the State Appellate Defender (OSAD), has filed a motion for leave to withdraw as counsel, in full compliance with the procedures set forth in *Anders v. California*, 386 U.S. 738 (1967), and its Illinois

progeny. This court granted the defendant ample time in which to file a *pro se* brief or other document objecting to OSAD's motion or explaining the merits of this appeal, but the defendant has not filed any sort of response. This court has examined OSAD's motion and the brief accompanying it, as well as the entire record on appeal, and has concluded that OSAD's dim assessment of this appeal is warranted. The circuit court did not err in denying the defendant's motion to withdraw guilty plea, and any suggestion to the contrary would lack arguable merit. Accordingly, OSAD is granted leave to withdraw as counsel, and the judgment of the circuit court is affirmed.

¶ 3

BACKGROUND

¶ 4 In late 2012, the defendant was charged with predatory criminal sexual assault of a child (720 ILCS 5/11-1.40(a)(1) (West 2012)), one other felony, and three misdemeanors. On May 1, 2014, the defendant, his public defender, and an assistant State's attorney appeared before the circuit court. The parties informed the court that they had reached a fully negotiated plea agreement, as follows: the defendant would plead guilty to predatory criminal sexual assault of a child, as charged, and would be sentenced to imprisonment for a term of six years, to be followed by mandatory supervised release for three years; the defendant would register as a sex offender and undergo all required HIV and STD testing; and the State would move to dismiss the other felony count and the three misdemeanor counts.

¶ 5 In response to queries from the court, the defendant indicated that he understood the proceedings, did not have any difficulty in communicating with his attorney, had discussed the matter sufficiently with his attorney, and was satisfied with his attorney's

performance. He also indicated that he understood the paperwork associated with his case. The court admonished the defendant as to the nature of the charge of predatory criminal sexual assault of a child and the possible penalties for that offense, and the defendant indicated his understanding. Those admonishments included specifically informing the defendant that the offense was a Class X felony punishable by imprisonment for 6 to 60 years (see 720 ILCS 5/11-1.40(b)(1) (West 2012)), to be followed by mandatory supervised release for a term of at least 3 years and possibly for the remainder of his natural life. The court noted that the defendant "would have to serve at least 85% of the time in the Illinois Department of Corrections" and would not receive day-for-day credit. The court admonished the defendant as to his right to plead not guilty, his right to a trial, the State's burden of proof at trial, his rights at trial—including the right to confront and cross-examine the State's witnesses, the right to testify or to remain silent, and the right to call other witnesses to testify—and further admonished him that he would waive all of those rights by pleading guilty, and the defendant indicated his understanding of all of those admonishments.

¶ 6 The court then asked the prosecutor for a factual basis for the guilty plea. The factual basis was fairly detailed, and fills two average-sized paragraphs in the report of proceedings. It included statements that on some date between April 1, 2011, and September 1, 2011, the defendant, who was over the age of 17 years at the time, was driving his car and giving a ride to A.B., a girl born on January 4, 2005, and thus under the age of 13 years, when he pulled his vehicle over and placed his penis in A.B.'s anus. After the prosecutor recited the factual basis, the court asked defense counsel, "Does the

defense so stipulate?" Defense counsel replied, "We would so stipulate that the State would intend to prove that, Your Honor."

¶ 7 The parties waived a presentence investigation report. In response to further queries from the court, the defendant indicated that he was pleading guilty freely and voluntarily, and that nobody had threatened him, pressured him, or promised him anything beyond the terms of the plea agreement. The defendant pleaded guilty to predatory criminal sexual assault of a child. The court determined that there was a factual basis for the plea, and that the plea was knowing and voluntary. The court accepted the guilty plea, and entered judgment thereon. The defendant declined to exercise his right of allocution. In accordance with the plea agreement, the court sentenced the defendant to imprisonment for six years, to be followed by mandatory supervised release for three years. The plea hearing concluded with the court's admonishing the defendant about his right to file a motion to withdraw the guilty plea and his right to appeal.

¶ 8 On May 28, 2014, 27 days after the plea hearing, the defendant filed a timely, short, *pro se* motion to withdraw his guilty plea. He claimed that (1) the factual basis for the plea was inadequate, (2) he always wanted a trial and felt that his attorney forced him to plead guilty, and (3) counsel provided inadequate representation. On January 15, 2015, the defendant filed another short *pro se* motion to withdraw his guilty plea. He claimed that (1) the factual basis for the plea was inadequate, (2) counsel provided inadequate representation, and (3) he was "poorly advised" as to the rights he was

forfeiting by pleading guilty. The court appointed the public defender to represent the defendant and granted him 30 days to file an amended motion to withdraw guilty plea.

¶ 9 On April 16, 2015, the defendant filed, by appointed counsel, another motion to withdraw guilty plea. He claimed that (1) plea counsel had provided ineffective assistance, and (2) he never stipulated to the State's factual basis for the plea. The defendant added that he had "a defense worthy of consideration," but he did not specify or describe this defense.

¶ 10 On April 27, 2015, the court held a hearing on the defendant's motion to withdraw guilty plea. The defendant testified that he "really wanted to go to trial" and did not see any "actual basis" for a guilty plea. He never saw a police report in his case. He did not know what exactly plea counsel had done in connection with his case, but he thought that counsel had not properly investigated the case because he never saw "any motions that was [*sic*] filed on anything, as far as like the inconsistency of the police or what they did with the witnesses or questioning them without anyone around and certain things [the defendant had] asked [about]." At the same time, the defendant acknowledged that he "didn't have any witnesses" he wanted counsel to find or to contact. Plea counsel had failed to tell the defendant "a certain lot of things" that he later learned about, "like truth-in-sentencing," and counsel had failed to "give [him] some other kind of way to—well, with—with what was happening and—and looking at the cases and everything." Also, the defendant complained about the way plea counsel related to him. Approximately two or three weeks before the scheduled start of trial, plea counsel's manner toward the defendant "changed." Instead of focusing on trial preparation, counsel started "planting

certain seeds in [the defendant's] head" and making comments such as, "You probably could get this." At one point, the defendant thought that plea counsel "was the prosecution." The defendant pleaded guilty because he was "listening to [his] lawyer" and "didn't think [he] was going to get any time." The defendant concluded his direct testimony by denying that he had committed the sexual assault and asserting that he always wanted to go to trial and prove his innocence.

¶ 11 On cross-examination by the State, the defendant seemed to acknowledge that the judge at the plea hearing had informed him that he would serve 85% of his sentence, but the defendant stated that he had not understood this information. The defendant also stated that, contrary to his statements at the plea hearing, he was not satisfied with plea counsel's representation and he did not want to plead guilty. On redirect examination, the defendant testified that when he answered the judge's questions at the plea hearing, he was merely following plea counsel's advice to "say 'yes' to everything," and he was "dumbfounded" when he heard the State describe the nature of the sexual assault that he was charged with committing. At that point in the defendant's testimony, the court asked the defendant, "What did you think you were pleading to?", and the defendant answered, "I was really just confused and distraught at that time."

¶ 12 After hearing arguments from the parties, the court denied the defendant's motion to withdraw guilty plea. The court explicitly found that the defendant had been adequately admonished at the plea hearing, and that his guilty plea was knowing and voluntary. On April 27, 2015, the court entered a written order to that effect. The defendant perfected the instant appeal from that order.

¶ 14 As previously mentioned, OSAD has filed an *Anders* motion to withdraw as the defendant's attorney on appeal. In its *Anders* brief, OSAD discusses two potential issues in this appeal, *viz.*: whether the circuit court abused its discretion in denying the defendant's motion to withdraw his guilty plea because (1) the defendant showed that his guilty plea resulted from the ineffective assistance of plea counsel and (2) plea counsel did not stipulate to the factual basis for the guilty plea.

¶ 15 A defendant does not have an absolute right to withdraw a previously-entered plea of guilty. *People v. Delvillar*, 235 Ill. 2d 507, 520 (2009). He must seek the circuit court's leave to withdraw the plea, and toward that end he must show "a manifest injustice under the facts involved." *People v. Pullen*, 192 Ill. 2d 36, 39 (2000). That is, the defendant bears the burden of showing the necessity of allowing him to withdraw the plea. *People v. Canterbury*, 313 Ill. App. 3d 914, 917 (2000). When faced with a motion to withdraw a guilty plea, a court must decide whether the defendant pleaded guilty due to "a misapprehension of the facts or of the law" or whether "there is doubt of the guilt of the accused and the ends of justice would better be served by submitting the case to a trial." *Pullen*, 192 Ill. 2d at 40. The circuit court has discretion to grant or deny a motion to withdraw guilty plea. *Delvillar*, 235 Ill. 2d at 519. On appeal, the denial of such a motion is reviewed for an abuse of discretion. *Id.* An abuse of discretion occurs where the court's decision is arbitrary, fanciful, or altogether unreasonable. *People v. Becker*, 239 Ill. 2d 215, 234 (2010).

¶ 16 At the hearing on his motion to withdraw the guilty plea, the defendant testified that he did not "think" that plea counsel had investigated his case properly, thus suggesting that counsel had acted in an unprofessional or deficient manner. The defendant's thought arose from the fact that the defendant never saw "any motions that was [*sic*] filed on anything, as far as like the inconsistency of the police or what they did with the witnesses or questioning them without anyone around and certain things [the defendant had] asked [about]." At the same time, the defendant acknowledged that he "didn't have any witnesses" he wanted counsel to find or to contact in preparation for trial.

¶ 17 Certainly a criminal defense attorney is duty-bound to explore and to investigate his client's case, so that he may develop a defense for the client and may present witnesses who are available and beneficial, and the failure to fulfill this duty renders counsel's assistance constitutionally ineffective. See, e.g., *People v. Makiel*, 358 Ill. App. 3d 102, 107-08 (2005). In order to establish that he was deprived of the effective assistance of counsel, a criminal defendant needs to show that his attorney's actions fell below an objective standard of reasonableness, and that he suffered prejudice as a result of the deficient performance. *Strickland v. Washington*, 466 U.S. 668 (1984). Here, the defendant's vague testimony did not convey any idea of what exactly counsel had failed to investigate, or how such an investigation could possibly have improved the defendant's prospects in the case. On the subject of plea counsel's representation, the defendant's only clear testimony was that he did not have any witnesses he wanted counsel to find or

to contact. The defendant clearly failed to show that counsel had failed to investigate his case or that his guilty plea resulted from such a failure.

¶ 18 Also at the hearing on the motion to withdraw guilty plea, the defendant testified that prior to the guilty plea, plea counsel had failed to tell him "a certain lot of things" about which he later learned. Along this line, "truth-in-sentencing" was the only specific item mentioned by the defendant. The defendant also testified that he did not think he would have to serve time in prison. Erroneous advice by plea counsel can serve as the basis for vacating a guilty plea, but only if the defendant shows that the erroneous advice rendered the plea involuntary. *People v. Beasley*, 2017 IL App (4th) 150291, ¶ 32. Here, even if plea counsel did fail to inform the defendant about truth-in-sentencing's effect on the amount of time he would spend behind bars, or any other aspect of sentencing, such failure had no impact on the case, for the court at the plea hearing definitely did inform him about truth-in-sentencing's effect, along with all other aspects of sentencing, and the defendant indicated his understanding. The defendant was fully informed about his plea agreement and the consequences of his guilty plea, including a term of imprisonment, and his plea was knowing and voluntary. His guilty plea did not result from a lack of necessary information.

¶ 19 Furthermore, the defendant testified that plea counsel's manner toward him "changed" approximately two or three weeks before the scheduled start of trial, and to such a degree that the defendant, at one point, thought that plea counsel "was the prosecution." He ultimately pleaded guilty, the defendant explained, because he "listen[ed] to [his] lawyer." Being coerced or threatened into pleading guilty renders a

guilty plea involuntary, warranting vacatur of the plea. See, e.g., *People v. Pequeno*, 337 Ill. App. 3d 537, 544 (2003). Here, though, no real facts support a coercion claim, and nothing in the record, aside from the defendant's bare allegation, indicates that the defendant would have persisted in a plea of not guilty or would have insisted on a trial, but for counsel's coercive manner toward him. The defendant did not articulate, or even hint at, any plausible defense that could have been raised at a trial. See *People v. Hall*, 217 Ill. 2d 324, 335-36 (2005). In short, the defendant did not establish any coercion, by counsel or by anyone else.

¶ 20 Another potential issue identified by OSAD is whether the circuit court abused its discretion in denying the defendant's motion to withdraw guilty plea because plea counsel did not stipulate to the factual basis for the plea. In this case, the State offered a rather detailed factual basis in the form of a summary of the evidence against the defendant. It certainly provided the circuit court with a factual basis for concluding that the defendant committed the offense to which he was pleading guilty. See Ill. S. Ct. R. 402(c) (eff. July 1, 2012); *People v. Jackson*, 199 Ill. 2d 286, 298 (2002). Rule 402(c) was thus satisfied, and a stipulation by the defendant or by plea counsel was unnecessary.

¶ 21 **CONCLUSION**

¶ 22 For all of the foregoing reasons, this court concludes that the circuit court did not abuse its discretion in denying the defendant's motion to withdraw guilty plea. Any argument that the court did abuse its discretion would be without merit. Therefore, OSAD is granted leave to withdraw as counsel, and the judgment of the circuit court is affirmed.

¶ 23 Motion granted; judgment affirmed.