2019 IL App (5th) 170044-U

NO. 5-17-0044

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	St. Clair County.
	)	
v.	)	No. 11-CF-825
	)	
FLOYD ROBINSON,	)	Honorable
	)	Robert B. Haida,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Justices Welch and Cates concurred in the judgment.

ORDER

¶ 1 *Held*: Where the trial court substantially complied with the admonishments required by Illinois Supreme Court Rule 402 (eff. July 1, 1997), the trial court's order denying defendant's motion to withdraw his guilty plea is affirmed.

¶ 2 Defendant, Floyd Robinson, was charged with two counts of burglary (720 ILCS 5/19-1(a) (West 2010)), one count of escape (*id.* § 31-6(c)), and one count of retail theft (*id.* § 16A-3(a)). Defendant pled guilty to escape and retail theft, and in exchange for his plea, the State dismissed the two burglary counts. The trial court sentenced defendant to concurrent sentences: 10 years for escape and 3 years for retail theft. Defendant's attorney filed a motion to reconsider the sentences and a motion to withdraw his guilty

plea. The trial court ordered defendant's case reassigned to another attorney because defendant had claimed his attorney at sentencing was ineffective in that he promised defendant that he would receive probation in exchange for his guilty plea. The new attorney filed a motion to withdraw guilty plea and to vacate the judgment. The trial court denied this motion. Defendant appealed. We found that his new attorney did not strictly comply with Illinois Supreme Court Rule 604(d) (eff. July 1, 2006) because he did not certify that he made "amendments to the motion necessary for adequate presentation of any defects in those proceedings." (Internal quotation marks omitted.) *People v. Robinson*, 2016 IL App (5th) 120519-U, ¶ 25. This court also found that the trial court did not comply with Illinois Supreme Court Rule 402(b) (eff. July 1, 1997). *Id.* We reversed, remanded, and directed the trial court "to allow the defendant the opportunity to file a new motion to withdraw guilty plea, to conduct a hearing on the motion, and to require strict compliance with Rule 604(d)." *Id.* On remand, the defendant filed a motion to withdraw guilty plea, the trial court conducted its hearing, and the trial court denied defendant's motion on January 11, 2017. Defendant appeals from this order.

¶ 3 BACKGROUND

¶ 4 The criminal charges against defendant stem from his theft of ink cartridges from a Walmart store in Cahokia.

¶ 5 At his plea hearing, the trial court informed defendant of the penalty ranges for escape and retail theft. These two crimes also provided a possibility of probation. Defendant told the court that he understood the possible penalties. The trial court then explained that by pleading guilty, defendant was giving up his right to a jury or bench

trial, his right to make the State prove his guilt beyond a reasonable doubt, and his right to cross-examine and confront witnesses.

¶ 6 At the plea hearing, the State provided a factual basis in support of defendant's guilty pleas: "that a Walmart loss prevention officer observed defendant conceal several printer ink cartridges in his pants and leave the store. When defendant was stopped and escorted back into the store, he attempted to discard the items. After being booked and taken to the police department, defendant fled and was later found by police hiding in nearby bushes." The trial court concluded the plea hearing by finding that there was a factual basis for defendant's proffered guilty plea, and accepted the plea.

¶ 7 Defendant's sentencing hearing was held on May 1, 2012. The State asked the trial court to sentence defendant to 14 years on the escape charge and 6 years on the retail theft charge. In support, the State presented three arguments: "(1) the sentence was necessary to deter others; (2) defendant committed the current offenses while serving a period of mandatory supervised release for a felony retail theft from which he had been released from prison only three months prior; [and] (3) defendant's long history of prior criminality, dating back 35 years." *Robinson*, 2016 IL App (5th) 120519-U, ¶ 8. In response, defendant's attorney asked the court to sentence defendant to probation. In support, the defense presented four arguments: (1) the current charges were nonviolent, (2) defendant was currently employed, (3) defendant was aware of his mistakes and was seeking another chance, and (4) incarceration would be a hardship on defendant's 80-year-old dependent. *Id.*

¶ 8 At the conclusion of the sentencing hearing, the trial court sentenced defendant to 10 years on the charge of escape, followed by 2 years of mandatory supervised release (MSR), and 3 years on the charge of retail theft, followed by 1 year of MSR, with the sentences to run concurrently.

¶ 9 On May 2, 2012, defendant filed a *pro se* motion to withdraw his guilty plea, stating that his plea was not intelligently made because he did not know that he had been eligible for an extended term on the escape charge, and that if he had known that fact, he would have accepted the State's three-year plea offer. He claimed that the State made the three-year offer to his first defense attorney, Anne Keeley, and that she never informed him that the plea offer had been revoked. Defendant also alleged that after Keeley was replaced by his second defense attorney Alex Baker, he informed Baker about the State's three-year offer. Instead of advising defendant to accept that offer, defendant claims, attorney Baker "told him to plea[d] guilty with a no cap plea to get probation."

¶ 10 Attorney Baker filed a motion to reconsider defendant's sentence and to withdraw his guilty plea. Because defendant had claimed that Baker was ineffective, the trial court appointed a third defense attorney due to the conflict of interest.

¶ 11 On October 17, 2012, the third appointed attorney, Andrew Liefer, filed a motion to withdraw guilty plea and vacate judgment accompanied by a Rule 604(d) certificate. In this motion, attorney Liefer claimed that the trial court failed to: "(1) advise defendant of the nature of the charges and the minimum and maximum sentences prescribed by law; (2) advise defendant he had the right to plead not guilty or persist in that plea; [and] (3) advise defendant he had the right to a trial and by pleading guilty he waived that

right." *Robinson*, 2016 IL App (5th) 120519-U, ¶ 11. Attorney Liefer also alleged that the plea was not knowing and voluntary, that the State failed to provide the required factual basis, that the trial court did not provide the correct Illinois Supreme Court Rule 605 admonishments, and that the sentence was excessive and harsh.

¶ 12 On that same date, the trial court confirmed that the only motion being presented was the motion filed by attorney Liefer—that all motions filed by prior attorneys were "waived and withdrawn." The trial court denied the motion to withdraw the guilty plea and vacate judgment, finding that defendant had been properly admonished pursuant to Illinois Supreme Court Rules 402 and 605. Ill. S. Ct. R. 402 (eff. July 1, 1997); Ill. S. Ct. R. 605 (eff. Oct. 1, 2001).

¶ 13 Defendant then filed additional *pro se* motions alleging that attorney Liefer was ineffective. Defendant claimed Liefer was ineffective because he neglected to raise the other issues that had been raised by his two former defense attorneys and because he did not argue defendant's claim that his plea was not knowing and voluntary. In support of the second claim, defendant alleged that he had a conversation with Liefer about attorney Baker's promised probation and that Liefer stated he would bring that to the court's attention but failed to do so.

¶ 14 On November 1, 2012, the trial court held a hearing on defendant's *pro se* motions. The trial court denied defendant's motion to vacate, finding that his plea was knowing and voluntary, noting that the trial court admonished defendant of the sentence range and that by pleading guilty he was waiving his right to a trial. The trial court also found inadequate proof that Liefer provided ineffective assistance because defendant

could not establish that but for Liefer's "errors," he would not have pled guilty and would have proceeded to trial.

¶ 15 Defendant appealed to this court, arguing that attorney Liefer's Rule 604(d) certificate was insufficient, that the trial court failed to comply with Rule 402(b), and that the trial court failed to conduct an adequate inquiry into his claims that attorney Liefer was ineffective.

¶ 16 After reviewing Liefer's Rule 604(d), we concluded that it was defective because Liefer did not certify that he amended the motion "necessary for adequate presentation of any defects" in the earlier proceedings. *Robinson*, 2016 IL App (5th) 120519-U, ¶¶ 21-23, 25. We also found that the trial court did not comply with Rule 402(b) at sentencing because the court did not ask defendant if he had been made any promises in exchange for his plea. *Id.* ¶¶ 24, 25. We reversed, remanded, and directed the trial court to allow defendant to file a new motion to withdraw his guilty plea, to conduct a hearing on this new motion, and to require strict compliance with Rule 604(d). *Id.* ¶ 25.

¶ 17 On remand, the trial court appointed attorney Brian Flynn to represent defendant. Attorney Flynn filed a new motion to withdraw defendant's guilty plea on December 8, 2016, arguing that attorney Baker was ineffective because he promised defendant that he would receive a sentence of probation in exchange for pleading guilty and then made no objection when defendant did not receive probation. Attorney Flynn also filed a Rule 604(d) certificate that contained the requisite wording.

¶ 18 On January 11, 2017, the trial court held a hearing. Defendant testified in a manner consistent with his claim that attorney Baker told him he would receive probation if he pled guilty, stating:

> "I was not properly admonished. You said, was I admonished by Judge Cook. Judge Cook did not properly admonish me up under Supreme Court Rule 402. Had he asked about, was any plea—was any promise given to me, I would have told him that Alex Baker offered me probation, come and take probation."

Defendant testified that before he entered his guilty plea, attorney Baker told him that the alleged three-year offer did not exist. Furthermore, he was aware that he was making an "open plea" and explained his understanding that this meant that the sentence was within the judge's discretion.

¶ 19 The trial court took judicial notice of testimony previously given by Anne Keeley and Alex Baker at an earlier evidentiary hearing on defendant's postconviction petition.

¶ 20 Keeley testified that she did not recall having any plea-based conversations with defendant and that she would not have informed defendant of a plea deal unless the State had made that deal.

¶ 21 Baker testified that he received one plea offer from the State. That offer required defendant to plead guilty to escape and retail theft; the State would drop the two burglary charges; and the State reserved the right to argue for any lawful sentence. Baker suggested that defendant take this deal, which he did. Baker testified that he would never guarantee a sentence, and he denied promising defendant that he would receive probation. However, he testified that he informed defendant that a sentence of probation was within the range of possible sentences.

¶ 22 The trial court denied defendant's motion on January 11, 2017, stating that Judge Cook substantially complied with Illinois Supreme Court Rule 402(a) and 402(b) at the sentencing hearing. The court found that the testimony of attorneys Keeley and Baker was credible, as both attorneys denied defendant's claims under oath that there was a three-year offer. The court stated that because defendant was so familiar with the court system, if the State had offered a three-year sentence, defendant would have immediately informed Judge Cook of that offer upon hearing that his sentence exceeded the alleged offer. The trial court also concluded that defendant's plea was voluntary.

¶ 23 ANALYSIS

¶ 24 On appeal, defendant argues that Judge Cook did not substantially comply with Illinois Supreme Court Rule 402 at his March 20, 2012, plea hearing, and therefore, his motion to withdraw his guilty plea should have been granted.

¶ 25 A trial court's decision to grant or deny a motion to withdraw a guilty plea is within the trial court's sound discretion. *People v. Hale,* 82 Ill. 2d 172, 175-76, 411 N.E.2d 867, 868 (1980); *People v. Delvillar*, 235 Ill. 2d 507, 519, 922 N.E.2d 330, 338 (2009) (citing *People v. Walston*, 38 Ill. 2d 39, 42, 230 N.E.2d 233, 234 (1967)). Therefore, we will not reverse the trial court's decision denying a motion to withdraw a guilty plea unless the trial court clearly abused its discretion. *Hale*, 82 Ill. 2d at 175-76; *Delvillar,* 235 Ill. 2d at 519. A court's ruling constitutes an abuse of discretion if it is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court. *People v. Patrick*, 233 Ill. 2d 62, 68, 908 N.E.2d 1, 5 (2009) (citing *People v. Hall*, 195 Ill. 2d 1, 20, 743 N.E.2d 126, 138 (2000)).

¶ 26 The act of entering a plea of guilty is considered "grave and solemn." *Brady v. United States*, 397 U.S. 742, 748 (1970). If a defendant were allowed to change his mind in order to have a jury hear his case, the guilty plea would become "a temporary and meaningless formality reversible at the defendant's whim." *United States v. Barker*, 514 F.2d 208, 221 (D.C. Cir. 1975).

¶ 27 Allowing a defendant to withdraw his plea is not automatic and should be based on a need to correct a manifest injustice. *People v. Hillenbrand*, 121 Ill. 2d 537, 545, 521 N.E.2d 900, 903 (1988). The defendant bears the burden to demonstrate that it is necessary that he be allowed to withdraw his plea. *People v. Feldman*, 409 Ill. App. 3d 1124, 1127, 948 N.E.2d 1094, 1098 (2011) (quoting *People v. Dougherty*, 394 Ill. App. 3d 134, 140, 915 N.E.2d 442, 447-48 (2009)).

¶ 28 The trial court should allow a plea to be withdrawn if (1) the plea was entered on a misapprehension of fact or law, (2) there is doubt as to the defendant's guilt, (3) the defendant has a meritorious defense, or (4) the ends of justice would be better served by submitting the case to a jury. *People v. Davis*, 145 Ill. 2d 240, 244, 582 N.E.2d 714, 716 (1991) (citing *People v. Morreale*, 412 Ill. 528, 531-32, 107 N.E.2d 721, 723 (1952)).

¶ 29 Defendant specifically argues that he should be allowed to withdraw his guilty plea because the trial court failed to adequately admonish him by reciting the Rule 402(b) admonishments at the hearing and ensuring that he understood the meaning of the admonishments. Judge Cook reviewed the Rule 402(a) admonishments but omitted the Rule 402(b) admonishments. Defendant argues that the omissions mandate a finding that

the trial court did not substantially comply with Rule 402, and thus, the trial court should have allowed him to withdraw his guilty plea.

¶ 30 Illinois Supreme Court Rule 402 (eff. July 1, 1997) requires that in any hearing where a defendant enters a plea of guilt, the court must substantially comply with certain admonitions to the defendant. The Rule 402(a) admonitions include ensuring that the defendant understands (1) the charges; (2) the applicable minimum and maximum sentences, including any enhancements and potential consecutive sentences; (3) his right to plead guilty or not guilty; and (4) that if he chooses to plead guilty, he waives his right to a jury trial and his right to confront the witnesses. Ill. S. Ct. R. 402(a) (eff. July 1, 1997). Because the Rule 402(b) admonitions are specifically at issue in this case, we include the full language of the rule:

> "(b) Determining Whether the Plea is Voluntary. The court shall not accept a plea of guilty without first determining that the plea is voluntary. If the tendered plea is the result of a plea agreement, the agreement shall be stated in open court. The court, by questioning the defendant personally in open court, shall confirm the terms of the plea agreement, or that there is no agreement, and shall determine whether any force or threats or any promises, apart from a plea agreement, were used to obtain the plea." Ill. S. Ct. R. 402(b) (eff. July 1, 1997).

¶ 31 Substantial compliance with Rule 402 does not mean literal compliance. *People v. Dismore*, 33 Ill. App. 3d 495, 501-02, 342 N.E.2d 151, 156-57 (1975). Substantial compliance is determined by the admonishments provided to the defendant at the hearing when the plea of guilt is received. *People v. Blankley*, 319 Ill. App. 3d 996, 1007, 747 N.E.2d 16, 25 (2001). A defendant's due process rights are violated if the trial court does not substantially comply with the required admonishments. *People v. Whitfield*, 217 Ill. 2d 177, 195, 840 N.E.2d 658, 669 (2005). In *People v. Whitfield*, the supreme court held

that the trial court did not substantially comply with the admonition requirements because the trial court did not explain that a term of MSR would be added onto the sentence of imprisonment. *Id.* at 189-91. The court explained that the court's failure to advise the defendant of the MSR period constituted "an unfair breach of the plea agreement," and that the defendant should have been allowed to withdraw his guilty plea. *Id.* at 195.

¶ 32 Failure to comply with all of the Rule 402 admonishments does not necessarily establish a due process violation or other grounds that would allow a defendant to withdraw his guilty plea. *Dougherty*, 394 Ill. App. 3d at 139 (quoting *Davis*, 145 Ill. 2d at 244). Defendant must establish that real justice was denied or that he was prejudiced by the inadequate admonishments. *Id.*

¶ 33 In our previous order in this case, we noted that Judge Cook did not comply with Rule 402(b) because he did not ask defendant whether there was "any force or threats or any promises, apart from a plea agreement," used to obtain his agreement to the stated plea. Ill. S. Ct. R. 402(b) (eff. July 1 1997); *Robinson*, 2016 IL App (5th) 120519-U, ¶ 24. Our concern with Judge Cook's omission at defendant's plea hearing was based on the facts presented in that appeal. The primary basis for our reversal was that attorney Liefer failed to comply with Rule 604(d) because he did not certify that he amended defendant's *pro se* motion to adequately address any deficiencies in defendant's motion. *Id.* ¶¶ 24, 25. We were concerned that Judge Cook's omission of the Rule 402(b) admonishments made attorney Liefer's failure to comply with Rule 604(d) more egregious. *Id.* ¶ 24.

¶ 34 In the first appeal, we were unaware of the testimony of attorneys Keeley and Baker from the hearing on defendant's postconviction petition. Therefore, we did not know that attorney Keeley denied that there was a three-year plea offer and we did not know that attorney Baker denied that he assured defendant he would receive probation for his open guilty plea. We stated, "where defendant has repeatedly alleged that Attorney Baker promised him he would be sentenced to a term of probation if he pleaded guilty *and the record fails to rebut that allegation*, a real question remains as to whether defendant voluntarily and intelligently pleaded guilty." (Emphasis added.) *Id.*

¶ 35 In this second appeal, we have a different overall view of the case because on remand the trial court heard and observed defendant as he testified at the hearing and had access to the previous testimony of attorneys Keeley and Baker. In compliance with our order, the trial court considered the evidence and defendant's allegations before concluding that Judge Cook substantially complied with Rule 402. The court reviewed the plea hearing transcript and noted that the State informed Judge Cook of the terms of the plea in compliance with Rule 402(b)—that defendant was eligible for up to 14 years on the escape charge and up to 6 years on the retail theft charge. Furthermore, defendant confirmed that he understood that the sentencing range was 3 to 14 years on the escape charge and 1 to 6 years on the retail theft charge. Considering the testimony at the hearing and the testimony from the hearing on defendant's postconviction petition, the court found that Judge Cook substantially complied with the Rule 402 admonishment requirements.

¶ 36 Despite defendant's argument to the contrary, Illinois courts have held that a trial court can be in substantial compliance with Rule 402 even if it omits one or more of the admonitions. In *People v. Dougherty*, the court found that there was substantial compliance with Rule 402 even though the trial judge did not admonish the defendant on every provision. *Dougherty*, 394 Ill. App. 3d at 139. The court found that the trial judge substantially complied with Rule 402 because the evidence established that the defendant entered his plea voluntarily and with full understanding. *Id.* The court reasoned that the purpose of Rule 402 admonishments "is to ensure that a defendant understands his plea, the rights he has waived by pleading guilty and the consequences of his action." *Id.* at 138 (citing *People v. Johns*, 229 Ill. App. 3d 740, 593 N.E.2d 594 (1992)). Literal compliance is not mandated. *Id.* (citing *People v. Burt*, 168 Ill. 2d 49, 658 N.E.2d 375 (1995)). The court defined "substantial compliance" as follows: "although the trial court did not recite to the defendant, and ask defendant if he understood, all the components of Rule 402(a), the record nevertheless affirmatively and specifically shows that the defendant understood them." *Id.* (citing *People v. Walker*, 109 Ill. 2d 484, 488 N.E.2d 529 (1985)). Whether the standard of "substantial compliance" has been met depends upon the facts of each case. *Id.* at 139 (citing *People v. Dennis*, 354 Ill. App. 3d 491, 820 N.E.2d 1190 (2004)). To determine whether the defendant's guilty plea was intelligently and voluntarily given in the absence of full compliance with the Rule 402 admonishments, the court may consider the entire record. *Id.* (citing *People v. Krantz*, 58 Ill. 2d 187, 317 N.E.2d 559 (1974)). Although *Dougherty* involved a trial court's omission of Rule 402(a) admonishments, we find the reasoning of the case to be

persuasive in this Rule 402(b) context because the most important factor common to all Rule 402 admonishments is whether the defendant intelligently and voluntarily entered his guilty plea.

¶ 37 Illinois courts have also held that a trial court's failure to provide Rule 402(b) admonishments—to determine if a defendant's plea was the result of promises—may constitute harmless error. In *People v. Sharifpour*, the error was found harmless because defendant's attorney testified at the hearing on this motion to withdraw his guilty plea that she made no promises to the defendant. *People v. Sharifpour*, 402 Ill. App. 3d 100, 114, 930 N.E.2d 529, 543 (2010). As our supreme court stated in *People v. Ellis*:

> "If upon review of the entire record it can be determined that the plea of guilty made under the terms of a plea agreement was voluntary, and was not made as the result of force, threats or promises other than the plea agreement, the error resulting from failure to comply strictly with Rule 402(b) is harmless." *People v. Ellis*, 59 Ill. 2d 255, 257, 320 N.E.2d 15, 16 (1974) (citing *Krantz*, 58 Ill. 2d 187).

¶ 38 Here, upon review of the entire record, including the postconviction hearing testimony of attorneys Keeley and Baker, we concur with the trial court's assessment that defendant's guilty plea was voluntarily and intelligently made, and was not the result of "force, threats or promises other than the plea agreement" (*id.*). The attorneys' testimony effectively contradicted defendant's claims that the State offered attorney Keeley a three-year plea offer and that attorney Baker promised defendant that he would be sentenced to probation. The trial court, having observed defendant's testimony, determined that defendant was less credible on the issue of the alleged probation promise. "The trial court was not required to accept defendant's testimony at the motion to withdraw [his] guilty plea but could instead regard it as at best improbable and at worst false." *People v.*

Christensen, 197 Ill. App. 3d 807, 812-13, 555 N.E.2d 422, 425 (1990) (citing *People v. Van Ostran*, 168 Ill. App. 3d 517, 521, 522 N.E.2d 851, 853 (1988)). Furthermore, a defendant's mistaken impression, without substantial objective proof, provides an insufficient basis on which a trial court should vacate a guilty plea. *Dougherty*, 394 Ill. App. 3d at 140 (citing *Hale*, 82 Ill. 2d 172). We also find support for the trial court's order in defendant's statements to the trial court that acknowledged: (1) that he was informed by his attorney before sentencing that there was no three-year plea deal and (2) that he was fully aware that his plea was an "open plea." Defendant explained his understanding of his open plea in that the ultimate decision would be made by the trial judge. We find that the trial court did not abuse its discretion in denying defendant's motion to withdraw his guilty plea. *Hale*, 82 Ill. 2d at 175-76.

¶ 39 CONCLUSION

¶ 40 For the reasons stated in this order, we affirm the judgment of the St. Clair County circuit court.

¶ 41 Affirmed.