

2014 IL App (2d) 120841-U
No. 02-12-0841
Rule 23 Order filed March 5, 2014
Modified upon denial of rehearing May 22 , 2014

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).

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Lake County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 12-CF-483
)	
DANIEL S. GRAHAM,)	Honorable
)	Daniel B. Shanes,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Justices McLaren and Jorgensen concurred in the judgment.

ORDER

- ¶ 1 *Held:* Defense counsel was ineffective for moving to vacate defendant's guilty plea rather than moving for a reduction or waiver of the fee that defendant would have needed to pay to comply with the home-monitoring provision of his agreed-upon probation; we remanded the cause for a motion to reduce or waive the fee and for a hearing, after which the trial court would reinstate either defendant's probation or the prison sentence that it imposed after defendant's trial.
- ¶ 2 Defendant, Daniel S. Graham, was charged with two counts of violating an order of protection (720 ILCS 5/12-3.4(a)(1) (West 2012)). He agreed to plead guilty to one count in exchange for the State's recommending 24 months of probation. The trial court accepted the

agreement, ordered defendant to be evaluated by the probation department, and advised defendant that he would have to comply with any conditions the probation department imposed. The probation department found that defendant should be placed on electronic home monitoring (EHM). However, before that could happen, defendant needed to have a land line and pay a \$1,250 fee for the global positioning system (GPS) equipment. Because defendant could not comply with these terms, he moved to vacate his guilty plea. The trial court granted that motion, defendant proceeded with a jury trial, and the jury found him guilty of one count of violating an order of protection.¹ Before sentencing, defendant moved the court to reinstate his guilty plea and the terms of it. The trial court denied the motion and sentenced defendant to 30 months in prison. At issue in this appeal is whether defendant received ineffective assistance of counsel, and, if he did, whether he is entitled to have the terms of his plea agreement reinstated. We find that defendant did receive ineffective assistance of counsel. However, instead of reinstating the terms of the plea agreement, we vacate defendant's sentence and remand this cause for a hearing on whether defendant can comply with the terms of EHM.

¶ 3 The following facts are relevant in resolving the issues raised. In 2011, defendant's ex-girlfriend obtained an order of protection against him. In 2012, in violation of this order of protection, defendant contacted his ex-girlfriend two times. Based on these incidents, defendant was charged with two counts of violating the order of protection.

¶ 4 Pursuant to a plea agreement, defendant agreed to plead guilty to one count in exchange for 24 months of probation. Additionally, the State explained that, as part of the agreement, defendant had to undergo an evaluation with the probation department. Elaborating on this point, the State indicated that "[defendant] will follow all recommendations of th[e] probation

¹ Before trial, the State nol-prossed the second count of violating an order of protection.

department's] evaluation, which will include, among any other terms, should they find fit, the GPS leg monitor." In admonishing defendant, the court advised defendant that, "if [the probation department] want[s] you to wear the GPS leg monitor, I'm ordering that you do." The court then stated, "If they don't, that's fine." The court accepted the plea agreement, finding it knowingly and voluntarily made and supported by a factual basis, and defendant immediately reported to the probation department.

¶ 5 Later that same day, defendant returned to court and moved to vacate his guilty plea. As the State explained to the court, the probation department determined, after an evaluation, that defendant should be placed on EHM. However, "what [the parties] did not know [when the plea agreement was made] is that the defendant would have to make a payment of \$1250 upfront before he could be placed on the bracelet." Moreover, the State indicated that "[t]he other issue is that the defendant needs to have a land line in order for the *** GPS bracelet to work." The State explained that "[b]ecause [defendant] doesn't have a land line for the GPS to be connected to, that bracelet isn't feasible for him to be released on because it would be too easy for that to be – it just wouldn't work the way that it's intended." In order to salvage the plea agreement, the State offered to have defendant put on periodic imprisonment, but defendant rejected that offer. Thus, because the agreement the parties made was "impossible for [defendant] to comply with on its current terms," defense counsel, an assistant public defender, asked the court to vacate the plea. The court granted that motion, and defendant proceeded with a jury trial.

¶ 6 The jury found defendant guilty, and, before sentencing, defendant moved to reinstate the negotiated guilty plea. In his motion, defendant noted that the statute authorizing the use of a GPS does not indicate that a defendant has to pay a fee upfront. Moreover, defendant asserted that the court should have held a hearing on defendant's ability to pay before it vacated the plea.

Defendant urged the court to hold a hearing on his ability to pay the \$1,250 fee, and, if the court determined that defendant could not pay it, defendant asked the court to waive it.

¶ 7 The court denied the motion, noting that “in the end the defense request[ed] to vacate the plea and at a minimum defense acquiesced in vacating the plea.” The court sentenced defendant, and this timely appeal followed.

¶ 8 At issue in this appeal is whether counsel was ineffective for moving to vacate the plea, and, if so, what remedy is available to defendant. Accordingly, the first issue we address is whether counsel was ineffective.

¶ 9 A defendant has a right to the effective assistance of competent counsel during the plea-bargaining process. *Lafler v. Cooper*, 566 U.S. ___, ___, 132 S. Ct. 1376, 1384 (2012). When a defendant claims that he has been denied this right, he must establish both prongs of the test announced in *Strickland v. Washington*, 466 U.S. 668 (1984). *Lafler*, 566 U.S. at ___, 132 S. Ct. at 1384. That is, the defendant must prove that (1) counsel’s performance fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for counsel’s errors, the result of the proceedings would have been different. *Id.* In the context of plea negotiations, prejudice under the second prong arises when a defendant shows that, but for counsel’s deficient advice, there is a reasonable probability that a plea agreement would have been presented to the court, the court would have accepted the plea agreement’s terms, and the conviction or sentence that would have been imposed under the agreement’s terms was less severe than that imposed after the defendant’s trial. *Id.* ___, 132 S. Ct. at 1385. We review *de novo* whether counsel was ineffective, as the facts here are not in dispute. *People v. Nowicki*, 385 Ill. App. 3d 53, 81 (2008).

¶ 10 With these principles in mind, we conclude that defendant has established that his counsel was ineffective. First, counsel's performance fell below an objective standard of reasonableness in that counsel was unaware that the fee imposed to cover the costs of the GPS device could have been reduced or waived. Specifically, section 5-6-3(l) of the Unified Code of Corrections (Code) (730 ILCS 5/5-6-3(l) (West 2012)) provides that "[t]he court may order an offender who is sentenced to probation or conditional discharge for a violation of an order of protection [to] be placed under electronic surveillance as provided in Section 5-8A-7 of this Code." Section 5-8A-7 of the Code (730 ILCS 5/5-8A-7 (West 2012)) provides for a domestic violence surveillance program. It states that "[i]f the Prisoner Review Board, Department of Corrections, or court (the supervising authority) orders electronic surveillance as a condition of *** probation *** for a violation of an order of protection *** the supervising authority shall use the best available global positioning technology to track domestic violence offenders." Section 5-9-1.16(c) of the Code (730 ILCS 5/5-9-1.16(c) (West 2012)) touches on how to assess the costs of EHM equipment. It states that "[t]he supervising authority of a domestic violence surveillance program under Section 5-8A-7 of this Act shall assess a person either convicted of, or charged with, the violation of an order of protection an additional fee to cover the costs of providing the equipment used and the additional supervision needed for such [a] domestic violence surveillance program." 730 ILCS 5/5-9-1.16(c) (West 2012). However, "[i]f the court finds that the fee would impose an undue burden on the victim, the court may reduce or waive the fee." *Id.* Although section 5-9-1.16(c) of the Code does not address the reduction of the EHM device fee based on a *defendant's* ability to pay, section 5-6-3(b)(10)(v) of the Code (730 ILCS 5/5-6-3(b)(10)(v) (West 2012)) does. This section provides that, in cases other than the drug and alcohol offenses specified in section 5-6-3(b)(10)(iv) of the Code (730 ILCS 5/5-6-

3(b)(10)(iv) (West 2012)), where EHM is ordered, “the court shall impose a reasonable fee for each day of the use of the [EHM] device *** unless after determining the inability of the defendant to pay the fee, the court assesses a lesser fee or no fee as the case may be.” 730 ILCS 5/5-6-3(b)(10)(v) (West 2012); see also 730 ILCS 5/5-6-3(g) (West 2012) (indicating that “[a]n offender sentenced to probation *** who *** is assigned to be placed on an approved [EHM] device[] shall be ordered to pay all costs incidental to such *** approved electronic monitoring in accordance with the defendant’s ability to pay those costs.”).

¶ 11 Reading these provisions together, it is apparent that a defendant convicted of violating an order of protection may be given probation with EHM. These statutes also indicate that the costs associated with EHM should be assessed after determining the defendant’s ability to pay. If the defendant does not have the means by which to pay these costs, the court, instead of vacating the order of probation, may reduce the costs or waive them altogether. Here, instead of seeking, pursuant to these statutes, to reduce or waive the \$1,250 fee that the probation department imposed for the GPS device, defense counsel, believing that defendant could not get probation without paying that fee, asked the court to vacate defendant’s guilty plea *in toto*. This constituted a misunderstanding of the applicable law. When an attorney misconstrues what a statute requires, counsel’s performance cannot be considered objectively reasonable. See *In re Danielle J.*, 2013 IL 110810, ¶ 35.

¶ 12 Further, defendant has established that he was prejudiced by counsel’s actions. The record reflects that the State and defendant agreed that defendant would plead guilty to one count of violating an order of protection in exchange for 24 months of probation. The parties presented this agreement to the court, and, after admonishing defendant, the court found defendant’s guilty plea knowingly and voluntarily made and supported by a factual basis. Thus, the court accepted

it. After the plea was vacated and defendant proceeded with a trial, the court sentenced defendant to a harsher sentence, *i.e.*, 30 months in prison. Given the reasonable probability that the fee would have been reduced or waived, the fact that defendant was given a harsher sentence after trial versus the sentence he faced pursuant to the terms of the plea agreement establishes that defendant was prejudiced. See *Lafler*, 566, U.S. at ___, 132 S. Ct. at 1387 (if a defendant receives deficient counsel in considering whether to accept a plea agreement, “prejudice can be shown if the loss of the plea opportunity led to a trial resulting in *** the imposition of a more severe sentence”).

¶ 13 The State seems to advance two reasons why counsel was not ineffective. First, it notes that, aside from the \$1,250 fee, defendant could not comply with the requirements of EHM because he did not have a land line. In reply, defendant plausibly argues that the \$1,250 fee was the real impediment to complying with EHM, as the cost of obtaining a land line is *de minimis*.² Second, the State claims that counsel was not ineffective because no evidence was presented establishing defendant’s inability to pay \$1,250. However, evidently, there is no evidence only because counsel did not know that such evidence could be submitted.

¶ 14 Citing *Lafler*, defendant claims that we must reinstate the terms of the plea agreement, because it is already known that the court would have accepted them. See *id.* at ___, 132 S. Ct. at 1389. We agree. Under the circumstances, we deem it best to put the parties in the position they would have been prior to counsel’s unprofessional error. On remand, defendant may move to waive or reduce the fee, the State may attempt to revoke defendant’s probation, or the parties may take whatever other actions are appropriate, as determined by the trial court. For these reasons, we vacate the sentence imposed by the circuit court of Lake County, reinstate the

² According to defendant, it would cost him around \$20 per month to have a land line.

sentence imposed following defendant's guilty plea, and remand this cause for further proceedings consistent with the views expressed herein.

¶ 15 Sentence vacated; cause remanded with directions.

¶ 16 **SUPPLEMENTAL ORDER ON DENIAL OF REHEARING**

¶ 17 The State has filed a petition for rehearing asking that we reconsider our decision on grounds that we find unpersuasive. We deny the State's request. However, at the end of the petition, it asks that we clarify the remedy we ordered in this case. The State contends that the syllabus (see Illinois Supreme Court Rule 23(b)(1) (eff. July 1, 2011)) of our earlier order contains instructions inconsistent with the remedy set forth in the text of the order.

¶ 18 The syllabus is not actually part of an order. In this context, "syllabus" simply means "headnote." Webster's Third New International Dictionary 2315 (2002). As the Style Manual for the Supreme and Appellate Courts of Illinois explains:

"Under Supreme Court Rule 23(b), as amended effective January 1, 2011, all written orders must contain a syllabus, that is, a statement of the holding of the court. The syllabus serves as a substitute for headnotes, which have traditionally been added to written opinions by case publishers. The syllabus can be much briefer than headnotes." Style Manual for the Supreme and Appellate Courts of Illinois § I(E)(1) (4th ed. rev. 2012).

The syllabus is simply a summary of the holding of the case rather than the holding itself. Similarly, United States Supreme Court contain a syllabus, to which the following footnote is typically appended: "The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader." See, *e.g.*, *Air Wisconsin Airlines Corp. v. Hoeper*, ___ U.S. ___, ___, 134 S. Ct. 852, 855 Fn.* (2014). In

short, in the event of a conflict between the text of an order and the syllabus section, the text of the order controls.

¶ 19 That said, for the sake of absolute clarity, we will restate our holding here. Our intent is to place the parties in the same position they were in before counsel's unprofessional error. Accordingly, we reinstate the plea agreement. On remand, the parties may take whatever action they might have taken at the point in the proceedings immediately prior to counsel moving to vacate the plea agreement, whether it be a motion to vacate or modify the agreement or some other appropriate action. This decision in no way constrains the trial court's sound discretion to take any action it deems proper, within the bounds of the law. The State's petition for rehearing is denied.