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2014 IL App (3d) 130051-U

Order filed May 8, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of the 12th Judicial Circuit,
)	Will County, Illinois,
Plaintiff-Appellee,)	
)	Appeal No. 3-13-0051
v.)	Circuit No. 11-CF-2101
)	
RICHARD DEAN,)	Honorable
)	Daniel J. Rozak,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE CARTER delivered the judgment of the court.
Justices McDade and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not abuse its discretion in denying defendant's motion to withdraw his guilty plea.

¶ 2 Defendant, Richard Dean, appeals the trial court's denial of his motion to withdraw guilty plea. Defendant pled guilty to a Class A misdemeanor for unlawful possession of cannabis with intent to deliver (720 ILCS 550/5(b) (West 2010)) and was sentenced to 24 months of court supervision. On appeal, defendant argues: (1) the State improperly indicted him with a felony charge by withholding information from the grand jury of a laboratory report

indicating a Class A misdemeanor amount of cannabis; and (2) his counsel was ineffective for recommending that he plead guilty and failing to inform him that the laboratory report indicated only a misdemeanor amount of cannabis had been recovered. We affirm.

¶ 3

FACTS

¶ 4

On October 26, 2011, defendant was charged by criminal complaint with a Class 4 felony of unlawful possession of cannabis with intent to deliver. 720 ILCS 550/5(c) (West 2010). The State alleged that on October 25, 2011, defendant unlawfully possessed with intent to deliver "more than 10 grams but not more than 30 grams" of a substance containing cannabis. At his first appearance, on October 26, 2011, defendant was admonished that the maximum penalty for a Class 4 felony was one to three years of imprisonment. The State indicated that the probable cause in support of the charge was that a deputy performed a traffic stop of defendant's vehicle and encountered a strong odor of cannabis. The deputy searched the vehicle and recovered 12 grams of a green leafy substance. On November 10, 2011, the State filed a bill of indictment alleging the same charge against defendant, a Class 4 felony charge of unlawful possession of cannabis with intent to deliver.

¶ 5

On December 2, 2011, the State furnished discovery materials to defendant, which included a November 4, 2011, laboratory report indicating the cannabis recovered from defendant weighed 6.63 grams. On January 6, 2012, the assistant State's Attorney amended the indictment to a Class A misdemeanor charge of unlawful possession of cannabis with intent to deliver, alleging defendant unlawfully possessed with intent to deliver "more than 2.5 grams but not more than 10 grams" of a substance containing cannabis. 720 ILCS 550/5(b) (West 2010).

¶ 6

On January 13, 2012, the parties reached a plea agreement. In reciting the factual basis for the plea, the State noted that the officers conducting a traffic stop of defendant's vehicle encountered a strong odor of cannabis. The officers searched the vehicle and recovered a green

leafy substance that subsequently tested positive as containing 6.63 grams of cannabis.

Defendant admitted to police that he purchased the cannabis and was trying to sell it to friends for money.

¶ 7 The trial judge noted that the charge had been amended to a Class A misdemeanor. Defendant indicated that he understood that he would be pleading guilty in exchange for 24 months of court supervision, \$1,000 in fines and costs, 30 hours of community service, and drug testing. The trial judge read the charge, indicating that it was a "Class A misdemeanor" for unlawful possession of cannabis with intent to deliver "more than 2.5 grams but not more than 10 grams" of a substance containing cannabis. Defendant agreed that if the case went to trial the State's evidence would show what was indicated in the factual basis. The trial court admonished defendant that he was pleading guilty to a Class A misdemeanor and described the possible penalties. Defendant indicated he understood the possible penalties. Defendant was admonished that by pleading guilty he was waiving his right to: (1) trial; (2) confront witnesses; (3) present evidence; and (4) the State having to prove its case beyond a reasonable doubt. Defendant confirmed that he had not been promised anything in exchange for his guilty plea and he had not been forced, threatened, or coerced into pleading guilty.

¶ 8 The trial court accepted defendant's guilty plea and sentenced him to 24 months of court supervision, a \$1,000 fine, 30 hours of community service, and drug testing. The written order of supervision indicated that defendant pled guilty to unlawful possession of cannabis with intent to deliver, a Class A misdemeanor. The trial court admonished defendant that he had the right to appeal but first was required to file a motion to withdraw his guilty plea in the trial court within 30 days and "any issue or claim of error not raised in the motion will be deemed waived[.]"

¶ 9 On February 1, 2012, defendant filed a motion to withdraw his guilty plea, which was later amended by his new counsel. In the motion, defendant argued that his plea was involuntary

because he: (1) did not know he could file a motion to suppress based on a lack of probable cause for the traffic stop; (2) thought his impounded car would be returned to him after he entered a guilty plea; (3) was not made aware of discovery materials regarding false allegations in the police reports as to the night of his arrest; and (4) was experiencing mental fatigue at the time of his plea. The trial court denied defendant's motion to withdraw guilty plea. Defendant appealed.

¶ 10

ANALYSIS

¶ 11

On appeal, defendant argues that the trial court erred in denying his motion to withdraw guilty plea. A trial court's decision to grant or deny a motion to withdraw guilty plea is within the sound discretion of the trial court and, as such, is reviewed for an abuse of discretion. *People v. Baez*, 241 Ill. 2d 44 (2011). A defendant does not have an automatic right to withdraw a guilty plea but, rather, must show a "manifest injustice" occurred under the facts involved. *Id.* at 110. The decision of the trial court will not be disturbed unless the plea was entered through a misapprehension of the facts or law, or if there is doubt as to the defendant's guilt and justice would be better served by conducting a trial. *Baez*, 241 Ill. 2d 44.

¶ 12

I. Indictment

¶ 13

Defendant argues that this case should be remanded for a new trial because the State improperly withheld the exculpatory information of the laboratory report which would have prevented the grand jury from rendering a felony indictment. Defendant claims that the indictment was improper because at the time of the grand jury hearing the State knew or should have known that only a misdemeanor amount of cannabis had been recovered.

¶ 14

The State argues that defendant "procedurally defaulted" appellate review of this issue by failing to raise it in the trial court. Generally, a defendant's argument is forfeited on appeal if it was not raised in the trial court. *People v. Enoch*, 122 Ill. 2d 176 (1988); Supreme Court Rule

604(d) (eff. July 1, 2006) (issues not preserved in a motion to withdraw guilty plea are forfeited). Here, defendant did not raise the indictment issue in his motion to withdraw guilty plea, thereby forfeiting the argument.

¶ 15 Despite forfeiture, plain errors affecting substantial right may be reviewed by an appellate court. *People v. Morgan*, 385 Ill. App. 3d 771 (2008); Ill. S. Ct. R. 615(a) ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court"). Under the plain error doctrine, reviewing courts may consider errors affecting substantial rights of the accused if either: (1) the evidence was closely balanced; or (2) the error was so serious that it affected the integrity of the judicial process. *People v. Herron*, 215 Ill. 2d 167 (2005).

¶ 16 Here, consideration of whether the evidence was closely balanced is inapplicable because defendant was convicted following a guilty plea upon the State's proffer of a factual basis for the plea. See *Morgan*, 385 Ill. App. 3d 771. Also, determining whether the error was so serious as to affect the integrity of the judicial process is inapplicable to defendant's issues involving the indictment because defendant's voluntary guilty plea waived all nonjurisdictional errors or irregularities that occurred prior to the entry of his guilty plea. See *People v. Townsell*, 209 Ill. 2d 543 (2004) (following the entry of a voluntary guilty plea, a defendant may not raise claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea and may only attack the voluntary and knowing nature of the guilty plea); cf. *Morgan*, 385 Ill. App. 3d 771 (on appeal from a negotiated guilty plea, the appellate court addressed a forfeited issue regarding a violation of one-act one-crime principles as affecting the integrity of the judicial process under the second prong of the plain error analysis). Therefore, defendant's voluntary guilty plea in this case constituted a waiver of the alleged error pertaining to the indictment.

¶ 17 Furthermore, the original indictment gave defendant implicit notice of the Class A misdemeanor charge prior to his guilty plea. A defendant has a fundamental due process right to notice of the charges brought against him and, therefore, may not be convicted of an offense he has not been charged with committing. *People v. Kennebrew*, 2013 IL 113998. However, a defendant may be convicted of an uncharged offense not expressly included in the charging instrument if it is a lesser included offense of a crime charged in the charging instrument. *Kennebrew*, 2013 IL 113998. We examine the charging instrument to determine whether an uncharged offense is a lesser-included offense of the offense charged. *Id.*; *People v. Kolton*, 219 Ill. 2d 353 (2006) (in examining the charging instrument, the parties are provided with a closed set of facts and have notice of all possible lesser-included offenses). An offense is a lesser-included offense if every element of the uncharged offense is contained in the charging instrument or any element not contained therein can reasonably be inferred from the allegations. *Kennebrew*, 2013 IL 113998.

¶ 18 Here, the indictment gave defendant notice of the potential of a conviction on the lesser-included offense of the Class A misdemeanor of unlawful possession of cannabis with intent to deliver. Defendant did not have the right to an acquittal where the evidence was insufficient to establish the felony charge but was sufficient to establish a lesser-included offense. See *Kennebrew*, 2013 IL 113998. Consequently, the record does not support defendant's contention that the State acted improperly by indicting him with a felony charge based on police testimony of approximately 12 grams of cannabis while the laboratory report indicted 6.63 grams. Nothing in the record indicates that the State was in possession of the laboratory report prior to the grand jury hearing. Furthermore, based upon the laboratory results, the State amended the indictment to the lesser-included Class A misdemeanor charge prior to defendant pleading guilty. Therefore, we decline's defendant's request for this case to be remanded for a new trial.

¶ 19

II. Ineffective Assistance of Counsel

¶ 20

Defendant also argues that his counsel was ineffective for recommending that he plead guilty to the amended Class A misdemeanor charge instead of seeking to start proceedings anew. To prevail on a claim of ineffective assistance of counsel, defendant must establish that: (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984); *People v. Albanese*, 104 Ill. 2d 504 (1984).

¶ 21

To establish prejudice in the context of a guilty plea, defendant must show a reasonable probability existed that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. *People v. Hall*, 217 Ill. 2d 324 (2005). A bare allegation that the defendant would have refrained from pleading guilty is not enough to establish prejudice. *Id.* Rather, the defendant's claim must be accompanied by a claim of innocence or the assertion of a plausible defense that could have been raised at trial. *Id.* Whether the alleged deficient performance of counsel caused defendant to plead guilty rather than going to trial largely depends on whether defendant would have likely succeeded at trial. *Id.*

¶ 22

In this case, the record refutes defendant's claim that he would have refrained from pleading guilty to the Class A misdemeanor charge. Defendant was admonished that the charge had been amended to a Class A misdemeanor and that he was pleading guilty to a "Class A misdemeanor" for possession with intent to deliver cannabis in the amount of "more than 2.5 grams but not more than 10 grams." Defendant agreed that the amount of cannabis recovered was 6.63 grams. The trial court admonished defendant that he was pleading guilty to a Class A misdemeanor for which he could receive up to one year in jail or up to 24 months of probation that would include conditional discharge or supervision. In addition to fines and costs,

