2012 IL App (1st) 110702-U

FOURTH DIVISION
Opinion filed August 9, 2012
Modified on denial of rehearing September 27, 2012

No. 1-11-0702

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10 MC1 444257
	)	
SHAWN COLBERT,	)	The Honorable
	)	James Patrick Murphy,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Lavin and Justice Fitzgerald Smith concurred in the judgment.

O R D E R

¶ *1* *Held:* Circuit court did not abuse its discretion in denying defendant's amended motion to withdraw a guilty plea to charges of domestic battery and criminal damage to property, where the plea was voluntary in that it was negotiated, defendant was thoroughly admonished about pleading guilty to both charges, and defendant

acknowledged that he understood the admonishments. Furthermore, defense counsel's representation of defendant was not ineffective.

¶ 2 Defendant Shawn Colbert entered a negotiated guilty plea to one charge of domestic battery and one charge of criminal damage to property, was sentenced to 12 months of conditional discharge with domestic violence classes, a one-year order of protection, and $435 in fines and fees. The circuit court denied defendant's amended motion to withdraw the guilty plea. Defendant appeals, contending that the circuit court's decision was an abuse of discretion because he was unaware that the guilty plea included a confession of guilt to criminal damage to property. He contends both that the guilty plea was involuntary and that he received ineffective assistance of counsel.

¶ 3 On August 9, 2012, this court entered a Rule 23 order affirming defendant's convictions and sentence. On August 22, 2012, after entry of the Rule 23 order, defendant filed a motion for leave to file a supplemental record on appeal. On September 12, 2012, this court allowed that motion. The supplemental record essentially contains the notice of appeal, the amended notice of appeal, and motions and orders related to the notices of appeal. The supplemental record has no bearing on the petition for rehearing that defendant filed on August 28, 2012. The State explicitly observed that it had no objection to the supplemental record.

¶ 4 During the guilty plea proceedings on November 30, 2010, the circuit court initially told defendant that he was charged with domestic battery and that if he were found guilty he faced up to one year in jail, so he should have counsel, and the court appointed a lawyer who was present from the Chicago Bar Association. After the case was passed and recalled, the

assistant State's Attorney informed the court of the terms of the plea agreement that had been reached, and defense counsel concurred with the State's description of it. The court granted defense counsel leave to file his appearance, and then addressed defendant as follows:

"[THE COURT:] Mr. Colbert, you have two charges. Okay? Count 1 is for domestic battery. That complaint says that on November 19th of this year at 4930 South Cottage Grove here in Chicago you knowingly and without legal justification caused bodily harm to Dawn Norfleet, a family or household member by striking her about the face.

Do you understand the nature of that charge against you?

THE DEFENDANT: Yes.

THE COURT: Count 2 is for criminal damage to property. That complaint says that on that same date and at that same location, you knowingly damaged the property of Dawn Norfleet, that property being her glasses and a cell phone, without her consent.

Do you understand the nature of that charge against her [*sic*]?

THE DEFENDANT: Yes.

THE COURT: I'm told you wish to plead guilty to those two charges and receive as a sentence 12 months conditional discharge, during which time you must complete domestic violence classes, pay $435 in fines and costs and obey a 12-month order of protection.

Is that correct?

THE DEFENDANT: Yes.

THE COURT: Is that what you would like to do?

THE DEFENDANT: Yes."

¶ 5 The circuit court then admonished defendant, and defendant acknowledged that he understood, that when he pleaded guilty, he waived, meaning he gave up, his rights to a bench or jury trial, to see and hear witnesses testify against him, to call his own witnesses, and to remain silent and have the State prove his guilt beyond a reasonable doubt.

¶ 6 The circuit court further admonished defendant, and defendant acknowledged that he understood, that he could be sentenced from 1 to 364 days in jail, that he could be required to pay a fine up to $2,500, or that he could receive a sentence involving any combination of jail and a fine. Understanding all of those things, defendant stated that he wished to plead guilty.

¶ 7 In response to the court's questions, defendant indicated that no one had threatened him or promised him anything to get him to plead guilty, and that he was pleading guilty of his own free will.

¶ 8 The factual basis for the plea disclosed that on November 19, 2010, at 4930 South Cottage Grove Avenue, defendant struck Dawn Norfleet, a household or family member, on the face, broke her glasses, and broke her phone.

¶ 9 The court found that the plea had been entered into freely and voluntarily, and found defendant guilty of domestic battery and criminal damage to property. The following

colloquy then ensued:

"THE COURT: What's the concern, sir?

[Defense Counsel]: He was under the impression that this was a plea on the domestic battery only and not the criminal damage to property, and I'm not sure that I made that clear to him because I'm not sure that I was clear on that. I understood it would be 12 months for domestic battery. It's concurrent, it arises out of the same incident.

THE COURT: I just was reading the specifications. They had both statutory numbers on them.

[Defense Counsel]: I overlooked that then. I did not fully explain that to him, and I don't know–

Do you need to proceed on that charge?

THE COURT: We're not going to do this at the bench. This case has been passed for four hours now.

Mr. Colbert, if you don't want to do it, you don't have to do it. The State's offer is on the two charges. If that's a deal-breaker for you, I'll let you withdraw the plea of guilty and we'll set the case for trial. It's up to you. If you want to take their offer on those two charges–and your attorney is right, it's concurrent. It runs at the same time. You're just pleading on two charges. It's totally up to you."

¶ 10 The record reflected that there was a conference between "the witness and

counsel." The following colloquy then occurred:

"THE COURT: It's two misdemeanor charges under the same case number.

I'm not trying to rush you. I just have a lot to do. If you need to think about, that's fine, but you've been here all day and these are things that you have to know by now.

[Defense Counsel]: Your Honor, we will submit our plea of guilty.

Is that correct? Do you understand you'll be entering a plea with regard to domestic battery and criminal damage to property?

THE DEFENDANT: Yes.

THE COURT: This is what you want to do, Mr. Colbert?

THE DEFENDANT: Not really, but . . .

THE COURT: Not really. Okay. Not really means we'll set it for trial.

[Defense Counsel]: There you have it. It'll be set for trial. We'll set it for trial.

May I get my book, Judge?

THE COURT: I know you had your complainant here. I guess we'll pick a date and hopefully it will work out for her.

Mr. Colbert, pick something in January.

[Defense Counsel]: Do you want to suggest a date, Judge?

THE COURT: I'll suggest January 13th.

THE DEFENDANT: Excuse me. Is the--the sentence is--you gave me two charges, is that right?

THE COURT: I haven't given you anything. The State has charged you with domestic battery, that's Count 1, and criminal damage to property. So there's two complaints under one case number arising out of the same nucleus, the same set of facts. They're going forward on both. They've made you an offer of a sentence in exchange for your plea of guilty on both charges. You can take it or you can say no way, I want a trial. That's your call. No one else in the room has that--can make that decision.

THE DEFENDANT: Let's take it, Judge. Sorry.

THE COURT: Mr. Colbert, you want to plead guilty on both counts then?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. So now that you know that the plea of guilty is on both charges, you want to keep the plea the same, you don't want to withdraw your plea of guilty?

THE DEFENDANT: No, sir.

THE COURT: Okay. Anything else you want to say?

THE DEFENDANT: No, sir.

THE COURT: Based on your plea of guilty to those two charges and

based on the factual basis, the sentence is 12 months conditional discharge with domestic violence classes, you must pay $435 in fines and costs and it will be a 12-month order of protection.

Do you understand that, sir?

THE DEFENDANT: Yes, sir."

¶ 11 The court then explained the order of protection to defendant.

¶ 12 On December 17, 2010, defendant filed a motion to withdraw the guilty plea and vacate the judgment. In the motion, defendant alleged as follows. Prior to the plea, defendant believed that the charge accusing him of criminal damage to property would be dismissed as part of the plea agreement. Defendant did not voluntarily enter into a plea agreement in which he would plead guilty to domestic battery and criminal damage to property. Therefore, defendant did not knowingly and voluntarily enter a guilty plea and he should be allowed to withdraw it.

¶ 13 On January 19, 2011, defense counsel stated as follows:

"I will offer testimony or assert as an officer of the court that I did not explain to [defendant] in advance that the plea would be on that second charge."

¶ 14 Defense counsel stated further that defendant was nervous and fearful and did not grasp what the court told him when he pleaded guilty and that therefore the plea was not voluntary.

¶ 15 On January 27, 2011, defendant was granted leave to file an amended motion to withdraw the guilty plea and vacate the judgment, which was identical to the original motion

except that it said to see the attached affidavit. That affidavit lacked a notary's jurat, but defendant was sworn to the affidavit in court on January 27, 2011. In the affidavit, defendant stated as follows. Defendant did not have experience appearing in courtrooms and consequently was "very nervous and confused by what" defense counsel and the court were telling him in court. It was not defendant's desire to plead guilty to the charges against him, and he repeatedly so informed defense counsel, but he felt rushed and pressured to plead guilty by defense counsel, the court, and the prosecutor. Defense counsel never told defendant that he would be pleading guilty to criminal damage to property as part of a plea agreement, and defendant never agreed to plead guilty to criminal damage to property.

¶ 16 During the hearing on the amended motion to withdraw the guilty plea on January 27, 2011, defense counsel argued that defendant misapprehended the facts and did not act voluntarily when he agreed to plead guilty. Defense counsel observed that defendant did not have an opportunity to retire away from the bench to consult with defense counsel during the circuit court proceedings. The court said that defendant was the one who "re-initiated" his interest in pleading guilty and that to say the court pressured defendant was "surprising." Defense counsel said that he was the Chicago Bar Association attorney assigned to that courthouse on the day of defendant's guilty plea and that he moved among the courtrooms and did not exclusively devote his time that day to defendant. The circuit court observed that defense counsel and defendant stepped away from the bench during the plea proceeding and had a conference. The circuit court observed that defendant was not pressured whatsoever to plead

guilty. In denying defendant's motion to withdraw the guilty plea, the circuit court stated that it did not know what else it could have done to ensure that defendant's plea was voluntary.

¶ 17 On appeal, defendant contends that the guilty plea was involuntary and that it resulted from ineffective assistance of counsel, and he requests remandment for further proceedings because he was not aware that the plea included the charge of criminal damage to property. Defendant maintains that the sixth amendment violation was so serious that prejudice need not be shown because the representation was no more than *pro forma* in that he had no representation until the morning of the plea, "and then was provided with an attorney so unfamiliar with the facts of the case that he unwittingly negotiated a plea to a charge of criminal damage to property." Defendant describes the sixth amendment violation as "extraordinary," and also maintains that the circuit court recognized that there was a basis for withdrawal of the plea.

¶ 18 Illinois Supreme Court Rule 402 (eff. July 1, 1997) prescribes the procedures to be followed for pleas of guilty. Pursuant to Rule 402, the court in a guilty plea proceeding must inform the defendant of and determine that he understands the nature of the charges and the minimum and maximum possible penalties. The court must also inform the defendant and determine that he understands he has the right to plead guilty or not guilty, that if he pleads guilty there will not be a trial of any kind, and that if he pleads guilty he waives the rights to a jury trial and to be confronted with the witnesses against him. The court must also determine whether a guilty plea is voluntary and whether there is a factual basis for the plea. Supreme Court Rule 402(b), (c) (eff. July 1, 2012). If the plea results from 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." Only substantial compliance, not literal compliance, with Rule 402 is required. See *People v. Robinson*, 63 Ill. 2d 141, 145 (1976); *People v. Davenport*, 22 Ill. App. 3d 849, 851 (1974).

¶ 19 Whether to allow the withdrawal of a guilty plea is a matter within the discretion of the circuit court. *People v. Pugh*, 157 Ill. 2d 1, 13-14 (1993); *People v. Johnson*, 154 Ill. 2d 356, 361 (1993); *People v. Hale*, 82 Ill. 2d 172, 175-76 (1980). The circuit court should allow the withdrawal of a guilty plea where it was entered under a misapprehension of the facts or the law, where the plea resulted from counsel's misrepresentations, where there exists doubt as to the defendant's guilt, where there exists a defense worthy of a jury's consideration, or where a jury trial will better serve the ends of justice. *Johnson*, 154 Ill. 2d at 361-62; see also *People v. Spicer*, 47 Ill. 2d 114, 116 (1970). However, the defendant's mistaken, subjective impression is not sufficient to warrant withdrawal of a guilty plea. *Hale*, 82 Ill. 2d at 175-76. The test is whether real justice has been denied or whether the defendant has been prejudiced by the inadequate admonition. *People v. Davis*, 145 Ill. 2d 240, 250 (1991); *People v. McCracken*, 237 Ill. App. 3d 519, 521 (1992). The negotiated nature of the defendant's plea cannot be overlooked in determining whether the guilty plea was knowing and voluntary. *Davenport*, 22 Ill. App. 3d at 853. The Illinois Supreme Court noted the "grave and solemn" nature of the entry of a guilty

plea and observed that leave to withdraw a guilty plea "is not granted as a matter of right, but as required to correct a manifest injustice." *People v. Evans*, 174 Ill. 2d 320, 326 (1996).

¶ 20 Here, the State argues that the circuit court's admonishments far exceeded substantial compliance with Rule 402. We conclude that the circuit court substantially complied with Rule 402 and that the record belies defendant's assertions. More particularly, the record belies defendant's allegation that he did not understand he was pleading guilty to criminal damage to property in addition to domestic battery. The circuit court admonished him more than once that the plea included both of those charges, domestic battery and criminal damage to property. The record discloses that defendant clearly understood that the guilty plea encompassed the two crimes of domestic battery and criminal damage to property. The court thoroughly admonished defendant of the nature of the charges; the minimum and maximum penalties, including terms of incarceration and possible fines and fees; his right to plead not guilty; and his rights to a jury trial, to a bench trial, and to confront and present witnesses and to testify. Defendant acknowledged that his plea was not induced by force or threats or any promises.

¶ 21 The court determined that defendant's guilty plea was free and voluntary and that no one had forced him to plead guilty. Defendant indicated that he understood all of the admonitions. Although these circumstances would appear to establish that defendant's plea was voluntary and not the result of any coercion by counsel or misapprehension or misunderstanding by defendant, defendant claims that he was coerced into the plea.

¶ 22 However, it appears that defendant's guilty plea resulted from negotiations and was a negotiated plea. Defendant agreed to the factual basis for the plea. Furthermore, there is no indication that defense counsel was unfamiliar with the factual basis for the plea. The factual basis supported the guilty plea to criminal damage to property because the factual basis showed that defendant broke the victim's glasses and her phone. We note that the circuit court imposed a lenient sentence of conditional discharge rather than incarceration. Given the circumstances, defendant is precluded from challenging his sentences (see *People v. Coady*, 156 Ill. 2d 531, 539-41 (1993)), and the guilty plea was knowing and voluntary.

¶ 23 Next, to demonstrate ineffective assistance of counsel in connection with a guilty plea, the defendant must show both that defense counsel's performance was deficient and that it prejudiced the defendant. *Pugh*, 157 Ill. 2d at 14. It is not necessary to consider the deficiency before considering the prejudice. *Id*. at 15. To prove the prejudice prong of the test of ineffective assistance of counsel in a plea proceeding, "the defendant must show that there is a reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial." *Id*. The record should show a reasonable probability that, "but for the error, the defendant would have rejected the plea arrangement." *Id*.

¶ 24 Here, defendant said only that counsel never told him that he would be pleading guilty to criminal damage to property as part of the plea agreement. Defendant never said that he would have rejected the plea but for counsel's omission. Defendant did not indicate that he would have rejected the plea but for counsel's errors even in the motions to withdraw the guilty

plea and the supporting affidavit. Given the circumstances, defendant failed to show the requisite prejudice and was not deprived of effective assistance of counsel. We reject defendant's argument that he was not required to show prejudice.

¶ 25 In the petition for rehearing, defendant argues that rehearing is required because he and defense counsel were unaware of the criminal damage to property charge. Defendant again cites an 80-year-old case (*Powell v. Alabama*, 287 U.S. 45, 58 (1932)) for an allegedly analogous situation, and he claims on rehearing that this court ignored his argument and the *Powell* case.

¶ 26 First, the record rebuts defendant's claim that he was unaware of the criminal damage to property charge. Even if he had been unaware of that charge, his mistaken, subjective impression is not sufficient to warrant withdrawal of the guilty plea, as we previously noted. Furthermore, even if defendant and defense counsel initially were unaware of the criminal damage to property charge, they became aware of it and, after they became aware of it, they held a conference together, as we previously observed. Following that conference, defendant decided to plead guilty to both charges, domestic violence and criminal damage to property. The understanding of defendant and defense counsel that the guilty plea would encompass both charges of domestic battery and criminal damage to property is plainly obvious from the excerpt from the transcript quoted above. Defendant is improperly rearguing and rehashing the merits of his arguments on rehearing, and he is not entitled to do so. See Illinois Supreme Court Rule 612(o) (eff. Sept. 1, 2006); Illinois Supreme Court Rule 367(b) (eff. Jan. 1, 2006) ("Reargument

of the case shall not be made in the petition)"; *Sobina v. Busby*, 62 Ill. App. 2d 1, 25-26 (1965).

¶ 27 Next, this court did not overlook *Powell*, in which the trial court's failure to provide the defendants with sufficient time to retain counsel deprived the defendants of due process. *Powell*, 287 U.S. at 71. We did state in the original Rule 23 order that we had considered all of defendant's arguments on appeal.

¶ 28 More particularly, *Powell* is factually distinguishable. *Powell* was a racially volatile capital case involving "ignorant and illiterate" defendants whom the military had to guard to protect them from hostile crowds. *Powell*, 287 U.S. at 52, 71. There were concerns in *Powell* about subjecting the defendants to a hostile environment and the "haste of the mob" (*Powell*, 287 U.S. at 58), considerations which were wholly absent from the misdemeanor case before this court. *Powell* also is factually distinguishable because, unlike the present case, it did not involve the circumstances of the present case, namely, a conference about two misdemeanor charges between defense counsel and defendant after they had indisputably become aware of the second charged misdemeanor, and a subsequent guilty plea to both misdemeanor charges after that conference between defense counsel and defendant.

¶ 29 We have considered, and rejected, all of defendant's arguments on appeal.

¶ 30 The judgment of the circuit court is affirmed.

¶ 31 Affirmed.