

2011 IL App (1st) 110741-U

FIFTH DIVISION
November 18, 2011

No. 1-11-0741

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
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,)	Appeal from the
)	Circuit Court of
)	Cook County.
v.)	
)	No. 07 CR 16467
DAVID PEMBERTON,)	
)	The Honorable
Defendant-Appellant.)	Neera Walsh,
)	Judge Presiding.
)	
)	
)	

JUSTICE HOWSE delivered the judgment of the court.
Justices Joseph Gordon and McBride concurred in the judgment.

ORDER

¶ 1 *Held:* Circuit court did not abuse its discretion in denying defendant's amended motion to withdraw a guilty plea to a charge of theft of more than \$500,000 in connection with his financing of a foreign company's purchase of a plane, where the plea was negotiated, defendant was thoroughly admonished about pleading guilty and acknowledged that he understood the admonishments, and defendant was a well-educated and experienced business man.

¶ 2 Defendant David L. Pemberton entered a negotiated guilty plea to theft in an amount in excess of \$500,000, was sentenced to a four-year prison term, and was ordered to pay restitution in the amount of \$600,500. Defendant appeals from the circuit court's decision denying his amended motion to withdraw the guilty plea. On appeal, defendant contends that the circuit court's decision was an abuse of discretion because it resulted from a misapprehension of the facts and the law, he had a defense worthy of consideration, and a trial would better serve the ends of justice.

¶ 3 The factual basis for the plea and other materials in the record disclose that the victim, Dateline Overseas, Ltd. (Dateline), was a charter airline based in Cyprus. The chief financial officer of Dateline, Natalya Roussina, would testify that in November 2004, Dateline wished to purchase an airplane for \$5,070,000. Roussina contacted defendant and his company, Avalon Air Holdings, Inc. (Avalon), to finance the purchase of the plane. Pursuant to the agreement, on December 14, 2004, Dateline would wire a deposit of \$1,017,500 to defendant. Within 10 days, defendant was supposed to transfer the \$1,017,500, plus the balance of the purchase price, to Insured Aircraft Title Service (IATS), an escrow agent, to close the sale. Dateline did transfer \$1,017,500 to defendant on December 14, 2004. The funds were deposited

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in defendant's account at Premier Bank in Wilmette, Illinois, pursuant to the agreement. Defendant then failed to fund the purchase and returned only \$417,000 to Dateline. The resulting loss to Dateline was \$600,500 (\$1,017,500 minus \$417,000). Records from Premier Bank would show that defendant used the funds for his personal expenses.

¶ 4 The State charged defendant with deceiving Dateline and stealing Dateline's funds by failing to transfer the funds to the escrow account. Defendant pleaded guilty to one count that charged him with theft of more than \$500,000. The remaining counts were disposed of by *nolle prosequi*. Some of those counts charged defendant with theft of more than \$100,000 but less than \$500,000, and some of the counts charged him with theft of more than \$10,000 but less than \$100,000.

¶ 5 During the guilty plea proceedings on November 18, 2010, defendant stated that he was 73 years old and that he graduated from Northwestern University. The circuit court admonished defendant, and defendant acknowledged that he understood, that probation was not an available sentence for the Class 1 felony to which he was pleading guilty, and that the sentencing range was 4 to 15 years in the penitentiary, the extended term sentencing range was 15 to 30 years, a fine up to \$25,000 could be assessed, and he would have to serve 2 years of mandatory supervised release, commonly called parole, after he served his penitentiary sentence.

¶ 6 The circuit court further admonished defendant, and defendant further acknowledged he understood, that he had the right to plead not guilty and to have a trial before a judge or a jury, that a jury consisted of 12 persons chosen by defendant, defense counsel, and the

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prosecutor, that the jury would hear the evidence and decide defendant's guilt or innocence, and that the decision of the jury would be required to be unanimous. Defendant indicated that he had signed the written jury waiver.

¶ 7 The circuit court also admonished defendant, and defendant said that he understood, he was giving up his right to see and hear witnesses testify against him, to remain silent, and to have the State prove his guilt beyond a reasonable doubt.

¶ 8 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.

¶ 9 The court stated that defendant had been told during the conference that he would be sentenced to four years in the penitentiary, that he would have to pay fines, fees, and costs in the amount of \$505, and that there would be a judgment against him for a significant amount of money, into the hundreds of thousands of dollars. Defendant acknowledged that he understood.

¶ 10 On January 6, 2011, defendant's original attorney asked for leave to withdraw because of an irreconcilable conflict with defendant. The court told counsel to put the motion in writing and that the presiding judge of the criminal division would have to rule on it. New defense counsel informed the court that defendant had asked his opinion about withdrawing the guilty plea, and new defense counsel requested two weeks to make the decision. New defense counsel also said that defendant perceived that the original attorney had a conflict of interest. The court granted new defense counsel leave to file his appearance, and continued the case for

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seven days. The court also entered and continued the motion of original defense counsel for leave to withdraw, and entered and continued the plea to January 13.

¶ 11 On January 13, 2011, new counsel (from the previous date) informed the court that he had not had sufficient time to investigate fully to file a motion to withdraw the guilty plea. He stated that it was likely he would file a motion to withdraw, but that he had advised defendant to surrender.

¶ 12 During sentencing, the assistant State's Attorney argued that defendant had committed a Class 1 felony involving a significant amount of money for which probation was not available, and that defendant had "no significant background." The defense stood on the agreement for the minimum, four-year prison sentence that was reached during the Rule 402 conference. The assistant State's Attorney then presented a restitution order, and new defense counsel asserted an objection to that. The circuit court then sentenced defendant to a four-year prison term, to be followed by two years of mandatory supervised release. The court also ordered defendant to pay restitution in the amount of \$600,500, plus statutory interest since December 14, 2004. New counsel argued that there was a question whether the actual loss was \$500,000 or more, and whether the amount ordered in restitution, \$600,500, was an accurate amount. The court observed that the issue could be revisited at a later date. New defense counsel said that there were credits to which defendant was entitled. New defense counsel did not believe that the credits would reduce the amount to \$500,000, but he said that defendant thought it would. The court observed that, for the time being, original defense counsel and new

defense counsel were co-counsel in the case.

¶ 13 On February 8, 2011, defendant filed an amended motion to withdraw the guilty plea. In the motion, defendant alleged as follows. On the day of sentencing, January 6, 2011, defendant had a new attorney, and the circuit court continued the case to January 13, 2011. On that date, defendant was sentenced to a four-year prison term, which was the minimum sentence allowed for the most serious charge, theft of more than \$500,000. Defendant has a meritorious defense in that the amount was actually less than \$500,000. Defendant did not understand that if he could prove that the amount was less than \$500,000, it would cast doubt on his guilt as to the most serious charge, and render him eligible for probation on a lesser charge. It would serve the ends of justice if defendant were permitted to go to trial and prove that the amount was less than \$500,000. Defendant could then argue that probation would be a reasonable sentence based on his age, his relatively light criminal background, and his poor physical health.

¶ 14 At the hearing on February 8, 2011, several new attorneys appeared on behalf of defendant. The court allowed one of the new attorneys to file his appearance. The attorney then requested leave to file an amended motion to withdraw the guilty plea, as well as leave to file a Rule 604(d) certificate and an affidavit of defendant. The court told the assistant State's Attorneys that they could cross-examine defendant, if they wished. Defendant's new attorney argued that defendant's previous two attorneys did not give him a true understanding of the nature of the charge to which he had pleaded guilty. Counsel argued that defendant had a meritorious defense, namely, that his crime was less than the Class 1 nonprobationable felony to

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which he had pleaded guilty (see 720 ILCS 5/16-1(a)(1), 5/16-1(b)(6.2) (West 2010)) because the amount was less than \$500,000 given that his expenditures would bring down the amount of money he owed to the victim. New defense counsel accused defendant's original attorney of doing "a very shoddy job" of representing defendant. He focused on an email in which the original attorney said that defendant could blame him. He argued that the amount of money owed, and the amount that Dateline would have accepted, was \$350,000 and not over \$500,000. The new attorney stated that he had a letter to that effect. The letter may be a February 10, 2010, letter that defendant wrote to the probation officer who prepared the presentence investigative report. In the letter, defendant stated that he thought the \$340,000 he spent on personal expenses would "come out of [his] commission." Defendant had throat cancer while the case was pending, was in the hospital several times when the case was in court, and used Tylenol number 3 pills that the doctors prescribed for him for pain.

¶ 15 On appeal, defendant contends that the denial of his amended motion to withdraw the guilty plea was an abuse of discretion. He argues that the guilty plea was "taken under a dark cloud" and that he had a meritorious defense worthy of consideration that the amount taken was less than \$500,000. He maintains that if he could prove that amount, that would cast doubt on the most serious charge and his guilt and make probation an available sentence. He further maintains that it would serve the ends of justice to permit him to present his defense that he thought the \$340,000 he spent on personal expenses would be deducted from his commission, thus reducing the amount of the theft to less than \$500,000. He requests remandment for trial.

¶ 16 The State responds that the appeal may be dismissed because defendant's brief fails to comply with supreme court rules requiring a copy of the judgment being appealed and a copy of the notice of appeal. The State responds further that the circuit court properly denied defendant's amended motion to withdraw the guilty plea. The State argues that defendant did not provide, or refer to, any evidence that would support his claims, and that the record shows no such evidence exists. The State maintains that the circuit court admonished defendant thoroughly, that defendant acknowledged he understood the admonishments, and that therefore defendant failed to present any objective evidence that he misunderstood the facts or the law. The State further maintains that defendant did not present any objective evidence of a reasonable doubt of his guilt, or of a meritorious defense, because there was no objective evidence that he owed less than \$500,000. The State observes that defendant's claim that he would deduct the money from his commission was contained in a letter that was not allowed into evidence and consequently constituted inadmissible hearsay. The State also argues that defendant repeatedly and intentionally delayed the proceedings and therefore failed to present any evidence that withdrawal of his guilty plea and holding a trial would serve the ends of justice. Although the State correctly observed that there are flaws in defendant's brief, we will address the merits of the appeal.

¶ 17 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. 177 Ill. 2d R. 402(b), (c) (eff. July 1, 1997). 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).

¶ 18 Whether to allow the withdrawal of a guilty plea is a matter within the discretion of the trial 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 trial 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).

¶ 19 Here, the trial judge substantially complied with Rule 402. She gave defendant a realistic picture of what might happen to him. She thoroughly admonished defendant of the nature of the charge; the minimum and maximum penalties for theft of more than \$500,000, including terms of imprisonment and periods of mandatory supervised release; 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.

¶ 20 The trial judge 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 misapprehended the facts and the law, that he had a

defense worthy of consideration, and that a trial would better serve the ends of justice.

¶ 21 However, the record belies defendant's assertions. More particularly, the record belies defendant's allegation that he did not understand. The record discloses that defendant was a graduate of Northwestern University, that he was in his 70's, and that he had extensive business experience. The record further discloses that defendant did not express confusion about the charges, or ask the circuit court for an explanation or clarification.

¶ 22 Furthermore, it appears that defendant's guilty plea resulted from negotiations and was a negotiated plea. Defendant agreed to the factual basis for the plea. The factual basis showed that Dateline transferred \$1,017,500 to him on December 14, 2004, and that he returned only \$417,000 to Dateline. The factual basis further showed that defendant stole the balance of \$600,500, which was an amount greater than \$500,000, and used the funds for his personal expenses. We are not unsympathetic to defendant's health problems, and we note that the circuit court sentenced him to the minimum term for the Class 1 felony to which he pleaded guilty. 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 The judgment of the circuit court is affirmed.

¶ 24 Affirmed.