2011 IL App (2d) 100425-U
No. 2—10—0425
Order filed August 11, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JOSHUA M. BURTON, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of De Kalb County. Nos. 08—CF—403 08—CF—675 Honorable Robbin J. Stuckert, Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Burke concurred in the judgment.

ORDER

Held: The trial court did not abuse its discretion in denying defendant's motion to withdraw his guilty plea, which motion asserted that he pleaded guilty with the understanding that the felony charges would be reduced upon his payment of restitution: defendant assured the court that he had received no promises in exchange for his plea; in any event, no such promise was made, as counsel merely told defendant that he would continue to negotiate with the State, such that defendant's subjective belief that the charges indeed would be reduced was not reasonably justified.

¶ 1 Defendant, Joshua M. Burton, entered a negotiated plea of guilty to two counts of theft (720 ILCS 5/16—1(a)(1)(A) (West 2008)) and was sentenced to 30 months' probation and 180 days in

the De Kalb County jail. In addition, defendant was ordered to pay $19,399 in restitution. Following the denial of his motion to withdraw his plea, defendant timely appealed. Defendant argues that his plea was involuntary, because when he pleaded guilty, he did not understand that he was pleading guilty to two felonies. We affirm.

¶ 2 I. FACTS

¶ 3 Defendant was charged in two separate cases with theft. On February 4, 2009, defendant pleaded guilty to each charge. The factual basis for the plea in case No. 08—CF—403 established that, on June 24, 2008, defendant took a semi-tractor trailer having a value in excess of $300 from Premiere Transfer for the purpose of dismantling it and reselling its aluminum parts. The factual basis for the plea in case No. 08—CF—675 established that, on October 25, 2008, defendant took two equipment buckets having a value in excess of $300 from FCC Attachments. After hearing the factual bases, the trial court stated that they were sufficient to "sustain findings of guilty beyond a reasonable doubt of two charges of Class 3 felony theft." The court admonished defendant that he was pleading guilty to Class 3 felony thefts and as to the penalties that he faced. The court asked defendant whether anyone made any promises to him, threatened him, or coerced him to plead guilty. Defendant assured the court that he was pleading voluntarily.

¶ 4 The assistant State's Attorney advised the court that the plea agreement provided that defendant would be released from jail *instanter* and the matter continued for sentencing. He stated: "[T]here's an issue of restitution and that's kind of where we're at." Defense counsel explained:

> "My client doesn't have access to some bank accounts that are in his name through the care of his father and since his arrest we've had trouble understanding what the contents of those

are. So his release today is contemplated for purposes of gaining access to those accounts and understanding just how much he can pay on restitution."

The court stated: "All right. So it's my understanding other than restitution at this time the terms of the sentence have been agreed to by both?" Defense counsel responded, "Yes."

¶ 5 On June 25, 2009, the parties appeared for sentencing. At that time, the assistant State's Attorney advised the court that they had an agreed sentence of 30 months' probation and 180 days in the De Kalb County jail. Defendant would be given credit for 90 days already served, and good time would apply. Defendant would also be ordered to pay certain fees, fines, and $19,399 in restitution. The court asked defendant if that was his understanding of the sentence, and defendant responded that it was. The court entered sentence as agreed.

¶ 6 On July 24, 2009, defendant moved to withdraw his plea, arguing that, when he pleaded guilty, he did not understand that he was pleading guilty to two felonies. Defendant claimed that he "did not understand that he was being placed on felony probation but rather was under the misunderstanding that he was being placed on court supervision on reduced charges." In his affidavit, he averred that "he did not understand until after his sentencing that he had been found guilty of two felonies and placed on felony probation." He further averred that "he would not have pled guilty if he had not been reassured by his then attorney that his cases would end up as misdemeanor convictions."

¶ 7 A hearing on defendant's motion took place on March 25, 2010. Defendant testified that he had been represented by Peter Gruber when he entered his plea. After being arrested, defendant spent 90 days in jail because he was unable to post bond. During that time, Gruber visited him in jail once. According to defendant, Gruber told him: "That the restitution was going to be settled.

If [defendant] paid a substantial amount, *** it would be down to a misdemeanor and then that was about it and nobody got back to [defendant]." When defendant went to court on February 4, 2009, to plead guilty, he believed that negotiations were still in progress.

¶ 8 Defendant further testified that, after he had pleaded guilty and on that same day, he and his grandfather met with Gruber at Gruber's office. Gruber told him that if he paid a substantial amount of restitution the charges would be lowered to misdemeanors. Defendant did not recall if he met with Gruber again prior to sentencing. According to defendant, he first learned on the day of sentencing that the charges would not be reduced. Had he known that he was pleading guilty to felonies, he would not have pleaded guilty. He pleaded guilty only because Gruber told him that the charges would be reduced to misdemeanors in the future.

¶ 9 On cross-examination, defendant admitted that, when he pleaded guilty, the trial court admonished him that he was pleading guilty to two felonies and explained the full range of penalties. Defendant admitted that he told the court that he understood the nature of the charges and the penalties he faced. Defendant also admitted that he told the court that no one made any promises to him concerning the pleas and that no one threatened him or coerced him into pleading guilty. He admitted that he told the court that he was pleading guilty voluntarily. According to defendant, he could have paid restitution on February 4, 2009, but he could not recall the amount. He told Gruber that he was able to pay a substantial amount of restitution on that date. Gruber never gave defendant an amount. As of the time of the hearing on his motion, defendant had not paid any restitution. Later, defendant testified that he could have paid $8,000. Defendant recalled being sentenced and he recalled the admonishments of the court.

¶ 10 John Livingston, defendant's grandfather, testified that defendant resided with him at the time of defendant's arrest. Livingston hired Gruber. When he met with Gruber on February 4, 2009, they discussed the possibility of having the charges reduced to misdemeanors if some amount of restitution were paid; however, Gruber never told him an amount. Gruber only described the amount as "substantial." Livingston was going to "come up with some of the money" toward restitution. He could not say how much, however, because he was never given an amount. He could have provided a "substantial" amount.

¶ 11 Gruber testified that he received a letter from the State's Attorney's office dated December 2, 2008, which contained an offer for defendant. The offer provided that defendant would plead guilty to two counts of Class 3 felony theft and be sentenced to 30 months of concurrent probation and 90 days in jail with credit for time served. He would also pay various fees and fines and approximately $18,000 in restitution. The offer had a termination date of January 31, 2009. Gruber communicated that offer to defendant in December. At that time, Gruber asked defendant to determine how much money he could raise for a "lump sum" payment of restitution by the time of the plea or sentencing. According to Gruber, the State had asked for a "substantial" payment, so he wanted to find out from defendant what he could offer the State. Defendant never gave Gruber an exact amount. Defendant told Gruber that his father had set up an educational trust fund for him and that, because he was not going to college, he may be able to access the money. Initially, Livingston told Gruber that he was not willing to give any money, because he had already spent a significant amount of money in attorney fees. In spring 2009, Livingston told Gruber that he would be willing to give some money but by then the State's offer had expired.

¶ 12 Gruber further testified that, in a letter to defendant, dated January 27, 2009, Gruber told defendant that the State had tentatively offered to reduce the felony charges to Class 4 felonies or Class A misdemeanors provided that a substantial amount of restitution were paid and/or valuable information were given. He advised defendant that if those conditions were not met by February 4, 2009, then the initial offer from the State would stand. Before defendant pleaded guilty, Gruber explained to defendant that the State was not amending the charges and that he was pleading guilty to felonies. He told him that he would continue his efforts to come up with a restitution amount that might convince the State to reduce the charges to Class 4 felonies or Class A misdemeanors.

¶ 13 On cross-examination, Gruber testified that, in speaking with the State concerning the offer, he was under the impression that, if there was a substantial amount of restitution paid or information provided concerning other crimes in the county, the State would be willing to re-examine the offer. Prior to February 4, 2009, Gruber had not been given an exact dollar amount. His impression was that defendant would have to come up with more than half of the restitution but not all of it. There was some discussion that it could not be as little as $3,000 or $4,000; it had to be more than half.

¶ 14 Gruber met with defendant and Livingston after defendant pleaded guilty. At that time, Gruber indicated to them that a reduction of the charges to misdemeanors was still a possibility. It was not until sometime in June 2009, about two to three weeks before sentencing, that Gruber told them it was no longer an option. According to Gruber, it was no longer an option because Gruber never had a firm amount to offer the State.

¶ 15 Gruber testified that he mailed a letter, dated January 27, 2009, to the State, providing, in pertinent part, as follows:

"[T]he State had made a tentative proposal to reduce the charges in return for [a] substantial payment of the restitution involved in both of these cases. I do not know what amount was contemplated when the State used the term substantial and my client wishes to explore this further. Please advise at your earliest convenience.

Further, my client is the beneficiary of a trust established by his father and his mother when he was a child. How much money is available in that trust is unknown to myself and my client at this time. My client's father refuses to communicate with his mother and maternal grandfather regarding the amount present in the trust fund. This has seriously curtailed our ability to determine what amount of restitution, if any, could be paid by [defendant] for restitution at the time a plea is entered. [Defendant] believes that he can and would be allowed access to his trust information if he were released from custody.

With that in mind, I would propose that on February 4, 2009, the State agree to release [defendant] on a recognizance bond, as he had already served the entire term of his incarceration pursuant to the offer. We would request that the matter be continued for a 30 to 45 date during which time [defendant] can determine how much restitution can be paid up front at the time of plea. Should the amount that he is able to pay be acceptable with the State, then a reduction may be in order. Should [defendant] not be able to pay a substantial amount of restitution, then the original terms of the offer would remain in place.

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In any event, we stand committed to accepting the offer as presented by your office; however, we wish additional time to see if we can meet the additional terms necessary for

reduction. Please advise if you would be willing to release [defendant] on a recognizance on February 4, 2009."

¶ 16 According to Gruber, on the morning of February 4, 2009, the State refused to agree to release defendant on recognizance if he did not enter a plea, because its offer had expired on January 31, 2009. But they would continue their discussions after defendant's release and before sentencing. Gruber never was told an exact amount of restitution by the State, but the ballpark amount was more than $10,000. He could not remember when he was told that amount, but he stated that it was sometime in spring 2009. He had a discussion with defendant's mother on the phone in May concerning the issue of restitution. He spoke with Livingston in June.

¶ 17 On redirect examination, Gruber stated that about 30 to 45 days after defendant had pleaded guilty, defendant told him that he had "an amount that might be near 3500 but it was conditional." Gruber "remember[ed] [defendant] saying that amount but [he] remember[ed] there being some vacillation in terms of is it there or is it not there." Defendant never told Gruber for certain that he could pay $3,500 for restitution nor did defendant ever give Gruber a definite amount that he could put down.

¶ 18 On recross-examination, Gruber testified that Livingston had told him that his house was paid for and that he could borrow whatever money was necessary. However, that was after the State told Gruber that it was no longer willing to discuss restitution. In December 2008, Livingston told Gruber that he was not willing to contribute any money. Sometime after December he expressed a willingness to contribute and asked what exact amount was needed.

¶ 19 The trial court found that defendant's guilty plea was voluntary and denied the motion. Defendant timely appealed.

¶ 20 II. ANALYSIS

¶ 21 Defendant contends that the trial court erred in denying his motion to withdraw his guilty plea. According to defendant, he presented substantial objective proof that, when he pleaded guilty on February 4, 2009, to two felonies, he was under the mistaken impression that his felonies would be reduced to misdemeanors. We disagree.

¶ 22 A defendant does not have an absolute right to withdraw a guilty plea and bears the burden of demonstrating to the trial court the necessity of withdrawing the plea. *People v. Allen*, 323 Ill. App. 3d 312, 315 (2001). Leave to withdraw a guilty plea is granted not as a matter of right, but only as required to correct a manifest injustice under the facts involved. *People v. Hillenbrand*, 121 Ill. 2d 537, 545 (1988). Leave should be granted if it appears that (1) the plea was entered on a misapprehension of the facts or the law, (2) there is doubt as to the guilt of the accused, (3) the accused has a meritorious defense, or (4) the ends of justice will be better served by submitting the case to a jury. *People v. Davis*, 145 Ill. 2d 240, 244 (1991). Absent substantial objective proof that a defendant's mistaken impressions were reasonably justified, a defendant's subjective impressions are insufficient grounds on which to withdraw a guilty plea. *People v. Hale*, 82 Ill. 2d 172, 176 (1980). A trial court's denial of a motion to withdraw a guilty plea will not be disturbed on appeal unless the decision was an abuse of discretion. *Davis*, 145 Ill. 2d at 244.

¶ 23 First, we find that defendant's claim is foreclosed, because he assured the trial court that he received no promises. When he entered his plea, defendant said that he understood that he was pleading guilty to two Class 3 felonies. He denied that he had received any promises. In his motion, however, he asserted in essence that he did not mean what he said, claiming that he had "been reassured by his then attorney that his cases would end up as misdemeanor convictions." Such an

assertion cannot succeed. "[Illinois Supreme Court] Rule 402 was designed to insure properly entered pleas of guilty, not to provide for merely an incantation or ceremonial." *People v. Krantz*, 58 Ill. 2d 187, 194-95 (1974). Thus, "a defendant cannot be rewarded for disregarding the specific admonitions of the court." *People v. Radunz*, 180 Ill. App. 3d 734, 742 (1989); see also *People v. Robinson*, 157 Ill. App. 3d 622, 629 (1987) ("If a plea of guilty is to have any binding effect or is to be given any subsequent weight, the extensive and exhaustive admonitions given by the circuit court in this case and acknowledged by petitioner must be held to overwhelm petitioner's current assertion that he entered his plea involuntarily").

¶ 24 In any event, the record does not establish that Gruber made any promise to defendant. It is clear from the testimony at the hearing on defendant's motion that the State's written offer to defendant required defendant to plead guilty to two Class 3 felonies and pay approximately $18,000 in restitution. Gruber advised defendant by letter that the State had tentatively offered to reduce the felony charges provided that a substantial amount of restitution were paid and/or valuable information were given, but if those conditions were not met by February 4, 2009, then the initial offer from the State would stand. Gruber continued to negotiate a reduction in the charges, but there was some question as to how much money defendant could provide. Thus, before defendant pleaded guilty, Gruber explained to defendant that the State was not amending the charges and that defendant was pleading guilty to felonies.

¶ 25 Although Gruber admittedly told defendant after the plea that he would continue his efforts to come up with a restitution amount that might convince the State to reduce the charges to Class 4 felonies or Class A misdemeanors, it is clear that no promises of reduced charges were made to defendant. Indeed, defendant admits in his brief that Gruber "might not have made errors of law or

engaged in intentional 'misrepresentations.' " We certainly agree. To the extent that defendant subjectively believed that his charges ultimately would be reduced, Gruber did nothing to justify that impression.

¶ 26 The thrust of defendant's argument centers on what happened after he entered his plea. He argues that the State never expressed a specific dollar amount needed to reduce the charges and that Gruber similarly never provided him with a specific dollar amount. According to defendant, there was never any "meeting of the minds" on the subject of restitution and how much restitution would be needed for a reduction of charges. However, we fail to see how the fact that Gruber was unable (for whatever reason) to successfully negotiate a reduction of defendant's charges invalidates defendant's guilty plea to those charges. (Notably, defendant makes no claim that Gruber was ineffective.)

¶ 27 Based on the foregoing, the trial court's denial of defendant's motion to withdraw his guilty plea was not an abuse of discretion.

¶ 28 III. CONCLUSION

¶ 29 For the reasons stated, we affirm the judgment of the circuit court of De Kalb County.

¶ 30 Affirmed.