2012 IL App (2d) 100583-U
No. 2-10-0583
Order filed March 23, 2012

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellee,	)	
v.	)	No. 08-CF-2220
JUAN C. CORTEZ,	)	Honorable George J. Bakalis,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Bowman concurred in the judgment.

ORDER

Held: (1) The trial court properly denied defendant's motion to withdraw his guilty plea, which he alleged was induced by ineffective assistance of counsel: the evidence did not establish a reasonable probability that, had counsel known the full extent of defendant's admissions, he would have recommended (and defendant would have accepted) a 20-year offer by the State instead of an open plea; (2) although defendant was admonished that his MSR term would be three years rather than three years to life, it was presently unknown whether his actual MSR term would be long enough to trigger a due process violation, and thus the improper admonishment provided no present basis for disturbing his plea.

¶ 1 Defendant, Juan C. Cortez, appeals from an order of the circuit court of Du Page County denying his motion to withdraw his plea of guilty to a single count of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2006)). We affirm.

¶ 2 Defendant was originally charged with three counts of predatory criminal sexual assault and a single count of intimidation (720 ILCS 5/12-6(a) (West 2006)). All of the charges were based on acts perpetrated against the same victim, A.O., who, at all relevant times, was nine years old or younger. Plea negotiations resulted in alternative offers from the State. Under either offer, if defendant pleaded guilty to a single count of predatory criminal sexual assault of a child, the State would nol-pros the remaining charges. Defendant had the option of entering a blind plea—one with no agreement as to sentencing—or he could plead guilty in exchange for a 20-year prison term. Defendant chose to enter a blind plea. Before accepting defendant's guilty plea, the trial court incorrectly admonished him that a prison term for the offense would be followed by a three-year term of mandatory supervised release (MSR). In fact, the actual MSR term for one convicted of predatory criminal sexual assault of a child "shall range from a minimum of 3 years to a maximum of the natural life of the defendant." 730 ILCS 5/5-8-1(d)(4) (West 2006).

¶ 3 Among the witnesses who testified at defendant's sentencing hearing was Robert Holguin, an investigator employed by the Du Page County State's Attorney's office and assigned to the Du Page Child Advocacy Center. Holguin testified that he interviewed the victim, who related that defendant had inserted his penis into her anus on three separate occasions. The victim told Holguin that defendant threatened to kill her or her mother if she told anyone about what had happened. Holguin testified that he also interviewed defendant. The record reflects that the interview was divided into two sessions. During the first session, Defendant admitted that he had inserted his penis

into A.O.'s anus on one occasion. During the second session, defendant admitted that he had anally penetrated A.O. on two other occasions. The trial court sentenced defendant to a 25-year prison term followed by an MSR term of three years to life. In orally pronouncing sentence and in its written sentencing order, the trial court correctly stated the applicable MSR term.

¶ 4 Defendant was represented by Attorney Steven Klein when he entered his plea and at his sentencing hearing. However, a different attorney was appointed to represent defendant in connection with his motion to withdraw his plea. At the hearing on that motion, Klein was called as a witness. Klein testified that, prior to the entry of defendant's plea, he had received a transcript of only the first session of Holguin's interview with defendant. Klein admitted that, during discovery, the State had tendered a written report indicating that Holguin had interviewed defendant twice and summarizing defendant's admissions during each session. However, Klein learned of the second session only after defendant entered his plea. Prior to that, Klein was under the impression that defendant had admitted to placing his penis in A.O.'s anus on only one occasion, not three. Klein had planned to argue at defendant's sentencing hearing that the offense was a "one-time thing," which did not call for an especially lengthy prison term. Klein testified that he recommended that defendant enter a blind plea. Klein advised defendant that, because he had no prior criminal history, he could "shoot for" the minimum prison term of six years. Klein thought that prison terms offered by Du Page County prosecutors in plea negotiations were often longer than the terms imposed on defendants who entered blind pleas. Klein testified that he thought a blind plea was the best course of action because he believed he could argue that the offense against A.O. was an isolated occurrence. Klein did not testify, however, that, if he had known about the second session of the interview, he would have advised defendant to accept the State's alternative offer of a 20-year

prison term. Asked whether knowledge of the full extent of defendant's inculpatory statements would have altered his "opinion *** of how high a sentence [defendant] would have got [*sic*]," Klein responded, "In all honesty, it's very hard to say in hindsight what [*sic*] my mind would be changed."

¶ 5 Defendant testified that Klein had indicated that he thought that, if defendant entered a blind plea, the trial court would probably sentence defendant to 10 years' imprisonment or less. Defendant relied on that opinion when he rejected the State's offer of a 20-year prison sentence.

¶ 6 Defendant first argues that he should have been permitted to withdraw his guilty plea because he entered it without the effective assistance of counsel. The lack of effective assistance of counsel can render a guilty plea involuntary. See *People v. Edmonson*, 408 Ill. App. 3d 880, 884 (2011). To establish ineffective assistance of counsel a defendant must show that: "(1) counsel's performance was objectively unreasonable; and (2) the defendant suffered prejudice as a result." *Id.* (citing *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)). Defendant argues that Klein's performance was deficient because, when he recommended that defendant enter a blind plea, he had not adequately investigated the aggravating factors—defendant's admission to multiple sex offenses—that might result in a longer sentence than the 20-year prison term offered by the State.

¶ 7 Where the defendant suffered no prejudice as a result of counsel's allegedly deficient performance, an ineffective-assistance-of-counsel claim may be decided against the defendant without consideration of whether counsel's performance was actually deficient. *People v. Pulliam*, 206 Ill. 2d 218, 249 (2002). "To prove prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *People v. Guerrero*, 2011 IL App (2d) 090972, ¶ 60. In this case, that would entail showing that there is a reasonable probability that, if Klein had been aware of the extent of

defendant's admissions, defendant would have accepted the State's offer of a 20-year prison term. Although Klein testified that defendant's admission to multiple sex offenses "significantly weakened" his sentencing strategy of portraying the offense as an isolated incident, he stopped short of stating that his recommendation to defendant would have been any different. Klein never testified that, when he advised defendant to enter a blind plea, he believed that it was likely that defendant would receive a sentence exceeding 20 years if the sentencing strategy failed—an eventuality that Klein surely must have considered. Under these circumstances, we cannot say there is a reasonable probability that, if Klein had known the extent of defendant's incriminating statements, Klein would have recommended a different course of action or defendant would have taken a different course of action. Accordingly, defendant has failed to establish prejudice.

¶ 8 Defendant next argues that his plea was invalid because he was not accurately admonished that his prison sentence would be followed by an MSR term ranging from three years to life. As noted, defendant was incorrectly told that the term would be three years. In *People v. Burns*, 405 Ill. App. 3d 40 (2010), this court observed:

> "For a guilty plea to pass muster under the due process clause, 'the record must affirmatively show that the plea was entered intelligently and with full knowledge of its consequences.' [Citation.] [Supreme Court] Rule 402(a)(2) provides that the trial court must admonish a criminal defendant of 'the minimum and maximum sentence prescribed by law' for the offense to which the defendant is pleading guilty [citation], and 'is designed to ensure that a guilty plea meets this requirement' [citation]. *** [U]nder the due process clause and Rule 402(a)(2), it is necessary to admonish a defendant who is entering a guilty plea that he

or she will be required to serve a term of MSR after completing his or her prison term. [Citations.]" *Id.* at 42-43.

¶ 9 The State contends that, because the MSR term was stated correctly when the trial court pronounced sentence and is set forth correctly in the trial court's written sentencing order, the issue could have been raised in defendant's motion to withdraw his plea. The State argues that, by failing to do so, defendant forfeited the issue. See Ill. S. Ct. R. 604(d) (eff. July 1, 2006) ("Upon appeal any issue not raised by the defendant in the motion to *** withdraw the plea of guilty and vacate the judgment shall be deemed waived.") Defendant contends, however, that the issue is reviewable under the plain-error rule, which permits consideration of a forfeited error where the evidence in a case is so closely balanced that the outcome might have resulted from the error and not the evidence (*People v. Herron*, 215 Ill. 2d 167, 178 (2005)) or where the error is so serious that the defendant was denied a substantial right and thus a fair hearing (*id.* at 179).

¶ 10 Although the right to be fully informed of the consequences of a guilty plea is a substantial one (accord *People v. Davis*, 145 Ill. 2d 240, 251 (1991) (although defendant's motion to withdraw his guilty plea did not raise issue of trial court's incorrect admonition that defendant could receive probation, the issue would be reviewed "[d]ue to the gravity of the error, and in the interests of justice")), it is settled that, when a defendant enters a blind plea, the failure to properly admonish the defendant about MSR does not give rise to a due process violation if the total length of the defendant's prison term plus the MSR term is less than the maximum prison term the defendant was told he might receive (see *People v. Whitfield*, 217 Ill. 2d 177, 193 (2005)). Here, defendant was informed that he could be sentenced to a prison term of up to 30 years to be followed by a 3-year MSR term. Thus, defendant was given the impression that the aggregate length of his terms of

imprisonment and MSR could be as high as 33 years. Because the law provides for an indeterminate period of MSR, there is no reliable way to predict what the aggregate actually will be. It could be as short as 28 years or as long as the remainder of defendant's life. Consequently, any due process violation resulting from the faulty admonition is, at the moment, entirely contingent and inchoate. As such, relief is premature. We are not persuaded that the mere possibility that the trial court's error will ripen into a due process violation decades in the future requires defendant's otherwise valid guilty plea to be disturbed. If and when that time comes, defendant will presumably be entitled to raise the due process violation in a collateral proceeding such as that provided by the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)).

¶ 11 Defendant argues that there is essentially no difference, from a due process standpoint, between a fixed MSR period and an indeterminate MSR period; even when the term is fixed, the Prisoner Review Board may order early termination (see 730 ILCS 5/3-3-8(b) (West 2006)). The mere possibility of early termination of a fixed MSR period is not, in our view, meaningfully analogous to the true indeterminancy of the MSR period that those guilty of certain sex offenses must serve. The indeterminate MSR period is not merely a life term subject to early termination, but rather is part of "a comprehensive scheme" (*People v. Rinehart*, 2012 IL 111719, ¶ 29) marking "a philosophical and procedural change in how parole operates" (*id.*) for the offenders to whom it applies. We thus decline to predicate relief from defendant's guilty plea on speculation about how the scheme will operate here.

¶ 12 For the foregoing reasons, the judgment of the circuit court of Du Page County is affirmed.

¶ 13 Affirmed.