2014 IL App (2d) 130168-U
No. 2-13-0168
Order filed March 20, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JONATHON MIKULA, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 11-CF-826 Honorable John J. Kinsella, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Presiding Justice Burke and Justice Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly denied defendant's motion to withdraw his guilty plea: any admonishment after entry of the plea could not have affected the validity of the plea, and in any event the court did not misadvise him that a motion to withdraw would be automatically granted; although he testified that he was not receiving certain medication in jail, he presented no evidence that he was denied appropriate medical care; and the statutory subsection under which he was charged with aggravated unlawful use of a weapon was not invalidated by *Aguilar*.

¶ 2 Defendant, Jonathon Mikula, appeals from an order of the circuit court of Du Page County denying his motion to withdraw his negotiated plea of guilty of a single count of aggravated unlawful use of a weapon (720 ILCS 5/24-1.6(a)(1), (a)(3)(H) (West 2010)).

Defendant argues that the motion should have been allowed because: (1) he was not adequately admonished about limitations on his ability to withdraw his plea; (2) he entered his plea in order to secure his release from jail so that he could receive necessary medical treatment; and (3) the statute under which he was charged is unconstitutional. We affirm.

¶ 3 Defendant entered his plea on May 17, 2011. Pursuant to the plea agreement, defendant was sentenced to 24 months' probation and 90 days in the Du Page County jail. With credit under section 3 of the County Jail Good Behavior Allowance Act (730 ILCS 130/3 (West 2010)), defendant would serve only 45 days in jail, including time in custody prior to sentencing. When defendant entered his plea, he had been unable to post bond and had been in custody for 38 days. Prior to accepting defendant's plea, the trial court admonished him that by pleading guilty he would be waiving his rights to trial, to compel the attendance of witnesses and present their testimony on his behalf, to confront and cross-examine the witnesses against him, and to hold the State to the burden of overcoming the presumption of his innocence with proof beyond a reasonable doubt. Defendant acknowledged that he understood that his plea would waive these rights. He further confirmed that no one was forcing him to plead guilty or threatening him to procure his plea. The State then recited the factual basis for the plea. The State indicated that, if the matter proceeded to trial, the State's evidence would show that, on April 4, 2011, defendant became irate with an employee of a Game Stop store in Aurora who refused to allow defendant to shop after the store had closed. The following day, defendant returned to the store and confronted the same employee. Referring to the previous evening, defendant indicated that, because he is disabled, he does not fight, but he will use a gun. Defendant then raised his shirt, revealing a handgun in his waistband. Defendant stated that messing around with him was a bad idea.

¶ 4 After hearing the factual basis for the plea, the trial court confirmed that defendant wished to plead guilty. The trial court accepted defendant's plea, finding that it was knowing and voluntary. After imposing sentence in accordance with the plea agreement, the following exchange took place between the trial court and defendant:

"[THE COURT:] Sir, let me advise you that if you wish to withdraw the plea that you have entered here this morning, you have to file a written motion within the next thirty days setting forth in writing the reasons you wish to withdraw the plea. Do you understand that?

THE DEFENDANT: Yes, sir.

* * *

THE COURT: Any reason you have that you fail to include would be considered waived or given up by you. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: If such a request was granted, this case would be set down for trial. If the request was denied, you have a right to appeal. You have to file a notice of appeal with the Circuit Court Clerk within 30 days of the denial of your request to withdraw your plea. *** Any question about what's happened here this morning?

THE DEFENDANT: No, sir."

¶ 5 When he entered his plea, defendant was represented by Ricky Holman, an assistant public defender. Thereafter, defendant retained private attorney Michelle L. Moore, who, on June 15, 2011, filed a motion to withdraw defendant's guilty plea. The motion asserted that defendant had entered his plea "in order to secure his release from the DuPage [*sic*] County Jail, rather than remain incarcerated and await a trial date." According to the motion, when defendant

entered his plea, he was suffering from attention deficit/hyperactivity disorder (ADHD) and a mental disorder caused by steroidal medications prescribed following surgery for degenerative disc disease and, as a result of these disorders, his plea "was neither knowingly nor intelligently made, with an understanding of the potential consequences and possible defenses available to him."

¶ 6 At the hearing on the motion, defendant testified that his bail was originally set at $250,000 but was later reduced to $75,000. Defendant was unable to obtain 10% of that amount as security for a bail bond (see 725 ILCS 5/110-7(a) (West 2010)), so he remained in custody. Defendant further testified that, while in jail, he had spoken with Holman. During his conversations with Holman, defendant believed that he had a defense to the charge, but he did not have the chance to discuss the defense with Holman. Defendant also did not have the opportunity to review a videotape that had been tendered by the State in discovery.

¶ 7 Defendant testified that he pleaded guilty in order to get out of jail. He was told that if he entered a negotiated plea he would be released sooner than if he remained in jail until the matter could be tried. Defendant agreed that it was fair to say that he pleaded guilty because he was incapable of posting bail.

¶ 8 Defendant further testified that in March 2011 he had surgery for degenerative disc disease, and a couple of "vertebrae" were removed. Defendant also suffered from ADHD. Before he was arrested, he was on medication for both ADHD and "post operative" symptoms or pain related to the surgical procedure. Asked what medication he was taking, defendant responded, "There was steroid that they were giving to shrink the nerve in my spine in order for actually a second surgery that was planned to be actually weeks prior to me actually go [*sic*] in." Defendant did not receive medication for ADHD or degenerative disc disease while he was in

custody. He testified that not having access to the medication affected his decision to plead guilty. He stated, "I don't believe that I was able to actually, with the pain and everything that was going on, I don't believe I was thinking quite clearly as I should have been." At that point, defendant's primary goal was to be released from custody so as to receive medical treatment, try to get his life back in order, and develop a defense.

¶ 9 On cross-examination, defendant admitted that he entered his guilty plea intending to withdraw it, but he denied having a "strategy."

¶ 10 The trial court initially granted defendant's motion to withdraw his plea. However, the State successfully moved for reconsideration. Defendant filed a timely notice of appeal, but, because his attorney had failed to file a certificate of compliance with Illinois Supreme Court Rule 604(d) (eff. July 1, 2006), this court remanded for further proceedings. *People v.* Mikula, No. 2-12-1112 (Dec. 13, 2012) (minute order); see generally *People v. Lindsay*, 239 Ill. 2d 522, 531 (2011). On remand defendant renewed his motion to withdraw his plea. The trial court denied the motion. This appeal followed.

¶ 11 It is well established that the decision whether to permit a defendant to withdraw his or her guilty plea rests in the sound discretion of the trial court, and the trial court's decision will not be disturbed on review absent an abuse of discretion. *People v. Baez*, 241 Ill. 2d 44, 109-10 (2011). As our supreme court has observed:

> "A defendant does not have an automatic right to withdraw a plea of guilty. [Citation.] Rather, defendant must show a manifest injustice under the facts involved. [Citation.] The decision of the trial court will not be disturbed unless the plea was entered through a misapprehension of the facts or of the law, or if there is doubt as to the guilt of the accused and justice would be better served by conducting a trial. [Citation.] Where the

defendant has claimed a misapprehension of the facts or of the law, the misapprehension must be shown by the defendant." *People v. Delvillar*, 235 Ill. 2d 507, 520 (2009).

¶ 12 Defendant initially argues that his plea of guilty "was procured under a misapprehension of the law with regard to his ability to later withdraw the plea." According to defendant, this misapprehension of law was the result of the trial court's "unqualified" admonition, following acceptance of defendant's plea, that, if he wished to withdraw his plea, he would have to file a written motion within 30 days. Rule 604(d) provides, in pertinent part, that "[n]o appeal from a judgment entered upon a plea of guilty shall be taken unless the defendant, within 30 days of the date on which sentence is imposed, files in the trial court a motion to reconsider the sentence, if only the sentence is being challenged, or, if the plea is being challenged, a motion to withdraw the plea of guilty and vacate the judgment." Ill. S. Ct. R. 604(d) (eff. Feb. 6 2013). Illinois Supreme Court Rule 605(c) (eff. Oct. 1, 2001) provides, *inter alia*, that the trial court shall advise a defendant whose conviction rests upon a negotiated guilty plea that he or she has a right to appeal (Ill. S. Ct. R. 605(c)(1) (eff. Oct. 1, 2001)) and "that prior to taking an appeal the defendant must file in the trial court, within 30 days of the date on which sentence is imposed, a written motion asking to have the judgment vacated and for leave to withdraw the plea of guilty, setting forth the grounds for the motion" (Ill. S. Ct. R. 605(c)(2) (eff. Oct. 1, 2001)). Although the trial court provided the requisite advice, defendant complains that the court "did not advise [him] that absent a legal basis other than, 'I changed my mind' or 'I just did this to get out of jail,' he would not be allowed to withdraw his guilty plea, and it would stand as a permanent conviction, regardless of his personal motives short of an agreement as to his guilt of the charged offense." Defendant's argument, in substance, is that the trial court did not inform him that a motion to withdraw his plea would not automatically be granted. The argument is meritless.

Because the admonition in question was given *after* defendant entered his plea, it could not have affected his decision to enter the plea.

¶ 13 Moreover, as the State observes, in *People v. Wilson*, 295 Ill. App. 3d 228 (1998), the Fourth District rejected essentially the same argument defendant makes here. In *Wilson* the defendant argued that he entered his plea based on the mistaken belief that (in the court's words) "he could automatically withdraw his plea by simply filing a motion to withdraw" (*id.* at 236). The *Wilson* court responded as follows:

> "Defendant bears the burden to establish that the circumstances existing at the time of plea, judged by objective standards, justified his mistaken impression. Absent substantial objective proof showing that defendant's mistaken impression was reasonably justified, subjective impressions alone are not sufficient grounds on which to vacate a guilty plea. [Citation.]
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> In this case, defendant does not claim that his attorney gave him incorrect information. Furthermore, the trial court described the appeal process on the record, stating, in pertinent part, as follows:
>
> > '[Y]ou have the right to appeal. Before taking an appeal you would have to file within 30 days a written motion *asking to have the trial court reconsider* the sentence or to have the judgment vacated and a [*sic*] for leave to withdraw your plea of guilty, setting forth the reasons in the motion. *If* the motion is allowed, the sentence would be modified or the plea and sentence and judgment would be vacated and trial date would be set ***.' ***
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> Because the trial court informed defendant he would have to *ask* the court for leave to withdraw the plea and used the conditional word 'if,' defendant's belief that he

> could automatically withdraw his plea was not reasonably justified. Furthermore, the appellate court has held that where neither counsel nor the trial court induced a defendant's misunderstanding, the defendant's guilty plea can stand. [Citation.] Accordingly, we hold that the trial court did not err by denying defendant's motion to withdraw guilty plea on this basis." (Emphases in original.) *Id.* at 236-37.

The reasoning in *Wilson* applies with even more force here. The trial court specifically advised defendant that "*[If] the request [to withdraw the guilty plea] was denied*, you have a right to appeal." (Emphasis added.) Thus defendant could not have *reasonably* believed that a motion to withdraw his guilty plea would be granted automatically.

¶ 14 Defendant additionally argues that he should have been permitted to withdraw his plea because "[it] was made under duress (as he was not receiving necessary medications and could not post bond) or prompted by a desire to change his incarceration status." We disagree. Although defendant testified that, while in custody, he was not receiving medication that he had been taking before his arrest, no competent evidence was presented that defendant was deprived of appropriate medical care in jail. Defendant relies primarily on *People v. Urr*, 321 Ill. App. 3d 544 (2001), which held that a defendant who pleaded guilty because of conditions in the Cook County jail, where he was being held pending trial, should have been permitted to withdraw his plea. *Urr* is readily distinguishable. In that case, the defendant claimed that he had been sexually assaulted in jail and "was receiving 'daily threats.' " *Id.* at 548. The *Urr* court was careful to note that a defendant's claim that he or she pleaded guilty because of jail conditions does not necessarily establish that the plea was involuntary. *Id.* at 547. Rather, the defendant "must allege a specific instance of abuse, which caused him to plead guilty, and he must sufficiently establish a nexus between the alleged violence and his guilty plea." *Id.* Perhaps if

defendant had proved that authorities at the county jail were remiss in their statutory duty to provide him with necessary medical care (see 730 ILCS 125/17 (West 2010)), it could be argued that his guilty plea was not voluntary. However, although defendant testified that he was not receiving certain medication while in jail, there is no evidence that he was not receiving appropriate care.

¶ 15 We note that defendant has cited an unpublished order of this court issued under Illinois Supreme Court 23(b) (eff. July 1, 2011) in an unrelated appeal. Defendant contends that he cites the decision not as precedent but "solely for consideration to the extent that the principles therein annunciated apply to the facts of the present case ***." Illinois Supreme Court Rule 23(e)(1) (eff. July 1, 2011) specifically provides that orders issued under Rule 23(b) "may not be cited by any party except to support contentions of double jeopardy, *res judicata*, collateral estoppel or law of the case." Defendant has not cited the order in question for any of these reasons and we will not consider the order in reaching our decision.

¶ 16 During the pendency of this appeal, our supreme court issued its opinion in *People v. Aguilar*, 2013 IL 112116. In his reply brief, defendant argues, for the first time, that pursuant to *Aguilar* the statute under which defendant was charged is unconstitutional. The State has moved for leave to file a surreply brief to respond to this argument. We grant the motion.[1]

[1] We note that Illinois Supreme Court Rule 341(j) (eff. Feb. 6, 2013) provides, in pertinent part, that "[t]he reply brief, if any, shall be confined strictly to replying to arguments presented in the brief of the appellee." In its appellee's brief, the State did not raise any issue involving the constitutionally of the aggravated-unlawful-use-of-a-weapon statute. However, our decision to allow the State to file a surreply brief addressing the issue ameliorates the unfairness that would otherwise result from permitting defendant to raise the issue for the first

¶ 17 Section 24-1.6 of the Criminal Code of 1961 provides, in pertinent part, as follows:

"(a) A person commits the offense of aggravated unlawful use of a weapon when he or she knowingly:

(1) Carries on or about his or her person or in any vehicle or concealed on or about his or her person except when on his or her land or in his or her abode, legal dwelling, or fixed place of business, or on the land or in the legal dwelling of another person as an invitee with that person's permission, any pistol, revolver, stun gun or taser or other firearm; or

(2) Carries or possesses on or about his or her person, upon any public street, alley, or other public lands within the corporate limits of a city, village or incorporated town, except when an invitee thereon or therein, for the purpose of the display of such weapon or the lawful commerce in weapons, or except when on his or her own land or in his or her own abode, legal dwelling, or fixed place of business, or on the land or in the legal dwelling of another person as an invitee with that person's permission, any pistol, revolver, stun gun or taser or other firearm; and

(3) One of the following factors is present:

(A) the firearm possessed was uncased, loaded, and immediately accessible at the time of the offense; or

(B) the firearm possessed was uncased, unloaded and the ammunition for the weapon was immediately accessible at the time of the offense; or

(C) the person possessing the firearm has not been issued a currently valid Firearm Owner's Identification Card; or

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time in his reply brief.

(D) the person possessing the weapon was previously adjudicated a delinquent minor under the Juvenile Court Act of 1987 for an act that if committed by an adult would be a felony; or

(E) the person possessing the weapon was engaged in a misdemeanor violation of the Cannabis Control Act, in a misdemeanor violation of the Illinois Controlled Substances Act, or in a misdemeanor violation of the Methamphetamine Control and Community Protection Act; or

(F) (blank); or

(G) the person possessing the weapon had a order of protection issued against him or her within the previous 2 years; or

(H) the person possessing the weapon was engaged in the commission or attempted commission of a misdemeanor involving the use or threat of violence against the person or property of another; or

(I) the person possessing the weapon was under 21 years of age and in possession of a handgun as defined in section 24-3, unless the person under 21 is engaged in lawful activities under the Wildlife Code or described in subsection 24-2(b)(1), (b)(3), or 24-2(f)." 720 ILCS 5/24-1.6(a) (West 2010).

¶ 18 In *Aguilar*, our supreme court held that a charge based of subsections (a)(1) and (a)(3)(A) ran afoul of the second amendment to the United States Constitution, which forbids states from comprehensively banning possession of firearms outside the home. It is clear, however, that *Aguilar* does not stand for proposition that the conduct charged in this case—*i.e.* possession of a weapon outside the home while "engaged in the commission or attempted commission of a misdemeanor involving the use or threat of violence against the person or property of another"

(720 ILCS 5/24-1.6(a)(1), (a)(3)(H) (West 2010))—is constitutionally protected. *Aguilar*, 2013 IL 112116, ¶ 22 n.3 ("We make no finding, express or implied, with respect to the constitutionality or unconstitutionality of any other section or subsection of the AUUW statute."). Accordingly, defendant's argument is without merit.

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

¶ 20 Affirmed.