2014 IL App (3d) 130021-U

Order filed December 10, 2014

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 14th Judicial Circuit, Rock Island County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-13-0021
v.	)	Circuit No. 10-CF-298
	)	
ANTWOINE EUBANKS,	)	Honorable Frank R. Fuhr,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justices Carter and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's denial of defendant's motion to suppress is affirmed on the grounds presented to the trial court. The issue of whether defendant's confession, provided less than one month before defendant entered his guilty plea, was plea-related and inadmissible according to Supreme Court Rule 402(f) requires consideration of matters outside of this record and should be addressed by the trial court in a postconviction petition.

¶ 2 The State charged defendant, Antwoine Eubanks, with first-degree murder for the shooting death of Sam Rush and aggravated battery with a firearm for the shooting of Erik Childs in March 2010. During his second interview with law enforcement officials that took

place in April 2011, defendant recanted his initial statement denying involvement and confessed to shooting the victims. A few weeks later, in May 2011, defendant appeared before the court and entered a plea of guilty to one count of first-degree murder, which the court accepted. The State dismissed other charges pursuant to the agreement, which were never reinstated. The terms of the plea agreement required the State to dismiss certain charges and to recommend a sentence of 35 years' incarceration for first-degree murder, pending defendant's cooperation in the cases against two other participants in the shootings. Eventually, defendant rejected the negotiated agreement and withdrew his guilty plea.

¶ 3 For purposes of the impending trial, the judge refused to suppress defendant's confession on the contractual grounds raised by the defense. After a stipulated bench trial, the court found defendant guilty of first-degree murder and sentenced defendant to 50 years' incarceration. Defendant appeals, now arguing the court should have suppressed his confession because his statement was plea-related and inadmissible pursuant to Supreme Court Rule 402(f). We affirm.

¶ 4 BACKGROUND

¶ 5 The State charged defendant Antwoine Eubanks with one count of first-degree murder for the shooting death of Sam Rush and one count for the aggravated battery of Erik Childs with a firearm based on an incident that occurred on March 30, 2010. Following his arrest on April 14, 2010, defendant denied any involvement in the shootings of Rush and Childs when interviewed by detectives.

¶ 6 On April 19, 2011, detectives Gene Karzin and Tina Noe interviewed defendant with his attorney present. During the interview, detective Karzin informed defendant that a prosecuting attorney was listening to the interview and simultaneously texting him with questions to ask

defendant. Defendant confessed that he, Pashanet Reed, and Stephon Phelps[1] lured the victims to a specific location where defendant shot both Rush and Childs.[2] Just before the recording ends, defendant's attorney stated he was going to step out of the room to "make sure we're good."

¶ 7 On May 11, 2011, defendant appeared, with counsel, before the court for the purpose of entering a guilty plea. The prosecutor indicated the parties had reached a "negotiated disposition." Provided defendant "continues to truthfully cooperate and, if necessary, truthfully testify," the State agreed to recommend to the court that defendant should be sentenced to 35 years' incarceration for first-degree murder, followed by a mandatory supervised release (MSR) period. The court advised defendant that the first-degree murder charge carried a potential term of incarceration between 20 and 60 years but, if extendable, defendant faced 20 years to life in prison. The court told defendant that he would "get what [he] bargained for" as long as he complied with the agreement. The State provided a factual basis for the plea and, after finding defendant knowingly and voluntarily entered the guilty plea, the court entered judgment for first-degree murder and dismissed, with leave to reinstate the aggravated battery with a firearm charge, on the motion of the State. Pursuant to the State's request, the court continued the matter for sentencing "pending the defendant's cooperation with the co-defendants' cases."

¶ 8 On November 10, 2011, defendant filed a *pro se* motion to withdraw his guilty plea and, thereafter, filed another motion to withdraw his guilty plea on February 14, 2012. On March 27, 2012, defense counsel filed an amended motion to withdraw his guilty plea, arguing that, due to the mandatory 25-year enhancement for the use of a firearm during the murder of Rush,

[1] Phelps is also referred to as "Bogan" and "Bogan-Phelps" throughout the proceedings in the trial court. For purposes of this order, we will use "Phelps."

[2] The details of defendant's confession are stated at length during the discussion of the stipulated bench trial.

defendant's negotiated sentence of 35 years was void for being below the statutory 45-year minimum.

¶ 9 On March 28, 2012, during the hearing on defendant's amended motion to withdraw his guilty plea, the following discussion occurred:

"THE COURT: *** It is my understanding and my recollection that they offered you 35 actual years in prison if you cooperated, for lack of a better word.

THE DEFENDANT: Right.

THE COURT: Okay? Not 60, not anything enhanced. Basically, the 35 would have been because they would have gone back and amended the charge to delete the issue of the firearm, because I didn't admonish you about that because that was not part of the plea agreement. The plea agreement was 35 actual years. You understand that?

THE DEFENDANT: Yeah.

***

MS. KAUZLARICH [State's Attorney]: *** The State offered the 35 years to [defendant] in exchange for his truthful cooperation, and in speaking to the victim's family, that was the agreement, 35 years.

*** If [defendant is] allowed to withdraw his guilty plea, I can still use his taped statement that he gave to me, sir, against him.

And secondly, if he is convicted, sir, the mandatory minimum is 45 years in prison. That's ten more years than what I offered at the 35.

***

THE COURT: Can I ask why [it's still your desire to withdraw this plea]?

THE DEFENDANT: Because I wouldn't have took it in the first place if I knew I was – if it was only 35 years. I wouldn't even took it. Only reason I took it is my lawyer told me to take it. That's the only reason.

THE COURT: What – That's nonsense. *** And you agreed to the factual basis, and I admonished you, just as I do everybody else, and you understood exactly what was going on.

***

So – So that – So sitting there and saying you took something only because your attorney… Because, quite frankly, that's a hell of a deal. You shot this guy. You shot the guy. It's not – It's not – You agreed to the factual basis. You shot the man. This wasn't a case where you were hiding in the – you hid around the bush, and somebody else did it. The factual basis said you shot him.

So to sit there and tell me that you took a plea only because your attorney told you to, and the fact that, quite frankly, he saved you at least ten years prison, at least ten. Because that's – 45 is if you give get the minimum if you're convicted. You understand that?

THE DEFENDANT: Yeah.

***

THE COURT: Fine – Fine. It's withdrawn. Good luck. *** Your plea is withdrawn."

The court allowed defendant to withdraw his guilty plea and continued the matter for a pretrial hearing. Defendant filed a motion requesting substitution of Judge Meersman on April 17, 2012, and the matter was subsequently transferred to Judge Fuhr.

¶ 10 On May 15, 2012, defendant filed a motion to suppress statements, arguing that "pursuant to his obligation under the bargain reached with the State, [defendant] provided a videotaped statement to law enforcement officials and attorneys from the Rock Island County State's Attorneys office after [defendant] had entered an open guilty plea on May 11, 2011, as to his involvement in the murder." Defendant argued that the trial court did not have the authority to accept the guilty plea because the 35-year sentence was void since it fell below the statutory minimum of 45 years, with the firearm enhancement. Defendant argued ultimately it would be "legally impossible" for him to "enjoy the benefit of the sentence promised to him." Consequently, based on the law of contracts, the State should not be allowed to receive its benefit of the bargain (the use of the April 19, 2011, videotaped confession).

¶ 11 On June 21, 2012, the court allowed the parties to argue their positions concerning defendant's motion to suppress his 2011 confession. The court requested a copy of the transcript from the withdrawal of defendant's guilty plea hearing and took the matter under advisement.

¶ 12 On June 22, 2012, the court entered a written "Opinion & Order," denying defendant's request to suppress his recorded statements. The court found that "no final judgment or sentence was imposed at the time of the plea." The court further stated,

> "Judge Meersman made it clear to the Defendant prior to granting his motion to withdraw his plea that the agreement between the parties was that after cooperating, the State would agree to the withdrawal of this plea and allow the Defendant to plead to an amended count that eliminated the allegation of the use

> of a firearm ***. This procedure would then allow him to be sentenced to his agreed to thirty-five (35) years in prison. From the record, it is clear that it is not the State that has been unable or unwilling to fulfill [its] end of the bargain, but the Defendant by refusing to cooperate and withdrawing his guilty plea. The State and Judge Meersman made it clear to the Defendant at the hearing on his motion to withdraw his guilty plea what the consequences would be if he withdrew his plea, including the use of the statements he had earlier provided to the State in the presence of his counsel at a subsequent trial."

¶ 13 On August 28, 2012, the matter proceeded to a stipulated bench trial before Judge Fuhr for the offense of first-degree murder. Defendant filed a motion *in limine* on the date scheduled for the trial, requesting the court to bar the use of his recorded statement, which the court denied.

¶ 14 The stipulations established the following facts. Investigating officer Jon Cary would testify he responded to the scene of a shooting and observed Rush and Childs shot inside a vehicle. After canvassing the neighborhood, Cary learned a dark green Lincoln Town Car had been at the scene and a silver sedan was observed "creeping in the alley" behind a house.

¶ 15 Rock Island police detective Tina Noe would testify that an off-duty police officer heard gunshots while in the area of the incident and observed a dark green Lincoln Town Car fleeing the area at a high rate of speed. Reed and Phelps were located in the vehicle after it was stopped by police. On March 30, 2010, detectives Noe and Karzin interviewed Phelps, who indicated he was with defendant on the day of the shooting and that Phelps had traded a gun with defendant. On March 31, 2010, Phelps provided the gun and ammunition to the police department.

¶ 16 On March 30, 2010, detectives Noe and Hoogerwerf interviewed Reed who identified defendant as the person who shot Rush and Childs. Reed denied any involvement in setting the

victims up, but admitted to leaving a voicemail on defendant's phone stating, "I can't believe you shot them." Officers located a cell phone at the scene of the shooting and detective Noe learned defendant drove to a cell phone store after the murder to obtain another "SIM card" with the same cell phone number as the phone located at the scene. Detective Noe would also testify Reed admitted, during an interview on April 27, 2012, that defendant shot the victims. Detective Noe interviewed Phelps on July 26, 2012, and Phelps identified defendant as the person who shot the victims. After detective Noe located defendant in Decatur on April 14, 2010, defendant denied any involvement in the shooting. Further, detectives Noe and Karzin interviewed defendant, "pursuant to a proffer agreement," on April 19, 2011.

¶ 17 Pashanet Reed would testify that she spent March 30, 2010, riding around in a green Lincoln Town Car, drinking and smoking cannabis with Phelps and defendant. Phelps and defendant began to discuss how Childs had robbed one of Phelps' friends and planted a gun at defendant's brother's house. While driving around, defendant gave Phelps a gun, which Phelps shot into the air, emptying the bullet chamber. Reed drove to pick up keys from Phelps' girlfriend's residence, where Phelps entered the residence and returned with a black gun with a red "X" on the side. Phelps gave the gun to defendant, and the three went to defendant's brother's house, where defendant picked up a silver or gray rental car.

¶ 18 Reed, Phelps, and defendant drove the rental car to Davenport to pay money toward the car. After driving around again, the three returned to drop Reed and Phelps off at Reed's mother's home, where Reed and Phelps got into the green car and began driving toward 5th Street and 19th Avenue in Rock Island. Defendant called Reed, asking where she and Phelps were located. During this time, Phelps was on the phone with Rush, asking Rush "where he was at." At some point, Rush indicated to Phelps that he was "pulling up" because Phelps told Reed to

call defendant. Reed called defendant and told him Rush and Childs were there, and Cassia "Tia" Leigh was with them in the front seat.

¶ 19 Rush exited the vehicle and walked over to the car where Reed and Phelps were seated. While Phelps and Rush were talking, defendant ran from the side of a house and started shooting into Rush's car. Rush yelled something, and Reed heard more gunshots as she drove away from the area. Reed tried to call defendant while she was driving away, but his voicemail answered, and she left a message stating, "I can't believe you shot them."

¶ 20 Phelps would testify that he picked up Reed in his green Lincoln Town Car on March 30, 2010. The two drove around drinking and met up with defendant and rode around in defendant's silver four-door rental car. The three drove to a bank in Davenport, where defendant paid for the rental car and defendant pulled out a gun that Phelps shot off as they drove around. Phelps proposed to defendant that he would trade that gun and give defendant a bigger gun, a "Springfield XDM." At some point, they saw Childs, who Phelps did not know, but Reed and defendant started talking about how Childs left a gun in defendant's brother's yard. According to Phelps, defendant stated he wanted to "f***" Childs up, but defendant did not say he was going to kill anybody.

¶ 21 Rush called Phelps and asked him for some "kush" (cannabis). Phelps indicated he did not have any cannabis on him, but Reed had some cannabis she was willing to sell. On their way back to Rock Island, defendant indicated that Childs was with Rush and that was why Rush had not been answering defendant's calls, making defendant mad. After Phelps and Reed dropped defendant off at his car, the two drove to meet Rush to sell him cannabis.

¶ 22 Phelps told Rush where he and Reed were located and Phelps believed Reed told defendant the location of their meeting with Rush. As Rush pulled up, Reed told defendant on

the phone, "Dude in the back seat, he with [Rush] now." Rush approached the car where Reed and Phelps were seated to purchase cannabis, but Rush wanted more cannabis than Phelps had with him, so he started arguing with Rush.

¶ 23 While Rush was at their vehicle, Phelps saw somebody run from between the houses and start shooting at the backseat of Rush's car. Rush ran toward his car when defendant ran around back of the car and shot Rush. As Reed drove away from the scene, Phelps asked Reed why defendant shot Rush, and Reed indicated Rush should not have been "trying to save people." Reed told Phelps to shut up and stop crying and that the incident had nothing to do with them. According to Phelps, Reed tried to contact defendant and, after being pursued by the police, both Reed and Phelps jumped out of the car to run, but were caught by police.

¶ 24 During defendant's April 19, 2011, interview, with his attorney present, defendant indicated he met up with Reed and Phelps to purchase "kush," and the three drove around, smoking cannabis and drinking. According to defendant, Phelps called Rush and defendant, Reed, and Phelps began talking about Childs. While driving around, Phelps used all of the bullets in defendant's gun, and they went to Phelps' girlfriend's house where Phelps retrieved a different gun. Reed stated "Murk that n***," and defendant indicated that if the time was right, he might do it. Phelps told defendant he should shoot both Rush and Childs.

¶ 25 After putting money in an account to pay for the rental car, they traveled back to Rock Island, where Phelps was supposed to meet Rush. Defendant parked his rental car in the alley and when Rush and Childs pulled up, Reed called defendant to tell him that "Tia" was sitting in the front passenger seat. Defendant stated that he ran from between the houses toward Rush's car, shooting Childs three times. Defendant heard Rush yell "no," and saw Rush running back toward the car. Defendant ran around the back of the car and shot Rush three times.

¶ 26 Reed drove away as defendant was shooting and the three planned to meet in Davenport to trade guns afterward. Defendant ran back toward his car and drove toward the I-Wireless store in Davenport because he lost his cell phone. As he drove away, he saw police chasing Reed in her vehicle. On March 31, 2010, defendant traveled to Decatur to stay with his mom.

¶ 27 Defense counsel renewed his objection to the use of the April 19, 2011, statement during the stipulated bench trial. In addition, defense counsel stated, "[t]he defense is not stipulating to the truthfulness of the witnesses, the sufficiency of the evidence, or the sufficiency of the evidence to convict. It is merely stipulating to the availability of the testimony and evidence contained in the written stipulation of the parties." The court admitted the recordings of the interviews of Reed and Bogan, without objection, and admitted the recording of defendant's April 19, 2011, interview over defendant's objection. At the end of the hearing, the court found defendant guilty of first-degree murder and set the matter for sentencing on October 18, 2012.

¶ 28 On August 29, 2012, defendant filed a motion for new trial asserting the trial court erred when it admitted the recording of defendant's April 19, 2011, statement "for reasons previously set forth in defendant's motion to suppress." On October 18, 2012, the court sentenced defendant to 25 years on the murder charge, plus the mandatory 25 years for the use of the firearm, for a total of 50 years' incarceration, to be followed by three years' MSR. The trial court entered judgment sentencing defendant to 50 years' incarceration for first-degree murder on October 22, 2012. Defendant filed a motion to reconsider sentence, which the court denied on December 31, 2012. Defendant timely appealed.

¶ 29 ANALYSIS

¶ 30 On appeal, defendant claims his April 19, 2011, statement was inadmissible pursuant to Supreme Court Rule 402(f). The State responds defendant forfeited his contention that the

statement was plea-related for purposes of Rule 402(f) because defendant failed to bring this issue to the attention of the trial court.

¶ 31 In his opening brief, defendant acknowledges forfeiture and agrees he did not raise the Rule 402(f) when before Judge Fuhr and, instead, challenged the admissibility of the confession by advancing a contractual theory. However, defendant urges this court to excuse his forfeiture of the Rule 402(f) issue either by finding defense counsel provided ineffective assistance or by applying the plain error doctrine.

¶ 32 In the trial court, Judge Fuhr was well aware that Judge Meersman allowed defendant to withdraw his guilty plea simply because defendant desired to do so. Judge Meersman inquired whether defendant felt pressured into pleading guilty and Judge Meersman advised defendant the State's offer to recommend a 35-year sentence was a "hell" of a deal. After reviewing the transcript of the proceeding before Judge Meersman, Judge Fuhr made the following findings:

> "Judge Meersman made it clear to the Defendant prior to granting his motion to withdraw his plea that the agreement between the parties was that after cooperating, the State would agree to the withdrawal of this plea and allow the Defendant to plead to an amended count that eliminated the allegation of the use of a firearm ***. This procedure would then allow him to be sentenced to his agreed to thirty-five (35) years in prison."

We note that Judge Meersman did not make a finding that the negotiated agreement was void, but rather, allowed defendant to withdraw his guilty plea simply because defendant changed his mind. Further, Judge Fuhr, when ruling on the motion to suppress, did not find defendant was allowed to withdraw his guilty plea because the agreement was void or unenforceable.

¶ 33 It is apparent from this record that Judge Fuhr carefully reviewed the transcript of the hearing on defendant's motion to withdraw his guilty plea before Judge Meersman and, thereafter, considered the pleadings and arguments of counsel, before ruling on the motion to suppress submitted to the court by defense counsel. Judge Fuhr denied defendant's motion to suppress on contractual grounds, finding it was "not the State that has been unable or unwilling to fulfill [its] end of the bargain." Judge Fuhr specifically found it was defendant who failed to honor the plea agreement "by refusing to cooperate and withdrawing his guilty plea."

¶ 34 In this appeal, defendant does not assert Judge Meersman committed error by allowing defendant to withdraw his guilty plea. Similarly, defendant does not assert on appeal that Judge Fuhr committed any error when he ruled upon the precise issues raised in defense counsel's motion to suppress. In the absence of an allegation of judicial error by either Judge Meersman or Judge Fuhr, in this case, plain error does not apply.

¶ 35 However, this does not necessarily mean this court is unable to consider the Rule 402(f) issue in the context of an ineffective assistance of counsel claim now raised by defendant for the first time on appeal. To establish a claim of ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). In addition, defendant must also establish that defense counsel's deficient performance resulted in prejudice, such that the result of the proceedings would have been different had counsel not acted deficiently. *Id.* at 687. In reviewing a claim of ineffective assistance, a court does not need to determine whether counsel's performance was deficient before examining the prejudice suffered by defendant as a result of the alleged deficiencies. *Id.* at 697.

¶ 36 Based on *Strickland*, we turn to the issue of whether Judge Fuhr's ruling would have been favorable to defendant if the motion to suppress had also included an allegation that suppression was required under Rule 402(f). Based on this record, this court must speculate whether the State offered a reduced 35-year sentence in exchange for *both* defendant's confession *and* his ongoing cooperation in the prosecution of the other participants defendant implicated in his April 19, 2011, confession. Second, we must speculate whether the State offered to recommend a reduced 35-year sentence before or after defendant completed his April 19, 2011, statement. This court is unable to glean these relevant facts from the record now before us, in spite of appellate counsel's observation that such an inference is supported by the record.

¶ 37 At this juncture, for the reasons set forth above, we are unable to determine whether there was prejudice that resulted from defense counsel's apparent unawareness concerning the application of Rule 402(f). A determination of prejudice is not possible based on this record because we are unable to determine whether the plea negotiations began before April 19, 2011, or whether those negotiations, if any, required defendant to first provide both an incriminating statement *and* also cooperate in any future prosecutions occurring after April 19, 2011. This court wishes to make it very clear that we believe the Rule 402(f) issue raises valid concerns about the effectiveness of trial counsel, but this court is unable to reach the merits of this issue at this time. Since the issues relevant to the timing and conditions discussed during the plea negotiations involve factual matters outside the scope of this record, we conclude the Rule 402(f) issue is best addressed in the trial court in a subsequent postconviction petition. Should defendant elect to pursue the issue of whether his trial involved an error of constitutional dimension due to the alleged ineffective assistance of trial counsel, defendant can file a postconviction petition in the trial court. *People v. Kunze*, 193 Ill. App. 3d 708, 725-26 (1990)

(when consideration of matters outside of the record is required to determine the issues presented for review, defendant's contentions are more appropriately addressed in a petition for postconviction relief.) This procedural avenue would allow the trial court an opportunity to properly consider defendant's contentions of error concerning Rule 402(f).

¶ 38 CONCLUSION

¶ 39 For the foregoing reasons, the judgment of the circuit court of Rock Island is affirmed.

¶ 40 Affirmed.