2012 IL App (4th) 110361-U

NO. 4-11-0361

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
October 10, 2012
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
TIMOTHY McCULLOUGH,	)	No. 09CF2115
Defendant-Appellant.	)	
	)	Honorable
	)	Heidi N. Ladd,
	)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Justices Appleton and Cook concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed, concluding (1) defendant was not denied the effective assistance of counsel and (2) defendant voluntarily and intelligently entered into his guilty plea.

¶ 2 In September 2010, defendant, Timothy McCullough, pleaded guilty to one count of predatory criminal sexual assault of a child, a Class X felony (720 ILCS 5/12-14.1(a)(1), (b)(1) (West 2008)), and one count of criminal sexual assault, a nonprobationable Class 1 felony (720 ILCS 5/12-13(a)(3), (b)(1) (West 2008)). That same day, the trial court sentenced defendant to consecutive prison terms of 23 years and 4 years, requiring defendant to serve at least 85% of his sentence before he could be considered for good-time credit.

¶ 3 Later that month, defendant filed a motion to withdraw his guilty plea and vacate the judgment. In December 2010, he filed an amended motion to withdraw his guilty plea and

vacate the judgment, alleging that he received ineffective assistance of counsel. Following a March 2011 hearing, the trial court entered a 12-page-written order denying defendant's amended motion. This appeal followed.

¶ 4 On appeal, defendant argues the trial court erred by denying his motion to withdraw his guilty plea because defendant received ineffective assistance of counsel and thus did not enter into his plea voluntarily and intelligently. We disagree and affirm.

¶ 5 I. BACKGROUND

¶ 6 In December 2009, the State charged defendant by information with four counts of predatory criminal sexual assault of a child, a Class X felony (720 ILCS 5/12-14.1(a)(1), (b)(1) (West 2008)), based on defendant placing his penis in the vaginas and mouths of A.F. and J.F., who were both under the age of 13. The State also charged defendant with two counts of child pornography, a nonprobationable Class 1 felony (720 ILCS 5/11-20.1(a)(1)(vii), (c) (West 2008)), based on defendant knowingly photographing the unclothed buttocks of A.F. and J.F. On September 8, 2010, by the parties' agreement, the State also charged defendant with one count of criminal sexual assault, a Class 1 nonprobationable felony (720 ILCS 5/12-13(a)(3), (b)(1) (West 2008)), based on defendant placing his penis in the vagina of A.F., a family member who was under the age of 18.

¶ 7 That same day, the parties appeared for a hearing, at which defendant indicated he wished to enter a plea of guilty to "an agreed-upon disposition." The trial court explained the new sexual assault charge to defendant, confirming he understood "what that charge [was] claiming." The court explained the full range of possible penalties and sentences. Defendant indicated he understood.

¶ 8 The trial court advised defendant of the legal rights he would be giving up by pleading guilty. Specifically, the court informed defendant he had a right to a trial by a judge or jury, at which (1) the State would have to prove defendant guilty beyond a reasonable doubt, (2) defendant would have the right to confront witnesses, (3) defendant could present his own witnesses, and (4) defendant could either elect to testify or remain silent. The court explained by pleading guilty defendant "would not only give up [his] right to a trial but [he] would give up all those rights that go along with a trial." Defendant indicated he understood.

¶ 9 The trial court asked defendant whether his offer to plead guilty was being made voluntarily. Defendant responded, "Yes, your Honor. The court also asked whether anyone had forced, threatened, or coerced defendant "in any way" to make him plead guilty. Defendant responded, "No, your Honor."

¶ 10 The trial court next informed defendant of the predatory criminal sexual assault of a child charge, confirming defendant understood the possible penalties and sentences for the charge. Defendant indicated he was entering his guilty plea to this charge voluntarily. The court again asked defendant whether anyone forced, threatened, or coerced defendant "in any way" to plead guilty, to which defendant responded, "No, your Honor."

¶ 11 The State informed the trial court that in exchange for defendant pleading guilty to (1) predatory criminal sexual assault of a child and (2) criminal sexual assault, the State would agree to consecutive sentences of 23 years and 4 years in prison. The State noted each offense required defendant to serve at least 85% of his sentence. The State also agreed to dismiss the remaining counts.

¶ 12 The State provided the factual basis for the plea, which included the following

facts. Defendant was married to the victims' mother at the time of the 2008 offenses. Following a divorce, the children, who where seven and eight years old at the time of the offenses, gave detailed information about vaginal, oral, and anal penetration by defendant. Following defendant's arrest and after having been confronted with the girls' accusations, defendant admitted their statements were essentially correct. Defense counsel stipulated the State's witnesses would testify substantially as the State indicated. The trial court then accepted defendant's guilty pleas to predatory criminal sexual assault of a child and criminal sexual assault, finding (1) defendant had been advised of his rights pursuant to Illinois Supreme Court Rule 402 (eff. July 1, 1997); (2) defendant entered his pleas knowingly, understandingly, and voluntarily; and (3) a factual basis supported the pleas. The court then proceeded to sentencing. Defendant's attorney waived a presentence report. Thereafter, the court sentenced defendant to consecutive sentences of 23 years and 4 years, noting the offenses required defendant to serve at least 85% of his sentence before he could be considered for good-time credit.

¶ 13 On September 30, 2010, defendant filed a motion to withdraw his guilty plea and vacate the judgment. In December 2010, defendant filed an amended motion to withdraw his guilty plea and vacate the judgment, alleging defendant's trial attorney, Janie Miller-Jones, provided ineffective assistance, causing defendant to feel "forced into pleading guilty." Specifically, defendant asserted Miller-Jones (1) cursed at defendant and acted disrespectfully toward him; (2) repeatedly acted argumentative with him; (3) met with him only one time at the jail while his case was pending; (4) acted in a threatening manner toward defendant; (5) did not listen to defendant and would only "talk at" defendant; (6) may have breached attorney-client privilege; (7) did not provide all of the pertinent information to defendant, such that defendant

was unable to make an informed decision as to whether to plead guilty; (8) refused to answer his questions; (9) did not follow through "numerous times" when she told defendant she would meet with him at the jail; and (10) did not communicate with defendant. Defendant also alleged he "did not feel comfortable with Ms. Miller-Jones representing him in that he did not trust" her. Further, defendant's motion claimed defendant did not knowingly or intelligently enter his guilty plea. It also asserted Miller-Jones failed to properly investigate potential defenses and failed to subpoena evidence that could have been used in defendant's defense, and as a result, defendant felt forced to plead guilty.

¶ 14 In March 2011, the parties appeared for a hearing on defendant's amended motion. Defendant testified he "was pretty much forced" into pleading guilty. He said initially Miller-Jones seemed sincere about his case, but when defendant provided Miller-Jones with information and leads, she would "come back and say, 'well, that's not going to help you any.' " Specifically, defendant asked Miller-Jones to subpoena about 40 of his relatives and was "shocked" when she "just came back" with his brother, sisters, sister-in-law, and nephews. He testified Miller-Jones told him she had a private investigator interview some of the individuals, and she gave defendant the "little packets of information" from these interviews. To defendant's knowledge, however, Miller-Jones did not subpoena any of the individuals for trial. Defendant also gave Miller-Jones information about one of the State's "key witnesses," but Miller-Jones told him it was "useless." She also told defendant the courtroom would "shun" her if she put two kids on the stand.

¶ 15 Contrary to the allegation in his written motion, defendant estimated Miller-Jones met with him three times in jail. She told him at least three other times she would visit but did not follow through. Defendant said he had "way more" phone calls with Miller-Jones than visits.

Their phone conversations were usually "very brief," with the longest lasting approximately 20 minutes. Defendant said when he and Miller-Jones spoke, her tone was "very irritated." She swore at him, acted argumentative, and made him feel like he was "being interrogated by a cop."

¶ 16 During Miller-Jones' first two meetings with defendant, she showed defendant the police reports and the victims' interviews. She explained the victims' allegations to defendant and asked defendant whether he made the statements contained in the reports. Defendant testified he was reading the reports when she asked him about whether he had made the statements. Defendant responded "bunches of stuff is a bunch of BS." Defendant testified he did not have enough time to look through all the reports because they were lengthy. Further, he said, he did not have his glasses so he could not really see what he was reading. He told Miller-Jones he could not read the papers, but she did not offer to read the reports to him. He said Miller-Jones did not provide him with all the pertinent information about his case but instead seemed "leery" and "withholding." When he asked her questions about his case, she "seldomly [*sic*]" answered.

¶ 17 When defendant asked Miller-Jones how the trial process worked, she briefly explained but told him as soon as the jury heard the victims' testimony and his "crazy confession," they would "hang [his] ass" and "crucify" him. Defendant said about a month before his scheduled trial, Miller-Jones called him in jail and told him they were not going to trial. Miller-Jones said "a lot of derogatory stuff," including defendant's "ass [was] toast" and his "chances of freedom were something like *** slim to none." She said to defendant, "how would you feel if somebody were masturbating in front of your sons?"

¶ 18 According to defendant, Miller-Jones told him about the State's offer of 23 years

and 4 years "less than 24 hours" before the time of his plea. He did not have a chance to discuss it with his family, although he told Miller-Jones he wished to do so. Defendant said when he came to court on September 8, he did not know he was coming to make a plea. He spoke to Miller-Jones briefly before his case was called, at which point she showed him the plea agreement document and passed him a pen to sign it. She did not explain to him why the charges had been changed. Ultimately, defendant said he pleaded guilty because he felt he "had no choice."

¶ 19 Miller-Jones testified she was defendant's trial counsel and represented him at a hearing on a section 115-10 motion (725 ILCS 5/115-10 (West 2010)). She read the police reports and watched the video-recordings of the victims' interviews. Over the course of representing defendant, she met with him six times at the jail. She also spoke with him at least eight times over the phone.

¶ 20 Miller-Jones estimated her initial meetings with defendant took "hours." She testified she watched defendant "read every word of the police reports" at the jail. He did not mention he needed glasses. She also brought her personal laptop to the jail for defendant to watch the victims' interviews. Miller-Jones testified she explained the trial process to defendant.

¶ 21 Miller-Jones said she sent an investigator to interview defendant's sisters, brother, and friends and gave the investigators' reports to defendant to read. She also subpoenaed phone records and "fourteen or fifteen people" and was "fully prepared to try [defendant's] case." However, she did "not really" gather any strong, relevant information from her subpoenas or interviews. Based on the facts and evidence, Miller-Jones opined defendant was likely to be convicted, and based on the charges, defendant would likely receive a sentence of natural life.

She reasoned it would be difficult to convince the jury the victims' mom "made this all up" and "forced her kids to say all these things." She also said defendant's "crazy confession" partially corroborated what had happened. Moreover, she noted the victims' recorded interviews, which the trial court had ruled admissible at the section 115-10 hearing, were "very good" in that the victims provided clear descriptions of the incidents and their descriptions matched one another's. Physical evidence also corroborated the victims' descriptions of events.

¶ 22 Based on the magnitude of evidence against defendant, Miller-Jones admitted she had a stern talk with defendant in September about considering a plea. She did not, however, threaten or curse at defendant, nor did she coerce him into pleading guilty. She admitted she raised her voice several times when "he was going off, and [she] needed to bring him back to what [she] was talking about because sometimes he was incoherent." She said she was not argumentative with defendant, but if he made a claim that was not supported by the evidence or was completely contradicted by the evidence, she "would call him on it."

¶ 23 Miller-Jones did not believe she ever told defendant he would be "crucified" because she does not usually use that word with her clients. She told defendant the chances of winning his trial were slim and if defendant was convicted at trial, he would likely receive a natural life sentence. Thus, she "urged him to really think about a plea because [of] what was at stake." She acknowledged she may have told him "his ass would be toast" if he went to trial, but she did so in an effort to emphasize to defendant "how bad things [were]." Although she knew defendant's chances of winning were "slim," Miller-Jones remained committed to doing "the best [she] could."

¶ 24 Based on what Miller-Jones told defendant, defendant told her on September 3 he

was willing to negotiate with the State. She then contacted the State, which agreed to change one Class X charge to a Class 1 charge, which would eliminate the mandatory natural life sentence for defendant. Miller-Jones explained the agreement to defendant over the phone and explained why the charges were changed, and he told her he wanted a plea. She acknowledged he was "thrown off guard" when the trial court set defendant's plea hearing for the same day Miller-Jones told the State and court defendant wished to plead guilty. However, he told her he still wanted to go through with the plea. Miller-Jones acknowledged the plea negotiations changed "at the last minute" in that initially the State had offered to agree to sentences of 13 1/2 years on each charge, equaling the same amount of total years. The parties modified the agreement to avoid having defendant receive a mandatory natural life sentence.

¶ 25 Miller-Jones never provided any confidential information to anybody without permission. She told defendant about the plea the day before the hearing and discussed the State's offer with defendant's sister, per defendant's request. The next morning, she told defendant about her conversation with defendant's sister, and he indicated he wanted to accept the plea. Before the hearing, Miller-Jones reviewed the proposed plea order with defendant, and he indicated he still wanted to plead guilty. Contrary to defendant's assertion, Miller-Jones said she was neither reluctant to cross-examine the victims nor was she concerned the public would "shun" her for representing defendant.

¶ 26 Following arguments, the trial court stated it needed time to deliberate. In April 2011, the court entered a 12-page written order denying defendant's motion to withdraw his guilty plea and vacate the judgment. First, the court rejected defendant's assertion he was coerced into pleading guilty. The court found defendant exhibited a lack of credibility, noting

"lack of specificity characterized much of the defendant's testimony." By contrast, the court observed Miller-Jones to be "very credible" and "open, specific, [and] direct in her answers," with a "good recall of the facts." According to the court, Miller-Jones' actions throughout defendant's case reflected "she thoroughly evaluated the evidence and merits of the case with [defendant], conveyed to him her professional assessment of what would happen at trial, fully prepared for that trial and gave the defendant her prudent advice as to what would be the best way to proceed, while letting him decide." Further, the court found prior to accepting defendant's pleas, the court "strictly followed, if not surpassed, the requirements for a plea admonition," which dispelled any suggestion defendant's plea was involuntary or unknowing.

¶ 27 The trial court likewise rejected defendant's ineffective-assistance-of-counsel allegations, finding defendant failed to meet either prong of the test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The court noted "Miller-Jones' decisions were the product of sound trial strategy and that her representation met the reasonable standard" of professional competence. Moreover, the court noted the overwhelming evidence against defendant and found defendant "failed to establish any possible, let alone plausible, defense."

¶ 28 This appeal followed.

¶ 29 II. ANALYSIS

¶ 30 On appeal, defendant argues the trial court erred by denying his motion to withdraw his guilty plea because defendant received ineffective assistance of counsel and thus did not enter into his plea voluntarily and intelligently.

¶ 31 The decision of whether to allow a defendant to withdraw his guilty plea is a matter within the discretion of the trial court and will not be disturbed absent an abuse of that

discretion. *People v. Manning*, 227 Ill. 2d 403, 411-12, 883 N.E.2d 492, 498 (2008). A court abuses its discretion only when its decision is arbitrary, unreasonable, or fanciful or where no reasonable person would take the trial court's view. *People v. Pelo*, 404 Ill. App. 3d 839, 864, 942 N.E.2d 463, 485 (2010).

¶ 32 A defendant does not have an absolute right to withdraw his guilty plea. *Manning*, 227 Ill. 2d at 412, 883 N.E.2d at 498. However, a court should allow a defendant to withdraw his plea of guilty where (1) the plea is based on a misapprehension of the facts or the law or on misrepresentations of counsel, (2) there is doubt as to defendant's guilt, (3) the accused has a defense worthy of consideration by a jury, 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, 582 N.E.2d 714, 716 (1991). A challenge to a guilty plea alleging ineffective assistance of counsel is subject to the standard set forth in *Strickland*, 466 U.S. 668. *Hill v. Lockhart*, 474 U.S. 52, 57 (1985). To prevail on a claim of ineffective assistance of counsel, a defendant must show (1) counsel's performance fell below an objective standard of competence, and (2) the defendant suffered prejudice as a result of that deficient performance. *Strickland*, 466 U.S. at 687. An attorney's conduct is deficient if the attorney fails to ensure the defendant's guilty plea was entered voluntarily and intelligently. *People v. Hall*, 217 Ill. 2d 324, 335, 841 N.E.2d 913, 920 (2005). To establish prejudice, the defendant must show a reasonable probability that, absent counsel's errors, the defendant would have pleaded not guilty and insisted on going to trial. *Hill*, 474 U.S. at 59.

¶ 33 Here, the trial court denied defendant's motion to withdraw his guilty plea after finding (1) Miller-Jones did not coerce him into pleading guilty, (2) Miller-Jones provided competent assistance, and (3) defendant failed to show he was prejudiced by Miller-Jones'

allegedly deficient performance. The trial court did not abuse its discretion.

¶ 34 Initially, we note, in support of his argument Miller-Jones provided ineffective assistance, defendant relies extensively on his own testimony at the hearing on the motion to withdraw his plea. However, Miller-Jones' testimony conflicted with most of defendant's testimony, and the trial court explicitly found Miller-Jones testified credibly while defendant did not. A court of review may not substitute its own judgment for that of the trier of fact on matters of credibility or weight of the evidence. *People v. Beasley*, 384 Ill. App. 3d 1039, 1046, 893 N.E.2d 1032, 1038 (2008).

¶ 35 Based on the trial court's credibility determinations and Miller-Jones' testimony, we conclude the court did not abuse its discretion in denying defendant's motion to withdraw his plea. Specifically, Miller-Jones testified she (1) met with defendant six times at the jail; (2) spoke with defendant eight times over the phone; (3) explained the trial process to defendant; (4) sent an investigator to interview defendant's sisters, brother, and friends; (5) showed defendant the police reports, the victims' video-recorded interviews, and the investigator's interview reports; and (6) subpoenaed "fourteen or fifteen people." With respect to the plea agreement, Miller-Jones testified defendant told her on September 3 he was "willing to negotiate." Thereafter, Miller-Jones negotiated a deal with the State to eliminate the mandatory natural life sentence for defendant. She testified defendant seemed "thrown off guard" when the trial court set defendant's plea hearing so quickly after he indicated he wished to plead guilty, but she also said she confirmed again with defendant he still wanted to go through with the plea. Based on the foregoing, the trial court correctly determined Miller-Jones' representation "met the reasonable standard" of professional competence.

¶ 36 Moreover, we note, while Miller-Jones acknowledged using forceful language with defendant, the trial court found her language "did not rise to the level of being coercive." In addition, the court reasoned the trial court's admonitions at defendant's plea hearing sufficiently dispelled any notion defendant was coerced into making a deal. The court's findings were not unreasonable. See *People v. Wilson*, 295 Ill. App. 3d 228, 237, 692 N.E.2d 422, 428 (1998) (concluding the trial court did not err by denying the defendant's motion to withdraw his guilty plea because, although defense counsel allegedly told the defendant to " '[t]ake the plea or die,' " counsel testified he (1) pressured the defendant to take the plea because he strongly believed the defendant would be convicted and sentenced to death and (2) left the final decision up to the defendant). Here, defense counsel's straight talk with the defendant, designed to get him to recognize the seriousness of his self-inflicted predicament, did not constitute coercion. It was her job to convey to defendant the risks of going to trial on the original charges, including a mandatory life sentence. As the trial court noted in its thorough and thoughtful order, she fulfilled her professional duty to defendant by doing so.

¶ 37 III. CONCLUSION

¶ 38 Based on the foregoing, we conclude the trial court did not abuse its discretion in denying defendant's motion to withdraw his guilty plea because counsel provided effective assistance and defendant entered into his plea voluntarily and intelligently. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 39 Affirmed.