2012 IL App (4th) 110477-U

Filed 9/13/12

NO. 4-11-0477

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
ANDRAY D. ALEXANDER,	)	No. 10CF50
Defendant-Appellant.	)	
	)	Honorable
	)	Robert L. Freitag,
	)	Judge Presiding.

JUSTICE COOK delivered the judgment of the court.
Presiding Justice Turner and Justice Steigmann concurred in the judgment .

ORDER

¶ 1 *Held*: The trial court did not err in denying defendant's motion to withdraw his guilty plea.

¶ 2 Defendant, Andray D. Alexander, entered an open guilty plea to aggravated battery. The trial court sentenced him on that charge to six years in prison. Defendant moved to withdraw his guilty plea, alleging his attorney erroneously advised him he would be sentenced to probation if he pleaded guilty. If not for his counsel's misleading representation, defendant claimed, defendant would not have pleaded guilty. Following an evidentiary hearing, the court denied defendant's motion.

¶ 3 Defendant appeals, arguing the trial court erred in denying his motion to withdraw his guilty plea. We disagree and affirm.

¶ 4 I. BACKGROUND

¶ 5 In January 2010, the State charged defendant with aggravated battery (720 ILCS 5/12-4(b)(8) (West 2008)), alleging he made physical contact of an insulting or provoking nature with Haley Currie in a public place of accommodation. Specifically, the State alleged defendant placed his hands around Currie's throat and pushed her when they were at a gas station. The trial court appointed the Public Defender to represent defendant. Assistant Public Defender Harvey C. Welch—who, it appears, already represented defendant in other pending cases—was assigned to defendant's case.

¶ 6 In May 2010, when defendant pleaded guilty to aggravated battery in this case, defendant also faced charges of residential burglary, a traffic offense, and retail theft in three separate cases. The plea hearing, at which attorney Welch represented defendant, covered all four cases. The parties indicated that the State had agreed to drop the burglary and traffic charges in exchange for open guilty pleas to the two remaining offenses.

¶ 7 The trial court admonished defendant regarding the plea procedure and the consequences of pleading guilty. With respect to aggravated battery, the court read the charge to defendant, who confirmed he understood the nature of the alleged offense. The court then explained that aggravated battery was a Class 3 felony, for which defendant could be sentenced to an extended term of up to 10 years in prison, which would entail an additional year of mandatory supervised release, and fined up to $25,000. Defendant indicated that he understood the range of penalties.

¶ 8 The trial court admonished defendant that, since defendant was out on bond for retail theft when the alleged aggravated battery occurred, he faced mandatory consecutive

sentences, meaning the sentences would be served "one after the other." Defendant indicated he understood the mandatory consecutive sentencing.

¶ 9 The trial court explained that the anticipated plea was "what we call an open or blind plea," meaning that, aside from the dismissal of charges the State had promised, "there is no agreement as to the penalty" for retail theft or aggravated battery. Defendant stated he understood that no such agreement existed.

¶ 10 The trial court advised defendant of aspects of his right to trial that he would be giving up by pleading guilty—he was not required to plead guilty, but he could demand separate trials on both charges, at which he would be represented by an attorney and the State would be required to prove each element of the charges he faced beyond a reasonable doubt; his attorney could question the State's witnesses and present evidence on defendant's behalf; defendant could testify for himself but could not be required to do so; he could choose to be tried before a judge or before a 12-person jury that could not find him guilty unless all 12 jurors agreed that the State had met its burden of proof. The court stated, "If you plead guilty today, you're going to be waiving or giving up those rights. *There is not going to be any trial in either one of those cases*." (Emphasis added.) Defendant indicated he understood that he was giving up those rights.

¶ 11 The trial court further warned defendant that, if he was not a United States citizen, his conviction could result in deportation, the denial of entry into the United States, or the denial of naturalization. Defendant stated he understood those possible consequences.

¶ 12 The trial court then inquired into the voluntariness of defendant's guilty pleas. The court asked whether "anyone forced you, threatened you, or coerced you at all to make you plead guilty to either one of these charges today." Defendant responded that no one had done

that. The court then asked, "*[H]as anyone promised you anything as far as what's going to happen here*, other than the dismissal of those other cases?" (Emphasis added.) Defendant replied, "No."

¶ 13 The trial court asked the State for a factual basis for defendant's guilty pleas. With respect to the aggravated battery charge, the State represented that the available evidence would show that police officers were dispatched to a gas station in response to a "domestic dispute." "Several witnesses" would testify that defendant grabbed Currie by the throat and shoved her out the doors of the gas station convenience store. Video surveillance would show defendant "putting his hands on the area of Ms. Currie's throat and pushing her out of the door." When, following a car chase, the police stopped the vehicle used by defendant and Currie, defendant was identified as the driver. At that point, Currie "confirmed [to police] what witnesses had observed, and stated that this defendant, her boyfriend of several years, believed that she had been cheating on him, and thus placed his hands around her throat and pushed her." The court asked defense counsel whether he "believe[d] the State could call such witnesses to testify if this case were to proceed to trial?" Defense counsel stipulated to the described evidence being available.

¶ 14 The trial court then asked defendant, "understanding now the possible penalties that could be imposed in each of these cases, *as well as all of those rights that you give up by pleading guilty*" (emphasis added), how he would plead to the charge of aggravated battery in this case. Defendant replied, "Guilty." The court found "an understanding and voluntary waiver" of his trial rights and a sufficient factual basis and, thus, accepted defendant's guilty plea. In August 2010, the court sentenced defendant to six years in prison for aggravated battery, to be

served consecutively with a four-year sentence for retail theft.

¶ 15 In September 2010, through attorney Welch, defendant filed a motion to reconsider his sentence. Through different counsel, Harold M. Jennings, defendant filed a motion to withdraw his guilty plea. (Defendant continued to acknowledge his guilt for retail theft, seeking only to revisit his aggravated-battery conviction.) In the motion to withdraw his plea, defendant claimed he received ineffective assistance of counsel in that "defendant was led to believe by his Public Defender [(Welch)] that he was a realistic candidate for probation or in worst case a minimum prison sentence." Defendant asserted that he would not have pleaded guilty to aggravated battery "if he had any expectancy of the sentence received."

¶ 16 In February 2011, the trial court held an evidentiary hearing on defendant's motion to withdraw his guilty plea. Jennings represented defendant at this hearing. Relevant evidence consisted of testimony by defendant and Currie, "proffers" of others' expected testimony, to which the State consented, the surveillance video from the gas station, and video from the patrol cars of the officers who arrested defendant.

¶ 17 Defendant testified that he had no contact with his counsel, Welch, except for a two-minute meeting in the courthouse hall preceding an unidentified court appearance, where Welch advised him not to speak and to let Welch handle everything. However, defendant also testified that he sometime asked Welch to interview Currie and Welch indicated, in defendant's words, "like he can't do nothing for me." According to defendant, Welch was unavailable to speak with him or with Currie, who would have testified at trial that defendant did not touch her, or with other witnesses to whom defendant referred Welch. However, defendant also testified that Currie and defendant's brother, Major Blackman, were present for a meeting at which Welch

told defendant "[he was] going to get probation."

¶ 18 Defendant denied having battered Currie. Nevertheless, he testified, he pleaded guilty because Welch indicated he could get defendant probationary sentences for both aggravated battery and retail theft. Defendant testified that he read at "[p]robably" a third- or fourth-grade level. Defendant explained that he relied on Welch to act in defendant's best interest—to "put[ ] up a fight" on his behalf—"but he wasn't really doing it."

¶ 19 Currie testified that Welch never inquired into her version of events although she repeatedly tried to contact him and made herself available to be interviewed. According to Currie, defendant did not "hit," "hurt," or "choke" Currie at the gas station or later in the car. Instead, they had a verbal dispute stemming from Currie's belief that defendant was cheating on her with another woman. She testified that she, not defendant, was driving the vehicle that police stopped after the car chase. According to her, she told the police "it was a mistake" and defendant "didn't do anything."

¶ 20 Defendant "proffered" the testimony of several additional witnesses. The gas station employee who initially called the police when he noticed defendant and Currie arguing would have testified that he observed them getting along better when they left the gas station. He tried to cancel the first call, but officers were already on their way to the gas station. The employee explained to the responding officers that "everything seemed fine because she [(Currie)] consented to leaving with the young man [(defendant)]." He would have testified that no one at the gas station pressed charges.

¶ 21 Defendant's brother, Blackman, would have testified that he was present when attorney Welch told defendant, " [']I believe you're going to get probation[’] or [']I will get you

probation['] or words to that effect." He and another witness would also have testified to defendant and Currie's unsuccessful efforts to contact Welch.

¶ 22 Another witness who was with Currie before the incident at the gas station would have testified that Currie sent defendant "some fairly nasty[,] violent text messages" before the incident. She would have testified that she observed Currie "[throw defendant's] clothes and everything out in the trash." The witness would have testified that Currie "had been drinking on the evening in question."

¶ 23 Another witness would have testified that he was present in the vehicle with defendant and Currie when they were stopped by police. He would have testified that he heard Currie tell a police officer that "she was fine" and that he did not witness anything at the gas station or in the vehicle "that gave rise to an aggravated battery."

¶ 24 Defendant also introduced the surveillance video from the gas station, as well as recordings from police dashboard cameras of the pursuit of the vehicle defendant and Currie used. Attorney Jennings represented that the surveillance video showed "nothing indicating that any battery or any insulting or provoking physical contact took place." However, the trial court was unable to play the video. Following arguments, the court took the matter under advisement so the surveillance footage could be viewed on other equipment.

¶ 25 In March 2011, the trial court issued a written order denying defendant's motion to withdraw his guilty plea. In relevant part, the court found no credible evidence that Welch told defendant he would be sentenced to probation if he pleaded guilty. The court specifically noted defendant's contradictory testimony regarding the amount and nature of his contact with Welch and the conflicts between some of that testimony and both Currie's testimony and the proffered

testimony from Blackman, which indicated that they were present in a conference room when Welch told defendant he was a likely candidate for probation. The court further found no "credible evidence that establishes doubt as to [defendant's] guilt of such consequence that this court ought to permit him to withdraw his plea of guilty." Specifically, the court noted that (1) the video from the traffic stop contradicted Currie's testimony that she was the driver of the vehicle when the car chase occurred, calling her remaining testimony into question, and (2) contrary to defense counsel's claims, the surveillance video from the gas station, although of poor quality, appeared to depict physical contact between the people identified as defendant and Currie.

¶ 26 In May 2011, the trial court denied defendant's motion to reconsider his sentence. This appeal followed.

¶ 27 II. ANALYSIS

¶ 28 Defendant argues the trial court erred by denying his motion to withdraw his guilty plea. We disagree.

¶ 29 "Leave to withdraw a plea of guilty is not granted as a matter of right, but as required to correct a manifest injustice under the facts involved." *People v. Pullen*, 192 Ill. 2d 36, 39, 733 N.E.2d 1235, 1237 (2000). A trial court enjoys discretion in deciding whether to grant a motion to withdraw a guilty plea under Illinois Supreme Court Rule 604(d) (eff. July 1, 2006). *Id*., at 39-40, 733 N.E.2d at 1237. Allowing a defendant to withdraw his guilty plea may be appropriate if the plea "was entered through a misapprehension of the facts or of the law, or if there is doubt of the guilt of the accused and the ends of justice would better be served by submitting the case to a trial." *Id.* at 40, 733 N.E.2d at 1237; see also *People v. Davis*, 145 Ill. 2d

240, 244, 582 N.E.2d 714, 716 (1991) (a motion to withdraw a guilty plea should also be granted if the plea resulted from misrepresentations by the prosecutor, defense attorney, or another authority, or if the defendant has a defense worthy of consideration by a jury). Reversal on appeal is warranted only if the trial court abused its discretion. *Pullen*, 192 Ill. 2d at 40, 733 N.E.2d at 1237.

¶ 30 Here, the trial court's decision not to allow defendant to withdraw his plea followed a hearing at which defendant presented evidence. The court's findings are thus entitled to considerable deference. See *In re Marriage of Sturm*, 2012 IL App (4th) 110559, ¶ 6, 970 N.E.2d 117, 120 ("Questions of witness credibility and conflicting evidence are matters for the trial judge to resolve as the trier of fact. Because he sees and hears the witnesses, he is in a position superior to a reviewing court for assessing their demeanor, judging their credibility, and weighing the evidence.").

¶ 31 In this case, defendant asked the court to allow him to withdraw his guilty plea because he received ineffective assistance of counsel. A defendant's constitutional right to the effective assistance of counsel extends to aspects of the plea-bargaining process. *Hill v. Lockhart*, 474 U.S. 52, 56-57 (1985). To make out a claim for ineffective assistance of counsel, a defendant must show that both (1) defense counsel's performance was so deficient that it "fell below an objective standard of reasonableness" and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984). Generally, to show he was prejudiced by ineffective assistance of counsel in pleading guilty, a defendant must establish a reasonable probability that, but for deficiencies in his legal counsel, he would have pleaded not

guilty and insisted on going to trial. *Hill*, 474 U.S. at 59.

¶ 32 Defendant's ineffective-assistance claim is based on attorney Welch's alleged erroneous representation that defendant would be sentenced to probation or a minimum prison sentence for aggravated battery if he pleaded guilty. The trial court found no credible evidence that Welch actually advised or promised defendant that he would receive such a sentence. Defendant's testimony was marked by contradictory statements. Specifically, his indication that he had only one meeting with Welch, at which the facts of his case were not discussed, contradicts his assertion that Welch provided erroneous advice that led defendant to plead guilty; it also contradicts Currie's testimony and the proffered testimony of defendant's brother, Blackman. Currie's testimony was also incredible in that her version of events was disproved by the video evidence. Her claims—specifically, that she, not defendant, drove the car away from the gas station and led police on the car chase and that she, not defendant, was angry due to suspicions of cheating—reflect her self-interest as defendant's girlfriend in seeing his conviction overturned. In these circumstances, the court did not err in disbelieving all of this testimony. Defendant's ineffective-assistance claim fails because he is unable to show that Welch's performance as counsel was deficient in the way he alleged.

¶ 33 Even if the disregarded testimony were to be believed, the proceedings at defendant's plea hearing would defeat his argument that he was prejudiced by Welch's statement or promise that he would be sentenced to probation. The trial court's admonitions at that hearing were sufficient to negate any possible effect of the alleged erroneous advice from defense counsel. The critical question is "whether the trial court's admonitions were sufficiently related to counsel's erroneous advice to overcome the prejudice created by that advice." *People v. Hall*,

217 Ill. 2d 324, 339, 841 N.E.2d 913, 922 (2005). Here, in relevant part, the court ensured that defendant understood that no deal had been reached regarding his sentence following his guilty plea, that he faced a possible prison sentence of up to 10 years for aggravated battery, and that he was waiving his right to a jury trial by pleading guilty. Significantly, defendant assured the court that his decision to plead guilty was not influenced by any extraneous promises—whereas he now claims he would not have pleaded guilty but for Welch's promise that he would be sentenced to probation. These proceedings related directly to the alleged erroneous advice and should have exposed or cured any misconceptions defendant had regarding his anticipated sentence. This case is, thus, materially distinguishable from *People v. Morreale*, 412 Ill. 528, 533-34, 107 N.E.2d 721, 724 (1952), where the supreme court held the defendant's guilty plea was involuntary due to deficiencies in his representation that were not addressed by the trial court's admonishments, and *Hall*, 217 Ill. 2d at 341, 841 N.E.2d at 923-24, in which the supreme court found that deficiencies in the defendant's representation warranted an evidentiary hearing on his postconviction petition, where he alleged his guilty plea resulted from ineffective assistance of counsel.

¶ 34 Finally, defendant also argues he should have been allowed to withdraw his guilty plea because he has a defense worthy of consideration at trial. Defendant relies for this assertion on Currie and defendant's testimony and the proffered testimony of another witness, which indicate that defendant did not make any provoking or insulting physical contact with Currie. This was the same evidence the trial court permissibly discredited. The court did not err in finding no credible evidence of a defense sufficient to justify allowing defendant to withdraw his plea.

¶ 35 III. CONCLUSION

¶ 36 For the foregoing reasons, we affirm the trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment as costs of this appeal.

¶ 37 Affirmed.