2013 IL App (4th) 110908-U

NOS. 4-11-0908, 4-11-0909 cons.

FILED
March 27, 2013
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from |
| Plaintiff–Appellee, | ) | Circuit Court of |
| v. | ) | McLean County |
| MARQUINCY GARY, | ) | Nos. 10CF491 |
| Defendant–Appellant. | ) | 10CF503 |
| | ) | |
| | ) | Honorable |
| | ) | Charles G. Reynard, |
| | ) | Judge Presiding. |

PRESIDING JUSTICE STEIGMANN delivered the judgment of the court.
Justices Pope and Knecht concurred in the judgment.

**ORDER**

¶ 1 *Held*: In this consolidated case, the appellate court affirmed the trial court's denial of the defendant's motion to withdraw guilty plea, vacated the defendant's $200 DNA assessment, and remanded with directions.

¶ 2 In October 2010, defendant, Marquincy Gary, pleaded guilty to (1) unlawful possession of a controlled substance with intent to deliver (720 ILCS 570/401(c)(2) (West 2010)) (McLean County case No. 10-CF-491) and (2) unlawful delivery of a controlled substance within 1,000 feet of a church (720 ILCS 570/407(b)(2) (West 2010)) (McLean County case No. 10-CF-503). In exchange for his guilty plea, the State dismissed other counts that were pending against defendant and agreed to certain concessions related to fines and fees. The trial court later accepted defendant's plea and entered a judgment of conviction on both counts. In December 2010, the court sentenced defendant to concurrent 18-year, extended-term sentences on both

counts, ordering that the sentences be served consecutively to defendant's two-year sentence in another case (Livingston County case No. 10-CF-66).

¶ 3 In January 2011, defendant *pro se* filed motions to withdraw his guilty pleas and for reconsideration of his sentence. After considering those motions, the trial court denied them.

¶ 4 Defendant appeals, arguing that (1) he should be permitted to withdraw his guilty plea because the trial court failed to admonish him that his sentences would have to be served consecutively to his two-year sentence in the Livingston County case, (2) his case should be remanded for the appointment of counsel to investigate his allegations that his trial counsel was ineffective, and (3) the court erred by imposing a $200 deoxyribonucleic acid (DNA) assessment, given that his DNA sample was already on file. We disagree with defendant's first two arguments but agree with his third. Accordingly, we affirm in part, vacate his $200 DNA assessment, and remand with directions.

¶ 5 I. BACKGROUND

¶ 6 In October 2010, defendant pleaded guilty to (1) unlawful possession of a controlled substance with intent to deliver in case No. 10-CF-491 (this court's case No. 4-11-0908) and (2) unlawful delivery of a controlled substance within 1,000 feet of a church in case No. 10-CF-503 (this court's case No. 4-11-0909). In exchange for his guilty plea, the State dismissed other counts that were pending against defendant and agreed to certain concessions related to fines and fees.

¶ 7 At defendant's October 2010 plea hearing, the trial court admonished defendant regarding (1) the charges to which he intended to plead guilty and (2) the potential penalties he could face in each case, beginning with the unlawful-possession-with-intent-to-deliver charge in

case No. 10-CF-491, as follows:

"THE COURT: Okay. [No. 10-CF-491] is a class one felony which is nonprobabtionable due to [your] prior record and you're also eligible for an extended term due to your prior record. What that basically means is that the possible penalties on this particular charge are between a minimum of four and a maximum thirty years in *** the penitentiary. The extended term takes it from the normal maximum of fifteen up to an extended term maximum of thirty. So your sentence could be anywhere between four and thirty years in prison and any sentence of imprisonment would be followed by a two[-]year period of mandatory supervised release [(MSR)].

* * *

Okay. I am noting for the record that you're consulting with [defense counsel].

In terms of the possible penalties provided by law as to count two in the [No. 10-CF-]491 case, do you have any questions?

THE DEFENDANT: No, sir."

The court then proceeded to admonish defendant regarding the potential penalties he could face in case No. 10-CF-503.

"THE COURT: [No. 10-CF-503] is also a class one felony[,] non-probationable offense due to prior record, eligible for

an extended term due to prior record so basically the same penalties that I mentioned earlier are applicable to this charge as well.

Do you understand that?

THE DEFENDANT: Yes."

The court then inquired as to whether any "consecutive sentencing issues" existed, to which the prosecutor responded, as follows: "The court could discretionarily impose it, but it is not mandatory." The court then moved to admonish defendant as to the possibility of consecutive sentencing.

"THE COURT: Another possibility is that the sentences in these two cases could be ordered to be served consecutively. That means one after the other rather than being served at the same time. Not to try to scare you, but basically that means at the maximum end the sentence could be thirty plus thirty. Do you understand that the court would have discretion to sentence you in that fashion if the court saw fit to do so?

THE DEFENDANT: Yes, sir.

THE COURT: Any questions about that?

THE DEFENDANT: No, sir."

Defense counsel added that although the court's admonishments were "absolutely proper and complete," defendant had expressed "doubt" as to whether he had a prior conviction that would make him "nonprobationable in this case and would also make him eligible for extended term."

The court responded that the State would be required to prove that those prior convictions existed at the sentencing hearing.

¶ 8 Following the exchanges related to the potential sentences the trial court could impose, the court admonished defendant that although he had negotiated away several charges and agreed to certain fines and fees, he was entering an open plea, which meant that "those sentences that [the court] mentioned to [him] earlier could be the sentences in [his] cases." Defendant responded that he understood the court's admonishment.

¶ 9 The trial court later accepted defendant's guilty plea in both cases and, in December 2010, sentenced defendant to concurrent 18-year, extended-term sentences, ordering that the sentences be served consecutively to his two-year sentence in the Livingston County case.

¶ 10 In January 2011, defense counsel filed a motion to reconsider sentence. Shortly thereafter, defendant *pro se* filed motions to withdraw his pleas and to reduce his sentence, arguing that his counsel was ineffective for advising him to refuse an offer of 12 years in prison and to plead guilty with no agreement as to sentence. Defendant added that he only entered the pleas because he relied on his counsel's assertion that his federal conviction could not be used to impose an extended term.

¶ 11 At an August 2011 hearing, the trial court allowed defense counsel to adopt defendant's *pro se* pleadings, and the court thereafter considered arguments related to both. After doing so, the court denied the motion to withdraw pleas, finding that defense counsel's advice related to extended-term sentencing, even if incorrect, was "not a sufficient basis to withdraw a plea of guilty knowingly and voluntarily given." The court thereafter took the motion to

reconsider sentence under advisement.

¶ 12 In September 2011, the trial court denied defendant's motion to reconsider sentence, and this appeal followed. (In October 2012, this court granted defendant's motion to consolidate these appeals.)

¶ 13 II. ANALYSIS

¶ 14 Defendant argues that (1) he should be permitted to withdraw his guilty plea because the trial court failed to admonish him that his sentences would have to be served consecutively to his two-year sentence in the Livingston County case, (2) his case should be remanded for the appointment of counsel to investigate his allegations that his trial counsel was ineffective, and (3) the court erred by imposing a $200 DNA assessment, given that his DNA sample was already on file. We address defendant's contentions in turn.

¶ 15 A. Defendant's Claim That the Trial Court Erred by Denying His Motion To Withdraw Plea

¶ 16 Defendant contends that he should be permitted to withdraw his guilty plea because the trial court failed to admonish him that his sentences would have to be served consecutively to his two-year sentence in the Livingston County case. The State concedes that the court erred by failing to admonish defendant that his sentence could run consecutively to his sentence in the Livingston County case, but posits that the error does not amount to plain error, given that he was admonished that he could receive an aggregate sentence of 60 years, 40 more years than he was ordered to serve in this case. We agree with the State.

¶ 17 Initially, we note that defendant concedes that he failed to include this argument in his motion to withdraw guilty pleas, rendering his argument forfeited. Nevertheless, defendant

contends that the trial court's failure to admonish him that his sentence could run consecutively to the sentence in the Livingston County case resulted in a void sentence and, therefore, we should review his claim because void sentences may be challenged at any time. See *People v. Williams*, 188 Ill. 2d 365, 370, 721 N.E.2d 539, 543 (1999) ("If a defendant's guilty plea is not voluntary and knowing, it has been obtained in violation of due process and, therefore, is void."). We reject defendant's claim that his sentence is "void" because the error in this case involved the procedure surrounding the acceptance of his pleas—namely, improper admonishments under Illinois Supreme Court Rule 402(a)(2) (eff. July 1, 1997)—rendering the court's order voidable and reviewable on direct appeal but not void as exceeding the court's authority. See *People v. Davis*, 344 Ill. App. 3d 400, 404-05, 800 N.E.2d 539, 543-44 (2003). Here, the court's sentence was properly imposed, and defendant's contention is simply that the court failed to properly explain what his sentence could be as required by Rule 402. Accordingly, we turn to whether the court's failure to comply with Rule 402(a)(2) amounted to plain error. See *People v. Hayes*, 336 Ill. App. 3d 145, 151, 782 N.E.2d 787, 792 (2002) ("[I]f the trial court fails to give a defendant the admonitions required by Rule 402, it may constitute plain error.").

¶ 18 To demonstrate plain error, of course, a defendant must show that he was prejudiced by the underlying error. *People v. Adams*, 2012 IL 111168, ¶ 21, 962 N.E.2d 410. Here, defendant fails to meet that standard. The trial court admonished defendant that he could face up to 60 years in prison if he pleaded guilty to the charges to which he agreed to plead guilty. On these facts, we do not conclude that defendant was prejudiced by the court's failure to properly admonish him under Rule 402.

¶ 19 In so concluding, we honor defendant's forfeiture and reject his claim that he

should be permitted to withdraw his guilty plea.

¶ 20 B. Defendant's Claim That His Case Should be Remanded for the Appointment of Counsel To Investigate His Allegations of Ineffective Assistance of Counsel

¶ 21 Alternatively, defendant contends that his case should be remanded for the appointment of counsel to investigate his allegations that his trial counsel was ineffective. Specifically, defendant asserts that but for defense counsel's having told him that he (1) could not get an extended-term sentence based on his conviction in federal court and (2) should reject a 12-year sentence in favor of an open plea, he would not have pleaded guilty. As such, defendant posits that he was entitled to have independent counsel appointed and a hearing on his *pro se* claims of ineffectiveness pursuant to *People v. Krankel*, 102 Ill. 2d 181, 464 N.E.2d 1045 (1984). We disagree.

¶ 22 When a defendant raises a *pro se* allegation of ineffective assistance of counsel, new counsel is not automatically appointed. *People v. Taylor*, 237 Ill. 2d 68, 75, 927 N.E.2d 1172, 1175 (2010). Under *Krankel*, the trial court first examines the factual basis of the defendant's claim. *Id.* If the court determines the claim lacks merit or pertains only to matters of trial strategy, new counsel need not be appointed and the *pro se* motion may be denied. If, however, the defendant's allegations show possible neglect of the case, new counsel should be appointed to argue the defendant's claim. *Id.,* 927 N.E.2d at 1176.

¶ 23 In this case, defendant claims that counsel provided him poor advice related to (1) whether he was eligible for an extended term and (2) rejection of an alleged 12-year sentence in favor of an open plea at a hearing where defendant did not testify. These two alleged deficiencies do not constituted a *pro se* claim of ineffective assistance of counsel sufficient to

trigger the trial court's duty to conduct the initial *Krankel* inquiry. Defense counsel adopted defendant's motions and argued them on defendant's behalf. Our review of the record shows that the claims amount to what defense counsel described as a "misunderstanding." Based on the record before us, we do not conclude that the court erred by failing to conduct a *Krankel* inquiry. See *People v. Whitaker*, 2012 IL App (4th) 110334, ¶ 21, 974 N.E.2d 445 (concluding that a *Krankel* inquiry was unnecessary where the defendant's claims were subject to more than one interpretation).

¶ 24 Nevertheless, any argument defendant continues to maintain in relation to ineffective assistance of counsel by his trial counsel is better left to a postconviction petition, where a record can be made of what specifically, if anything, counsel told defendant related to his potential for receiving an extended-term sentence and whether to reject a 12-year plea offer in favor of entering an open plea. See *People v. Holloman*, 304 Ill. App. 3d 177, 186, 709 N.E.2d 969, 975 (1999) ("adjudication of a claim of ineffective assistance of counsel is often better made in proceedings on a petition for postconviction relief, where a complete record can be made").

¶ 25 C. Defendant's Claim That the Trial Court Erred by Imposing a $200 DNA Assessment

¶ 26 Defendant's final contention is that the trial court erred by imposing a $200 DNA assessment, given that his DNA sample was already on file with the State. The State concedes, and we accept the State's concession. See *People v. Marshall*, 242 Ill. 2d 285, 302, 950 N.E.2d 668, 679 (2011) (vacating the portion of the trial court's order requiring the defendant to submit an additional DNA sample and requiring him to pay the $200 DNA analysis fee because the defendant's DNA was already on file).

¶ 27 Accordingly, we vacate the trial court's imposition of the $200 DNA assessment.

¶ 28 III. CONCLUSION

¶ 29 For the reasons stated, we vacate the portion of the trial court's order requiring a $200 DNA assessment. We otherwise affirm and remand for issuance of an amended sentencing judgment consistent with this order. Because the State successfully defended a portion of the criminal judgment, we grant the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 30 Affirmed in part, vacated in part, and cause remanded with directions.