2013 IL App (4th) 120969-U

NO. 4-12-0969

FILED
August 26, 2013
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Adams County
PHILLIP S. DIAZ, JR.,	)	No. 10CF310
Defendant-Appellant.	)	
	)	Honorable
	)	Scott H. Walden,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Presiding Justice Steigmann and Justice Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: Contrary to defendant's contention, it was not ineffective assistance for defense counsel to refrain from amending the *pro se* motion to withdraw the guilty plea so as to include the sentencing issue that defendant raises in this appeal, but he is correct that he deserves additional presentence credit as well as credit against a fine.

¶ 2 Defendant, Phillip S. Diaz, Jr., entered a negotiated plea of guilty to first degree murder (720 ILCS 5/9-1(a)(1) (West 2010)). Part of the consideration for his guilty plea was that he would receive a prison sentence no longer than 45 years. As it turned out, the trial court sentenced him to imprisonment for 45 years.

¶ 3 Defendant appeals, and he makes three arguments in his appeal. First, he argues that defense counsel rendered ineffective assistance by failing to amend defendant's *pro se* motion to withdraw his guilty plea so as to allege that the trial court had erred by considering, in the sentencing hearing, that defendant already had received leniency in the plea agreement. We find no deficient

performance in this regard.

¶ 4 Second, defendant argues he is entitled to two additional days of presentence credit. See 730 ILCS 5/5-4.5-100(b) (West 2010). The State agrees, and so do we.

¶ 5 Third, defendant argues he is entitled to a credit against the "State Police Ops" fee (really a fine) of $5. See 725 ILCS 5/110-14(a) (West 2010). The State agrees, and so do we.

¶ 6 Therefore, we affirm the trial court's judgment as modified so as to allow defendant an additional two days of presentence credit as well as the credit against the fine, and we remand this case with directions to amend the mittimus accordingly.

¶ 7 I. BACKGROUND

¶ 8 A. The Charge

¶ 9 On May 24, 2010, the State filed an information charging defendant with first degree murder (720 ILCS 5/9-1(a)(1) (West 2010)). The information alleged that on May 23, 2010, he "shot Ian Barksdale with a pistol, thereby causing [his] death."

¶ 10 On July 13, 2010, a grand jury returned an indictment, which likewise charged defendant with first degree murder (720 ILCS 5/9-1(a)(1) (West 2010)) in that he "shot Ian Barksdale with a pistol."

¶ 11 B. The First Appearance

¶ 12 In the first appearance, on June 7, 2010, the trial court informed defendant that if he were convicted of the charge, his sentence of imprisonment would be in the range of "45 years to natural life."

¶ 13 Under section 5-4.5-20(a)(1) of the Unified Code of Corrections (730 ILCS 5/5-4.5-20(a)(1) (West 2010)), first degree murder was punishable by imprisonment for not less than 20

years and not more than 60 years. Section 5-8-1(a)(1)(d)(iii) (730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2010)) provided, however: "[I]f, during the commission of the offense, the person personally discharged a firearm that proximately caused *** death to another person, 25 years or up to a term of natural life shall be added to the term of imprisonment imposed by the court."

¶ 14 C. The Negotiated Guilty Plea

¶ 15 In a hearing on May 2, 2011, counsel informed the trial court that defendant wished to enter a negotiated plea of guilty. The proposed agreement was that, in return for defendant's plea of guilty to first degree murder, he would receive three benefits. First, the phrase "with a pistol" would be deleted from the indictment so that defendant would not be subject to the 25-year enhancement in section 5-8-1(a)(1)(d)(iii) (730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2010)). Second, his prison sentence would be no more than 45 years. Third, the State would nol-pros "a pending charge [arising from] an incident that occurred in the Adams County Jail while [defendant] was incarcerated there."

¶ 16 In its admonitions in the guilty-plea hearing, the trial court told defendant:

> "Under this negotiation, the sentence would be somewhere between 20 and 45 years. In other words, it could be no less than 20, but it could be no more than 45 years in terms of time in the department of corrections. Again, whatever that sentence might be, it would be followed by three years of mandatory supervised release.
>
> Is that your understanding of this negotiation?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Has anyone threatened you in any way or

promised you anything, other than the negotiations in this case, to get you to give up all of the rights that I have explained to you and to plead guilty?

THE DEFENDANT: No, sir."

¶ 17 After confirming with defendant that, in light of the admonitions, he wished to plead guilty to the first degree murder of Ian Barksdale, the trial court requested the prosecutor to provide a factual basis for the guilty plea.

¶ 18 Essentially, the factual basis was as follows. In the early morning hours of May 23, 2010, the Quincy police arrested defendant outside the Casino Starlite Terrace for violating a Quincy ordinance against fighting. Defendant had gotten into an altercation with Ian Barksdale, who was employed as a security guard at the Casino Starlite Terrace. The police took defendant to the Quincy police station and soon afterward released him when his brother, Benny Smothers, paid the bond.

¶ 19 At approximately 4 a.m., after defendant was released from the police department, he drove to the Frederick Ball housing complex, at Lind and 9th Streets. While he was at the housing complex, a surveillance video camera recorded him reaching into the trunk of a Chevrolet Camaro belonging to DaVontae Smothers. Later, DaVontae Smothers told the police that it was his nine-millimeter pistol that defendant took out of the trunk.

¶ 20 The surveillance video then showed defendant talking on a cell phone. According to witnesses, he was talking on the phone with Ian Barksdale's brother, trying to persuade him to come to Lind and 9th Streets to settle the dispute that had erupted outside the Casino Starlite Terrace. (It is unclear how the dispute involved Ian Barksdale's brother—or if it did involve him.)

¶ 21 Around 4:20 a.m., defendant, Benny Smothers, DeBrail Smothers, DaVontae

Smothers, and Keon Chapman invited two women, Michshaya Williams and Shana Douglas, to accompany them to Benny Smothers's house, at Lind and 24th Streets. On the way to Benny Smothers's house, the group decided to stop at a Hardee's restaurant located at 30th and Broadway Streets.

¶ 22 It happened that, at this same time, Ian Barksdale and two of his friends or relatives arrived at the Hardee's restaurant, on foot, to get something to eat—just as defendant and his companions were rolling up, in two vehicles, into the drive-through lane. Apparently, this encounter (or reencounter) was random. Ian Barksdale walked up to the drive-through door of the restaurant, passing by the black sport utility vehicle (SUV) in which defendant was riding.

¶ 23 Defendant got out of the SUV and confronted Barksdale. The two squared off as if to resume their fight. Then defendant pulled out the nine-millimeter pistol. Barksdale raised his hands and began to back away. Defendant fired at Barksdale two or three times. Barksdale turned around and fell to the ground, facedown. Defendant then approached Barksdale from behind, as he lay on the ground, and fired three more shots into him.

¶ 24 At approximately 9:50 a.m. on May 23, 2010, Barksdale died of the gunshot wounds.

¶ 25 An autopsy revealed five gunshot wounds:

> "Ian Barksdale suffered one bullet wound to the front of his right thigh, which exited the rear of his thigh. He was shot once in the right foot. There were also three entrance wounds to the back of Ian Barksdale's right thigh, all traveling upwards toward the torso area, consistent with the victim being on the ground, face down, while being shot from above and behind.

> Those wounds include the fatal wound, which entered the mid-right thigh and traveled upward into the pelvis in the victim, lacerating his iliac artery. Ian Barksdale died as a result of hemorrhagic shock or loss of blood, relating to the severing of that artery."

¶ 26 Defense counsel agreed that if the case went to trial, the State could present evidence substantially supporting the factual basis.

¶ 27 After confirming with defendant that he was "pleading guilty because [he was] in fact guilty," the trial court found a factual basis, entered judgment on the plea, and "conditionally concur[red] in the negotiations."

¶ 28 Then the trial court asked defendant again:

> "Mr. Diaz, has anyone threatened you in any way or promised you anything, other than these negotiations, to get you to give up all of those rights I explained to you and to plead guilty?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: The court finds that Mr. Diaz has knowingly and voluntarily waived each of the rights explained to him."

¶ 29 D. The Sentencing Hearing

¶ 30 On August 26, 2011, the trial court held a sentencing hearing, which began with the prosecutor presenting to the court a photograph of Ian Barksdale with his two children.

¶ 31 Then a victim impact statement by Barksdale's father was read. According to the statement, Barksdale was working at the Casino Starlite Terrace the night of May 23, 2010, as a

security guard, to "keep *** the peace within the club." He was unarmed. The statement continued:

> "Whatever happened in the Starlite that night, Ian wasn't the cause of the problem. His job was to intervene to avoid trouble. He didn't go around the club starting fights. He tried to break them up. Ian wasn't in the club to party. He was there as a means of feeding and clothing his children."

¶ 32 Then the statement addressed defendant directly:

> "After Benny bailed you out of jail, I guess your South Side Chicago mentality told you to settle the score with the Quincyians that you thought disrespected you. In the meantime you all tried to lure Turk into an ambush, and lucky for him, he didn't go for it or he might have been a victim that night. My son, on the other hand, happened to be at the right place at the wrong time, and he wasn't so lucky. He was at his sister's house to pick up his children and to purchase food when you—when you all pulled into Hardee's. My daughter, her husband, and my grandson watched helplessly as Phillip Diaz, Junior murdered Ian as if he were a mad dog, and while he laid facedown on the ground, you shot him in the back not once but several times. My family had to watch while you took his—while he took his last breath."

¶ 33 After the reading of the victim impact statement, the defense submitted "20 or so letters from several people, most of whom were pastors, family friends, and cousins of Mr. Diaz"

(to quote the trial court). The court stated it had read all those letters and that it would consider them to be an addendum to the presentence investigation report.

¶ 34 Then it came time for the prosecutor to make his argument. He argued to the trial court:

> "The defendant has turned Ian Barksdale into a crushing, unrelenting absence. In very literal terms, he has turned into nothing because he no longer exists, and while it is reasonable for us to anticipate, and certainly should not offend us when we hear that this court will be asked to convey or administer some sense or some amount of mercy to defendant through its action, one of the starting points that we should keep in mind is that by virtue of the facts of the case, the agreement that brings us here today, the defendant has already received a level of mercy in terms of—in the temporal sense, because, as we know, the offense carried with it a potential term of up to his natural life. Under the terms of the agreement, the time that he will spend in the Department of Corrections will be for a maximum of 45 years. So it is not inaccurate to say that he has already received a measure of mercy, and from the perspective of the People of the State of Illinois, he has received all the mercy that he is entitled to."

¶ 35 Defense counsel then made his argument, in which he pointed out defendant's lack of a serious criminal record: "four or five arrests," all of which "except one [were] misdemeanors that resulted in very light sentences, if any sentence." He observed that defendant had some college

credits. On the basis of the many letters written in defendant's support, he suggested that the murder was atypical of defendant and that he was not a "throwaway kind of guy" who should receive 45 years' imprisonment.

¶ 36 Defendant then made a statement in allocution. He insisted that, despite the "bad decision" he had made, for which he was very sorry, he was not "an animal." "I'm not that person," he said. He requested "the family to accept [his] apology," and he requested to the court "to be somewhat lenient," although he "accepted [his] responsibility." He intended to devote the rest of his life to dissuading others from making bad decisions such as his.

¶ 37 After hearing the arguments and the statement in allocution, the trial court said:

> "Mr.—well, all the people who wrote in on behalf of Mr. Diaz, and there were many, and mostly from church folks, ask for mercy and leniency, and, again, as Mr. Barnard [(the prosecutor)] has suggested, a certain amount of that mercy and leniency has already been provided through the State's Attorney's Office. Had Mr. Diaz been convicted of first degree murder at the end of a trial, the least sentence he could receive after that is the longest sentence that is available to me today under this negotiation."

¶ 38 The trial court then discussed the factors in mitigation and the factors in aggravation: "certain things that [the court had] to consider to make the sentence lighter and certain things to make the sentence heavier." The court said:

> "Under lighter, pretty much the only thing that applies I think would be the hardship on Mr. Diaz's child. I don't know what—and, again,

I have to consider that. I don't know the level of contact that he had. I don't know whether he was providing financially for the child, but any time a child does not have a father, that's—that's a hardship, whether there was a financial support or not.

Mr. Diaz himself suffered a bit of that by virtue of the fact that his father was in prison during much of his early life."

¶ 39 Next, the trial court considered, on the other hand, the "factors to make the sentence higher." One such factor was defendant's prior criminal record: misdemeanor damage to a car; felony possession of a controlled substance; resisting arrest; felony bail-jumping in Wisconsin; and "something called terrorist threats in Arkansas," which actually was nothing more than his throwing a trash can at a convenience-store security guard while making threats. The most recent of these offenses was in 2006. It was not, the court agreed, a "terrible record," but it was not "the absence of a criminal record," either.

¶ 40 Another factor in aggravation the trial court considered was the need to deter others from committing murder. The court remarked: "Well, I wish that by virtue of sentences the court imposes that people would stop and think before they commit crimes, but I don't think that often happens. Certainly didn't happen in this instance."

¶ 41 "[T]o a limited extent," the trial court could understand defendant's account of "how quickly things happened, how it was not a well thought out matter." Nevertheless, addressing defendant, the court noted:

"Everything I read here, other than your version, suggests that there was a pause; that this Miss Williams, who provided a statement,

> suggests that after Mr. Barksdale rushed up towards you and that you pulled the gun, that he began to back away, held his hands up as if he wanted nothing to do with it, and you shot him, and then—in fact, after you said, now what, bitch? That you shot him, and he went down. In fact, turned as if to run away, but went down, and then there was a pause, and then you went up and shot him while he laid on the ground, and that's what changes the whole tenor of this action, of this crime."

¶ 42 The trial court acknowledged that defendant did not appear, by his behavior in court, to be an "animal," and the court acknowledged he had aimed below the waist instead of at the back of the head or torso. Even so, in the court's view, walking up to Barksdale as he lay facedown on the ground, wounded and incapacitated, and firing three more shots into him showed a coldness that "no legal theory" could possibly justify.

¶ 43 So, the trial court concluded: "[A] sentence of 45 years in the Department of Corrections is the correct sentence, and that is the sentence of the court today." The court explained to defendant:

> "Mr. Diaz, based on what everyone has told me about you in these letters and what I perceive to be a sincere statement of you today, you have the ability to, if you will, minister to those with whom you come in contact in the Department of Corrections for the next 45 years and to do good, but you have received the mercy to which you were entitled by virtue of the negotiation in this case; and that darkness,

that coldness that prompted you, allowed you to go up and shoot him while he laid on the ground; that's what warrants the 45 years in the Department of Corrections."

¶ 44 E. Defendant's *Pro Se* Motion To Withdraw His Guilty Plea

¶ 45 On September 14, 2011, defendant filed, *pro se*, a motion to withdraw his guilty plea and to vacate the sentence. In this motion, he alleged that his trial counsel, Todd Urban, had rendered ineffective assistance by (1) failing to file motions for a change of venue and for suppression of evidence, (2) inadequately communicating with defendant, (3) not allowing defendant to go to trial and seek an instruction on second degree murder, and (4) advising defendant that a guilty plea was his only option.

¶ 46 F. Defendant's *Pro Se* Motion To Reduce the Sentence

¶ 47 Also on September 14, 2011, defendant filed a *pro se* motion to reduce the sentence of 45 years' imprisonment. In this motion, he argued that, for four reasons, his sentence was too severe: (1) his background warranted the minimum sentence; (2) the prosecutor had used factually incorrect statements from witnesses to advocate for the maximum sentence allowable under the plea agreement, even though the crime was not heinous; (3) the trial court failed to consider mitigating evidence and failed to compare defendant's case with recent second degree murder cases in Adams County, in which the defendants received shorter prison sentences than he; and (4) the ineffectiveness of defense counsel had effectively coerced defendant into pleading guilty.

¶ 48 G. The Trial Court's Initial Ruling on the Motion To Withdraw the Guilty Plea

¶ 49 On April 3, 2012, the trial court held a hearing on the *pro se* motion to withdraw the guilty plea. In the hearing, defendant was represented by Edward K. Downey. After hearing

evidence and arguments, the court denied the motion.

¶ 50 Defendant appealed.

¶ 51 H. Our Summary Remand

¶ 52 On July 3, 2012, we granted defendant's agreed motion for a summary remand on the ground that Downey's Rule 604(d) certificate was insufficient. See Ill. S. Ct. R. 604(d) (eff. July 1, 2006). We ordered: "The cause is remanded to the circuit court for the filing of a Rule 604(d) certificate, the opportunity to file a new post-plea motion, if counsel concludes that a new motion is necessary, a hearing on the motion, and strict compliance with requirements of Supreme Court Rule 604(d)." *People v. Diaz, Jr.*, No. 4-12-0335 (July 3, 2012) (summarily remanding with directions on agreed order).

¶ 53 Holly Henze represented defendant after the remand. On September 4, 2012, she filed a Rule 604(d) certificate, in which she stated as follows:

> "1. I have reviewed the Defendant's pro se motions.
>
> 2. I have consulted with the Defendant by mail, and I ascertained his contentions of error in the plea and sentencing hearings.
>
> 3. I have examined the trial court file and report of proceedings of the guilty plea and sentencing hearing and ascertained that no amendments to the Defendant's pro se motions were necessary to adequately present his contentions of defect in the plea and sentencing proceedings."

¶ 54 On October 11, 2012, the trial court entered the following order:

"Cause comes on for hearing on Motion to Withdraw Guilty Plea. Counsel has filed the appropriate Rule 604(d) certificate since remand by the 4th District Appellate Court. Arguments heard, Motion to Withdraw Guilty Plea denied. On motion of defendant, O.S.A.D. [(the office of the State Appellate Defender)] is hereby appointed on appeal."

¶ 55 II. ANALYSIS

¶ 56 A. Our Subject-Matter Jurisdiction

¶ 57 It does not appear that the trial court ever ruled on defendant's *pro se* motion to reduce the sentence. The appellate court has held: "Once a timely motion has been filed pursuant to Rule 604(d)[,] a notice of appeal filed thereafter but prior to disposition of the motion lacks efficacy and does not divest the trial court of the jurisdiction to dispose of the motion on its merits." *People v. Giles*, 230 Ill. App. 3d 730, 733 (1992). See also *People v. Trimarco*, 364 Ill. App. 3d 549, 550 (2006) ("Although neither party questions this court's jurisdiction, we have a duty to examine our jurisdiction *sua sponte* and to dismiss an appeal if jurisdiction is lacking.").

¶ 58 A motion to reduce a sentence is different, however, from other posttrial motions in that it is not considered to be filed until defendant files a notice of hearing on the motion. 730 ILCS 5/5-4.5-50(d) (West 2012); *People v. Stevenson*, 2011 IL App (1st) 093413, ¶ 38 n.1. The record does not appear to contain a "notice of motion *** set[ting] the motion [for reduction of sentence] on the court's calendar on a date certain within a reasonable time after the date of filing." 730 ILCS 5/5-4.5-50(d) (West 2012). Therefore, the motion to reduce the sentence is effectively unfiled, the notice of appeal is efficacious, and we have subject-matter jurisdiction.

¶ 59 B. Defense Counsel's Decision Not To Amend the *Pro Se* Motion To Withdraw the Guilty Plea

¶ 60 Defendant begins with the proposition that the trial court erred in determining his sentence. The error, according to defendant, was to regard the sentence cap in the plea agreement as already-provided leniency. The court remarked that, under the plea agreement, defendant would receive leniency up front, before the court weighed the factors in mitigation and aggravation, in that the maximum prison sentence he could receive under the plea agreement was 45 years, whereas 45 years was the minimum prison sentence he would have received had he been convicted in a trial. Defendant contends that defense counsel rendered ineffective assistance by neglecting to amend the *pro se* motion to withdraw the guilty plea so as to complain of this alleged error by the court.

¶ 61 One of the elements of ineffective assistance is deficient performance, and performance is deficient only if it "fall[s] outside the wide range of professionally competent assistance considering all the circumstances." (Internal quotation marks omitted.) *People v. Irvine*, 379 Ill. App. 3d 116, 129 (2008). Was it "outside the wide range of professionally competent assistance" to refrain from asserting this alleged error in an amended motion to withdraw the guilty plea?

¶ 62 To answer that question, we must first be clear on what the law regards as grounds for withdrawing a guilty plea. A trial court should grant a motion to withdraw a guilty plea if the defendant entered the guilty plea under a misapprehension of fact or law, or if the defendant has a defense worthy of consideration by a jury, or if justice would best be served by allowing the defendant to withdraw the guilty plea. *People v. Morreale*, 412 Ill. 528, 531-32 (1952). In his brief, defendant does not lay out these grounds for withdrawing a guilty plea, and he does not say which

of these grounds, in his view, applies to him. We are unable to guess.

¶ 63 It is unclear to us how this issue would belong in a motion to withdraw the guilty plea. When pleading guilty, defendant knew he could receive 45 years' imprisonment—and as it turned out, that is what he received. In his brief, he speaks of "the trial court's improper consideration of factors at sentencing." That sounds like a sentencing issue, not a plea issue.

¶ 64 A defense counsel could have reasonably decided not to raise this issue in an amended motion to reduce the sentence, considering that the trial court had the right to reject the plea agreement outright if, in its estimation, the sentence cap therein, 45 years' imprisonment, was too lenient, given the factors in aggravation. See Ill. S. Ct. R. 402(d)(2) (eff. July 1, 2012). By corollary, the court had the right to decide that 45 years' imprisonment, the upper limit of the plea agreement, was the most lenient sentence the court was willing to impose, given the factors in aggravation—in other words, that the plea agreement barely squeezed by the court's critical scrutiny.

¶ 65 Again, 45 years' imprisonment was a potential sentence by the terms of the plea agreement. If, under the plea agreement, 45 years was a potential sentence, the parties to the plea agreement contemplated that the guilty plea would not necessarily result in a sentence below 45 years' imprisonment. "We agree with defendant that remorse and guilty pleas can be factors in mitigation. However, *** the existence of mitigating factors does not obligate the trial court to reduce a sentence from the maximum allowed." *People v. Pippen*, 324 Ill. App. 3d 649, 653 (2001).

¶ 66 C. Presentence Credit

¶ 67 Under section 5-8-7(b) of the Unified Code of Corrections (730 ILCS 5/5-4.5-100(b) (West 2010)), a defendant shall receive, against the prison sentence, a credit of one day for each day the defendant spent in presentence custody. Federal marshals arrested defendant on June 5, 2010.

The sentencing order gives him credit, however, only from June 7, 2010, the date he was taken into custody in Adams County. Defendant argues, and the State concedes, that he is entitled to credit from June 5, 2010. We agree.

¶ 68 D. Credit Against a Fine

¶ 69 Section 110-14(a) of the Code of Criminal Procedure of 1963 (725 ILCS 5/110-14(a) (West 2010)) provides: "Any person incarcerated on a bailable offense who does not supply bail and against whom a fine is levied on conviction of such offense shall be allowed a credit of $5 for each day so incarcerated upon application of the defendant. However, in no case shall the amount so allowed or credited exceed the amount of the fine."

¶ 70 In this case, the trial court set bail at $1 million, and defendant was in presentence custody from June 5, 2010, until the court sentenced him on August 26, 2011. Part of the sentence was a "State Police Ops" fee of $5. Although labeled a "fee," this actually was a fine. *People v. Millsap*, 2012 IL App (4th) 110668, ¶ 31. Defendant argues, and the State concedes, that the trial court should have given him full credit against that fine. We agree.

¶ 71 III. CONCLUSION

¶ 72 For the foregoing reasons, we affirm the trial court's judgment as modified to award an additional two days of presentence credit as well as a credit of $5 against the state police operations fee, and we remand this case with directions to amend the mittimus accordingly. We award the State $50 in costs against defendant.

¶ 73 Affirmed as modified and remanded with directions.