2014 IL App (4th) 100430-UB

NO. 4-10-0430

FILED
August 27, 2014
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
AARON C. SMITH,	)	No. 09CF276
Defendant-Appellant.	)	
	)	Honorable
	)	Charles McRae Leonhard,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Pope and Harris concurred in the judgment.

ORDER

¶ 1 *Held*: Where defendant presented only bare allegations of prejudice, he failed to establish ineffective assistance of counsel based on counsel's misrepresentation about the evidence necessary to show defendant's prior convictions at sentencing.

¶ 2 In February 2009, the State charged defendant, Aaron C. Smith, by information with one count of aggravated driving under the influence of alcohol (625 ILCS 5/11-501(a)(1), (d)(2)(E) (West 2008)). After a June 2009 stipulated bench trial, the Champaign County circuit court found defendant guilty. At a July 2009 hearing, the court sentenced defendant to 25 years' imprisonment. Defendant filed a *pro se* motion to reduce his sentence. In October 2009, defendant's counsel filed a motion for a new trial or, alternatively, to reduce the sentence. In May 2010, the court denied defendant's postjudgment motion.

¶ 3 Defendant appealed, and in October 2011, we dismissed defendant's appeal because we lacked jurisdiction of the cause. *People v. Smith*, 2011 IL App (4th) 100430, 960

N.E.2d 595. Defendant filed a petition for leave to appeal, which the supreme court denied. However, in the exercise of its supervisory authority, that court directed this court to vacate our October 2011 judgment and directed us to treat defendant's posttrial motion as having been timely filed. *People v. Smith*, 2014 IL 113396, 8 N.E.3d 1042 (directing vacature in nonprecedential supervisory order on denial of petition for leave to appeal). We do so now and note that, with a timely posttrial motion, defendant's June 2010 notice of appeal was timely filed. Accordingly, we have jurisdiction of this cause under Illinois Supreme Court Rule 604(d) (eff. July 1, 2006).

¶ 4 On appeal, defendant contends his stipulated bench trial was involuntary because he relied upon his counsel's incorrect advice regarding his prior convictions. We affirm.

¶ 5 I. BACKGROUND

¶ 6 The State's February 2009 charge stemmed from defendant's actions on January 2, 2009. The charge asserted defendant had previously violated section 11-501(a) of the Illinois Vehicle Code (625 ILCS 5/11-501(a)(1) (West 2008)) six or more times, making this violation a Class X felony. See 625 ILCS 5/11-501(d)(2)(E) (West 2008). In April 2009, defendant filed a bill of particulars, seeking evidence of his prior convictions for driving under the influence. After a May 2009 hearing, the trial court denied defendant's request.

¶ 7 On June 29, 2009, the trial court held a stipulated bench trial. Defendant did not dispute the sufficiency of the State's evidence of his guilt. He only disputed the sentencing matter regarding the number of his prior driving-under-the-influence convictions. Before accepting defendant's waiver of his right to a jury trial, the court admonished defendant about the nature of the charge against him, the minimum and maximum sentences for a Class X felony, and the right to a jury trial. The court also questioned defendant to ensure his waiver was

voluntary and defendant indicated he understood the penalties for a Class X felony. After accepting defendant's jury-trial waiver, the court admonished defendant about the rights he was giving up by stipulating the State's evidence was sufficient for the court to find him guilty. Defendant indicated he understood the rights he was giving up. After considering the parties' stipulated evidence, the court found defendant guilty of driving under the influence.

¶ 8 On July 31, 2009, the trial court held defendant's sentencing hearing. Defendant argued the State's evidence was only sufficient to show he had three prior convictions for driving under the influence. Specifically, he alleged the other three convictions listed in his presentence investigation report were only noted in a report in a "federal record" and had not been verified. The court disagreed with defendant's argument and sentenced him as a Class X felon to 25 years' imprisonment.

¶ 9 In September 2009, defendant filed a *pro se* motion for the reduction of his sentence, in which defendant admitted his guilt. The trial court appointed new counsel to represent defendant on his motion for the reduction of his sentence. On October 23, 2009, the new counsel filed a motion for a new trial or, alternatively, to reduce the sentence. As to the new-trial portion of the motion, defendant asserted he was denied effective assistance of counsel by his trial counsel, Diana Lenik, based on her erroneous advice the State could only prove three of his prior convictions, which would yield only a Class 2 felony with a possibility of probation and a sentencing range of three to seven years' imprisonment. See 625 ILCS 5/11-501(d)(2)(C) (West 2008)). Specifically, defendant asserted Lenik told him the federal document would be inadequate to prove his prior convictions.

¶ 10 On December 18, 2009, the trial court held a hearing on defendant's postjudgment motion. Defendant testified in support of his motion, and the State did not present any evidence.

Defendant testified Lenik informed him the State had offered a 20-year prison term, which she described as " 'ridiculous.' " Lenik told defendant the State had the burden of proof on defendant's prior convictions and she did not think that all of defendant's prior convictions could be verified. Lenik stated she could only find three prior convictions and thought defendant would be subject to Class 2 sentencing, not Class X. She also told him probation was an option. Lenik further opined the federal document was not verifiable proof of defendant's prior convictions. Defendant testified that, if he had known he was subject to Class X sentencing, he would have taken his case to a jury trial. On cross-examination, defendant admitted his guilt and that the police's machinery stated he had a blood-alcohol concentration of .325. After hearing the parties' arguments, the court took the matter under advisement.

¶ 11 On May 29, 2010, the trial court entered a memorandum of opinion and order, denying defendant's postjudgment motion. The court found defendant had failed to prove both prongs of the test for ineffective assistance of counsel set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). On June 9, 2010, defendant filed a notice of appeal from the denial of his postjudgment motion in sufficient compliance with Illinois Supreme Court Rule 606 (eff. Mar. 20, 2009). As stated, we initially dismissed defendant's appeal because we lacked jurisdiction due to defendant's *pro se* motion to reduce his sentence being untimely filed. *Smith*, 2011 IL App (4th) 100430, 960 N.E.2d 595. However, in March 2014, our supreme court vacated our prior judgment and instructed us to treat defendant's posttrial motion as timely filed. *Smith*, 2014 IL 113396, 8 N.E.3d 1042. Thus, we now have jurisdiction and will address the merits of defendant's appeal.

¶ 12 II. ANALYSIS

¶ 13 Defendant's sole issue on appeal is his stipulated bench trial, which was

tantamount to a guilty plea, was involuntary because he relied upon his counsel's incorrect advice regarding the sentencing range for the offense.

¶ 14 In *People v. Clark*, 386 Ill. App. 3d 673, 676, 899 N.E.2d 342, 345-46 (2008), the Third District explained the relationship between a voluntary plea and counsel's advice as follows:

> "Due process requires that guilty pleas be voluntary and knowing. *People v.Young*, 355 Ill. App. 3d 317, 322, 822 N.E.2d 920, 924 (2005). That a defendant entered a guilty plea because of erroneous advice from counsel does not necessarily destroy the voluntary nature of the plea. See *People v. Pugh*, 157 Ill. 2d 1, 14, 623 N.E.2d 255, 261 (1993). A plea based on reasonably competent advice is a voluntary plea not open to attack on the grounds that counsel erred in his judgment. *People v. Palmer*, 162 Ill. 2d 465, 475, 643 N.E.2d 797, 801 (1994). However, a defendant's guilty plea, made in reliance on counsel's erroneous advice, is involuntary if the defendant did not receive effective assistance of counsel. See *Pugh*, 157 Ill. 2d at 14, 623 N.E.2d at 261; [*People v.*]*Correa*, 108 Ill. 2d [541,] 549, 485 N.E.2d [307,] 310 [(1985)].
>
> To establish that trial counsel was ineffective, defendant must demonstrate that (1) counsel's performance was deficient, and (2) there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going

> to trial. *Young*, 355 Ill. App. 3d at 322, 822 N.E.2d at 924. The standard for competence in guilty plea cases is not whether counsel's advice was correct, but whether defense counsel's advice was within the range of competence demanded of attorneys in criminal cases. *Pugh*, 157 Ill. 2d at 17, 623 N.E.2d at 262. Where defense counsel's advice is based on a misapprehension of the law, it falls outside the range of competence demanded of attorneys in criminal cases. See *Pugh*, 157 Ill. 2d at 19, 623 N.E.2d at 263; *People v. Curry*, 178 Ill. 2d 509, 529, 687 N.E.2d 877, 887 (1997). If defense counsel affirmatively provides 'unequivocal, erroneous, misleading representations' about the consequences of a plea, this may amount to ineffective assistance that renders a defendant's plea involuntary. See *Correa*, 108 Ill. 2d at 551-52, 485 N.E.2d at 311; *Young*, 355 Ill. App. 3d at 323, 822 N.E.2d at 925."

For an ineffective-assistance-of-counsel claim, our supreme court has noted "the standard of review for determining if an individual's constitutional rights have been violated is *de novo*." *People v. Hale*, 2013 IL 113140, ¶ 15, 996 N.E.2d 607.

¶ 15 As with any ineffective-assistance-of-counsel claim, we may begin our analysis by addressing the prejudice prong. See *Strickland*, 466 U.S. at 697. To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Here, defendant asserts his stipulated bench trial was tantamount to a guilty plea

and cites the United States Supreme Court's decision in *Hill v. Lockhart*, 474 U.S. 52 (1985). Under *Hill*, 474 U.S. at 59, to show prejudice in the context of a conviction based on a guilty plea, the defendant must show a reasonable probability that, but for counsel's errors, the defendant would have pleaded not guilty and insisted on going to trial. A defendant's bare allegation to that effect is insufficient. *People v. Hall*, 217 Ill. 2d 324, 335, 841 N.E.2d 913, 920 (2005). Rather, the defendant must provide either a claim of innocence or a plausible defense that could have been raised at a trial. *Hall*, 217 Ill. 2d at 335-36, 841 N.E.2d at 920. Whether counsel's deficient representation caused the defendant to plead guilty depends largely on whether the defendant likely would have succeeded at trial. *Hill*, 474 U.S. at 59. While this case is slightly different from *Hill* because defendant rejected the State's plea offer and chose a stipulated bench trial, we agree with defendant the analysis in *Hill* should be applied here.

¶ 16 In this case, defendant only contends that, if he had known for sure he was facing Class X sentencing, he would have continued to negotiate with the State for a sentence of less than 20 years and/or not done a stipulated bench trial and insisted on going to trial. We note defendant does *not* argue on appeal he would have accepted the State's offer of 20 years' imprisonment. Further, he does nothing more than raise the two aforementioned bare allegations. Thus, we find defendant has failed to meet his burden of proof as to the prejudice prong of *Strickland*. Moreover, the appellate record does not support a finding defendant would have succeeded at trial since defendant admitted at the hearing on his posttrial motion (1) he committed the offense and (2) the police's equipment showed he had a blood-alcohol concentration of .325.

¶ 17 Accordingly, we find defendant failed to establish he was denied effective assistance of counsel in this case.

¶ 18 III. CONCLUSION

¶ 19 For the reasons stated, we affirm the Champaign County circuit court's judgment. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal.

¶ 20 Affirmed.