2022 IL App (4th) 210597-U

NO. 4-21-0597

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
November 29, 2022
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Cumberland County
KEVIN V. SEANEY,	)	No. 20CF5
Defendant-Appellant.	)	
	)	Honorable
	)	Jonathan T. Braden,
	)	Judge Presiding.

JUSTICE BRIDGES delivered the judgment of the court.
Justices Cavanagh and Harris concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion in denying defendant's motion to withdraw his guilty plea, and we declined to address defendant's claim of ineffective assistance of counsel because it was not ascertainable on direct appeal. Therefore, we affirm.

¶ 2 Defendant, Kevin V. Seaney, appeals the denial of his motion to withdraw his guilty plea. Defendant argues that the State breached an off-the-record agreement to recommend probation in exchange for his cooperation with a drug task force officer, and the breach induced him to plead guilty. Defendant also argues that his counsel was ineffective for failing to withdraw his representation in order to testify at the hearing on his motion to withdraw his plea. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On January 13, 2020, defendant was charged by information with the following three offenses: count I for possession of methamphetamine in an amount greater than 15 grams but

less than 100 grams with intent to deliver[1] (720 ILCS 646/55(a)(2)(C) (West 2020) (Class X felony)), count II for possession of less than 15 grams of Alprazolam, a controlled substance (720 ILCS 570/402(c) (West 2020) (Class 4 felony)), and count III for possession of cannabis in a motor vehicle (625 ILCS 5/11-502.15(c)) (West 2020) (Class A misdemeanor)).

¶ 5 Defendant's initial bond was set at $500,000, and, on May 28, 2020, defendant moved to modify his bond to $30,000. The trial court denied his motion, explaining that although $500,000 was higher than a typical bond for a Class X felony of this nature, defendant had an extensive criminal history that included several violent offenses.

¶ 6 On September 21, 2020, the State filed an amended information, adding a fourth count for possession of methamphetamine in an amount of 5 or more grams but less than 15 grams with intent to deliver. 720 ILCS 646/55(a)(2)(B) (West 2020) (Class 1 felony).

¶ 7 That same day, the trial court held a hearing at which defendant pled guilty to the newly added count IV. Defendant's counsel acknowledged receipt of the amended information and stated that he and defendant had had an opportunity to review it. The State informed the trial court that the parties had reached an agreement for an open plea to count IV, in which the State would dismiss counts I through III. Both defendant and his counsel confirmed the plea agreement. When the trial court asked defendant whether he had an opportunity to talk with his counsel about the agreement, defendant responded, "[t]horoughly." Defendant had no further questions about the agreement.

¶ 8 The trial court read to defendant the charge of possession of methamphetamine between 5 and 15 grams with intent to deliver. The trial court stated that, as a Class 1 felony, the

[1]The information incorrectly stated the elements of section 55(a)(2)(C) of the Methamphetamine Control and Community Protection Act (720 ILCS 646/55(a)(2)(C) (West 2020)). Count I was amended on January 15, 2020, to match the language of the statute, and we have provided the amended language.

offense was punishable by 4 to 15 years' imprisonment, with up to 30 years if an extended term were to apply. It confirmed that the offense was probation eligible. Defendant stated that he understood the charge and range of possible penalties. He also understood that he had the right to plead not guilty and have a jury trial or a bench trial. Defendant stated that he was knowingly and voluntarily waiving his right to a jury trial.

¶ 9 The State then presented a factual basis. It stated that, if the case were to proceed to trial, it would call Officers Harris and Hanley, who would testify that, on January 13, 2020, defendant was in possession of methamphetamine in the amount of 5 or more grams but less than 15 grams and that he had intent to deliver the methamphetamine. Defendant and his counsel agreed the State would present substantially such evidence if the case were to proceed to trial.

¶ 10 Defendant's criminal history included pleading guilty in 2016 to unlawful use of a weapon by a felon; pleading guilty in 2015 to driving under the influence; pleading guilty in 2011 to aggravated battery; pleading guilty in 2007 to domestic battery; and pleading guilty to earlier offenses of knowingly damaging property, possession or manufacturing of methamphetamine, aggravated battery causing great bodily harm, and residential burglary.

¶ 11 Defendant confirmed that he was 41 years old, had reached the ninth grade, and could read and write. He answered that he was not currently taking any drugs or medications and that he understood the nature of the day's proceedings. It was defendant's wish to enter a plea of guilty.

¶ 12 The trial court, wanting to make sure that defendant understood he was entering into an open plea agreement, continued explaining that an open plea agreement meant "there is no set sentence right now." The trial court explained that a sentencing hearing would follow at a later date, whereat the State would make a recommendation and present evidence, and defendant's

attorney could do the same. The trial court then stated that it could "accept any of those recommendations or [it] could reject any of those recommendations, and sentence [defendant] to anything, any sentence that [it] believed [was] appropriate under the guidelines of a Class 1 Felony." It asked defendant, "[d]o you understand that?" Defendant answered that he understood.

¶ 13 The trial court again asked whether defendant understood he would not be sentenced that day, and defendant again responded affirmatively. Defendant still wished to plead guilty, and he thereafter pled guilty to count IV. The trial court accepted his plea of guilty on the open plea agreement, and it set the matter for a sentencing hearing.

¶ 14 Following defendant's plea, the State requested that defendant's bond be reduced and that he be released until the date of his sentencing. The trial court released defendant on a $10,000 personal recognizance bond.

¶ 15 That same day, defendant signed a guilty plea, which listed seven items above the signature line, including number six, which stated that "no threats or promises, not stated in open court, caused me to plead guilty."

¶ 16 On April 28, 2021, defendant filed a "Motion to Set Aside Guilty Plea, Enter Plea of Not Guilty, and Reset this Matter for Jury Trial." The motion stated that, at the September 21, 2020, hearing, defendant was advised that he was entering a plea of guilty with no set sentencing recommendation, and the trial court did not inquire as to whether he had been induced to enter his guilty plea as a result of any promises made to him. Defendant's motion further asserted that he had been induced to plead guilty by a promise made by the State, and he referenced his attached affidavit. Defendant averred that he was induced to enter a guilty plea based on a promise by the State, conveyed through his attorney, that if he "cooperated with [the] task force in providing information, the State would agree to a joint recommendation with [his] attorney that [he] would

be placed on probation." Defendant "further understood that the Court would likely agree with a joint recommendation." He averred that he pled guilty in reliance on this promise and that he cooperated with the task force, but, prior to his sentencing, he was advised the task force was unsatisfied with his cooperation.

¶ 17 On April 30, 2021, the State moved to reinstate defendant's bond to $500,000. In its motion, the State acknowledged that defendant had, on September 21, 2020, agreed to work with Officer Bill Freese in exchange for the recommended recognizance bond. The State's motion continued that it had agreed to the recognizance bond with the expectation that Freese would be in contact with defendant and inform the State of any concerns with defendant's release, and that defendant was no longer cooperating with Freese.

¶ 18 On May 3, 2021, the trial court heard both defendant's motion to withdraw his guilty plea and the State's motion to reinstate bond. Defense counsel argued that defendant pled guilty as part of a "greater plea understanding that was being negotiated between the State and his defense counsel, which contemplated that [defendant] would be assisting task force officers." Counsel argued that, at the hearing at which defendant pled guilty, the trial court never admonished defendant regarding the issue of other promises or threats made outside the presence of the court pursuant to Illinois Supreme Court Rule 402(b) (eff. July 1, 2012).

¶ 19 Defense counsel further argued that this was not a situation of "sour grapes" where a defendant moved to withdraw after getting a sentence he did not like. Instead, defendant had moved to withdraw prior to his sentencing hearing based on the State reneging its promise to recommend probation in exchange for cooperation.

¶ 20 Both the State and defense counsel examined defendant. When asked by defense counsel whether defendant understood "there was additional deal-making that was being done

behind the scenes," defendant responded yes. Defendant had understood that, if he pled guilty and was released from jail, "there would be *** a meeting and further instructions later." Defendant testified that he had a meeting with the task force officer (he did not name the officer) and that he "did everything [he] was supposed to do." In defendant's mind, he cooperated with the task force officer, and he was not informed until about a month and a half prior to the instant hearing that the officer was not satisfied with his cooperation. The officer did not respond to defendant's most recent texts in which defendant stated he heard the officer was not satisfied and asked what options he had to meet his requirements.

¶ 21 In response to the State's questions, defendant answered that, when he pled guilty, he understood the trial court could sentence him to any sentence in the possible range of sentences, and he understood a sentence of probation was not guaranteed.

¶ 22 Turning to the State's motion to reinstate bond, the State argued that defendant had been let out of jail on a recognizance bond in order to help Officer Freese, but even letting defendant out to help Freese "was a stretch" based on his extensive criminal history. The State continued that Freese had informed the State that defendant had not been in communication with him on a regular basis and was concerned about defendant being out on a recognizance bond without oversight. The trial court took both motions under advisement.

¶ 23 Following the hearing, defendant submitted a memorandum in support of his motion to withdraw his guilty plea. In his memorandum, he argued that he and his attorney had engaged in "a long series of plea negotiations that culminated in a negotiated plea plan," which was reflected in the attached draft plea agreement. Defendant confirmed that the draft plea agreement was not ultimately presented to the trial court, but he argued that the draft "obviously stayed in [his] mind as the crux of what he was agreeing to." The draft plea agreement included

defendant's signature and stated that defendant would plead guilty to count IV, the State would dismiss counts I through III, and defendant would be sentenced to an agreed term of 30 months' probation. The draft also stated that as a condition of defendant's probation, he agreed to cooperate with William Freese of the Southeastern Illinois Drug Task Force in the investigation of drug prosecutions, including making " 'undercover buys' " and providing other reasonable participation as directed by Freese and his predecessors and associates.

¶ 24 On May 11, 2021, the trial court denied defendant's motion to withdraw his guilty plea. The trial court acknowledged that it did not specifically question defendant as to whether any promise had been made to him that influenced his decision to plea, but defendant had executed a written plea agreement, which represented that no promises made outside of court had induced him to plea. The trial court explained that the failure to admonish a defendant did not automatically provide a basis to vacate a plea, and defendant's written acknowledgment that no promises were made was sufficient to comply with Rule 402(b), where defendant understood the nature of the proceedings against him and sought to vacate his plea on a promise withheld from the trial court at the time of his plea. At the time defendant pled, there was no agreement as to his sentence.

¶ 25 The trial court continued that defendant had "made the barest of allegations" regarding the promise of a joint recommendation in exchange for his cooperation with the drug task force officer. Defendant did not provide details about his cooperation, and he did not call any task force agents.

¶ 26 Turning to the draft plea agreement, the trial court found the parties' inability to reach the draft agreement evidenced that the State had not agreed to a sentence of probation. Defendant's subjective belief alone was insufficient to justify vacation of his plea.

¶ 27 Last, the trial court stated that even if defendant had an agreement with the State and complied with its terms, it had admonished him that it could reject a joint recommendation and sentence him to any sentence within the guidelines for a Class 1 felony. Defendant was still free to argue at sentencing that probation was appropriate, but this was not a case of defendant's misapprehension as to his eligibility for probation.

¶ 28 Defendant's sentencing hearing took place on June 2, 2021. Following defendant's witnesses and his statement in allocution, the State recommended a sentence of 13 years' imprisonment. The trial court sentenced defendant to 11 years' imprisonment, with credit for time served, followed by 2 years of mandatory supervised release.

¶ 29 Defendant moved to reconsider, arguing that, *inter alia*, the trial court erred in denying his motion to set aside his guilty plea. The trial court denied the motion.

¶ 30 This timely appeal followed.

¶ 31 II. ANALYSIS

¶ 32 Defendant raises two issues on appeal: (1) whether the trial court erred in denying his motion to withdraw his plea because the State breached an off-record agreement, which induced him to plead guilty; and (2) whether defense counsel was ineffective because he did not move to withdraw his representation so that he could testify to in support of defendant's motion to withdraw his plea. For both issues, defendant requests that we remand for further post-plea proceedings.

¶ 33 A. Motion to Withdraw Guilty Plea

¶ 34 Defendant argues that the trial court erred in denying his motion to withdraw his guilty plea. Defendant contends that the trial court failed to admonish him in open court as to whether any promises induced his plea. Defendant argues that there was an off-the-record

agreement between him and the State in which the State would agree to recommend a sentence of probation, and the State did not honor the agreement when it recommended 13 years' imprisonment at defendant's sentencing.

¶ 35 Defendant specifically points to his draft plea agreement, which he had attached as an exhibit to his memorandum in support of his motion to withdraw his plea. Defendant argues that, consistent with the draft plea agreement, he pled guilty with the understanding that he would meet with Freese and receive further instructions. Defendant asserts that his promised cooperation with Freese had to be secret and thus could not have been part of any probation order entered by the trial court.

¶ 36 Defendant continues that the State acted consistently with an agreement being in place. For one, on the day of defendant's guilty plea, the State amended the information to add count IV, to which defendant pled guilty. Further, following defendant's plea, the State requested a modification of his bond from a $500,000 deposit bond to a $10,000 recognizance bond, and the trial court agreed. And, at the hearing on defendant's motion to withdraw his plea, the State argued that defendant had been properly admonished but did not deny the existence of a prior agreement. Instead, the State referenced defendant's agreement to work with Freese, expressing concern that, while defendant was out on a recognizance bond, he had not been in regular communication with Freese.

¶ 37 Defendant concludes that he agreed to cooperate with Freese in exchange for the State's joint recommendation of probation, and this off-the-record agreement induced him to plead guilty. Defendant argues that because the State breached the off-the-record agreement, he should have been allowed to withdraw his guilty plea. He compares the facts of this case favorably with

the facts in *Scarborough v. State*, 938 A.2d 644 (Del. 2007), and urges us to follow the Delaware court's reasoning regarding the effect of an off-the-record agreement on a guilty plea.

¶ 38 The State responds that the trial court properly denied defendant's motion to withdraw his guilty plea. It argues that defendant acknowledges his plea was open, and the record rebuts his argument that there was an off-the-record agreement that the State failed to honor. The State points to defendant's written guilty plea, which provides that no out-of-court promises caused him to plead guilty. It argues that defendant's subjective expectation of probation was an insufficient basis to vacate his plea.

¶ 39 The State acknowledges that it requested defendant's release on a recognizance bond, but it disputes that this action affirmatively showed an off-the-record agreement for a sentencing recommendation of probation. It argues, rather, that this action showed only that defendant would agree to work with Freese in exchange for the recognizance bond. The State argues that, taken as a whole, the record clearly shows defendant was properly admonished regarding his plea, he understood his plea, and no promises caused him to plea guilty.

¶ 40 In general, a trial court's decision to deny a motion to withdraw a guilty plea is reviewed for an abuse of discretion. *People v. Hughes*, 2012 IL 112817, ¶ 32; see *People v. Glover*, 2017 IL App (4th) 160586, ¶ 29 (when a trial court reaches the merits of a motion to withdraw a guilty plea, the denial is reviewed for an abuse of discretion). An abuse of discretion occurs where the trial court's decision is arbitrary, fanciful, or unreasonable. *People v. McGath*, 2017 IL App (4th) 150608, ¶ 55.

¶ 41 We hold that the trial court did not abuse its discretion in denying defendant's motion to withdraw his guilty plea. When seeking relief from a guilty plea, a defendant may make two separate but related constitutional challenges: (1) the plea of guilty was not made knowingly

or voluntarily, and (2) the defendant did not receive the benefit of the bargain made with the State when pleading guilty. *People v. Whitfield*, 217 Ill. 2d 177, 183-84 (2005); see *People v. Manning*, 227 Ill. 2d 403, 412 (2008). These two challenges deal respectively with two different aspects of a plea: its acceptance and its implementation. *Whitfield*, 217 Ill. 2d at 185. Due process principles apply to both the acceptance and implementation of the plea. *Id.*

¶ 42 Defendant's argument in this case is primarily a benefit-of-the-bargain claim. However, defendant also raises the trial court's failure pursuant to Illinois Supreme Court Rule 402(b) (eff. July 1, 2012) to inquire whether outside promises were made, and we therefore first examine the voluntary nature of his plea.

¶ 43 An argument that a guilty plea was involuntary can be grounded in both due process and the sixth amendment right to counsel. *People v. Hughes*, 2012 IL 112817, ¶ 33. Generally, a due process challenge involves the trial court's duty to properly advise defendant regarding his plea, whereas a sixth amendment challenge involves counsel's deficient advice. *Id.* ¶¶ 35, 43. Defendant does not argue that his counsel failed to properly advise him as to the circumstances or consequences of his plea. Instead, he argues only that the trial court failed to inquire in open court whether any promises aside from the open plea agreement secured his guilty plea.

¶ 44 Under Illinois Supreme Court Rule 402(b) (eff. July 1, 2012), a trial court "shall not accept a plea of guilty without first determining that the plea is voluntary," and "[t]he court, by questioning the defendant personally in open court, shall confirm the terms of the plea agreement *** and shall determine whether any force or threats or *any promises*, apart from a plea agreement, were used to obtain the plea." (Emphasis added.) Substantial compliance with Rule 402 satisfies due process, and an imperfect admonishment is not reversible error unless real justice has been denied or the defendant was prejudiced by the inadequate admonishment. *Whitfield*, 217

Ill. 2d at 195. If the record demonstrates that a guilty plea was voluntary and not the result of promises apart from the plea agreement, then failure to strictly comply with Rule 402 is harmless. *People v. Sharifpour*, 402 Ill. App. 3d 100, 114 (2010).

¶ 45 Here, the trial court substantially complied with Rule 402(b), and the record supported that defendant's plea was voluntary. At the September 21, 2020, hearing, the agreement presented to the trial court was an open guilty plea to count IV, in which the State agreed to dismiss counts I through III. The trial court asked both defendant and his counsel whether that was their agreement, and they both answered affirmatively. When asked whether defendant had an opportunity to talk with his counsel about the plea agreement, defendant answered, "[t]horoughly." The trial court then admonished defendant of the nature of the charge against him, informed him of the minimum and maximum sentences available to punish the offense charged, reminded him of his right to plead not guilty and have a jury or bench trial, and recited the rights he would relinquish by pleading guilty.

¶ 46 The trial court also questioned defendant in open court, and defendant informed the trial court that he was 41 years old, had reached the ninth grade, could read and write, and was not currently taking any drugs or medications. Defendant stated that he understood the nature of the proceedings against him and wished to plead guilty. We note that defendant had an extensive history of pleading guilty, with over 10 prior guilty pleas introduced at the September 21, 2020, hearing as part of defendant's criminal history dating back to 1997.

¶ 47 Although the trial court did not ask defendant whether any promises were made by the State to secure his plea, this failure to inquire was harmless. The State's purported promise to defendant was for a sentencing *recommendation*. The trial court, in an explicit effort to assure that defendant understood he was entering an open plea, explained to defendant that the State could

make a sentencing recommendation at his future sentencing hearing, and the trial court could reject it and sentence him to any sentence appropriate for a Class 1 felony. Therefore, even if defendant had informed the trial court of the purported off-the-record agreement, the trial court would not have admonished defendant otherwise, and the circumstances of his guilty plea would have been substantially the same.

¶ 48 Turning to defendant's benefit-of-the-bargain claim, such a claim is rooted in the Supreme Court's decision in *Santobello v. New York*, 404 U.S. 257 (1971). *Whitfield*, 217 Ill. 2d at 184-85. In *Santobello*, the Supreme Court vacated the state court judgment because the prosecutor breached a promise made to the petitioner in his plea, explaining that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such a promise must be fulfilled." *Santobello*, 404 U.S. at 262. Consistent with *Santobello*, a defendant's due process rights are implicated when the defendant shows that their guilty plea was entered in reliance on a plea agreement. *Whitfield*, 217 Ill. 2d at 189; see *People v. Navarroli*, 121 Ill. 2d 516, 522 (1988) ("[A] defendant who enters a guilty plea in reliance upon the promise of the prosecutor is entitled to a remedy when the prosecutor breaches that promise."). The defendant's remedy may be specific performance of the plea agreement or the withdrawal of the plea. See *Santobello*, 404 U.S. at 263 (leaving the choice of remedy to the state court on remand). When a defendant enters a negotiated plea of guilty in exchange for benefits, both the State and the defendant are bound by the terms of the agreement. *Id.* at 190.

¶ 49 We need not decide today what due process implications, if any, the State's breach of an off-the-record agreement has compared to its breach of a negotiated plea agreement. That is because defendant has failed to show he did not receive the benefit of his alleged off-the-record

bargain. See *People v. Williams*, 328 Ill. App. 3d 879, 884 (2002) (the defendant bears the burden of demonstrating to the trial court the necessity of withdrawing the plea).

¶ 50 We acknowledge that the record supports that some agreement between defendant and the State took place off the record. When defendant pled guilty to count IV, the State had agreed to defendant's release on a recognizance bond, and after defendant moved to withdraw his plea, the State moved to reinstate defendant's $500,000 bond. In its motion, the State acknowledged that defendant had agreed to work with Freese, and it believed defendant was no longer cooperating with Freese. The State's motion was consistent with defendant's exhibit of a draft plea agreement in that both supported an agreement for defendant to help Freese in investigating drug prosecutions.

¶ 51 Fatal to defendant's argument, however, is that the purported agreement was not conditioned on defendant simply agreeing to plead guilty to count IV—it was conditioned on him actually cooperating with Freese. At the May 3, 2021, hearing on defendant's motion to set aside his guilty plea, defendant testified only cursorily to his interactions with a task force officer. It was defendant's understanding that following his guilty plea, "there would be *** a meeting and further instructions later." Defendant continued that the meeting was supposed to be about "[w]hat was expected of me, what wasn't expected of me." When asked if he met with the task force officer, defendant first responded "I did everything I was supposed to do." When asked again whether he in fact met with the task force officer, he replied simply, "Yeah." He also answered "yeah" to whether he received the officer's telephone number and whether he called him. After defendant was informed that the State believed there was an issue with his cooperation, he tried to text the officer but received no response. In defendant's mind, he always cooperated with the officer.

¶ 52 Notably, defendant provided no details as to his cooperation with Freese. He never testified as to what was expected of him, and what was not. He provided no details about when or where they met, or what they spoke of on the phone. Defendant simply concluded that he had upheld his end of the purported bargain. In general, the withdrawal of a plea cannot rest on a defendant's subjective belief alone. See *Sharifpour*, 402 Ill. App. 3d at 113 (a defendant's subjective belief of a promise for a shorter sentence is an insufficient ground for withdrawal of a plea; the defendant's belief must be objectively reasonable). Moreover, defendant did not call any other witnesses, such as Freese himself, who could have been questioned about the agreement and defendant's performance under the agreement.

¶ 53 Defendant's meager testimony is remarkable in light of the time between when he pled guilty and when he moved to set aside his plea. Defendant pled guilty on September 21, 2020, and he filed his motion to set aside his guilty plea on April 28, 2021. Defendant testified that he discovered Freese was dissatisfied with his cooperation only about a month and a half prior to the May 3, 2021, hearing, which begs the question as to what cooperation, if any, occurred between September 2020 and approximately mid-March 2021. Defendant did not elucidate, despite having the burden to show the necessity of withdrawing his plea.

¶ 54 In sum, defendant had to show he upheld his end of the bargain before the State was under an obligation to uphold its end. Under these circumstances, the trial court reasonably concluded that defendant had "made the barest of allegations" regarding his cooperation in exchange for the State's recommendation of probation—a far cry from a showing of a manifest injustice under the facts involved. *People v. Curtis*, 2021 IL App (4th) 190658, ¶ 31. As such, we cannot say the trial court's decision to deny defendant's motion was an abuse of discretion.

¶ 55 Last, we briefly address defendant's reliance on *Scarborough v. State*, A.2d 644 (Del. 2007). This case is not persuasive because it does not provide guidance on the situation before us. In *Scarborough*, neither the State nor the defendant raised the issue of an oral agreement outside of the written plea agreement until the direct appeal. *Id.* at 646. Accordingly, the trial court never had the opportunity to hear evidence regarding the off-the-record agreement, and the case was remanded for further factual findings. *Id.* at 646-47, 654. In contrast to the situation in *Scarborough*, defendant raised the issue of an off-the-record agreement before the trial court, and the trial court held a hearing on the matter. In short, defendant had his opportunity to provide an adequate factual basis in support of his motion to withdraw his plea but failed to do so.

¶ 56 B. Ineffective Assistance

¶ 57 Defendant also argues that his counsel was ineffective for failing to move to withdraw as his counsel. Defendant contends that his counsel was a key witness to support the off-the-record agreement between defendant and the State, and, per the advocate-witness rule, his counsel had to withdraw in order to testify at the hearing.

¶ 58 Claims of ineffective assistance of counsel may be raised on direct appeal where the basis for the claim can be ascertained from the record. *People v. Schaefer*, 2020 IL App (5th) 180461, ¶ 16. When the record is incomplete or inadequate for resolving an ineffective assistance claim, a collateral proceeding is preferred. *People v. Veach*, 2017 IL 120649, ¶ 46.

¶ 59 Here, defendant's claim of ineffective assistance is not ascertainable from the record. To prevail on a claim of ineffective assistance of counsel, a defendant must satisfy the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Bradford*, 2019 IL App (4th) 170148, ¶ 14. A defendant must show both (1) that counsel's performance was deficient and (2) that counsel's deficient performance prejudiced the defendant. *Id.* To establish

prejudice, the defendant must show that, but for counsel's deficient performance, there was a reasonable probability that the result of the proceeding would have been different. *Id.* ¶ 15.

¶ 60 In order to establish prejudice on defendant's claim, defendant needs to show that, had his counsel withdrawn, his counsel's testimony would have had a reasonable probability of affecting the outcome of defendant's motion to set aside his guilty plea. Instead, defendant offers a conclusory assertion that his counsel would have been a key witness in support of his motion to withdraw his plea, and he argues that "only plea counsel could provide the details of when and how the offer was conveyed and how counsel knew the State would no longer fulfill the promise." Such details may be helpful, or they may not; what is sure is that defendant's claim requires a record beyond what is before us. Accordingly, we are unable to address defendant's claim.

¶ 61 III. CONCLUSION

¶ 62 For the reasons stated, we affirm the judgment of the Cumberland County circuit court.

¶ 63 Affirmed.