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2012 IL App (3d) 110413-U

Order filed September 24, 2012
Modified Upon Denial of Rehearing February 20, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 12th Judicial Circuit,
)	Will County, Illinois,
Plaintiff-Appellee,)	
)	Appeal No. 3-11-0413
v.)	Circuit No. 08-CM-3078
)	
THOMAS STERNA,)	Honorable
)	Robert P. Livas,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justice Holdridge concurred in the judgment.
Justice McDade specially concurred.

ORDER

- ¶ 1 *Held:* Defendant was not entitled to withdraw his guilty plea where the State presented a sufficient factual basis prior to sentencing. In addition, the trial court did not abuse its discretion in denying the motion to withdraw the guilty plea because defendant did not have a meritorious defense. Finally, remand for compliance with Rule 604(d) was not required because the amended motion to withdraw the plea was not based on facts outside of the record.
- ¶ 2 Defendant, Thomas Sterna, pled guilty to one count of driving under the influence of a combination of alcohol and drugs. 625 ILCS 5/11-501(a)(5) (West 2008). He was sentenced to

24 months' conditional discharge, 240 hours of community service, and various fines, fees, and costs. On appeal, defendant argues that he should be allowed to withdraw his guilty plea or, in the alternative, the case should be remanded for additional postplea proceedings. We affirm.

¶ 3

FACTS

¶ 4 On July 28, 2008, defendant was charged with two counts of driving under the influence (DUI). The first count alleged that on January 7, 2008, defendant was driving while under the influence of alcohol, and the second count alleged that defendant was driving while under the influence of a combination of drugs and alcohol.

¶ 5 On June 8, 2010, defendant pled guilty to the second count. Prior to accepting the guilty plea, the trial court asked defendant if he had enough time to talk to his attorney about the plea, and defendant acknowledged that he did. The court then asked if there was a stipulation to the factual basis, and defense counsel agreed there was a stipulation. No factual basis was provided at that time. The court accepted the guilty plea and continued the matter for sentencing.

¶ 6 On June 15, 2010, defendant filed a *pro se* motion to vacate his guilty plea. In that motion, defendant stated that he was pressured into accepting the guilty plea and did not have an adequate amount of time to consider the plea. He alleges he was pressured into accepting the plea because his trial counsel told him that the State could prove defendant had a prior DUI conviction and that if convicted at trial, he faced jail time. At defendant's next court date, defense counsel explained that she could not argue the motion because doing so would essentially require her to argue her own ineffectiveness. Defendant then proceeded to argue his own motion. He argued that he was pressured into pleading guilty, there was no factual basis to warrant a guilty plea, and defense counsel had no knowledge of any potential defenses at the time

the guilty plea was entered and therefore could not properly advise him.

¶ 7 The trial court asked defendant if he had any evidence to support his allegation that he was innocent. He responded that he agreed to have blood tests taken, and was denied the opportunity to do so. Defendant also stated that he had passed the breathalyzer test, that all of the prescriptions that he was on were safe for driving, and that regardless, he had not taken any of his prescriptions prior to his arrest. During arguments on the motion, the State argued:

"I don't know if you recall this, but on the date that it was set for trial you asked us to return at 1:30 to be able to pick a jury or if we had a bench trial, but on that day we did not enter a plea until I believe it was at least 3 o'clock if not 3:30. Your Honor was waiting very patiently for [defendant] to speak with his attorney."

¶ 8 The State also explained,

"I believe also there was an overwhelming amount of evidence that would have been presented at this trial to show the defendant was in fact under the influence including specific statements the defendant made about how he takes methadone three times a day, that his last dose of methadone was about one hour prior to the police arrival, that he was found slumped over his steering wheel passed out inside of his vehicle with an open beer bottle in his right hand.

He was unresponsive to officers when they arrived on the scene. Paramedics had to be called and at which point he began telling the paramedics that he takes high doses of methadone and a mixture of muscle relaxers and sleeping pills several times a day in addition to consuming three to four beers a day. I believe that there would have been an overwhelming amount of evidence to be consistent with a finding of guilty.

He did blow a .047, and he was charged with the DUI based on the combination of the alcohol and muscle relaxers, sleeping pills and methadone he admitted to taking."

¶ 9 The trial court denied defendant's motion to withdraw his guilty plea. Defendant was sentenced on September 24, 2010. On direct appeal, this court remanded the case for proper compliance with Supreme Court Rules 604(d) and 605(b). *People v. Sterna*, No. 3-10-0750 (2011) (unpublished order under Supreme Court Rule 23). On remand, postplea counsel filed an amended motion to withdraw defendant's guilty plea. In that motion, counsel incorporated many of defendant's allegations from the previous hearing, including: (1) defendant did not have time to review his defense with his appointed counsel (2) the alcohol concentration in defendant's breath was 0.047, and (3) the defendant had no knowledge of the prior DUI and was not presented with the driving record reflecting the same until the day of trial. Counsel also filed a certificate pursuant to Rule 604(d).

¶ 10 The motion was heard on June 14, 2011. The State once again argued that defendant had enough time to consult with his attorney before accepting the guilty plea. The trial court denied defendant's amended motion. He appealed.

¶ 11 ANALYSIS

¶ 12 On appeal, defendant argues that: (1) he should be allowed to withdraw his plea because there was no factual basis to support the plea; (2) he should be allowed to withdraw his plea because there is doubt as to his guilt; and (3) in the alternative, his case should be remanded because postplea counsel did not fulfill its obligations under Rule 604(d). We address each argument in turn.

¶ 13 I. Factual Basis

¶ 14 Defendant's first argument on appeal is that his guilty plea should be vacated because the trial court accepted the plea without first determining whether there was a factual basis for the plea. We review *de novo*. *People v. Drum*, 194 Ill. 2d 485 (2000).

¶ 15 Defendant admits that this issue was not raised in his amended motion to withdraw guilty plea, and that it has therefore been forfeited. *People v. Smith*, 406 Ill. App. 3d 879 (2010).

Nonetheless, he asks us to consider the issue because postplea counsel was ineffective for not raising it in his amended postplea motion. *People v. Lacy*, 407 Ill. App. 3d 442 (2011) (doctrine of waiver does not apply where waiver stems from incompetency of counsel). We conclude that postplea counsel was not ineffective because a sufficient factual basis for the guilty plea was presented prior to the entry of a final judgment.

¶ 16 Illinois Supreme Court Rule 402(c) (eff. July 1, 2012) provides that "[t]he court shall not enter final judgment on a plea of guilty without first determining that there is a factual basis for the plea." The rule does not require strict compliance, but there must be at least substantial compliance. Ill. S. Ct. R. 402 (eff. July 1, 2012). The factual basis for a guilty plea usually consists of an express admission by defendant that he committed the alleged acts, or a recital of evidence to the court which supports the allegations in the indictment. *People v. Vinson*, 287 Ill. App. 3d 819 (1997). Rule 402(c) is satisfied "if there is a basis anywhere in the record up to the entry of the final judgment from which the judge could reasonably reach the conclusion that the defendant actually committed the acts with the intent (if any) required to constitute the offense to which he is pleading guilty." *Id.* at 821. A final judgment is not entered until the imposition of a sentence. *People v. Warship*, 59 Ill. 2d 125 (1974). When determining whether a factual basis exists, the court may look anywhere in the record and may consider police reports, confessions,

statements of witnesses, or information contained in the presentence report. *People v. Allen*, 323 Ill. App. 3d 312 (2001). In his petition for rehearing, defendant argues that our resolution of this case relies on determinations made at the first postplea hearing. We disagree. We rely on evidence recited into the record, which remains in the record, notwithstanding the procedural errors.

¶ 17 In this case, Rule 402(c) was not satisfied by defense counsel's mere stipulation that a factual basis existed. *People v. Williams*, 299 Ill. App. 3d 791 (1998). However, the State later provided a factual basis at the hearing on defendant's *pro se* motion to withdraw his guilty plea. Specifically, the State had evidence that defendant was found slumped over his steering wheel with a can of beer in his hand, and he admitted to taking methadone an hour before he was found. Defendant was also unresponsive at the scene, and the paramedics had to be called. Based on the above, the trial court could reasonably conclude that defendant committed the offense of driving under the combined influence of alcohol and drugs. See *People v. Royark*, 215 Ill. App. 3d 255 (1991) (factual basis need only allow court to reasonably conclude that defendant actually committed the offense).

¶ 18 In addition, we are not concerned that the State provided a factual basis for the guilty plea after the trial court accepted defendant's plea of guilty. Illinois law states that "[u]pon acceptance of a plea of guilty the court shall determine the factual basis for the plea." (Emphasis added.) 725 ILCS 5/115-2(a) (West 2010). As the above language makes clear, the State only needs to offer a factual basis prior to the entry of a final judgment, *i.e.*, sentencing. Accordingly, because the State presented a sufficient factual basis before defendant was sentenced, we hold that the trial court complied with Rule 402(c).

¶ 19

II. Doubt as to Defendant's Guilt

¶ 20 Defendant next argues that he should be allowed to withdraw his guilty plea because he had a defense but did not present it because his attorney pressured him into pleading guilty. We review for an abuse of discretion. *People v. Baez*, 241 Ill. 2d 44 (2011).

¶ 21 First of all, we would have to suspend all credulity to accept defendant's argument that he was pressured into a plea deal because he was "unaware" of his prior DUI conviction until he saw his driving abstract on the day of trial. He does not argue that he had no such conviction, only that he was unaware of it.

¶ 22 A defendant has no absolute right to withdraw a plea of guilty. *People v. Pullen*, 192 Ill. 2d 36 (2000). Defendant bears the burden of demonstrating sufficient grounds to support a motion to withdraw the plea. *People v. Stevens*, 324 Ill. App. 3d 1084 (2001). A motion to withdraw a plea should be allowed where it appears the plea was based on a misapprehension of the facts or law or because of misrepresentations by counsel, that defendant has a defense worthy of consideration, or where the ends of justice would be better served by a trial. *People v. Bryant*, 369 Ill. App. 3d 54 (2006).

¶ 23 The decision to allow a defendant to withdraw his guilty plea is within the sound discretion of the trial court. *Pullen*, 192 Ill. 2d 36. An abuse of discretion occurs when the trial court's decision is arbitrary, fanciful or unreasonable, or where no reasonable person would take the view adopted the by trial court. *People v. Illgen*, 145 Ill. 2d 353 (1991).

¶ 24 The record does not show that the trial court abused its discretion when it denied defendant's amended motion to withdraw his guilty plea. At the hearing on his *pro se* motion to withdraw the plea, defendant claimed that his blood alcohol level was 0.047, he had not

consumed any of his prescription drugs on the day in question, and that his request for a blood test was denied. The trial court stated that defendant did not establish that this was new evidence not known to him at the time he entered his plea. In addition, based on the evidence the State would have presented at trial, including defendant's own admission that he mixed alcohol, muscle relaxers, sleeping pills, and methadone, it was not an abuse of discretion for the trial court to conclude that defendant did not have a meritorious defense.

¶ 25 The record further reflects that defendant had enough time to consider the guilty plea. Defendant met with his attorney for at least 1½ hours in the conference room between the resumed court time of 1:30 p.m. and the time at which defendant entered his plea at 3 p.m. or later. Therefore, we conclude that no abuse of discretion occurred.

¶ 26 III. Compliance with Rule 604(d)

¶ 27 Defendant's final contention on appeal is that the case should be remanded because postplea counsel did not fulfill its obligations under Rule 604(d). We review *de novo*. *Drum*, 194 Ill. 2d 485.

¶ 28 The pertinent part of Rule 604(d) states "[w]hen the motion [to withdraw guilty plea] is based on facts that do not appear of record it shall be supported by affidavit." Ill. S. Ct. R. 604(d) (eff. July 1, 2006). In this case, defendant argues that the cause should be remanded because his amended motion was based on facts outside the record, and postplea counsel failed to support the motion with an affidavit from defendant. Importantly, defendant does not allege that the proceedings on his earlier motion to withdraw his plea were a nullity.

¶ 29 We find that defendant's argument is without merit. In this case, the facts supporting defendant's motion were introduced at the earlier hearing on his original *pro se* motion to

withdraw his guilty plea. During that hearing, he argued that he was pressured into pleading guilty by his appointed trial counsel, that he did not have time to review potential defenses, and that his blood alcohol content was 0.047 at the time of the alleged DUI. Moreover, the State admitted that defendant's blood alcohol content level was 0.047, and represented to the court that defendant had 1½ hours to consult with his attorney about the guilty plea. At this point in the proceedings, defendant's factual allegations became part of the record. Postplea counsel reviewed the transcripts and incorporated defendant's allegations into the amended motion to withdraw guilty plea. Therefore, the amended motion was not "based on facts that do not appear of record," and no affidavit was required. Ill. S. Ct. R. 604(d) (eff. July 1, 2006).

¶ 30

CONCLUSION

¶ 31 For the foregoing reasons, the judgment of the circuit court of Will County is affirmed.

¶ 32 Affirmed.

¶ 33 JUSTICE McDADE, specially concurring.

¶ 34 This order affirms the decision of the Will County Circuit Court denying defendant, Thomas Sterna's, amended motion to vacate his guilty plea. I concur in the judgment because I agree that an abuse of the trial court's discretion is not clearly evident on the facts before us.

¶ 35 There are, however, some troubling aspects to the events described in our record that suggest that an injustice may have been done in this case. First, defendant's case was scheduled for a bench trial on June 8, 2010, pursuant to a jury waiver filed that same morning. Defendant's court-appointed attorney announced she was ready to proceed, even though she had never spoken with him about the merits of his defense. The court told the parties to be seated and he would get to them soon. When the case resumed during the afternoon session, defendant's attorney

tendered defendant's guilty plea and asked for a sentencing date to be set.

¶ 36 During the court's admonishments, defendant acknowledged: giving up his right to trial, that he was not forced, threatened, or coerced into pleading guilty, and that he had had sufficient time to talk to his attorney *about the plea*. At that time, as our decision recites, the plea was entered, albeit without a factual basis being presented to the court.

¶ 37 On July 15, 2010, defendant filed a written motion which stated:

“Your Honorable Brian E. Barrett, I beg your forgiveness. I would like to Motion to Vacate my guilty plea, entered on June 8, 2010, as I was ‘in fact’ pressured into a guilty plea (which I was not guilty of), by the states attorney who put an offer on the table stating that I only had now (minutes) to accept and could not have any additional time to think about it. I will follow up with this on my next court date of July 20, 2010 unless you wish to see me sooner. I can be reached at the following (address and phone number omitted). My public defender was Dana Jakusz (phone number omitted). Thank you Tom”

As can be seen, defendant makes no allegations against his own attorney.

¶ 38 Nevertheless, at the motion hearing on July 16, 2010, his attorney declined to adopt and argue the motion, asserting she would be arguing her own ineffectiveness. In addition, at the hearing, the trial court misstated the gist of defendant's motion as having been directed against his attorney and asked him to explain how *his counsel* was ineffective.

¶ 39 Defendant responded that he had made a list and he told the court essentially the

following:

1. He was innocent and there was no factual basis to support the guilty plea;
2. His lawyer was recently assigned, they had not discussed *the case* at all, and, because of that she had no knowledge of any potential defenses and could not properly advise him at the time of taking the plea.
3. While waiting for the trial to start, he was told about *new*, previously-undisclosed discovery. He was moved to a small room and his attorney left the room. On her return (with no indication of how long she had been gone) she passed on information he assumed came from the state's attorney. He had no opportunity to talk with the state's attorney himself and also had no time to discuss with his own attorney either "the existing case" or the new information that was brought forth.
4. He was given the impression that he was causing a delay and trying the court's patience because his was the last case of the day.

¶ 40 When the court attempted to get "the record clear," it recited all of the court proceedings from the time defendant was charged and, upon finally arriving at June 8, 2010, indicated erroneously that the factual basis had been given and accepted. The court then recounted in detail the admonishments he had given defendant and the responses elicited and then asked defendant "why that admonishment wasn't valid to you?"

¶ 41 Defendant responded that he had been "passed along" a plea agreement that he had to respond to right away. He asked his attorney to seek more time and she came back and said the answer was "no," the offer was only for here and now. And because he was told the judge was getting impatient and he feared he might not get a fair trial, he agreed to the plea.

¶ 42 The court then asked defendant what evidence he had of his innocence and defendant answered there was no proof he was under the influence of anything. He had asked to have a blood test at the time, but was refused. He had passed the breathalyzer and he had information from the DMV “stating that all [his] prescriptions are safe to drive on and there is no basis for this charge even existing.”

¶ 43 Whereupon the court read defendant the statute about combination of drugs not being a defense and then paraphrased it when defendant did not understand. Defendant still persisted in his claim of innocence because there was no proof that he took the medications that day and he denied that he had. In response to the court’s second inquiry about why he had signed the plea agreement, defendant simply reiterated that he had been pressured to enter it and was given “no time at all” to think about it.

¶ 44 Thereafter, the state’s attorney stated her recollection of the plea agreement discussions and suggested (without having been present) that the public defender and defendant had spent almost the entire time discussing his rights and explaining what he was giving up by pleading and “reminding” the court that it had informed defendant of things not reflected in the record. The state’s attorney then offered her recollection of the factual basis.

¶ 45 When asked for final argument, defendant simply reiterated his innocence and his belief that he could prove it if given the chance. The trial court then recounted, without total accuracy, the sequence of events surrounding the guilty plea. The court apparently accepted at face value the representations of the state’s attorney regarding defendant’s “ample” time with his attorney.

¶ 46 There are two disturbing elements in this scenario. First, because defendant’s attorney had declined to participate in arguing the motion to withdraw the guilty plea and because

substitute counsel had not been provided, there was no one to advise defendant about pertinent details to make his argument more cogent. Therefore, significantly, there was no evidence in the record of how much time had actually been devoted to discussion between counsel and client of the wisdom and merit of accepting the State's offer (except the state's attorney's speculation of both time and content) and there was no corroboration of the defendant's assertion that he and his attorney had *never* had an opportunity to discuss the merits of his case so they could be considered in weighing the plea offer.

¶ 47 My second concern is that the interplay between the court and the defendant was like trains passing on parallel tracks. The court had asked if defendant was "forced, threatened, or coerced;" the defendant had answered "no" even though he felt pressured because the state's attorney demanded an immediate response to the offer and he had no time to weigh his options or to think. The court asked if defendant had had enough time to discuss the plea with his attorney and defendant answered "yes" even though he had been denied time to actually consider the offer and he had not had a chance to discuss his case with counsel so she could properly advise him about the wisdom of accepting the plea. The court appeared to assume the truth of defendant's statements to the police at the scene about medicine he had taken before driving (arguably a confession), although defendant contended that he advised the police shortly after his arrest that he had not taken anything and asked for a blood test, which was refused.

¶ 48 The court denied the motion and defendant was sentenced at a later date.

¶ 49 Arguably much or all of this became irrelevant when defendant, after remand from the appellate court, was allowed to file and argue, by counsel, an amended motion to withdraw his guilty plea. There are two reasons why I believe it is still relevant. The first is that, as the order

points out, it is all still in the record and actually serves as part of the basis for this new decision.

See ¶28. The second is the argument on the amended motion.

¶ 50 The motion itself advises, for the first time, that the new discovery presented to the defendant on the day of trial was a “purported driving record showing the defendant was a repeat offender” and “that based on the new information regarding Defendant’s record, counsel for the Defendant advised him that he faced a jail sentence if he did not accept the plea negotiation offered by the State.” The amended motion also asserted that defendant sought to withdraw his plea after leaving the courthouse and having “a reasonable amount of time” to consider the information provided him on June 8, 2010, leading to his *pro se* motion to withdraw his guilty plea. It also confirmed defendant’s earlier allegation that he had never had a chance to discuss the merits of the case with his counsel. Finally, the motion makes clear, as did the original, that defendant’s quarrel was with the state’s attorney, not his counsel.

¶ 51 At the hearing on the amended motion, the sum total of the argument made on behalf of the defendant was as follows:

DEFENSE: “Judge, if you will take a minute to read the motion, everything I have to say is written in the motion.”

COURT: “He is standing on the motion.”

STATE: “Your Honor, if I can respond, just based on the notes in this case. This case was set for jury trial on January 6, 2010. It was set for June 8th of 2010. On that date the trial was continued to 1:30. According to the notes on the file, your Honor, on that day he did have a Public Defender. The Public Defender took the client to the conference room *to talk about the*

offer for almost two hours, the only case the PD had on that date for trial and had plenty of time to speak to the client. Based on that, your Honor, we ask that you deny the motion.” (Emphasis added.)

COURT: “Any response?”

DEFENSE: “Judge, I would have to acknowledge that I have reviewed the transcript. The Court did an inquiry as follows: Have you had enough time to talk to your attorney about this plea, and my client did say I believe so, yes, sir. My client’s position or objection is that basically it was on that date in conference with his Public Defender, the conference that he had with her was directed primarily towards the plea and the consequences, not towards his defense that he thought he could put forth at the time of trial.”

COURT: “Motion is denied.”

None of the significant questions left open after defendant’s uncounseled *pro se* argument of his original motion were addressed in the amended motion or argued before the court.

¶ 52 The amended motion to vacate guilty plea was heard by a different judge than the original *pro se* motion. Given the full record with the concerns I have noted above, I would probably have granted both of the motions. However, based on the content of and argument on the amended motion, it cannot fairly be said that the trial court abused its discretion in denying it.