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2012 IL App (3d) 110711-U

Order filed September 24, 2012

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 14th Judicial Circuit,
Plaintiff-Appellee,)	Rock Island County, Illinois,
)	
v.)	Appeal No. 3-11-0711
)	Circuit No. 09-CF-209
JOSEPH E. DILTS,)	
)	Honorable
Defendant-Appellant.)	F. Michael Meersman,
)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justice Holdridge concurred in the judgment.
Justice McDade dissented.

ORDER

- ¶ 1 *Held:* Defendant was sentenced within the terms of the plea agreement.
- ¶ 2 Pursuant to a plea agreement with a sentencing cap of six years of imprisonment, defendant, Joseph E. Dilts, pled guilty to theft (720 ILCS 5/16-1(a)(1)(A) (West 2008)) and two counts of burglary (720 ILCS 5/19-1(a) (West 2008)). Defendant was sentenced to two concurrent four-year terms of imprisonment and a four-year period of probation. Defendant appealed, arguing that: (1)

aggravation, the State requested that defendant be sentenced to a term of incarceration of six years. Defendant's counsel argued that at the Rule 402 conference there was "an indication that maybe the best thing is to serve a sentence on this of approximately three years, and then after that [defendant] might do a consecutive amount of probation for three years[.]"

¶ 8 In sentencing defendant, the trial court stated,

"[A]s far as the 402 conference, like I said, I haven't changed my mind or anything except for the fact rather than the three years on Counts 2 and 3 I'm giving you concurrent terms in prison of four years. ***

As to Count 1, I want you on four years of consecutive probation when you get out."

¶ 9 Defendant appealed. This court remanded the case for the appointment of counsel on defendant's postplea motion and for further postplea proceedings. *People v. Dilts*, No. 3-09-0944 (2010) (unpublished order under Supreme Court Rule 23). On remand, the trial court denied defendant's postplea motion. On appeal, this court remanded the case for proper compliance with Supreme Court Rule 605(c) and further postplea proceedings consistent with Rule 604(d). *People v. Dilts*, No. 3-10-0875 (2011) (unpublished order under Supreme Court Rule 23).

¶ 10 On the second remand, defendant's attorney filed a motion to withdraw guilty plea on behalf of defendant, alleging that pursuant to the plea agreement defendant should not have been sentenced to more than a total of six years, and his sentence of four years of imprisonment and four years of probation exceeded the negotiated sentencing cap. The trial judge reviewed transcripts of the proceedings and indicated that he was referring to the amount of time defendant could spend in prison when he referred to the sentencing cap, and not the entire sentence as suggested by defendant. The trial court denied defendant's motion to withdraw guilty plea. Defendant appealed.

¶ 11

ANALYSIS

¶ 12 On appeal, defendant argues that his sentence should be reduced because he did not receive the benefit of the bargain of his plea agreement for a six-year cap on his sentence. Alternatively, defendant argues that the trial court erred in withdrawing its concurrence to the plea agreement and this case should be remanded to allow him to withdraw his guilty plea.

¶ 13

I. Benefit of the Bargain

¶ 14 We reject defendant's contention that his sentence should be reduced because he did not receive the benefit of the bargain of his plea agreement.

¶ 15 A defendant may challenge the constitutionality of his guilty plea by claiming that he did not receive the benefit of the bargain. *People v. Whitfield*, 217 Ill. 2d 177 (2005). A defendant's constitutional right to due process and fundamental fairness is violated if he pleads guilty in exchange for a specific sentence, but receives a different, more onerous sentence than the one to which he agreed. *Id.* However, a defendant's constitutional due process and fundamental fairness rights are not violated in cases in which the plea agreement capped the sentence at so many years' imprisonment and the trial court imposed a prison term shorter than the cap. *People v. Merritt*, 395 Ill. App. 3d 169 (2009); *People v. Jarrett*, 372 Ill. App. 3d 344 (2007).

¶ 16 A defendant who receives a prison sentence shorter than the agreed upon years of imprisonment received the benefit of his bargain, even if the addition of mandatory supervised release (MSR) caused the duration of the sentence to exceed the agreed maximum years of imprisonment, because a year of MSR is not interchangeable with a year of imprisonment. *Merritt*, 395 Ill. App. 3d 169 (sentencing defendant to concurrent prison terms of 23 and 5 years, plus 3 years of MSR, under a plea agreement for 25 years of imprisonment was not a violation of due process);

Jarrett, 372 Ill. App. 3d 344 (sentencing defendant to 8 years of imprisonment, plus 3 years of MSR, under a plea agreement with a cap of 10 years of imprisonment was not a due process violation). Similarly, defendant's four-year term of probation is not interchangeable with four years of imprisonment in the Department of Corrections (DOC).

¶ 17 Here, the only agreement made in relation to defendant's sentence was that it should not exceed six years of imprisonment. Therefore, defendant's sentence that included a prison term of four years did not exceed the six-year cap. Thus, defendant received the benefit of his bargain, and he is not entitled to a reduction of his sentence.

¶ 18 II. Trial Court's Concurrence to Parties' Plea Agreement

¶ 19 We also reject defendant's alternative argument that he should be allowed to withdraw his plea because the trial court withdrew its concurrence to the parties' plea agreement. Under Illinois Supreme Court Rule 402(d)(2) (eff. July 1, 2012), when a trial judge has indicated his concurrence or conditional concurrence in plea agreement, but later withdraws his concurrence or conditional concurrence, "the judge shall so advise the parties and then call upon the defendant either to affirm or to withdraw his or her plea of guilty." When reviewing whether a supreme court rule has been violated, a question of law is presented requiring a *de novo* standard of review. *People v. Meza*, 376 Ill. App. 3d 787 (2007).

¶ 20 In this case, the trial judge concurred in the plea agreement that consisted of defendant "plead[ing guilty] to all three of the counts with a cap of six years in the Illinois Department of Corrections in relation to possible sentence." While the parties may have discussed a three-year prison term and three years of probation, the plea agreement was not that specific. The plea agreement merely capped the amount of time defendant would spend in prison at six years.

Defendant was sentenced within the terms of that agreement, and the trial judge did not withdraw his concurrence to that agreement.

¶ 21

CONCLUSION

¶ 22 For the foregoing reasons, the judgment of the circuit court of Rock Island County is affirmed.

¶ 23 Affirmed.

¶ 24 JUSTICE McDADE, dissenting.

¶ 25 The majority has affirmed the decision of the Rock Island County Circuit Court sentencing defendant, Joseph Dilts, to two concurrent four-year terms of imprisonment to be followed by a four-year period of probation. The defendant contends that this sentence is eight years, that it exceeds the negotiated sentencing cap of six years, and that he did not, in violation of his due process rights, get the benefit of his bargain. I believe the defendant is correct and I would reverse the decision and allow him to withdraw his guilty plea.

¶ 26 Initially, I would like to emphasize that I have no problem with the defendant serving a substantial sentence as he has pled guilty to significant criminal offenses. However, as long as our criminal justice system is apparently wedded to plea-bargaining, I think it needs to be undertaken in good faith.

¶ 27 The State argues, and the majority agrees, that the agreement was for six years in the Department of Corrections and that the four years of imprisonment followed by two years of mandatory supervised release complies with the terms of that agreement. I do not find it as clear as does the majority that those six years plus the four years of probation are consistent with the language of the negotiation and the understanding of the parties.

¶ 28 The following facts appear to be undisputed: the defendant asked for and was granted a sentencing conference pursuant to Supreme Court Rule 402 (d) (2) for the purpose of learning how the court would sentence him pursuant to the agreed six year sentencing cap; the parties and the court seemed to settle on a sentence of three years in the Department of Corrections and three years of probation. However, following the rule 402 conference, the trial court stated on the record, "It's my understanding at this point that [defendant] is going to plead to all three of the counts with a cap of six years in the Illinois Department of Corrections in relation to possible sentence." On its face, this statement appears to be inconsistent with the understanding that the defendant and his attorney had of the sentencing agreement.

¶ 29 Later the trial court reviewed the charges with the defendant in open court and stated:

"There's a cap of six years imposed upon the plea in relation to the total amount of time you could be ordered to serve in relation to the plea agreement. ***

* * *

By pleading guilty though you waive your rights to trial *** and within a trial ***, and in this case ask this court to sentence you to a maximum cap of six years in Illinois Department of Corrections, *anything from probation up to six years.*" (Emphasis added.)

The court then heard the factual basis and accepted defendant's plea of guilty on all three counts of the information.

¶ 30 Later, at the sentencing hearing, the court said, relative to the 402 conference:

"I haven't changed my mind on anything *except for the fact rather*

than the three years on Cts 2 and 3, I'm giving you concurrent terms in prison of four years." (Emphasis added.)

¶ 31 A fair reading of the foregoing appears to me to show that the trial court did agree to three years in prison and three years on probation. While the State insists that the court never made that agreement, the court's own language at the sentencing hearing on September 2, 2009, clearly shows otherwise. The court "changed [its] mind" and sentenced the defendant to two concurrent terms of four years in prison, two years of mandatory supervised release, and four years on probation.

¶ 32 More importantly, I believe a fair reading of the court's various statements shows that its comments, taken altogether, reasonably could have suggested to the defendant and his counsel *prior to taking the plea* that sentencing in the Department of Corrections could include probation, as they thought was the understanding in the conference.

¶ 33 Our statutory sentencing scheme lends itself to some confusion in this regard if the courts are not completely precise in articulating what is being done. In the instant case, it is not clear to me what the sentencing cap was. Illinois statutes make clear that a "sentence" capped at six years could include the term of imprisonment, the mandatory supervised release, and the period of probation. A "sentence in the Department of Corrections" capped at six years would not include the period of probation because a person convicted and given probation is in the custody of the court, not the Department of Corrections. *People v. Speece*, 367 Ill. 76, 79-80 (1937), quoting *Dillingham v. United States*, 76 F.2d 35 (1935) (a defendant on probation is in the custody of the court issuing the probation order.) The trial court used the terms "sentence" and "sentence in the Department of Corrections" interchangeably in his discussions with defendant and his attorney.

¶ 34 Moreover, the statements made by the court at the time of defendant's guilty plea could be heard, not unreasonably, as suggesting that the time in the department of corrections could include "anything from probation up to six years." This would have been fully consistent with the professed understanding of defendant and his counsel that the court had agreed to a sentence of three years in prison and three years of probation.

¶ 35 The defendant has sought two possible types of relief in his appeal: first, that his sentence be reduced to a term reflective of what the trial court indicated it would give in the 402 conference, and, second, that he be allowed to withdraw his guilty plea because the court withdrew its concurrence following the 402 conference. I do not believe that there is enough certainty either in the circumstances surrounding defendant's sentencing or the lack of binding effect on the trial court of agreements in such conferences to warrant a reduction in his sentence. It does, however, seem clear that the defendant's guilty plea was entered believing, not unreasonably, a bargain had been struck that would result in a sentence different from and less than the one actually imposed. Either there was no meeting of the minds on the plea agreement or defendant did not get the benefit of the bargain he thought he had made. In either scenario, fairness would suggest he be allowed to withdraw his guilty plea.