

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2012 IL App (4th) 110635-U

NO. 4-11-0635

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
November 28, 2012
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	McLean County
DAVID A. SIMS,)	No. 10CF667
Defendant-Appellant.)	
)	Honorable
)	Robert L. Freitag,
)	Judge Presiding.

JUSTICE COOK delivered the judgment of the court.
Justices Steigmann and Appleton concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court did not err in denying defendant's motion to withdraw plea of guilty and vacate judgment.
- ¶ 2 In July 2010, the State indicted defendant, David A. Sims, for unlawful possession of cocaine with intent to deliver (720 ILCS 570/401(c)(2) (West 2010)) (count I), and unlawful possession of cocaine (720 ILCS 570/402(c) (West 2010)) (count II). Defendant's prior convictions mandated that he be sentenced as a Class X offender, 6 to 30 years, upon conviction of count I. His prior convictions made him eligible for an extended term upon conviction of either count. On March 8, 2011, defendant entered a negotiated plea. Under the terms of the agreement, defendant would plead guilty to count I in exchange for dismissal of count II and a sentencing cap of 20 years. In April 2011, the trial court sentenced defendant to 14 years. Defendant appeals, arguing the court erred when it denied his motion to withdraw plea of guilty

and vacate judgment, and his plea of guilty was not voluntary because it was based on a misapprehension of law. Defendant testified at the hearing on the motion that he felt "forced into trial with inadequate counsel," and he wanted his counsel to call two witnesses whose testimony could exonerate him of the intent-to-deliver charge. Further, defendant did not know to tell the judge at the final pretrial that he did not want to go to trial yet and that he wanted witnesses subpoenaed.

¶ 3

I. BACKGROUND

¶ 4 On July 10, 2010, Bloomington police officer Steve Moreland observed the driver of a white Pontiac stop in the road on Riley Drive, a "high drug, high crime area," and saw defendant walk to the passenger side of the vehicle, lean in the window, and talk to the driver of the vehicle. When defendant noticed Moreland's squad car, he entered the Pontiac and the driver drove away. Moreland stopped the vehicle and defendant was found to be in possession of 15 individually wrapped Baggies of cocaine totaling 8.4 grams, and \$185.70 United States currency.

¶ 5 At the October 14, 2010, final pretrial hearing, defendant asked the trial court if his attorney, appointed counsel from the office of the Public Defender, had "witnesses called." Counsel advised the court that defendant had not made him aware of witnesses he wanted called, and he and defendant had "talked *** at great lengths" about filing a motion to suppress and counsel had decided there was no basis for such a motion. The court explained that it was counsel's decision whether to file a motion to suppress and "what witnesses to call." The court asked if defendant had given counsel the names and addresses of the witnesses. Defendant stated counsel "never gave him the opportunity" to make him aware of witnesses. The court asked defendant for the names of the witnesses and ordered defendant to give counsel the telephone

number of a witness so counsel could try to talk to her before trial, set for October 18, 2010.

¶ 6 On October 18, defense counsel requested a continuance so that he could subpoena the witness, who "does have some testimony that would be relevant and material." The trial court continued the trial to November 15, 2010. Defendant then complained, "Prior to any time coming in here, I haven't really felt I had the opportunity to speak or address. [Counsel] has told me if I go to trial that I will be found guilty and I should cut my losses." The court replied, "You don't have to accept his advice, but that's his job is to give you his opinion." Defendant added that counsel would not subpoena evidence "crucial" to his defense—the videotape of the traffic stop and told defendant that he had no right to test the traffic stop.

¶ 7 On October 27, appointed counsel filed a motion to suppress evidence on the ground the officer had no grounds to effect an investigative stop of the Pontiac in which defendant was riding as a passenger. Following a hearing on November 30, 2010, the trial court granted the motion but then granted the State's motion to reconsider on December 23, 2010. After conferring with defendant, defense counsel requested "a little more time to engage in plea negotiations." The court continued the matter to January 24, 2011. On January 24, defense counsel asked the case be set for jury trial, and it was set for March 7, 2011. On March 7, defense counsel moved to continue the trial on the ground that defendant's family had retained counsel for him. The court asked defendant why he had waited so long to hire counsel, who had not yet entered an appearance. Defendant did not directly respond but complained he and counsel were not "compatible," and he was just made aware there were "no counteroffers, anything of that nature." The court continued the case to March 9 to permit hired counsel to enter an appearance.

¶ 8 On March 8, 2011, defendant appeared in court with appointed counsel, who advised the trial court the parties had reached a plea agreement. Under the terms of the agreement, defendant would plead guilty to count I of the indictment in exchange for dismissal of count II and a sentencing cap of 20 years' imprisonment, with defendant reserving the right to request a sentence less than 20 years. The parties agreed that the street-value fine should be \$850. The court advised defendant of the nature of the charge to which he was pleading and the penalties that could be imposed in the absence of an agreement, including the fact that he had to be sentenced as a Class X offender and that the term of imprisonment would be followed by a three-year term of mandatory supervised release. The court asked defendant if he understood the penalties for the offense, and defendant said that he did. The court then reviewed the terms of the plea agreement and asked defendant if he understood them. Defendant asked for a further explanation of the fines that would be imposed. The court explained the various fines that would be imposed and asked defendant if he understood. Defendant replied in the affirmative. The court then apprised defendant of his right to persist in his not guilty plea and the rights that he would be waiving if he pleaded guilty. Defendant said that he understood and that he did not have any questions about his "trial rights." The court then asked, "has anybody forced you or threatened you or coerced you at all to make you plead guilty to this charge today?" And defendant responded, "no." The court asked defendant if anyone had promised him anything, other than what was set forth in the plea agreement, and defendant answered in the negative. The State provided a factual basis. The court accepted defendant's guilty plea and ordered the preparation of a presentence investigation report.

¶ 9 Immediately after sentencing, on April 25, 2011, defendant filed a *pro se* motion

to withdraw his guilty plea. On June 28, 2011, different counsel, an assistant public defender, filed an amended motion to withdraw guilty plea. The trial court denied the motion, noting that the record completely contradicts defendant's allegations that he did not understand the ramifications of the plea agreement or the consequences of his actions and that the plea was not voluntary or knowing.

¶ 10

II. ANALYSIS

¶ 11 The Illinois Supreme Court recently discussed motions to withdraw guilty pleas, in *People v. Baez*, 241 Ill. 2d 44, 109-110, 946 N.E.2d 359, 398 (2011):

"The decision to grant or deny a motion to withdraw a guilty plea rests in the sound discretion of the circuit court and, as such, is reviewed for abuse of discretion. *People v. Delvillar*, 235 Ill. 2d 507, 519 (2009); *People v. Walston*, 38 Ill. 2d 39, 42 (1967). A defendant does not have an automatic right to withdraw a plea of guilty. *People v. Jamison*, 197 Ill. 2d 135, 163 (2001). Rather, defendant must show a 'manifest injustice' under the facts involved. *Delvillar*, 235 Ill. 2d at 520; *Jamison*, 197 Ill. 2d at 163. The decision of the trial court will not be disturbed unless the plea was entered through 'a misapprehension of the facts or of the law' or if there is doubt as to the guilt of the accused and justice would be better served by conducting a trial. *Delvillar*, 235 Ill. 2d at 520."

¶ 12

The State first argues that we should not consider an issue raised in defendant's

pro se motion, that his plea was induced by his belief that counsel would not provide effective assistance at trial, because the amended motion filed by his newly appointed postplea counsel did not raise that issue. However, defendant testified at the hearing on the motion to withdraw plea that he felt he was being forced into trial with inadequate counsel, that counsel told him he did not have sufficient grounds for his motion to suppress, that counsel lied to him, and refused to call witnesses. Arguments not raised in the trial court or argued in appellant's brief on appeal are waived. *Kiefer v. Rust-Oleum Corp.*, 394 Ill. App. 3d 485, 493 n.2, 916 N.E.2d 22, 28 n.2 (2009). Defendant's arguments here were raised in the trial court and were argued in his brief, and we will address them.

¶ 13 Defendant argues his plea was based on a misapprehension of law, that he thought, when he pleaded guilty, he was being forced into trial with inadequate counsel. Defendant says he did not trust his appointed counsel because counsel had originally stated there was no basis for a motion to suppress, then later filed a motion and "initially" won it. One of the witnesses defendant wanted called would state that he was familiar with defendant's drug habit and knew that eight grams was an amount that could be for defendant's "personal use." The second witness was the driver of the vehicle, who would testify that he was not buying drugs from defendant. The testimony both witnesses would have given was relevant because that evidence, if believed, could exonerate defendant of the greater charge, possession with intent to deliver a controlled substance.

¶ 14 The record directly refutes defendant's testimony that defense counsel would not have called witnesses to support his claim that the cocaine in his possession was for his personal use. The fact that defense counsel may have told defendant of the possibility of receiving a

greater sentence after trial cannot be considered coercive. *People v. Woods*, 134 Ill. App. 3d 294, 300, 480 N.E.2d 179, 183 (1985). After the trial court reconsidered its ruling on the motion to suppress and denied the motion, defendant evidently realized that a plea bargain would be his best option. The evidence of defendant's intent to distribute was compelling. The 8.4 grams of cocaine were broken down into 15 individually wrapped Baggies, and Officer Moreland testified that defendant's approach of the driver of the Pontiac stopped in the road on Riley Drive, a "high drug" area, was indicative of "a drug sale." Defendant jumped in the Pontiac when he saw Moreland's car behind him. Following his arrest, defendant told the police that he was "selling cocaine to provide for his family." If defendant had proceeded to trial and been convicted of possession with intent to distribute, he would have been exposed to a much lengthier prison sentence than the 20-year cap agreed to by the State. The court specifically asked defendant if anyone was coercing him to plead guilty, and defendant unequivocally responded in the negative. The court did not abuse its discretion by denying defendant's motion to withdraw his guilty plea.

¶ 15

III. CONCLUSION

¶ 16 We affirm the trial court's judgment. We grant the State its statutory assessment of \$50 against defendant as costs of this appeal.

¶ 17 Affirmed.