

NOTICE  
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2012 IL App (4th) 110682-U

Filed 7/27/12

NO. 4-11-0682

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
STEVE D. STOLTZ,	)	No. 09CF726
Defendant-Appellant.	)	
	)	Honorable
	)	Charles G. Reynard,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.  
Justices Steigmann and McCullough concurred in the judgment.

**ORDER**

¶ 1 *Held:* The appellate court affirmed the trial court's denial of defendant's motion to withdraw guilty plea but vacated the court's imposition of a public-defender fee and remanded with directions for a hearing.

¶ 2 In August 2009, the State charged defendant, Steve D. Stoltz, with unlawful possession of a controlled substance, less than 15 grams (720 ILCS 570/402(c) (West 2008)), a Class 4 felony. In January 2010, defendant entered into an open guilty plea. In March 2010, the trial court sentenced defendant to three years in prison, with one year of mandatory supervised release. In April 2010, defendant filed a motion to withdraw guilty plea, and the court denied the motion. Defendant appeals, arguing the court erred in (1) denying his motion because his guilty plea was not knowing and voluntary but was based on a misapprehension of the law and (2) imposing a \$200 public-defender fee without a hearing on his ability to pay. We affirm in part,

vacate in part, and remand with directions.

¶ 3

## I. BACKGROUND

¶ 4

On August 15, 2009, defendant was a passenger in a car driven by Peter Shawgo. Police stopped Shawgo's car on Interstate 55. Shawgo was driving without a license and was arrested. The officers who conducted the stop asked defendant to step out of the vehicle. The officers offered to give defendant a ride off the interstate. Department policy required the officers to perform a pat-down search of defendant before allowing him to ride in their vehicle. The officers searched defendant and found a chunky white substance in his pocket, which later tested positive for nine grams of cocaine.

¶ 5

On August 17, 2009, the State charged defendant with unlawful possession of a controlled substance, less than 15 grams. On January 14, 2010, defendant appeared in the trial court with his attorney. The court informed defendant of the charge against him and the possible sentences. The court admonished defendant of his rights. The State presented the following factual basis to the court:

"Judge, if this had proceeded to trial, the testimony would be that on August 15, 2009, the defendant, Steve Stoltz, was a passenger in a vehicle that was stopped for a traffic stop. The driver of that vehicle did not have a valid driver's license at the time, and the car was going to be towed. They had offered or were going to give Mr. Stoltz a ride, and in order for him to be transported, in order to do that, they performed a pat down search of his person. In his pocket, a chunky white substance was discovered.

That was later field tested and tested positive for nine grams of cocaine."

Defense counsel added the following remarks:

"MR. WELCH: Your Honor, we would so stipulate. And I think an additional fact for the record, and Ms. Patton doesn't know this because it is not her case. She may have said it, I don't remember, but he was on the interstate where you can't be a—like a hitchhiker or a walker. So he had to be taken, not into custody, but he had to be given a ride off of the interstate. And so that's how he ended up being searched.

THE COURT: I see.

MR. WELCH: But he couldn't turn down their offer of a ride because he was on the interstate."

The court found a factual basis supported defendant's guilty plea and defendant had voluntarily waived his trial rights. The court adjudged defendant guilty of possessing a controlled substance.

¶ 6 On April 20, 2010, new counsel for defendant filed a motion to withdraw guilty plea. The motion alleged "[d]efendant's plea was entered into on a misapprehension of the facts and/or the law." Specifically, defendant alleged prior defense counsel misunderstood the nature of the search performed on August 15, 2009, the purpose of the search, any law-enforcement policy regarding the search, and the admissibility of any results of the search. The motion alleged defense counsel misstated the facts of the case when, at the sentencing hearing, defense counsel stated defendant "was being put in a patrol car to be transported away from the scene and

was searched pursuant to protocol because you have to search people you're transporting."

Defendant further alleged the pat-down search was improper and defense counsel was under a misapprehension of the law when defense counsel believed the State had enough evidence to sustain a conviction.

¶ 7 On July 2 and July 28, 2010, the trial court held a hearing on defendant's motion to withdraw guilty plea. Defendant testified he was asked to exit the vehicle after Shawgo was arrested. Defendant did not have a valid driver's license. After exiting the vehicle, the officers told defendant they had to perform a pat-down search for their safety because they were on an interstate. The officers also informed defendant he would have to be transported off the interstate. Defendant testified he told the officers " I can get a ride, and I have somebody that can come right now.' " The officers instructed defendant to turn off his cell phone. The officers informed defendant a canine unit was on the way and they were going to search the vehicle and have it towed. Defendant consented to a search of the vehicle but did not consent to a search of his person. The officers told defendant he would be resisting if he did not allow them to perform a pat-down search. The officers performed the search and found a chunky white substance in his pocket. Defendant was wearing shorts and a tank top.

¶ 8 Defendant testified he was present during the plea and sentencing hearings and heard his counsel's recitation of the facts. Defense Counsel asked defendant if he recognized what his first counsel said in court was not accurate when defense counsel said it. Defendant responded, "[n]ot really, no." On re-cross-examination, the State asked defendant when he first realized "that Mr. Welch and the State's Attorney had misconstrued the facts in this case." Defendant responded, "I don't know. Somewhere there around sentencing after I'd talked with

counsel, I believe, after \*\*\* [he] had gotten ahold of me." Defendant admitted he did not raise the issue of his misunderstanding of the facts with his first defense counsel or the trial court.

¶ 9 Defendant's first attorney, Harvey Welch, also testified at the hearing on defendant's motion. Welch recalled the following facts: defendant was involved in a traffic stop where "there was nobody to drive the car, so the car was going to be towed." Because the stop was on the interstate, defendant "could not walk from where he was, and had no one there to transport him, so he was going to be taken into custody, for lack of a better word, \*\*\* because he is not allowed—no one is allowed to walk, or hitchhike, on the interstate highways." Welch testified from his discussions with the State, his understanding was as follows:

"the jurisdiction that was involved in—or that would have been involved in the transportation of Mr. Stoltz had a policy that, when someone was going to be placed in a squad car, that they were to be searched for officer safety and evidence of anything else of value or importance."

Welch testified he told defendant there was no way to suppress the evidence discovered during the search because the search was permitted by law or by policy. Defense counsel asked Welch if he had performed any research as to whether it would have been proper for the police to take defendant into custody at the time of the search. Welch replied:

"No, not necessarily, because, again, I did research to determine that you can't walk on the interstate highway; so therefore, I concluded that they had the authority, then, to, as I said, take him into custody. Not necessarily under arrest, but transport him

from where he was to another location, and that would have been done in a police car, and, therefore, that would have led to a search, at least for the purposes of safety."

¶ 10 The trial court denied defendant's motion. The court stated the "characterization that's being made of Mr. Welch's judgment as a factual mistake is not a mistake. In a narrative sense, we're dealing with the threshold of a change in status, vis-a-vis passenger to pedestrian. Obviously, he was a passenger, but since he couldn't drive the car away, he was an incipient pedestrian. Within moments, if the police had left him there, he would be a pedestrian, and that's simply not allowable."

The court also emphasized, had defendant already had a ride there waiting for him, "that would have made it a much closer question, because, then, maybe he wouldn't have been an incipient pedestrian." However, defendant testified he could have called for a ride, not he had a ride. The court found under all the circumstances, "Mr. Welch's characterization of the matter, I think, reflected sound judgment on his part."

¶ 11 This appeal followed.

¶ 12 II. ANALYSIS

¶ 13 On appeal, defendant argues the trial court erred in denying his motion to withdraw guilty plea. Defendant argues he did not voluntarily and knowingly enter his guilty plea because his plea was made upon a misapprehension of the law resulting from trial counsel's misrepresentation about whether defendant could challenge his pat-down search. Defendant also

argues the court improperly imposed a \$200 public-defender fee without first conducting a hearing on defendant's ability to pay. We address each argument in turn.

¶ 14                                   A. Defendant's Motion To Withdraw Guilty Plea

¶ 15                   Defendant's first challenge on appeal is to the trial court's denial of his motion to withdraw guilty plea. Generally, this court will not reverse a trial court's denial of a motion to withdraw guilty plea unless the court's decision was an abuse of discretion. *People v. Davis*, 145 Ill. 2d 240, 244, 582 N.E.2d 714, 716 (1991). If a guilty plea was entered on a misapprehension of the law or as a result of misrepresentations by counsel, the court should allow the defendant to withdraw his or her guilty plea. *Davis*, 145 Ill. 2d at 244, 582 N.E.2d at 716.

¶ 16                   Defendant argues the trial court should have granted his motion to withdraw guilty plea because his plea was based on trial counsel's erroneous advice no challenge could be made to the search which led to his arrest. Our supreme court has held the erroneous advice of counsel does not alone destroy the voluntary nature of a guilty plea. *People v. Pugh*, 157 Ill. 2d 1, 14, 623 N.E.2d 255, 261 (1993). Whether defendant's plea, made in reliance on counsel's advice, was voluntary and knowing depends upon whether defendant's counsel provided ineffective assistance. *Pugh*, 157 Ill. 2d at 14, 623 N.E.2d at 261.

¶ 17                   The two-part test established in *Strickland v. Washington*, 466 U.S. 668 (1984), for determining whether a defendant received effective assistance of counsel is applicable to the plea process. *Pugh*, 157 Ill. 2d at 14, 623 N.E.2d at 261. A defendant must show (1) counsel's performance was deficient and (2) defendant was prejudiced as a result. *Pugh*, 157 Ill. 2d at 14, 623 N.E.2d at 261. To satisfy the "prejudice" prong in plea proceedings, "the defendant must show there is a reasonable probability that, absent counsel's errors, the defendant would have

pleaded not guilty and insisted on going to trial." *People v. Hall*, 217 Ill. 2d 324, 335, 841 N.E.2d 913, 920 (2005). A bare allegation is insufficient and the defendant's claim must be accompanied by a plausible defense or a claim of innocence. *Hall*, 217 Ill. 2d at 335-36, 841 N.E.2d at 920. Whether defendant was prejudiced depends largely upon whether defendant would have likely succeeded at trial. *People v. Mrugalla*, 371 Ill. App. 3d 544, 548, 868 N.E.2d 303, 307 (2007). Defendant claims he entered a guilty plea based on counsel's misrepresentation he should not file a motion to suppress. Defendant was prejudiced only if he would likely be successful on a motion to suppress.

¶ 18 The State argues trial counsel's decision not to file a motion to suppress is a matter of trial tactics and is not subject to review. See *People v. Meyers*, 246 Ill. App. 3d 542, 545, 616 N.E.2d 633, 636 (2002). "It has also been held, however, that failing to file a motion to suppress can constitute ineffective assistance of counsel under certain circumstances \*\*\*, such as where it appears from the record that such a motion constituted the defendant's only viable defense." *Meyers*, 246 Ill. App. 3d at 545, 616 N.E.2d at 636. Defendant must show (1) the motion would have been granted and (2) the outcome of the trial would have been different.

¶ 19 Defendant argues the trial court would have granted a motion to suppress because the pat-down search the police performed was improper. The State argues the motion would not have been granted because the search was proper as a legitimate exercise of the police's community-caretaking function.

¶ 20 "Community caretaking is an exception to the fourth amendment's warrant requirement and is used to 'uphold searches or seizures as reasonable under the fourth amendment when police are performing some function other than investigating the violation of a

criminal statute.' " *People v. Mains*, 2012 IL App (2d) 110262, ¶ 13, 2012 WL 1664217. This exception applies when "(1) the officer is performing a function other than the investigation of a crime, and (2) the search or seizure was reasonable because it was undertaken to protect the safety of the general public." *Mains*, 2012 IL App (2d) 110262, at ¶ 13, 2012 WL 1664217. The community-caretaking exception has been found to apply to pat-down searches performed by officers offering a "courtesy ride" in a patrol car. See *People v. Smith*, 346 Ill. App. 3d 146, 164, 803 N.E.2d 1074, 1089 (2004). The Second District has held "that the need to transport a citizen in a police vehicle presents an exigent circumstance justifying a minimally intrusive pat-down of the citizen's outer clothing for weapons." *Smith*, 346 Ill. App. 3d at 164, 803 N.E.2d at 1089.

¶ 21 In *Smith*, the defendant was one of three passengers in a car that was the subject of a traffic stop on the interstate. *Smith*, 346 Ill. App. 3d at 149, 803 N.E.2d at 1078. The driver of the vehicle was arrested for driving under the influence. *Smith*, 346 Ill. App. 3d at 149, 803 N.E.2d at 1077-78. Two of the passengers in the car, including the defendant, were intoxicated and thus were unable to drive the car after the traffic stop. *Smith*, 346 Ill. App. 3d at 149, 803 N.E.2d at 1078. The third passenger had a suspended driver's license and was also unable to drive the car. *Id.* The officers gave the three passengers the option of using their cellular telephones to find a means of transportation off the interstate. *Id.* The passengers were unsuccessful in locating transportation. *Id.* The officers could not allow the passengers to remain on the interstate because doing so would be in direct violation of the Illinois Vehicle Code. *Smith*, 346 Ill. App. 3d at 151, 803 N.E.2d at 1079. The officers then offered the passengers a courtesy ride to the police station in their vehicle. *Smith*, 346 Ill. App. 3d at 149, 803 N.E.2d at 1078. Before allowing the passengers in their vehicle, the officers performed a pat-down search of each

passenger pursuant to a department policy that required officers to search passengers for weapons before allowing them into their vehicle. *Smith*, 346 Ill. App. 3d at 150, 803 N.E.2d at 1079. The defendant complied with a pat-down search and the officers found a handgun on the defendant and arrested him. *Smith*, 346 Ill. App. 3d at 151, 803 N.E.2d at 1079.

¶ 22 The defendant in *Smith* filed a motion to suppress, which the trial court granted. *Smith*, 346 Ill. App. 3d at 152, 803 N.E.2d at 1080. The trial court found the search was illegal and the handgun was the fruit of an illegal detention. *Id.* The Second District reversed, concluding the officers had legally detained the passengers after the original traffic stop had ended. *Smith*, 346 Ill. App. 3d at 149, 803 N.E.2d at 1078. Because the *Terry* stop (*Terry v. Ohio*, 392 U.S. 1 (1968)) was complete, the police-citizen encounter between the officers and the passengers became a community-caretaking situation. *Smith*, 346 Ill. App. 3d at 155, 803 N.E.2d at 1082. The detention was therefore legal for two reasons: (1) the officers had a reasonable suspicion a crime was about to be committed—it would have been illegal for the passengers to walk intoxicated on the interstate, had the officers left them there; and (2) under the particular facts of the case, an emergency situation existed which justified a seizure of the defendant's person—the emergency being the passengers were otherwise stranded on an interstate on which they could not legally remain as pedestrians. *Smith*, 346 Ill. App. 3d at 159-61, 803 N.E.2d at 1085-87.

¶ 23 Defendant argues *Smith* is factually different because the passengers in *Smith* were given options of how to leave the interstate. In *Smith*, the appellate court concluded the officers were justified in removing the defendant from the roadside because once all other legal options were exhausted, the officers had a duty to safely transport the passengers off the highway. *Smith*,

346 Ill. App. 3d at 166, 803 N.E.2d at 1091. Defendant alleges he was not provided alternate "legal options" to leave the interstate. Rather, the officers told him to turn off his cellular telephone, and he was not allowed to call for a ride. Defendant argues, had he been allowed to call for a ride, defendant would have had a "legal option" which would have removed him from the interstate. Defendant contends the officers were not justified in transporting him off the highway because all other legal options had not been exhausted, and the search was therefore improper. We disagree with defendant's conclusion police were required to afford him the opportunity to arrange an alternative way off the interstate.

¶ 24 In *People v. Queen*, 369 Ill. App. 3d 211, 219-20, 859 N.E.2d 1077, 1084 (2006), the Second District clarified its holding in *Smith* "should not be construed as a mandate that a peace officer who encounters an individual in an exigent situation must conceive and explore all means short of a seizure for bringing the individual to safety. The overarching criterion for searches and seizures is reasonableness." Defendant found himself in an exigent situation contemplated by the community-caretaking function when his status changed from a passenger in a car to a pedestrian on the interstate. The officers could not reasonably leave defendant on the interstate, as it would have been dangerous to him and in direct violation of the Illinois Vehicle Code. It was reasonable for the officers to transport defendant off the interstate; and as we have already established, police officers may perform a minimally intrusive pat-down search before providing a courtesy ride in their vehicle as a community-caretaking function. We conclude the search was reasonable under the circumstances.

¶ 25 Because we conclude the search was justified under the community-caretaking function, defendant would not succeed on a motion to suppress. Thus, defendant has not shown

his counsel was deficient for failing to file a motion to suppress and he was prejudiced as a result of counsel's performance. The trial court properly denied defendant's motion to withdraw guilty plea.

¶ 26 B. Public-Defender Fee

¶ 27 Defendant next argues his public-defender fee must be vacated because the trial court failed to conduct a hearing on defendant's ability to pay. Defendant requests this court to vacate the public-defender fee outright. The State concedes the court erred by imposing a public-defender fee without conducting the appropriate hearing. However, the State argues this court should vacate the fee and remand for a hearing on defendant's ability to pay. We agree with the State.

¶ 28 Section 113-3.1(a) of the Code of Criminal Procedure of 1963 (725 ILCS 5/113-3.1(a) (West 2008)), allows a trial court to impose a reasonable public-defender fee upon a defendant who receives the assistance of court-appointed counsel. Our supreme court has held the court must conduct a hearing into the defendant's financial circumstances and determine the defendant's ability to pay before imposing such a fee. *People v. Love*, 177 Ill. 2d 550, 556, 687 N.E.2d 32, 35 (1997). A defendant must be given notice the court is considering imposing the fee and be given an opportunity to present evidence on his ability to pay. *People v. Barbosa*, 365 Ill. App. 3d 297, 301, 849 N.E.2d 152, 154 (2006). A hearing on defendant's ability to pay is to be held "no later than 90 days after the entry of a final order disposing of the case at the trial level." 725 ILCS 5/113-3.1(a) (West 2008)). Absent such a hearing, an order for reimbursement must be vacated and the cause remanded for a section 113-3.1 hearing. *People v. Bass*, 351 Ill. App. 3d 1064, 1070, 815 N.E.2d 462, 468 (2004).

¶ 29 The trial court imposed a \$200 public-defender fee in this case. During sentencing, the court ordered defendant to pay "all of the financials as were recommended by the State within two years of release." The court did not provide defendant notice it would be imposing a public-defender fee, nor did it allow defendant to submit evidence on his ability to pay. The court imposed the \$200 fee in a March 30, 2010, supplemental sentencing order and notified defendant of the fee in a "notice to party" issued by the circuit clerk. The Public Defender later filed a "waiver of public defender fee"; however, the record reflects the \$200 fee was paid out of defendant's bond.

¶ 30 Defendant argues, in light of *People v. Gutierrez*, 2012 IL 111590, 962 N.E.2d 437, we must vacate the public-defender fee outright. In *Gutierrez*, our supreme court held the trial court must conduct a section 113-3.1 hearing on its own motion or on a motion of the State's Attorney, and the circuit clerk's office is not authorized to *sua sponte* impose public-defender fees. *Gutierrez*, 2012 IL 111590, ¶ 24, 962 N.E.2d 437. The supreme court concluded when the circuit clerk *sua sponte* imposes a public-defender fee, the proper remedy is to vacate the fee outright. *Gutierrez*, 2012 IL 111590, ¶ 24, 962 N.E.2d 437.

¶ 31 The *Gutierrez* court however, chose not to address whether the 90-day time limitation in section 113-3.1 is mandatory or directory, and whether it is proper for the appellate court to remand for a section 113-3.1 hearing after the 90 days has passed. See *Gutierrez*, 2012 IL 111590, ¶ 21, 962 N.E.2d 437. Defendant argues the *Gutierrez* court indicated the 90-day limitation is mandatory, and thus, because 90 days has passed since the trial court entered a final order in his case, this court cannot remand for a section 113-3.1 hearing. We disagree with defendant's contention the supreme court implied the 90-day limitation is mandatory. Rather, it

