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2013 IL App (3d) 110628-U

Order filed June 10, 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 14th Judicial Circuit,
Plaintiff-Appellee,)	Rock Island County, Illinois,
)	
v.)	Appeal No. 3-11-0628
)	Circuit No. 10-CF-117
)	
JOE WAYNE BROWN,)	Honorable
)	Walter D. Braud,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices McDade and Schmidt concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court erred when it did not hear defendant's claim of ineffective assistance of counsel in his motion to withdraw guilty plea before hearing arguments regarding defendant's other claims. However, because the court properly determined that the ineffective assistance claim was meritless, the error was harmless.
- ¶ 2 Defendant, Joe Wayne Brown, pled guilty to escape (730 ILCS 5/5-8A-4.1(a) (West 2010)) and attempted aggravated criminal sexual assault (720 ILCS 5/8-4(a), 12-14(a)(2) (West 2010)). He was sentenced to consecutive terms of 5 and 15 years' imprisonment. Thereafter,

defendant filed a motion to withdraw guilty plea. The trial court denied defendant's motion.

Defendant appeals, arguing that: (1) the trial court erred when it failed to appoint new counsel after defendant made a *pro se* claim of ineffective assistance of counsel in his motion to vacate guilty plea; and (2) a \$200 deoxyribonucleic acid (DNA) analysis fee assessed against him should be vacated. We vacate defendant's DNA analysis fee and otherwise affirm.

¶ 3

FACTS

¶ 4 Defendant was charged with attempted first degree murder (720 ILCS 5/8-4(a), 9-1 (West 2010)), attempted aggravated criminal sexual assault (720 ILCS 5/8-4(a), 12-14(a)(2) (West 2010)), escape (730 ILCS 5/5-8A-4.1(a) (West 2010)), aggravated battery (720 ILCS 5/12-3 (West 2010)), and two counts of aggravated criminal sexual abuse (720 ILCS 5/12-15(a)(1) (West 2010)). The court found probable cause for all counts and set the matter for trial.

¶ 5 On June 3, 2011, the parties entered into a fully negotiated plea agreement wherein defendant would plead guilty to attempted aggravated criminal sexual assault and escape and serve consecutive prison terms of 15 and 5 years, respectively. In exchange for the plea, the State dropped the other charges against defendant. Before the plea was accepted by the court, defendant confirmed that he was pleading guilty of his own free will. The court accepted the plea and sentenced defendant in accordance with its terms.

¶ 6 On June 7, 2011, four days after the plea was entered, defendant filed a *pro se* motion to withdraw guilty plea. He alleged that he was innocent of the "attempt aggravated criminal sexualt [*sic*] abuse" charge and now felt that he could win at trial. Defendant filed a separate *pro se* motion to withdraw guilty plea on June 20, 2011, alleging that counsel pressured him into taking the plea deal.

¶ 7 Defense counsel agreed to help defendant with his *pro se* motions to withdraw guilty plea; however, he informed the court that he did not want to make any comments on the allegations of ineffectiveness in defendant's second motion until the court made a preliminary finding on the issue. Thereafter, defense counsel filed a Rule 604(d) certificate and an amended motion merging both of defendant's *pro se* motions.

¶ 8 At a hearing on the amended motion, the court first addressed defendant's attempt to withdraw guilty plea because he was innocent. Defense counsel argued on defendant's behalf. After hearing arguments regarding the first claim, the court itself questioned defendant regarding his claim of ineffective assistance. The court asked defendant to explain why he thought counsel was ineffective and how counsel forced him to take the plea deal. After the court concluded its own questioning, it gave the State the chance to question defendant, but the State declined. The court then questioned defense counsel regarding defendant's complaint. Counsel denied defendant's allegations.

¶ 9 At the conclusion of the hearing, the court determined that defendant was not coerced into pleading guilty, and therefore defendant's claim of ineffective assistance of counsel was meritless. The court further found that there was no legal basis for which defendant should be allowed to withdraw his guilty plea. Therefore, defendant's motion to withdraw guilty plea was denied. Defendant appeals.

¶ 10 ANALYSIS

¶ 11 Defendant first argues that the trial court erred when it failed to appoint new counsel after he made a *pro se* claim of ineffective assistance of counsel in his motion to vacate guilty plea. Although claims of ineffective assistance can lead to the appointment of new counsel, there is no

per se rule that new counsel must be appointed every time a defendant presents a *pro se* motion alleging ineffective assistance of counsel. *People v. Baltimore*, 292 Ill. App. 3d 159 (1997). A trial court may instead conduct a preliminary investigation of the allegations, without the appointment of counsel, when a defendant makes *pro se* claims of ineffective assistance of counsel in postplea proceedings. *People v. Allen*, 391 Ill. App. 3d 412 (2009).

¶ 12 Here, the trial court did make an investigation into the allegations of ineffective assistance of counsel and determined that defendant's claims were meritless. However, it did so after hearing evidence and arguments relating to defendant's other claims in his motion to vacate guilty plea. Because the trial court did not first conduct a preliminary investigation to determine if new counsel should be appointed, we find that the court did err. See *Baltimore*, 292 Ill. App. 3d 159; *Allen*, 391 Ill. App. 3d 412.

¶ 13 However, even though we have found error, we conclude that the error was harmless. An error is harmless if the result would have been the same absent the error. *People v. Melton*, 2013 IL App (1st) 060039. Our supreme court has held a trial court's failure to appoint new counsel to argue a defendant's *pro se* posttrial motion alleging ineffective assistance of counsel can be found harmless. *People v. Moore*, 207 Ill. 2d 68 (2003).

¶ 14 Here, the trial court ultimately determined that defendant's ineffective assistance of counsel claim was meritless. Since the trial court reached a determination on the merits of defendant's claim, we may not reverse that determination unless it was manifestly erroneous. *People v. Tolefree*, 2011 IL App (1st) 100689. Based on our review of the record, we do not find that determination manifestly erroneous. Because the trial court ultimately determined that the claim was meritless, it is clear that it would have made the same determination had it conducted

the inquiry prior to hearing evidence on defendant's other claims. Therefore, we conclude that the trial court's error was harmless and defendant is not entitled to a new hearing.

¶ 15 Defendant also contends that the DNA analysis fee imposed at sentencing should be vacated because his DNA was registered at the time of sentencing. Section 5-4-3 of the Unified Code of Corrections mandates that all individuals convicted of an offense that is classified as a felony under Illinois law after January 1, 1998, submit to the taking, analyzing, and indexing of their DNA, and the payment of an analysis fee. 730 ILCS 5/5-4-3(a), (j) (West 2010). However, a defendant is only required to submit to and pay for the DNA assessment when he is not currently registered in the DNA database. *People v. Marshall*, 242 Ill. 2d 285 (2011). Here, defendant has provided a record that his DNA sample is currently on file. Based on this information, the State has confessed error and agrees that the DNA analysis fee should be vacated. Because we find that defendant's DNA was registered, we vacate the DNA analysis fee assessed against him at sentencing.

¶ 16 CONCLUSION

¶ 17 The judgment of the circuit court of Rock Island County is vacated in part and otherwise affirmed.

¶ 18 Vacated in part and affirmed in part.