

NOTICE

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2014 IL App (4th) 130081-U

NO. 4-13-0081

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

August 29, 2014

Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
MICHAEL TERRY,)	No. 11CF1865
Defendant-Appellant.)	
)	Honorable
)	John R. Kennedy,
)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices Knecht and Holder White concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's denial of defendant's motion to withdraw his guilty plea was not an abuse of discretion.

¶ 2 Defendant, Michael Terry, entered an open plea of guilty to retail theft over \$300 (720 ILCS 5/16A-3(a) (West 2010)) and the trial court sentenced him to 60 months in prison. Following sentencing, defendant moved to withdraw his guilty plea but the court denied his motion. Defendant appeals, arguing his guilty plea was not knowingly or voluntarily entered where he reasonably believed that the State would recommend a community-based sentence in exchange for his plea rather than a sentence of imprisonment. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On November 10, 2011, the State charged defendant with retail theft over \$300

(720 ILCS 5/16A-3(a) (West 2010)). It alleged he took compact discs, video games, and a television, valued in excess of \$300, from a Walmart without paying. The charging instrument also identified defendant as being extended-term eligible.

¶ 5 On March 21, 2012, defendant filed a motion to continue. He asserted that, aside from the charge at issue (case No. 11-CF-1865), he had additional pending felony charges for burglary and retail theft in case Nos. 11-CF-1697 and 12-CF-271. Defendant was also on parole in connection with case No. 07-CF-2201 and the Department of Corrections (DOC) had issued a warrant for him upon the filing of case No. 12-CF-271. He alleged his parole officer requested that his parole status be revoked and he could be held by DOC for up to approximately seven months. Defendant further asserted as follows:

"Counsel has negotiated a disposition in the Defendant's cases in which the Defendant could statutorily receive probation at an open sentencing hearing. The Defendant will be requesting a term of [Treatment Alternatives for Safe Communities (TASC)] probation to be supervised by the Drug Court program at said open sentencing hearing. However, the fact that the Defendant will be sent back to [DOC] in [case No.] 07-CF-2201 will prohibit the Defendant from participating in the Drug Court program."

Defendant requested a continuance "to return to [DOC] and finish serving his sentence in [case No.] 07-CF-2201 before resolving" his pending cases.

¶ 6 On April 4, 2012, the trial court conducted a hearing on defendant's motion to continue. At the hearing, defendant's counsel reiterated defendant's parole issue and stated as

follows:

"The issue here, [Y]our Honor, is that I believe the State and I have worked out a disposition in [defendant's] cases that statutorily could involve a community based sentence. The goal for [defendant] is to ask for drug court sentencing at an open sentencing hearing. As this Court knows, that if he's sent to [DOC] on the parole violations, there's not really much way for the Court to give him any sort of drug court disposition. "

Defense counsel went on to assert that she believed the State would object to a continuance, but she believed the case could also be "resolved with a plea and then perhaps set[ting] the sentencing hearing date out for a substantial amount of time so that [defendant] could rectify his parole issues."

¶ 7 In response, the State did object to continuing defendant's trial setting. However, it asserted it would not have a problem with defense counsel's suggestion "to set it for a plea" and delay sentencing "till down the road." The State further stated as follows:

"I think [defense] counsel is correct, however, in her suggestion that [defendant's] past and current criminal behavior is largely related to his addictions. I know what counsel really wants to do is have the opportunity to suggest to the Court that [defendant] get drug court as a resolution. The State's not made any agreement to that. However, the resolution of the cases that I have discussed with counsel would leave that potentiality open to

the Court."

¶ 8 The trial court denied defendant's motion to continue. It set the matter for the following week's trial call.

¶ 9 On April 9, 2012, defendant appeared before the trial court and entered an open plea of guilty to the charged offense. During those proceedings, the court advised defendant of the nature of the offense. It also described the minimum and maximum penalties he faced, including a range of imprisonment from 2 to 10 years. The court admonished defendant regarding his right to persist in his not-guilty plea and to demand and have a jury or bench trial. Further, it advised defendant of the rights he would be giving up by pleading guilty rather than opting for a trial. Defendant asserted he understood the court's admonishments and wished to plead guilty. Further, he denied that anyone forced, coerced, or threatened him into pleading guilty.

¶ 10 Upon inquiry by the trial court, the State asserted the parties agreed to open sentencing and defense counsel added that defendant's agreement with the State included the dismissal of defendant's other two pending cases (case Nos. 11-CF-1697 and 12-CF-271). Both the State and defendant agreed that defense counsel's statement accurately reflected the parties' bargain. Additionally, defendant asserted no other promises had been made to him and that he was pleading guilty of his own free will. The State presented a factual basis that on February 9, 2011, Walmart's loss-prevention department observed defendant fill a cart with nearly \$500 worth of merchandise and push the cart out of the front door of the store without paying. Loss-prevention employees ran to stop defendant, who abandoned the cart, and pursued defendant on foot. Defendant was apprehended as he attempted to leave the area by bus. The State further

asserted defendant was identified by the Walmart loss-prevention employees who pursued him from the scene.

¶ 11 Following the State's factual basis, the trial court accepted defendant's guilty plea. Defendant's counsel then requested the matter be set for a 90-day status hearing, asserting as follows:

"[D]efendant has a parole hold at this time. [DOC] should be coming to get him and he can see the parole board with regards to revocation issues. I would also be asking that he be released on recognizance in all three cases so that he can be released to [DOC]."

The State asserted no objection, stating, "obviously this is *** at Counsel's request." The court allowed defendant's motion with respect to bond and set the matter for status on July 2, 2012. At defense counsel's request, the court also noted defendant's suitability for TASC and drug-court evaluations.

¶ 12 On April 11, 2012, the parties again appeared before the trial court. Defense counsel noted DOC had unexpectedly decided to rescind defendant's parole warrant and, thus, he had been "released on the [DOC] hold." At the State's request, the court reinstated defendant's bond in his three pending cases. It also vacated the July 2012 status date and set the matter for sentencing.

¶ 13 On May 30, 2012, defendant's presentence investigation report was filed. The report showed defendant was 54 years old and had a criminal history that consisted of 16 felony convictions, 13 misdemeanor convictions, and 1 conviction for driving under the influence. The

record also reflected defendant underwent a TASC assessment and was found to be acceptable for TASC and eligible for drug court.

¶ 14 On June 4, 2012, the trial court conducted defendant's sentencing hearing. The State noted defendant had a significant criminal history that "date[d] back almost [40] years" and recommended he be sentenced to five years in DOC. Defense counsel argued defendant's criminal behavior was motivated by his substance-abuse issues and recommended he be sentenced to drug-court probation. Defendant gave a statement in allocution and also requested a sentence of drug-court probation. Ultimately, the court sentenced defendant to 60 months in prison.

¶ 15 On June 5, 2012, defendant, with the aid of counsel, filed a motion for reconsideration of his sentence. He argued his sentence was excessive and the court gave too much weight to his past criminal history and not enough weight to mitigating factors, including his potential for rehabilitation and lack of a violent history. On June 28, 2012, the trial court conducted a hearing and denied the motion.

¶ 16 Also on June 28, 2012, defendant filed *pro se* motions to withdraw his guilty plea and vacate sentence, and "to retract guilty plea." He alleged he did not fully understand the State's intention to seek a prison sentence rather than a community-based sentence when he pleaded guilty. The trial court appointed counsel to represent defendant in connection with his *pro se* motions. On October 22, 2012, with the aid of counsel, defendant filed a motion to vacate his guilty plea, alleging he did not fully understand the consequences of entering his plea and the decision to plead guilty was made without fully discussing his decision with counsel.

¶ 17 On November 5, 2012, defendant filed a revised motion "to retract guilty plea,"

raising substantially similar claims as those raised in connection with his original *pro se* motion. Specifically, defendant asserted he informed his defense counsel, Jamie Propps, that he would not accept any pleas or offers from the assistant State's Attorney prosecuting his case, Troy Lozar, unless "a drug court recommendation [was] included in the plea agreement." Defendant further alleged Propps failed to investigate Lozar's intention to seek prison time and, had he known the State would recommend a prison sentence, he would not have pleaded guilty. He maintained he possessed a "reasonable belief" that Lozar would provide a drug-court recommendation at sentencing both due to statements Propps made to him and Lozar's failure to object to his requests for continuances to address parole issues. Defendant also filed a motion to dismiss his appointed counsel and proceed *pro se*, which the trial court allowed.

¶ 18 On January 25, 2013, the trial court conducted a hearing on defendant's motion to withdraw his guilty plea. Defendant proceeded *pro se* and testified on his own behalf. He stated that on March 14, 2012, he spoke with Propps and informed her that he would only agree to plead guilty if the State would give a drug-court recommendation at sentencing. According to defendant, Propps replied that Lozar agreed defendant would be a good candidate for drug court but he "would forego making a recommendation until after [defendant's] assessment." Defendant again informed Propps that if the State did not agree to recommend drug-court probation he "would not plead to any charge whatsoever." He testified he sent Propps a letter on March 15, 2012, that reiterated his position and that letter was admitted into evidence.

¶ 19 Defendant stated on April 9, 2012, he was prepared for trial. Propps informed him that Lozar offered a deal that defendant could plead guilty to a Class III felony and have either an open plea or plead to five years. Defendant rejected the offer, stating he was adamant

about not pleading guilty to anything unless the State agreed to recommend drug court. He testified Propps stated she would speak to the judge about trying to get a continuance and Propps and Lozar went into the judge's chambers. Defendant then stated as follows:

"[W]hen *** Propps came out she sat down and she said, [']well, *** I have the deal. What is going to happen is you are going to plead guilty to an open plea. You will be eligible for Drug Court because the judge is going to give you a continuance until you handle all of your issues with [DOC], and he's going to give you a recognizance on each and every charge so that you can be released to [DOC].[']

She says, [']however, upon the conclusion of your—upon the conclusion of your issues with [DOC], I will be tracking you and you will be returned to the county jail. They will probably revoke your recognizance.['] "

Defendant testified it was his understanding at that time that, if he pleaded guilty and "all issues were resolved," Lozar would make a drug-court recommendation at sentencing.

¶ 20 On cross-examination, defendant acknowledged that Propps never told him he was going to get a drug-court recommendation. However, he testified that from her statements he believed he would receive one. He stated he expressed his desire for a drug-court recommendation to Propps several times, both verbally and in writing, and she knew his position.

¶ 21 Defendant also presented Propps's testimony. Propps agreed she had numerous

conversations with defendant about drug court. She noted he was concerned about his parole issues and she conveyed to him that it would be difficult for him to receive drug-court or TASC probation if he was on parole. Propps agreed that on April 9, 2012, defendant initially rejected a plea deal from Lozar that required him to plead guilty to a Class III felony with an open sentencing hearing or in exchange for a five-year sentence. She stated defendant was adamant about receiving a drug-court recommendation as a part of a plea until it was time for jury selection and then he agreed to plead guilty.

¶ 22 Propps testified, on April 9, 2012, the date of defendant's guilty plea, Lozar had not given her "a definitive answer as to what his recommendation would be at the open sentencing hearing." Propps asserted she had pursued a definitive answer on numerous occasions and also shared the State's lack of a definitive answer with defendant. She noted an e-mail exchange with Lozar in March 2012 in which he indicated he would not agree to recommend drug court for defendant but agreed defendant might be a good candidate for the drug-court program. According to Propps, Lozar asserted he wanted to see defendant's drug-court and TASC evaluations "before determining what his recommendation would be at the open sentencing hearing."

¶ 23 On cross-examination, Propps identified copies of e-mail correspondence concerning plea negotiations between her and the State, and that correspondence was admitted into evidence at the hearing. Propps agreed that, on March 7, 2012, Lozar stated in an e-mail that he would probably ask for a term of imprisonment in DOC if defendant entered an open plea of guilty on any of his pending cases. Following the e-mail exchange on March 7, Propps received a letter from defendant, which prompted her to seek a drug-court recommendation from

the State. On March 19, 2012, she e-mailed Lozar, stating defendant informed her that he would accept the State's offer to plead guilty to two Class IV felonies if the State would be willing to recommend drug court for him at sentencing. Lozar responded as follows: "No—I won't agree to it. He might be a good candidate, but his pleas have to be open if he wants a crack at it. I'd have to see what the reports say etc."

¶ 24 Propps denied that she ever promised defendant that the State would extend a recommendation for drug court. She asserted she accurately relayed plea negotiations to defendant. Propps acknowledged defendant repeatedly refused plea offers from the State that did not include a drug-court recommendation and she unsuccessfully negotiated for such a recommendation. She agreed, however, that defendant had a change of heart on his trial date and stated as follows:

"[Lozar] and I had gone back into chambers and discussed with [the judge] whether or not [defendant] could be released on his own recognizance on his three pending felony cases and that I would call his parole agent to notify them that they could come and get him to go to [DOC].

I would track him while he was at [DOC], and when he was nearing release on his parole revocation time I would come back in front of the court to have his bond reinstated so that he would be brought back to the Champaign County Jail.

We could then have the open sentencing hearing, and then I thought he would have a better chance of being found eligible for

Drug Court and suitable for TASC probation.

I came back into the courtroom. I notified [defendant] of this. I also notified him that jurors were prepared and that I was prepared to proceed to trial as well, and at that point he indicated that he would accept [Lozar's] fourth and final offer."

¶ 25 Propps testified her efforts in dealing with defendant's parole-revocation issue were for the purpose of making it more likely that defendant could receive evaluations that would determine his eligibility for TASC and drug court. She stated she explained her reasoning to defendant. Again, Propps denied that she ever suggested to defendant that the State had agreed to recommend drug court for him at sentencing. She asserted she made it clear to defendant that they were attempting to maximize his opportunity to receive drug-court probation but there was no guarantee he would receive that as his sentence or even receive such a recommendation from the State. Additionally, Propps testified defendant appeared to understand that the State would possibly not make a drug-court recommendation.

¶ 26 Following the parties' arguments, the trial court denied defendant's motion. It found defendant had been properly admonished at his guilty-plea hearing and had denied that any promises had been made to him other than those stated on the record. Additionally, the court found the evidence failed to show that Propps misadvised defendant regarding either the law, the facts, or what promises had been made to him.

¶ 27 This appeal followed.

¶ 28 II. ANALYSIS

¶ 29 On appeal, defendant argues the trial court should have permitted him to

withdraw his guilty plea as it was not intelligently and voluntarily entered. He contends the record supports a finding that he reasonably believed the State would recommend drug court at sentencing rather than a term of imprisonment.

¶ 30 "A defendant has no absolute right to withdraw his guilty plea" and, instead, "must show a manifest injustice under the facts involved." *People v. Hughes*, 2012 IL 112817, ¶ 32, 983 N.E.2d 439. "Withdrawal is appropriate where the plea was entered through a misapprehension of the facts or of the law or where there is doubt as to the guilt of the accused and justice would be better served through a trial." *Hughes*, 2012 IL 112817, ¶ 32, 983 N.E.2d 439. "Where the defendant has claimed a misapprehension of the facts or of the law, the misapprehension must be shown by the defendant." *People v. Delvillar*, 235 Ill. 2d 507, 520, 922 N.E.2d 330, 338 (2009). Additionally, "[t]o vacate a plea based on a misapprehension of law or fact, the defendant must establish that [his] mistaken beliefs or impressions were reasonably justified under all the circumstances when those circumstances are judged by an objective standard rather than by the defendant's own subjective impression." *People v. Christensen*, 197 Ill. App. 3d 807, 812, 555 N.E.2d 422, 425 (1990) (citing *People v. Hale*, 82 Ill. 2d 172, 176, 411 N.E.2d 867, 868 (1980)).

¶ 31 "[T]he decision to grant or deny a motion to withdraw a guilty plea rests in the sound discretion of the [trial] court and, as such, is reviewed for abuse of discretion." *Hughes*, 2012 IL 112817, ¶ 32, 983 N.E.2d 439. "An abuse of discretion will be found only where the court's ruling is arbitrary, fanciful, unreasonable, or no reasonable person would take the view adopted by the trial court." *Delvillar*, 235 Ill. 2d at 519, 922 N.E.2d at 338.

¶ 32 Defendant argues his plea cannot stand because he was under the mistaken

impression that the State had agreed to recommend drug court at sentencing. He notes he repeatedly rejected plea offers up to and on the date of trial that did not include an agreement by the State to provide a drug-court recommendation. Defendant maintains he had been ready for his case to go to trial until defense counsel made statements which caused him to believe he would receive the desired recommendation. We disagree with defendant's arguments and find the record supports the trial court's decision that he failed to show a misapprehension of either law or fact.

¶ 33 The record reflects defendant was properly admonished prior to pleading guilty. Further, upon inquiry by the trial court, he agreed that no promises had been made to him other than what was stated in open court, namely that two other cases pending against him would be dismissed. Evidence at the hearing on his motion to withdraw clearly indicates that defendant desired a drug-court recommendation from the State. However, the record also reflects Lozar refused to agree to provide such a recommendation. The record indicates, at the time of defendant's plea, Lozar had not decided upon a specific sentencing recommendation and wanted to wait to review defendant's evaluations before making his decision.

¶ 34 Nevertheless, defendant asserts Propps gave him the impression that the State agreed to give a drug-court recommendation by stating, "I have the deal," and by successfully negotiating an agreement that allowed him to take care of his parole issues prior to sentencing. However, defendant acknowledged that Propps never expressly told him that the State had agreed to provide a drug-court recommendation. Additionally, Propps contradicted defendant's testimony, stating she accurately relayed plea negotiations to defendant. Propps asserted she informed defendant that the purpose of addressing his parole issue was to make it more likely

that he would receive evaluations for TASC and drug court, thereby maximizing his opportunity to receive drug court as a sentencing disposition. Propps testified she conveyed to defendant, and he appeared to understand, that the State would possibly not make a drug-court recommendation at sentencing. Thus, while defendant maintains he was given the impression that he would receive his desired recommendation, the evidence supports a finding that defense counsel informed defendant of the actual implications of his plea agreement, *i.e.*, that he was not guaranteed any recommendation by the State at sentencing.

¶ 35 To support his position, defendant cites *People v. Davis*, 204 Ill. App. 3d 836, 840, 562 N.E.2d 389, 391 (1990), wherein this court determined the defendant had been operating under a misapprehension of fact when he pleaded guilty. In that case, the parties agreed that the purpose of the defendant's plea agreement was to allow the defendant to plead guilty to a lesser offense so that he would be eligible for TASC. *Davis*, 204 Ill. App. 3d at 839, 562 N.E.2d at 390. The defendant was initially advised that he was eligible for TASC, but learned after pleading guilty that his criminal record required a sentence of imprisonment. *Davis*, 204 Ill. App. 3d at 839, 562 N.E.2d at 390.

¶ 36 As argued by the State, *Davis* is distinguishable. Here, unlike in *Davis*, defendant's desired sentencing disposition remained a possibility at the time of sentencing. Defendant bargained for the opportunity to be eligible for drug court and that option was available to him at sentencing, pending agreement of the parties and approval of the trial court. See 730 ILCS 166/20(a) (West 2010) (providing that "[a] defendant may be admitted into a drug court program only upon the agreement of the prosecutor and the defendant and with the approval of the court").

¶ 37 In this case, defendant has failed to meet his burden of establishing a misapprehension of fact which resulted in his guilty plea. Defendant's alleged mistaken impression that the State would make a drug-court recommendation at sentencing was not reasonably justified where evidence was presented that his attorney accurately relayed plea negotiations to defendant and informed him that it was possible he would not receive the desired recommendation from the State.

¶ 38 III. CONCLUSION

¶ 39 For the reasons stated, we affirm the trial court's judgment.

¶ 40 Affirmed.