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2016 IL App (3d) 140692-U

Order filed December 23, 2016

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2016

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
Plaintiff-Appellee,)	of the 10th Judicial Circuit,
)	Peoria County, Illinois.
)	
v.)	Appeal No. 3-14-0692
)	Circuit No. 12-CF-837
EDDIE LEE PATTON,)	
Defendant-Appellant.)	Honorable
)	Stephen Kouri
)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices Carter and Schmidt concurred in the judgment.

ORDER

- ¶ 1 *Held:* Trial court properly denied defendant's motion to withdraw guilty plea where it was not objectively reasonable for defendant to believe he had automatic right to withdraw plea and go to trial. Remand for new postplea proceedings necessary where postconviction counsel's certificate did not comply with supreme court rule. Trial court's sentencing judgment corrected to reflect maximum term of five years' imprisonment for defendant's Class 3 aggravated battery conviction.
- ¶ 2 Defendant Eddie Lee Patton was charged with two counts of aggravated battery, one a Class X felony and one a Class 3 felony. Defendant pled guilty to both counts. The trial court orally sentenced defendant to 15 years of imprisonment, but the court's written judgment

reflected two concurrent 15-year prison sentences, one for each count. Defendant filed a motion to withdraw his guilty plea, which the trial court denied. On appeal, defendant argues that (1) the trial court should have granted his motion to withdraw guilty plea, (2) he is entitled to new postplea proceedings, and (3) the court's written sentencing judgment should be amended. We affirm the trial court's denial of defendant's motion to withdraw his guilty plea, remand for new postplea proceedings, and correct the court's written sentencing judgment to reflect a five-year prison sentence for defendant's Class 3 aggravated battery conviction.

¶ 3 Defendant was charged by indictment with two counts of aggravated battery (720 ILCS 5/12-3.05(b)(1)-(2) (West 2012)). Count I was a Class X felony, and count II was a Class 3 felony. A public defender was initially appointed to represent defendant, but defendant soon hired a private attorney. That attorney withdrew, and defendant retained new private counsel, Theodore Jamison, to represent him.

¶ 4 Jamison entered his appearance at a scheduled hearing on January 9, 2013. He arrived at the next hearing several hours late. A scheduling conference was set for April 4, 2013. Jamison failed to appear at the conference, and the prosecutor informed the court that Jamison was not answering his office phone and had moved but did not provide the State a new mailing address.

¶ 5 Jamison appeared at the next hearing on April 15, 2013. A bond reduction hearing was set for April 26, 2016. Neither Jamison nor the State appeared at that hearing. At Jamison's request, a motion hearing was set for May 2, 2013, at 12:00 p.m. Jamison failed to appear until the hearing had concluded at 2:25 p.m. The court offered to appoint a public defender for defendant, but he declined. The court ordered Jamison to appear at a rule to show cause hearing on May 16, 2013, as a result of his "failing to appear as required at several court hearings in this case."

¶ 6 Jamison appeared on May 16, 2013, and the court withdrew its rule to show cause but warned Jamison that if he “is even 5 min[utes] late going forward[,] there will be consequences.” Jamison appeared at hearings on June 14 and 17, 2013. Defendant’s trial was scheduled to begin on June 24, 2013. That morning, Jamison filed a motion to continue defendant’s trial. According to the motion, Jamison and his family received an order from the Cook County Sheriff four days earlier to vacate their home or be evicted. Jamison sought a continuance “to enable him to vacate his residence and secure a new residence for himself and his family.”

¶ 7 The State and defendant objected to Jamison’s request for a continuance, and the trial court denied Jamison’s motion. Jamison asked the court to reconsider, stating: “I’ve got to get home to my family.” The court again denied Jamison’s motion. After a recess, Jamison announced a plea deal: defendant would plead guilty to both counts of the indictment in exchange for a sentence of no more than 15 years.

¶ 8 Before accepting defendant’s plea, the trial court asked defendant if his attorney answered all of his questions. Defendant responded: “Yeah. He said I got 30 days to appeal this, right?” The court explained that defendant would “have a right to appeal *** but it will be after the sentencing.” After the trial court explained that defendant was giving up his right to a trial, defendant asked: “So you’re saying I could still go to trial today? *** Let’s go to trial.” After a brief recess, defendant vacillated some more but eventually stated: “Let’s go ahead and go with the plea.” Defendant denied that any threats or promises had been made in exchange for his guilty plea.

¶ 9 The trial court explained to defendant that he could receive a sentence of up to 15 years in prison plus mandatory supervised release (MSR) and would have to serve 85% of his sentence. Defendant asked, “The sentencing range isn’t going to be over 15 [years], right?” The

court responded, “With the cap it will not be over 15. It may be at 15. It may be quite a bit less than 15.” Defendant signed a printed “Plea of Guilty” form that stated in part: “I understand *** that if I plead Guilty, there will not be a trial of any kind, and that by pleading Guilty, I give up the right to a trial by Judge or jury.” The form also stated that defendant must file a motion to withdraw his guilty plea within 30 days of sentencing “and if said motion is granted, *** the plea of guilty *** will be vacated.”

¶ 10 On the date scheduled for the sentencing hearing, Jamison informed the court that defendant was dissatisfied with his representation and wanted a new attorney. The court appointed the public defender’s office to represent defendant. Defendant’s case was assigned to Assistant Public Defender Collette Bailey.

¶ 11 Thereafter, defendant filed *pro se* motions for a new attorney. The trial court denied the motions. Defendant also filed *pro se* motions alleging ineffective assistance of counsel of both Jamison and Bailey. He alleged, in part, that Jamison failed to inadequately advise him about pleading guilty. He claimed that he wanted to go to trial but thought Jamison was too focused on his family problems. He thought that pleading guilty “was the safest thing to do knowing that I could come back or withdraw the plea deal.”

¶ 12 At defendant’s sentencing hearing, the trial court orally sentenced defendant to “15 years [in prison at] Illinois Department of Corrections, [followed by] three years [of] mandatory supervised release.” The court’s written order states that defendant was sentenced to “imprisonment at the Department of Corrections of Illinois for a term of 15 years followed by a period of 3 years Mandatory Supervised Release (parole).” However, the court’s written sentencing judgment states that defendant was sentenced to two concurrent 15-year terms of imprisonment, one for each count of aggravated battery.

¶ 13 Defendant filed two *pro se* motions, alleging ineffective assistance of counsel and seeking to withdraw his guilty plea, alleging that the plea agreement “was forced on him” by his counsel. Bailey also filed a motion to withdraw guilty plea on behalf of defendant, asserting that Jamison did not explain the consequences of the plea or explain that he could plead not guilty and proceed to trial.

¶ 14 Thereafter, the court entered an order requiring the public defender’s office to assign a new attorney to the case. Assistant Public Defender Sam Snyder was appointed to represent defendant. Snyder filed an amended motion to withdraw guilty plea, which incorporated the allegations of Bailey’s motion “as well as Defendant’s *pro se* filings alleging ineffective assistance of counsel in regards to his plea of guilty.” The amended motion further alleged that defendant’s “plea of guilty was involuntary due to ineffective assistance of trial counsel.” The motion was accompanied by a certificate signed by Snyder and filed pursuant to Supreme Court Rule 604(d) (Ill. S. Ct. R. 604(d) (eff. Feb. 6, 2013), which stated: “I consulted with the Defendant in-person and by mail to ascertain the [sic] his contentions of error in the sentence or the entry of the plea of guilty, examined the court file and report of proceedings, and made any amendments to the motion necessary for adequate presentation of any defects in those proceedings.”

¶ 15 At the hearing on defendant’s motion, defendant testified that prior to trial he spoke with Jamison for a total of five hours. The State introduced visitor logs from the county jail showing that Jamison visited defendant for a total of more than nine hours on four separate occasions: once for four hours, once for three hours, and twice for over an hour. Defendant agreed that the visitor logs were correct.

¶ 16 Defendant testified that Jamison told him that he would receive a sentence of nine years if he pled guilty. Defendant admitted that he knew it was possible that he would receive up to 15 years in prison. He testified that he pled guilty so he would not have to go to trial on June 24, 2013, but thought he could go to trial later. He said he wanted to go to trial but did not think he would receive “a fair chance at trial” because his attorney was focused on his own problems.

¶ 17 Jamison testified that he was prepared to go to trial on June 24, 2013, but told defendant that taking a plea was in his best interest because his chance of winning at trial was small. He claimed his advice had nothing to do with the court’s denial of his motion to continue. Jamison testified that he spoke with defendant and his family about the plea for about 45 minutes, and defendant changed his mind many times over the course of the conversation. He denied telling defendant that he would receive nine years in prison for pleading guilty.

¶ 18 The trial court denied defendant’s motion to withdraw his guilty plea, explaining that it was convinced that Jamison was prepared for trial. Defendant filed a motion to reconsider his sentence. The trial court refused to consider the motion. At the same time, Snyder asked for and was granted leave to amend his Rule 604(d) certificate to state that he consulted with defendant to “ascertain *** his contentions of error in the sentence *and* the entry of the plea of guilty.” (Emphasis added.)

¶ 19 I

¶ 20 Defendant first argues that the trial court erred in denying his motion to withdraw his guilty plea. He argues that his plea was neither knowing nor voluntary because he reasonably believed he could later withdraw it and go to trial.

¶ 21 A court may not accept a guilty plea without first determining that it is voluntary. Ill. S. Ct. Rule 402(b) (eff. July 1, 2012). Before accepting a guilty plea, the trial court must provide

certain admonitions to the defendant informing him of and determining that he understands the following:

- “(1) the nature of the charge;
- (2) the minimum and maximum sentence prescribed by law, including, when applicable, the penalty to which the defendant may be subjected because of prior convictions or consecutive sentences;
- (3) that the defendant has the right to plead not guilty, or to persist in that plea if it has already been made, or to plead guilty; and
- (4) that if he or she pleads guilty there will not be a trial of any kind, so that by pleading guilty he or she waives the right to a trial by jury and the right to be confronted with the witnesses against him or her ***.” Ill. S. Ct. R. 402(a) (eff. July 1, 2012).

The court must also question the defendant in open court to “determine whether any force or threats or any promises, apart from a plea agreement, were used to obtain the plea.” *Id.* “The purpose of Rule 402 admonishments is to ensure that a defendant understands his plea, the rights he has waived by pleading guilty and the consequences of his action.” *People v. Dougherty*, 394 Ill. App. 3d 134, 138 (2009).

¶ 22 A defendant has no absolute right to withdraw a guilty plea. *People v. Mercado*, 356 Ill. App. 3d 487, 494 (2005). Rather, a defendant must establish a recognized basis for withdrawal. *Id.* A defendant may withdraw a guilty plea “[w]here it appears that the plea was entered on a misapprehension of the facts or of the law, or in consequence of misrepresentations by counsel or the State’s Attorney or someone else in authority, or the case is one where there is doubt of the guilt of the accused, or where the accused has a defense worthy of consideration by a jury, or

where the ends of justice will be better served by submitting the case to a jury.” *People v. Morreale*, 412 Ill. 528, 531-32 (1952). We review a trial court’s ruling on a motion to withdraw a guilty plea for an abuse of discretion. *Mercado*, 356 Ill. App. 3d at 494.

¶ 23 A defendant’s subjective impressions alone are insufficient grounds on which to vacate a guilty plea. *People v. Davis*, 145 Ill. 2d 240, 244 (1991). There must be substantial objective proof showing that a defendant’s mistaken impressions were reasonably justified. *Id.* The burden is on the defendant to establish that the circumstances existing at the time of the plea, judged by objective standards, justified the mistaken impression. *Id.*

¶ 24 Here, it was not objectively reasonable for defendant to believe that he had an automatic right to withdraw his guilty plea and go to trial. Defendant does not allege that his counsel, the State’s attorney or the court ever made that representation to him. To the contrary, the court complied with Supreme Court Rule 402 and advised defendant that by pleading guilty, he was forfeiting his right to a trial. Additionally, by signing the “Plea of Guilty” form, defendant acknowledged that he was giving up his right to a trial and understood that the trial court might not grant a motion to withdraw guilty plea if he filed one.

¶ 25 Defendant did not meet his burden of showing that he was justified in believing that he had an automatic right to withdraw his plea and go to trial. The trial court did not abuse its discretion in denying defendant’s motion to withdraw his guilty plea.

¶ 26 II

¶ 27 Defendant next argues that he is entitled to new postsentencing proceedings because his postconviction counsel failed to comply with the requirements of Illinois Supreme Court Rule 604(d) (eff. Feb. 6, 2013).

¶ 28 The version of Rule 604(d) in effect when defendant’s postconviction counsel filed his motion to withdraw his guilty plea and accompanying certificate states:

“The defendant's attorney shall file with the trial court a certificate stating that the attorney has consulted with the defendant either by mail or in person to ascertain defendant's contentions of error in the sentence or the entry of the plea of guilty, has examined the trial court file and the report of proceedings of the plea of guilty, and has made any amendments to the motion necessary for adequate presentation of any defects in those proceedings.” Ill. S. Ct. R. 604(d) (eff. Feb. 6, 2013).

Rule 604(d) requires strict compliance. *People v. Janes*, 158 Ill. 2d 27, 35 (1994). Where counsel fails to strictly comply with the rule, the case must be remanded to the trial court for the filing of a new postplea motion (if defendant so desires), a hearing on that motion, and strict compliance with the rule. *People v. Jordan*, 2016 IL App (3d) 140262, ¶ 11.

¶ 29 A certificate stating that defense counsel examined “the report of proceedings,” but not specifying that defense counsel examined “the report of proceedings of the plea of guilty” is deficient. *People v. Willis*, 2015 IL App (5th) 130020, ¶ 22; see also *People v. Luna*, 2015 IL App (2d) 140983, ¶ 7 (“Rule 604(d) requires counsel to certify that he or she has examined the report of proceedings of the plea of guilty”); *People v. Grice*, 371 Ill. App. 3d 813, 817 (2007) (certificate must contain “[a] statement that the attorney has examined the report of proceedings of the plea of guilty”). Omission of the words “of the plea of guilty” violates “the clear language and provisions of Rule 604(d).” *Willis*, 2015 IL App (5th) 130020, ¶ 22.

¶ 30 Here, postconviction counsel’s amended 604(d) certificate states that he consulted with defendant, “examined the court file and report of proceedings, and made any amendments to the

motion necessary for adequate presentation of any defects in those proceedings.” This certificate is deficient because it fails to state that defense counsel examined “the report of proceedings of the plea of guilty.” (Emphasis added.) See *Willis*, 2015 IL App (5th) 130020, ¶ 22. Because the certificate does not specify that defense counsel examined the report of proceedings “of the plea of guilty,” it does not strictly comply with Rule 604(d). *Id.* We remand for new postplea proceedings. See *Jordan*, 2016 IL App (3d) 140262, ¶ 11.

¶ 31

III

¶ 32

Finally, defendant argues that the trial court’s written judgment of sentencing erroneously states that he was sentenced to 15 years imprisonment on count II of the indictment. He asks us to amend the judgment to reflect a prison term of 5 years for that conviction.

¶ 33

The maximum sentence for a Class 3 felony is five years’ imprisonment. 730 ILCS 5/5-4.5-40 (West 2014). Illinois Supreme Court Rule 615(b)(4) permits us to “reduce the punishment imposed by the trial court.” Ill. S. Ct. R. 615(b)(4) (eff. Jan. 1, 1967). A sentence that exceeds the maximum sentence allowed by statute may be corrected on appeal pursuant to Rule 615(b)(4). See *People v. Tooley*, 328 Ill. App. 3d 418, 423 (2002).

¶ 34

Here, defendant pled guilty to two counts of aggravated battery, and the court sentenced him to 15 years in prison. In its oral pronouncement, the court did not specify the sentences for each conviction. However, the court’s written judgment lists a 15-year sentence for each count, resulting in two concurrent 15-year sentences.

¶ 35

The court’s imposition of a 15-year sentence on count II exceeds the maximum 5-year sentence allowed by statute. See 730 ILCS 5/5-4.5-40 (West 2014). Thus, we correct it to reflect a 5-year sentence on count II, to run concurrently with defendant’s 15-year sentence for count I. See *Tooley*, 328 Ill. App. 3d at 423.

¶ 36 The judgment of the circuit court of Peoria County is affirmed in part, modified in part,
and the cause is remanded for new postplea proceedings.

¶ 37 Affirmed in part and modified in part; cause remanded.