2016 IL App (3d) 150649-U

Order filed November 29, 2016

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2016

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 13th Judicial Circuit, La Salle County, Illinois.
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-15-0649 Circuit No. 12-CF-553
NADHER S. HOLATA,	)	The Honorable Daniel J. Bute,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE McDADE delivered the judgment of the court.
Justices Holdridge and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court properly rejected the defendant's arguments that trial counsel was ineffective, that trial counsel labored under a *per se* conflict of interest, and that the factual basis for the defendant's guilty plea was insufficient.

¶ 2 The defendant, Nadher S, Holata, pled guilty to cannabis trafficking (720 ILCS 550/5.1(a) (West 2012)) and was sentenced to 12 years of imprisonment. He filed a postconviction petition that alleged, *inter alia*, that his trial counsel was ineffective for failing to inform him of deportation consequences. The circuit court denied the defendant's petition after a

third-stage evidentiary hearing, and the defendant appealed. On appeal, the defendant argues that: (1) trial counsel rendered ineffective assistance by failing to inform the defendant of the deportation consequences of his criminal charges; (2) trial counsel labored under a *per se* conflict of interest; and (3) the factual basis presented by the State was insufficient to support the defendant's plea of guilty. We affirm.

¶ 3 FACTS

¶ 4 On December 4, 2012, the defendant was charged by indictment with unlawful possession of cannabis with the intent to deliver (720 ILCS 550/5(f) (West 2012)). Shortly thereafter, attorney Louis Bertrand filed an appearance on behalf of the defendant. A second count was added to the indictment several months later; count II charged the defendant with cannabis trafficking, alleging that the defendant knowingly brought over 2500 grams of cannabis into Illinois with the intent to deliver (720 ILCS 550/5.1(a) (West 2012)).

¶ 5 On July 18, 2013, the defendant pled guilty to cannabis trafficking pursuant to a negotiated plea agreement. The factual basis given by the State included that on November 25, 2012, a state trooper pulled over a vehicle on Interstate 80 in La Salle County that was driven by the defendant and in which the defendant's wife, Donna Holata, was a passenger. During the traffic stop, the state trooper searched the vehicle's trunk, where he found what turned out to be approximately 5,185 grams of cannabis, which had a street value of approximately $100,000. The quantity of the cannabis and the manner in which it was packed was indicative of the intent to deliver, as opposed to mere personal use. In addition, the defendant told the state trooper during the traffic stop that he was travelling from California back to Michigan.

¶ 6 After admonishments, the circuit court accepted the defendant's guilty plea and sentenced the defendant to 12 years of imprisonment.

¶ 7 On June 27, 2014, new counsel for the defendant filed a postconviction petition. The petition alleged, *inter alia*, that trial counsel Bertrand was ineffective for failing to inform the defendant of deportation consequences.

¶ 8 The petition was advanced to the third stage of postconviction proceedings, and on June 17, 2015, the circuit court held an evidentiary hearing on the petition. Trial counsel Bertrand testified that he represented both the defendant and Donna with regard to the traffic stop. He informed the defendant that the charges pending against him "could have some implication on his immigration status." He said that he never told the defendant, Donna, or their son that nothing bad would happen regarding immigration consequences. He did not inform the circuit court of any immigration consequences. He also testified that he never informed the defendant or Donna about mandatory deportation consequences in this case; he also stated that he was not aware of mandatory deportation consequences. If he had known of such consequences, he would have told them about it.

¶ 9 Donna testified that she and the defendant met with Bertrand at least five times regarding the charges[1] stemming from the traffic stop. The topic of immigration was broached four or five times; Donna stated that Bertrand told them not to worry about immigration consequences and that it was "not a big deal." Bertrand also never mentioned anything about mandatory deportation. The son of the defendant and Donna testified that Bertrand told him not to worry about immigration consequences for the defendant and that the defendant would be out of prison in 4½ years. Both Donna and her son testified that Bertrand told them that there were "bigger fish to fry" than the defendant. The defendant also testified; he stated that Bertrand told him not to worry about immigration consequences.

[1] Donna also faced criminal charges stemming from the traffic stop.

¶ 10 On August 21, 2015, the circuit court issued a written order in which it denied the defendant's postconviction petition. In relevant part, the court ruled that the defendant failed to meet the prejudice prong of the test for ineffective assistance of counsel. Specifically, the court found:

> "it would not have been rational for the defendant to reject what was essentially the minimum sentence. At no point during the evidentiary hearing; at no point in the Post-Conviction Petition, does the defendant assert his innocence or a plausible defense. The defendant, therefore, suffered no prejudice as a result of his plea."

¶ 11 The defendant appealed.

¶ 12 ANALYSIS

¶ 13 The defendant's first argument on appeal is that trial counsel rendered ineffective assistance by failing to inform him of the deportation consequences of his criminal charges.

¶ 14 When a defendant challenges his or her guilty plea on the basis of ineffective assistance of counsel, the defendant must establish that: (1) trial counsel's performance was objectively unreasonable; and (2) absent trial counsel's deficient performance, a reasonable probability exists that the outcome of the proceedings would have been different. *People v. Valdez*, 2016 IL 119860, ¶ 14. On review, we apply a dual standard: we defer to the circuit court's factual findings and will disturb them only if they are against the manifest weight of the evidence, and we review *de novo* the court's ultimate determination of counsel's effectiveness. *People v. Coleman*, 2015 IL App (4th) 131045, ¶¶ 61-67.

¶ 15 If the immigration consequences of a particular plea are "succinct, clear, and explicit," then counsel must advise the defendant of those consequences. *Padilla v. Kentucky*, 559 U.S.

356, 368 (2010). The failure by counsel to do so satisfies the first prong of the test for ineffective assistance of counsel. *Id.* at 371.

¶ 16 Here, there is no question that the defendant's trial counsel failed to inform him of the deportation consequences he faced, which was presumptively mandatory deportation (see 8 U.S.C. § 1227(a)(2)(B)(i) (West 2012); *Padilla*, 559 U.S. at 368-69). Accordingly, the defendant has met the first prong of the test for ineffective assistance of counsel. See *id.* at 371. The prejudice prong is another matter, however.

¶ 17 This court has stated:

> "In the context of a guilty plea, defendant must show that, but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial. *People v. Hughes*, 2012 IL 112817, ¶ 63. Establishing prejudice requires more than a " 'bare allegation' " that defendant would have rejected the plea and proceeded to trial. *Id.* ¶ 64 (quoting [*People v. Hall*, 217 Ill. 2d 324, 335 (2005)]). Rather, defendant must assert either (1) a claim of actual innocence, or (2) a plausible defense that could have been raised at trial. *Id.* The question of prejudice depends in large part on predicting whether the defendant would have been successful at trial. *Hall*, 217 Ill. 2d at 336." *People v. Valdez*, 2015 IL App (3rd) 120892, ¶ 26, *rev'd on other grounds*, *People v. Valdez*, 2016 IL 119860.

¶ 18 On appeal, as at the trial level, the defendant does not attempt to meet this standard for prejudice, nor does he even posit a specific prejudice argument. Rather, it appears that the

defendant believes prejudice should be presumed in this context, which, as is clear from the case law cited above, is not the state of the law in this area. Under these circumstances, we hold that the defendant has failed to show that he was prejudiced by his trial counsel's deficient performance. See *id.*

¶ 19 The defendant's second argument on appeal is that his trial counsel rendered ineffective assistance because he labored under a *per se* conflict of interest. The defendant contends the *per se* conflict arose from trial counsel's representation of both the defendant and Donna.

¶ 20 The constitutional right to the effective assistance of counsel includes the right to conflict-free representation. *People v. Bailey*, 374 Ill. App. 3d 1008, 1022 (2007). A *per se* conflict of interest arises when "certain facts about the defense counsel's status, by themselves *** engender a disabling conflict." *People v. Lawson*, 163 Ill. 2d 187, 211 (1994). "Often this conflict is the attorney's previous or contemporaneous association with either the victim, the prosecution, or an entity assisting the prosecution." *People v. Miller*, 199 Ill. 2d 541, 545 (2002). If a *per se* conflict of interest existed, the defendant is not required to satisfy the second prong of the test for ineffective assistance of counsel; rather, prejudice is presumed. *Id.* We review *de novo* whether trial counsel labored under a *per se* conflict of interest. *Id.* at 544.

¶ 21 Of significance to this particular case is that the mere existence of joint representation of multiple defendants does not establish that a *per se* conflict existed. *Bailey*, 374 Ill. App. 3d at 1022. Our supreme court has explained that "[t]reating multiple representation as creating a *per se* conflict would put an end to multiple representation altogether, since a possible conflict inheres in almost every instance of multiple representation, and a *per se* rule would preclude multiple representation even in cases where a common defense gives strength against a common attack." [Citations omitted.] *People v. Spreitzer*, 123 Ill. 2d 1, 17 (1988).

¶ 22 On appeal, the defendant argues that *People v. Fountain*, 2012 IL App (3d) 090558, is analogous and supports a finding that a *per se* conflict of interest existed. First, *Fountain* is not analogous. In that case, a *per se* conflict of interest existed with a law firm's representation of the defendant during probation revocation proceedings because the defendant's probation resulted from a conviction for a crime committed against Mitch Wilson, for whom the law firm had performed estate work either prior to or simultaneously with the defendant's probation revocation matter. *Id.* ¶ 18. In this case, there was no such victim-perpetrator dual representation.

¶ 23 Second, the defendant has not shown his situation to be one of the three recognized instances of *per se* conflicts, which are: "(1) when defense counsel has a prior or contemporaneous association with the victim, the prosecution, or an entity assisting the prosecution [citations]; (2) when defense counsel contemporaneously represents a prosecution witness [citations]; and (3) when defense counsel was a former prosecutor who had been personally involved in the prosecution of the defendant [citation]" (*People v. Hernandez*, 231 Ill. 2d 134, 143 (2008)). Rather, the defendant merely states, in a conclusory and speculative manner, that "[t]he objective facts clearly support the inescapable conclusion that defense counsel sacrificed defendant's constitutional [e]ffective assistance of counsel promise by, *sub silentio*, negotiating a lengthy prison sentence with *de facto* deportation for defendant so that Donna Holata would receive a lesser-sentence." Not only does this argument fail to meet one of the three recognized instances of *per se* conflicts, it is more akin to an argument that an actual—

not *per se*—conflict of interest existed (see, *e.g.*, *Bailey*, 374 Ill. App. 3d at 1022). Accordingly, we reject the defendant's argument.[2]

¶ 24 The defendant's third argument on appeal is that his conviction and sentence should be vacated because there was no factual basis to support a guilty plea to the cannabis trafficking charge. Specifically, the defendant asserts that the State's factual basis lacked any statement that the defendant knowingly brought the cannabis into Illinois.

¶ 25 Illinois Supreme Court Rule 402(c) states that a circuit court cannot enter a final judgment on a defendant's guilty plea until the court has determined that a factual basis exists to support the plea. Ill. S. Ct. R. 402(c) (eff. July 1, 2012). Rule 402 requires substantial compliance from the circuit court. *People v. Calva*, 256 Ill. App. 3d 865, 871 (1993). We review whether a circuit court substantially complied with Rule 402 for an abuse of discretion. *Id.*

¶ 26 The quantum of evidence required to establish a factual basis for a guilty plea is small—even smaller than a preponderance of the evidence. *Id.* at 872. "The factual basis can be established by several means, including the State's summary of testimony and evidence which it would have presented at trial [citation], or the defendant's own admissions." *Id.* A factual basis

[2] Alternatively, we also note that despite his argument to the contrary, the defendant failed to raise this *per se* conflict of interest issue in the circuit court. While the defendant did state in his postconviction petition that a *per se* conflict may have existed based on the dual representation, the defendant did not formulate an argument on the matter. As such, the defendant's conflict of interest argument on appeal fails "unless he demonstrates that he was actually prejudiced." *Miller*, 199 Ill. 2d at 545. To the extent that his argument could even be so liberally construed as to constitute an attempt to establish an actual conflict, that argument would fail. See *People v. Berland*, 74 Ill. 2d 286, 301 (1978) (holding that speculation and hypothetical conflicts do not establish that an actual conflict of interest existed); see also *Bailey*, 374 Ill. App. 3d at 1022.

has been established when the circuit court can reasonably conclude that the defendant, with the required mental state, committed the acts constituting the offense for which he or she is pleading guilty. *Id.*; *People v. Vinson*, 287 Ill. App. 3d 819, 821 (1997) (holding that "Rule 402(c) is satisfied *** if there is a basis anywhere in the record up to the entry of the final judgment from which the judge could reasonably reach the conclusion that the defendant actually committed the acts with the intent (if any) required to constitute the offense to which he is pleading guilty").

¶ 27 In this case, the cannabis trafficking charge alleged that the defendant knowingly brought over 2500 grams of cannabis into Illinois with the intent to deliver. The State's factual basis for the defendant's guilty plea included a statement that the defendant made to the state trooper that he was travelling from California to Michigan. The defendant also admitted that the State could call witnesses to testify to facts sufficient to support a conviction for cannabis trafficking. Based on the record, we find that it was reasonable for the circuit court to conclude that the defendant knowingly brought the cannabis into Illinois. Under these circumstances, we hold that the circuit court did not abuse its discretion when it found that a factual basis existed to support the defendant's guilty plea to cannabis trafficking. See *Calva*, 256 Ill. App. 3d at 871; *Vinson*, 287 Ill. App. 3d at 821.

¶ 28 CONCLUSION

¶ 29 The judgment of the circuit court of La Salle County is affirmed.

¶ 30 Affirmed.