2017 IL App (1st) 142499-U

No. 1-14-2499

Order filed September 13, 2017

Third Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10 CR 00439
	)	
JERRELL WALKER,	)	Honorable
	)	Carol Kipperman,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE COBBS delivered the judgment of the court.
Justices Fitzgerald Smith and Pucinski concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion when it denied defendant's motion to withdraw his plea.

¶ 2 In June 2011, defendant Jerrell Walker entered a blind plea of guilty to robbery and was sentenced, due to his criminal background, to a Class X sentence of 18 years in prison. Defendant subsequently filed a motion and an amended motion to withdraw the plea and vacate the judgment. After a hearing, the trial court denied defendant leave to withdraw the plea. On

appeal, defendant contends that the trial court erred when it denied him leave to withdraw the plea because he was denied the effective assistance of counsel when counsel "allowed" him to enter a non-negotiated guilty plea on the "mistaken belief that an earlier 10-year plea offer was still valid." We affirm.

¶ 3 On September 23, 2010, defendant and his counsel, La Coulton Walls, appeared before the court and requested a conference pursuant to Supreme Court Rule 402 (eff. July 11, 1997). Following the conference, the court stated that the offer was 10 years, but in consideration of the witnesses who were in court ready to proceed, defendant would be sentenced to 8 years "today and today only." Defendant stated that he needed to arrange care for his mother, and would return the next day. The following exchange then took place:

> "THE DEFENDANT: So, I can come back tomorrow, right?
>
> THE COURT: It's ten years tomorrow instead of eight years.
>
> THE DEFENDANT: I'll come back tomorrow because I got to get my mother situated. ***
>
> THE COURT: That's fine. You want to come back tomorrow, *** [do not] ask for eight. It's off. Tomorrow, it's ten. Just so you understand because I don't want you in front of me tomorrow pleading just give me eight. It's not an option. Just so you understand.
>
> THE DEFENDANT: All right."

Defendant did not return, and a warrant for violation of bail bond was subsequently issued.

¶ 4 On June 1, 2011, defendant appeared before the court and indicated through Walls that he wished to enter a plea of guilty. The court then asked defendant whether he understood what

"burglary" meant and defendant answered in the affirmative. The court then asked defendant whether he understood that "normally" burglary was a class 2 felony with a sentencing range of between 3 and 7 years, but that because of his criminal background the instant offense was a class X felony with a sentencing range of between 6 and 30 years in prison. Defendant answered in the affirmative. The court then requested a copy of the jury waiver and asked defendant whether he signed the waiver "freely and voluntarily." Defendant answered in the affirmative. The court next asked defendant whether it was correct that "no promises" were made to defendant "as to what the sentence would be" and defendant answered in the affirmative. The court then verified whether it was correct that "[t]here's been no promise of any set number of years, except that it's between 6 and 30," and defendant answered in the affirmative.

¶ 5 The parties then stipulated to the factual basis for the plea. The parties also stipulated that defendant had two previous convictions for the class 2 offense of burglary, which made him subject to a class X sentence. The court then asked defendant for his plea and defendant stated "[g]uilty." The court accepted defendant's plea and continued the matter for sentencing.

¶ 6 At sentencing on June 30, 2011, the State stated that defendant's criminal history made him subject to Class X sentencing. In mitigation, defense counsel argued that defendant's criminal history consisted of "petty offenses" during which no one was hurt. Counsel further argued that defendant was diagnosed as "bipolar" four years prior and that he was not taking his medication at the time of this offense. Counsel asked "for the minimum" so that defendant could get "treatment." Defendant stated that at the time of the offense he "was strung out on heroin."

¶ 7 The court then noted that defendant was sentenced to 15 years in prison in 1994, and that in 2005 the court gave defendant "a break" and sentenced him to 6 years. In other words, he

received "the minimum sentence," but then he "did the sentence" and "picked up another burglary" while "on parole." The court was "flabbergasted" and stated that it had to consider defendant's nine prior burglary convictions when crafting a sentence.

¶ 8 Defense counsel then told the court that "we was [*sic*] asking for six" and that the court had offered eight. The court replied that it did not make an offer, and counsel responded that there was a 402 conference. The court replied that it was "too late." The court further stated that based upon defendant's criminal record and the fact that he had the opportunity "to change his ways" but had not done so, that the "proper sentence" would be 18 years in prison.

¶ 9 Defendant then filed a *pro se* motion to vacate his plea. At the hearing on the motion, defendant appeared *pro se.* The court denied the motion. On appeal, we granted the parties' agreed motion for remand for proceedings in compliance with Supreme Court Rule 604(d) (eff. July 1, 2006). See *People v. Walker*, No. 11-2630 (2012) (dispositional order).

¶ 10 In March 2014, defendant filed, through counsel, an amended motion to withdraw the guilty plea alleging that he was denied the effective assistance of counsel when counsel said, based upon discussions with the court, that defendant would "serve less" than 10 years in prison if he entered a guilty plea. In his affidavit, attached in support of the motion, defendant averred that his plea should be vacated because he was told by counsel that he would receive less than 10 years in prison if he pled guilty and that he would not have entered a plea if he had known that the sentence recommendation made after the 402 conference was no longer available.

¶ 11 At the hearing on the amended motion, defendant testified that he was currently serving an 18-year sentence for burglary. On September 23, 2010, following a Rule 402 conference, the court made an offer of eight years. The court stated that the offer the next day would be 10 years.

At that time, defendant was out on bond. He did not come to court the following day, and a warrant was issued for his arrest. On June 1, 2011, defendant appeared in court represented by Walls, and entered a plea of guilty to burglary. Prior to entering the plea, defendant and Walls discussed the plea. Walls told defendant "he had discussed what was going to happen and he asked for six" and that if defendant entered a guilty plea, the court "offered eight." Defendant relied on this eight-year sentence when he entered his guilty plea. He remembered the court explaining that there was no promise as to any set number of years in connection with his guilty plea, but, based upon what counsel told him, he was "under the impression" that he "was going to get eight." If he had known that there was no agreement, he would have "[p]led not guilty" and gone to trial. At sentencing, he was "[v]ery" surprised by the 18-year sentence. Walls was also surprised and stated that defense asked for six and the court offered eight.

¶ 12 During cross-examination, defendant admitted that he did not appear in court on September 24, 2010, to enter his guilty plea; rather he returned about six months later. Defendant testified that he did not think that a Rule 402 conference took place on June 1, 2011, although "it supposedly had been through [his] attorney." Defendant acknowledged that the trial court specifically asked him whether he was entering a guilty plea and whether there was an agreement with regard to a potential sentence. However, defendant stated that "they" always asked him that. He acknowledged that the fact that a date was set for his sentencing was different from the proceedings in 2005 when he entered a guilty plea and was immediately sentenced. Defendant concluded, however, that "[i]t's the same system every time," the system "don't change." He also acknowledged that the court stated that the potential sentence was between 6 and 30 years in prison and that there was no promise regarding the length of his sentence.

¶ 13 Defendant and his attorney discussed the offer made during the 402 conference and counsel stated that "it was routine." Defendant "guess[ed]" that this was counsel's opinion. Although the trial court stated that there was "no agreed upon number," defendant went "on" what his attorney told him. Specifically, counsel told defendant that counsel "went into a 402 and asked for six, and the judge agreed to give eight." Defendant admitted that the 402 conference was months before he entered his plea, *i.e.*, "[t]the last court appearance [defendant] had before [he] jumped bond." Defendant acknowledged if he had not "jumped" bond, he would have been sentenced to 10 years in prison. However, he believed that he would be sentenced to eight years in prison in June 2011, that is, two years less than he would have received in September 2010.

¶ 14 In denying defendant's amended motion to withdraw the guilty plea, the trial court noted that the transcript of the plea hearing revealed that the court asked defendant whether any promises were made to him as to what the sentence would be and whether he understood that the potential sentence was between 6 and 30 years in prison and that in each instance defendant answered in the affirmative. The court therefore concluded that defendant was either lying "then" or lying "now" when he testified that his attorney promised something between 8 and 10 years in prison. The court acknowledged that no one contradicted defendant's testimony, but noted defendant's demeanor, that is, "the way he evaded any type of answer that, perhaps, *** would have been unfavorable to him." The trial court therefore denied the motion.

¶ 15 On appeal, defendant contends that the trial court erred when it denied him leave to withdraw his plea because he was denied the effective assistance of counsel when counsel "allowed" him to enter "a non-negotiated guilty plea" based upon the "mistaken belief" that the 10-year plea offer was still valid.

¶ 16 A defendant does not have an absolute right to withdraw his guilty plea. *People v. Manning*, 227 Ill. 2d 403, 412 (2008). Instead, to withdraw a guilty plea a defendant must demonstrate a manifest injustice under the facts involved. *People v. Baez*, 241 Ill. 2d 44, 110 (2011). "Ordinarily, the decision whether or not to allow a defendant to withdraw his guilty plea is a matter within the discretion of the trial court and will not be disturbed absent an abuse of that discretion." *Manning*, 227 Ill. 2d at 411-12. In those cases where a defendant claims a misapprehension of either the facts or the law, it is his burden to demonstrate any alleged misunderstanding or misrepresentation. *People v. Fernandez*, 222 Ill. App. 3d 80, 85 (1991). See also *People v. Davis*, 145 Ill. 2d 240, 244 (1991) ("[i]n the absence of substantial objective proof showing that a defendant's mistaken impressions were reasonably justified, subjective impressions alone are not sufficient grounds on which to vacate a guilty plea"). The trial court bears the burden to assess the credibility of a witness who testifies at a hearing on a motion to withdraw a guilty plea. *People v. Mercado*, 356 Ill. App. 3d 487, 497 (2005).

¶ 17 When a defendant pleads guilty as the consequence of the ineffective assistance of counsel, the plea is not knowingly and voluntarily made and the defendant should be allowed to withdraw it. *Manning*, 227 Ill. 2d at 412. A challenge to a guilty plea which alleges ineffective assistance of counsel is subject to the two-prong standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Id.* First, counsel's conduct is deficient under *Strickland* if he failed to ensure that the defendant entered the guilty plea voluntarily and intelligently. *People v. Rissley*, 206 Ill. 2d 403, 457 (2003). Second, to establish prejudice, the defendant must show that there is a reasonable probability that, absent counsel's error, he would not have pleaded guilty and would have insisted upon going to trial. *People v. Hall*, 217 Ill. 2d 324, 335 (2005).

¶ 18 Here, defendant contends that he was denied the effective assistance of counsel because counsel let him enter a non-negotiated plea on "the mistaken belief" that the trial court's offer of 10 years was no longer valid. In other words, counsel's performance was deficient because counsel did not tell defendant whether the trial court's September 2010 offer of 10 years in prison was still valid in June 2011.

¶ 19 At the hearing on the amended motion to withdraw the guilty plea, defendant testified that the trial court offered him an 8-year prison sentence if he entered a guilty plea on September 23, 2010, and a 10-year prison term if he entered his plea the next day. Defendant also acknowledged that rather than returning to court, he "jumped" bond, and did not actually enter the plea until June 2011. Defendant acknowledged that the court asked during the plea hearing whether he understood that the potential sentence was between 6 and 30 years in prison and whether it was correct that no promises were made to him regarding the length of his sentence, and that he answered in the affirmative. However, defendant asserted that he went "on" what counsel said, rather than what the court said. Specifically, he relied on counsel's statement that counsel "went into a 402 and asked for six, and the judge agreed to give eight." While defendant admitted that the 402 conference occurred on his last court appearance before he "jumped bond" and that he would have been sentenced to 10 years if he had returned to court the following day, based upon counsel's statement he believed that he would receive an 8-year sentence when he entered his plea in June 2011.

¶ 20 In denying the motion, the trial court noted that the transcript from the plea hearing revealed that the court asked defendant whether it was correct that no promises were made to him regarding the length of his sentence, and inquired twice whether defendant understood that

he faced between 6 and 30 years in prison. Defendant answered in the affirmative each time. The court concluded that either defendant lied "then" when he answered the court's questions or that he was lying "now" when he testified that his attorney promised something between 8 and 10 years in prison. The court noted that although no one contradicted defendant's testimony, defendant "evaded any type of answer that, perhaps, *** would have been unfavorable to him."

¶ 21 The trial court was in the best position to assess defendant's credibility (see *Mercado*, 356 Ill. App. 3d at 497), and found defendant's testimony at the hearing incredible. See also *People v. Primbas*, 404 Ill App. 3d 297, 302 (2010) (the trier of fact is not required to believe the defendant's testimony). Defendant did not therefore meet the burden "to establish that the circumstances at the time of the plea, judged by objective standards, justified [his] mistaken impression" that that he was going to receive a sentence of less than 10 years after he had jumped bond when he would have been sentenced to 10 years in prison if he had not. See *Davis*, 145 Ill. 2d at 244. Moreover, as defendant has failed to establish that his mistaken impression that the trial court's offer was still valid despite the fact that he jumped bond and the passage of time was justified, he has similarly failed to establish that counsel's failure to explicitly state that the court's offer was no longer valid constituted deficient performance. Defendant's ineffective assistance of counsel claim must therefore fail. See *Manning*, 227 Ill. 2d at 412.

¶ 22 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 23 Affirmed.