

2017 IL App (1st) 143670-U

No. 1-14-3670

Order filed May 5, 2017

Fifth Division

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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. 12 CR 17338
)	
GERARDO MARES,)	Honorable
)	Gregory Robert Ginex,
Defendant-Appellant.)	Judge, presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Gordon and Justice Reyes concurred in the judgment.

ORDER

¶ 1 *Held:* We affirm the trial court's denial of defendant's motion to withdraw his guilty plea where he failed to establish he entered into the plea based on a misapprehension of law or fact.

¶ 2 Following a negotiated guilty plea, defendant Gerardo Mares was convicted of aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2012)) and sentenced to eight years' imprisonment with a recommendation for Illinois Department of Corrections' (IDOC) boot camp. On appeal, defendant contends that the trial court erred when it denied his motion to

withdraw his guilty plea where he entered into the plea through a misapprehension that he would be eligible to participate in boot camp yet unbeknownst to him was actually ineligible based on his citizenship status. We affirm.

¶ 3 On September 21, 2012, the State charged defendant with six counts of attempted first-degree murder, three counts of aggravated discharge of a firearm and four counts of aggravated unlawful use of a weapon, all stemming from an incident where he allegedly discharged a firearm at an occupied vehicle.

¶ 4 Between March and May 2014, the record reveals that the State and defense counsel were in negotiations to resolve defendant's case by a plea agreement. On June 2, 2014, the parties appeared in court. Defense counsel informed the trial court that defendant's case "was set for plea agreement" but that defendant had "a couple of questions" outstanding concerning "[t]he sentencing." Counsel told the court that the State had made defendant an offer that "he's going [to] take," but requested a two-week continuance.

¶ 5 On June 17, 2014, the State nol-prossed all the counts against defendant except for Count 7, which alleged that he committed aggravated discharge of a firearm by knowingly discharging a firearm in the direction of a vehicle he knew or should have known to be occupied by Jose Gonzalez. Defendant informed the trial court that he wanted to plead guilty to that count. The court admonished him that, by pleading guilty, he would waive certain rights, such as a jury trial, the right to confront witnesses against him and the right to present a defense. Defendant told the court he understood. The following colloquy occurred:

"THE COURT: This charge is now what's called a Class 1 felony. It means under the law you could be sentenced anywhere from 4 to 15 years in

[IDOC] on extended term could be 15 to 30 years, you could be fined up to \$25,000. If you are sent to the penitentiary, on release you'd have to serve 2 years of mandatory supervised release and there are conditions where it does have a probation term up to 4 years. Do you understand the range of penalties involved?

THE DEFENDANT: Yes, sir.

THE COURT: Has anyone forced you or threatened you to plead guilty?

THE DEFENDANT: No, sir.

THE COURT: All right. Now, your attorney and the State have reached an agreement here. I was not part of that agreement, therefore I am not bound by it. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: You still have a right to plead not guilty; do you understand that?

THE DEFENDANT: (Nodding head.)

THE COURT: You understand that?

THE DEFENDANT: Yes, sir.

THE COURT: You are a citizen, [defendant]?

THE DEFENDANT: Resident.

THE COURT: Okay. Then I must advise you that the consequences of any conviction in this case could result in deportation, denial of admission to the United States, or exclusion of naturalization under the law. Do you understand that?

THE DEFENDANT: Yes, sir.”

¶ 6 The State proceeded to provide a factual basis for defendant’s plea. At 3:45 a.m. on July 4, 2012, Jose Orozco was driving his vehicle in Cicero with Jose Gonzalez and Brandon Otero. The men heard a loud noise and looked in the direction of the noise. Gonzalez observed defendant shoot a firearm in the direction of the vehicle, resulting in it being struck three times. Gonzalez and Orozco knew defendant and went to the Cicero Police Department where they identified him in a photo array. Defendant was subsequently arrested.

¶ 7 The trial court asked defendant if that was “essentially what happened,” and he responded “not to my knowledge.” The court clarified with him whether he was pleading guilty to the facts “as I read to you and as to what I apprised you about?” Defendant replied, “[y]es, sir.” The court then admonished him as follows:

“So you are aware, the contemplated sentence is 8 years [IDOC]. You are being sentenced here as a Class 1 offender. However, understand, if, [*sic*] and I’m going to recommend boot camp. You do the boot camp and you complete that properly through [IDOC], they will then release you with conditions. If you violate those conditions in any way, you are subject to be sent back for the 8 years. Do you understand that?”

Defendant responded, “[y]es, sir.” The court found that he understood the nature of the charges against him and the possible penalties, and that his guilty plea was voluntary.

¶ 8 The trial court accepted defendant’s guilty plea and sentenced him to eight years’ imprisonment with a “boot camp recommendation.” Defendant’s mittimus also shows that boot camp was recommended. The court admonished defendant about withdrawing his guilty plea and

his appeal rights. Defense counsel subsequently stated that he “wanted to spread of record” that he and his associate “had spoken to [defendant] and it was made clear” the sentence was eight years’ imprisonment “with recommendation [for boot camp].” The court agreed, stating “[i]t’s a recommendation, correct.” Defense counsel added that it was up to defendant to follow IDOC’s directions and successfully complete the program, otherwise he would be imprisoned. The court agreed and told defendant that IDOC “will cycle you in on the next given date to do that program.”

¶ 9 Twenty-nine days later, defendant filed, through a different attorney, a motion to withdraw his guilty plea. In the motion, defendant stated that he had been denied entry into the boot camp program “because he is not a U.S. citizen,” but also noted that the record was unclear on exactly “what lead [sic] to the *** ultimate decision.” First, defendant argued that his guilty plea was unknowing and involuntary because he was unaware his citizenship status could render him ineligible to participate in boot camp. Second, defendant argued that his defense counsel’s advice to plead guilty constituted ineffective assistance because counsel knew or should have known his citizenship status could render him ineligible to participate in boot camp. Defendant contended that, as a result of counsel’s error, he was unable to appreciate the consequences of his guilty plea and had he known of these consequences, he would not have pled guilty and would have proceeded to trial instead.

¶ 10 The State responded that the trial court told defendant that boot camp “was just a recommendation” multiple times and the record otherwise showed that he pled guilty knowingly and voluntarily. It asserted that defendant could not withdraw his guilty plea merely because he did not “get what he wanted.”

¶ 11 The trial court denied defendant's motion, finding his plea "knowingly" and "voluntarily" made and that defense counsel was not ineffective. The court noted that, under the boot camp statute, IDOC promulgates the program's rules and regulations, may terminate a defendant's participation in the program at any time, and provides a forum before a hearing officer for a defendant to resolve issues that arise from the program. Consequently, the court stated that it was unsure whether defendant's claim was in "the proper forum." Furthermore, the court found that defendant knew he was only being "recommend[ed]" for boot camp, a recommendation that IDOC did "not have to follow." This appeal followed.

¶ 12 Defendant contends that the trial court erred in denying his motion to withdraw his guilty plea where the inducement for his plea was a recommendation for boot camp, a program in which he was "categorically" ineligible to participate due to his citizenship status. He argues his misapprehension that he would be eligible for boot camp renders his guilty plea involuntary and unknowing such that it must be vacated.

¶ 13 After a defendant pleads guilty, he does not have an absolute right to withdraw his guilty plea. *People v. Delvillar*, 235 Ill. 2d 507, 520 (2009). Rather, he must establish "a manifest injustice under the facts involved," which occurs when he pleads guilty "through a misapprehension of the facts or of the law, or if there is doubt as to the guilt of the accused and justice would be better served by conducting a trial." *Id.* The defendant has the burden to show the misapprehension. *Id.* The decision to allow the defendant to withdraw his guilty plea rests within the discretion of the trial court. *Id.* at 519. We will not reverse the court's decision absent an abuse of that discretion, which occurs only when its "ruling is arbitrary, fanciful, unreasonable, or no reasonable person would take [its] view." *Id.*

¶ 14 Boot camp, more formally known as IDOC's impact incarceration program (see 730 ILCS 5/5-8-1.1 (West 2012); *Delvillar*, 235 Ill. 2d at 511), is a legislatively enacted program designed to be a substitute for a defendant's imprisonment. *People v. Manoharan*, 394 Ill. App. 3d 762, 770 (2009). Participants in the 120- to 180-day program undergo physical training, regimented activities, education and counseling. 730 ILCS 5/5-8-1.1(c), (f) (West 2012). If the defendant successfully completes the program, his sentence is reduced to time considered served. 730 ILCS 5/5-8-1.1(a) (West 2012). Although a trial court may recommend the defendant's participation in boot camp, IDOC has discretion whether to accept him into the program. *Id.* In order to be eligible for boot camp, the defendant must meet certain statutory eligibility requirements:

“(1) The person must be not less than 17 years of age nor more than 35 years of age.

(2) The person has not previously participated in the impact incarceration program and has not previously served more than one prior sentence of imprisonment for a felony in an adult correctional facility.

(3) The person has not been convicted of a Class X felony, first or second degree murder, armed violence, aggravated kidnapping, criminal sexual assault, aggravated criminal sexual abuse or a subsequent conviction for criminal sexual abuse, forcible detention, residential arson, place of worship arson, or arson and has not been convicted previously of any of those offenses.

(4) The person has been sentenced to a term of imprisonment of 8 years or less.

- (5) The person must be physically able to participate in strenuous physical activities or labor.
- (6) The person must not have any mental disorder or disability that would prevent participation in the impact incarceration program.
- (7) The person has consented in writing to participation in the impact incarceration program and to the terms and conditions thereof.
- (8) The person was recommended and approved for placement in the impact incarceration program in the court's sentencing order." 730 ILCS 5/5-8-1.1(b) (West 2012).

Further, IDOC "may also consider, among other matters, whether the committed person has any outstanding detainers or warrants, whether the committed person has a history of escaping or absconding, whether participation in the impact incarceration program may pose a risk to the safety or security of any person and whether space is available." *Id.*

¶ 15 Defendant does not argue that he failed to meet one of the enumerated statutory eligibility requirements, but rather argues he was unaware, as neither the trial court nor defense counsel told him, that IDOC had a rule making him ineligible to participate in boot camp because of his citizenship status. Because he did not know of the rule and his guilty plea was premised upon his eligibility for boot camp, he asserts he pled guilty through a misapprehension of fact and law.

¶ 16 Instructive in resolving defendant's contention is *People v. Manoharan*, 394 Ill. App. 3d 762 (2009). In *Manoharan*, as here, the defendant, a resident alien, pled guilty in exchange for a sentence, including a recommendation for boot camp but was denied entry into the program. *Id.* at 763-65. He filed a motion to withdraw his guilty plea, arguing that his trial counsel had been

ineffective for failing to advise him that, due to his citizenship status, he was ineligible for boot camp. *Id.* at 764-65. The trial court denied the motion. *Id.* at 765.

¶ 17 On appeal, the defendant argued his trial counsel had been ineffective for failing to inform him that IDOC had a rule precluding his participation in boot camp because of his citizenship status. *Id.* at 769-70 This court noted that, assuming *arguendo* that such a categorical rule existed, the defendant had failed to establish prejudice from his counsel's alleged error because he "was not entitled to participate in [boot camp], and he knew it." *Id.* at 770-71. We found that "the trial court merely recommended" that IDOC consider the defendant for boot camp, and IDOC, which had discretion to grant his entry into the program, could have "exclude[d] him for any number of reasons, regardless of his citizenship status." *Id.* at 770. We also found that the defendant knew IDOC had this discretion based on the trial court's admonishments to him and a written consent he had signed, which detailed IDOC's discretion regarding the program. *Id.* at 763-64, 770-71. Consequently, the defendant's claim of ineffective assistance of counsel had failed. *Id.* at 771.

¶ 18 In the present case, defendant did not sign a consent-to-boot-camp agreement as occurred in *Manoharan*. However, both his defense counsel and the trial court informed him that boot camp was merely a recommendation by the court for IDOC to consider. Prior to accepting defendant's guilty plea, the court told him that it was "going to recommend boot camp" which he would "complete" through IDOC. Defendant told the court he understood this fact. After the court accepted defendant's plea and admonished him about withdrawing his guilty plea, defense counsel informed the court that he and his associate had informed defendant that boot camp was merely a "recommendation." The court agreed, again stating that boot camp was "a

recommendation.” Thus, as did the defendant in *Manoharan*, defendant knew his participation in boot camp was not guaranteed, but rather just a recommended course of action by the trial court for IDOC to consider.

¶ 19 Furthermore, in defendant’s motion to withdraw his guilty plea, he was not even certain he was excluded from boot camp due to his citizenship status. Although in the motion, defendant asserted that he was informed “that he was precluded from the program because he is not a U.S. citizen,” he also stated that he “may also have been precluded from admission into Boot Camp because he suffers from panic attacks.” Defendant, however, ultimately concedes in the motion that “[i]t is unclear from the record what lead” to the “ultimate decision” to deny him entry into the boot camp program. Based on defendant’s motion, he ostensibly speculates that he was denied entry into boot camp due to his citizenship status without evidence of the actual reason.

¶ 20 We note that, in the boot camp statute (730 ILCS 5/5-8-1.1 (West 2012)) and in the administrative regulations on boot camp (20 Ill. Adm. Code §§ 460.10 *et seq.* (2012)), no express law or rule exists prohibiting non-citizens from participating in boot camp. However, even assuming *arguendo* that IDOC had a categorical, unwritten rule prohibiting non-citizens from boot camp, defendant nevertheless knew that boot camp was a recommendation and thus IDOC “had the discretion to exclude him for any number of reasons, regardless of his citizenship status.” *Manoharan*, 394 Ill. App. 3d at 770. Consequently, defendant has failed to establish that he entered into his guilty plea through a misapprehension of fact or law, and therefore no manifest injustice has occurred. Accordingly, the trial court did not abuse its discretion when it denied defendant’s motion to withdraw his guilty plea.

¶ 21 Defendant relies on *People v. Correa*, 108 Ill. 2d 541 (1985), *People v. Morreale*, 412 Ill. 528 (1952) and *People v. Harris*, 392 Ill. App. 3d 503 (2009), in support of his argument that the trial court erred in denying his motion to withdraw his guilty plea. We find all three cases readily distinguishable.

¶ 22 In *Correa*, 108 Ill. 2d at 551-53, our supreme court found the defendant's guilty pleas were involuntary because his defense counsel had erroneously told him that he would not be deported by pleading guilty. Here, defendant has failed to show that his counsel misled or erroneously told him anything concerning his guilty plea.

¶ 23 In *Morreale*, 412 Ill. at 530, 532-33, our supreme court found the defendant's guilty plea was involuntary primarily because his plea resulted from "hurried consultations between [his] counsel, the prosecutor, the substitute attorney and *** himself, which were accomplished during a recess of court by passing back and forth between two courtrooms." The court held that these circumstances "could not but help to engender confusion and misapprehension" in the defendant. *Id.* at 532-33. In the present case, there were no "hurried" circumstances leading to defendant's guilty plea. Rather, as the record reflects, his plea discussions with the State occurred over the course of many months.

¶ 24 Lastly, in *Harris*, 392 Ill. App. 3d at 505, the defendant filed a motion to withdraw an admission of violating his probation pursuant to Illinois Supreme Court Rule 604(d) (eff. Mar. 8, 2016), alleging that he did not voluntarily waive his right to a hearing on the State's petition to revoke his probation and did not understand the trial court's admonishments regarding his waiver. In response, the State moved to strike the defendant's motion, arguing Rule 604(d) was inapplicable and that withdrawing the admission was not a proper remedy. *Id.* 505-06. The trial

court agreed with the State and denied the motion, finding that withdrawal of the admission was not an available remedy. *Id.* at 506. On appeal, we first held that the defendant's motion to withdraw the admission was an available remedy. *Id.* at 507. We next found that the trial court abused its discretion in denying the motion to withdraw because it did not consider any evidence or arguments on the merits of the motion. *Id.* at 510. We therefore reversed and remanded the defendant's case for a consideration of the motion's merits. *Id.* Here, unlike in *Harris*, the report of proceedings shows that the trial court clearly considered the merits of defendant's motion to withdraw his guilty plea and correctly found that, because it merely made a recommendation to IDOC to consider defendant for boot camp, he was not entitled to withdraw his guilty plea.

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

¶ 26 Affirmed.