

2017 IL App (1st) 160582-U

No. 1-16-0582

Order filed June 26, 2017

First Division

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 15 CR 18443
	)	
JAMES JACOBS,	)	Honorable
	)	Stanley Sacks,
Defendant-Appellant.	)	Judge, presiding.

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JUSTICE HARRIS delivered the judgment of the court.  
Presiding Justice Connors and Justice Simon concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* Where the defendant was admonished that he was charged with a Class 3 felony, the trial court did not abuse its discretion in denying the defendant's motion to withdraw his plea because he did not understand he would have a criminal conviction.
- ¶ 2 Defendant James Jacobs appeals the denial of his motion to withdraw his plea of guilty to the Class 3 felony of the retail theft of merchandise valued at more than \$300 (720 ILCS 5/16-

25(a)(1), (f)(2) (West 2014)). After his arrest, defendant was placed in the Cook County State's Attorney's Deferred Prosecution Program, which allowed dismissal of the charge at the prosecution's discretion upon defendant's successful completion of the program's requirements in one year. The felony retail theft charge was reinstated after defendant failed to appear at a court date, and defendant subsequently entered a guilty plea in court and was sentenced to two years of probation. On appeal, defendant contends he should have been allowed to withdraw his guilty plea because he mistakenly believed that he would be re-enrolled in the Deferred Prosecution Program and that the plea would not result in a criminal conviction.

¶ 3 Defendant was arrested in April 2015 for taking clothing from the Neiman Marcus store at 737 North Michigan Avenue in Chicago without paying for it. Defendant, who was then 18 years old, was placed in the Deferred Prosecution Program, which required, *inter alia*, that he attend all scheduled court dates. The record on appeal includes a written copy of the requirements of the Deferred Prosecution Program signed by defendant and his counsel. That document provides, in pertinent part:

“This Deferred Prosecution Program will divert selected non-violent felony defendants without a prior felony conviction into an intensive twelve (12) month pre-indictment program and offer services to the defendants with the goal of these defendants avoiding future criminal behavior. When a defendant successfully completes this intensive year-long program, the State's Attorneys Office will exercise its prosecutorial discretion and dismiss the felony charge. Should a defendant fail, the felony case will proceed to a felony courtroom, where prosecution of the defendant will continue.”

¶ 4 When defendant did not appear for a court date in November 2015, a warrant was issued for his arrest and the retail theft charge was reinstated. On November 12, 2015, defendant appeared in court, represented by an assistant public defender, and was informed that he was being charged with retail theft. The State indicated its recommendation of two years of probation if defendant would plead guilty, and defense counsel stated that was acceptable.

¶ 5 The court further stated to defendant:

“I am going to read the charge and then ask you a number of questions. If you understand what [it] is I am asking you, answer the questions that I do ask you out loud with yes or no. If you don’t understand, tell me you don’t understand and I will explain it to you again.”

¶ 6 The trial court read the retail theft charge, and defendant indicated he understood the charge. The court admonished defendant that “[t]he charge I just read to you is a Class 3 felony” subject to a sentence of between two and five years in prison and also subject to a term of probation. Defendant responded affirmatively when asked if he wished to plead guilty to receive a term of two years of probation.

¶ 7 The court then told defendant that by pleading guilty, he gave up his right to a jury or bench trial and the rights to remain silent, confront witnesses against him and present evidence in his own defense. Defendant indicated that he understood. The court asked defendant if his guilty plea was offered “freely and voluntarily,” to which defendant responded, “Yes.”

¶ 8 The factual basis for the plea established that on April 16, 2015, defendant was identified by security staff at the Neiman Marcus store at 737 North Michigan Avenue in Chicago as having entered the store, putting a pair of jeans in his backpack and walking beyond the final

point of purchase without paying for the clothing. Security staff detained defendant and recovered the jeans, which had a retail value of \$655. Defendant did not have a receipt for the items, and the incident was recorded on the store's video surveillance camera. After that factual basis was read, the trial court sentenced defendant to two years of probation and admonished defendant as to his post-plea and appeal rights.

¶ 9 On December 10, 2015, defendant, represented by private counsel, filed a motion to withdraw his plea. The motion stated that defendant did not appear at his November 4, 2015, court date because he could not remember the date and was unable to reach his probation officer. According to the motion, defendant “believed that by entering a plea of guilty, the Court would then put him back into the Deferred Prosecution Program or that he entered into ‘Second Chance Probation’ ” and he “had reason to think this because he already had [a] probation officer.” The motion asserted that defendant was a high school student, lacked experience with the criminal court system and was in custody for three days prior to his plea hearing. The motion asserted that defendant did not make an informed decision to plead guilty and would not have pled guilty had he known it would result in a felony conviction.

¶ 10 At the hearing on the motion to withdraw, defense counsel stated that defendant's plea was based on a “misapprehension of what was happening” and “thought he would be continued on the Deferred Prosecution Program.” The court asked counsel why defendant would think that, and counsel responded, “Because he was already in the program.”

¶ 11 The court read into the record the colloquy from defendant's plea proceeding. The court asked defendant what he did not understand about those admonishments, and the following exchange occurred:

“DEFENDANT: I did not understand that I was going to be like a felony [*sic*] for the rest of my life.

THE COURT: I told you that, didn't I?

DEFENDANT: You told me that I was going to be on probation. And I assume that it was the same probation I was on. I thought it was just extended another year. That's what I assume.”

¶ 12 Defense counsel argued that defendant did not know he would receive a felony conviction and that defendant “simply thought it would be an extended period of probation.” In denying defendant's motion to withdraw his plea, the court found defendant “was admonished and no one in the world could not realize he was pleading guilty to a felony at that point.” The court concluded defendant “chose to plead guilty” and that he expressly indicated his plea was voluntary.

¶ 13 On appeal, defendant contends his guilty plea was not knowing or voluntary because he did not understand the consequences of entering his plea. Defendant asserts his plea was based on his misapprehension that if his plea was accepted, he would be re-enrolled in the Deferred Prosecution Program or into “second chance” probation.

¶ 14 A defendant “does not have the absolute right to withdraw his guilty plea” but should be allowed to do “where his plea was not constitutionally entered.” *People v. Manning*, 227 Ill. 2d 403, 412 (2008). A defendant may challenge the constitutionality of his guilty plea by alleging the plea was not made voluntarily or with full knowledge of the consequences. *Manning*, 227 Ill. 2d at 412. A guilty plea is constitutionally valid if it complies with Illinois Supreme Court Rule 402 (eff. July 1, 1997), which requires the court to admonish the defendant as to the nature of the

crime charged, the sentencing range, and the rights forfeited by the defendant as a result of the guilty plea. *People v. Urr*, 321 Ill. App. 3d 544, 547 (2001).

¶ 15 A defendant will be allowed to withdraw a guilty plea if the plea resulted from a misapprehension of the facts or of the law or a misrepresentation by defense counsel, the State's Attorney or someone else in authority. *People v. Kraus*, 122 Ill. App. 3d 882, 888 (1984). A misapprehension as to sentencing alternatives may render a guilty plea involuntary if the defendant was actually unaware of the possible punishment. *People v. Davis*, 145 Ill. 2d 240, 249 (1991), citing *Kraus*, 122 Ill. App. 3d at 888.

¶ 16 However, where a defendant has been thoroughly admonished, a guilty plea is not revocable simply based on the defendant's subjective belief that he would receive a certain sentence but did not. *Kraus*, 122 Ill. App. 3d at 888. More precisely, withdrawal of the plea is not permitted particularly "where there is no reasonable justification for the defendant's mistaken subjective impression." *Id.* Where the defendant has claimed a misapprehension of the facts or of the law, it is his or her burden to demonstrate any alleged misunderstanding or misrepresentation. *People v. Fernandez*, 222 Ill. App. 3d 80, 85 (1991). The trial court's decision to deny a defendant's motion to withdraw a guilty plea is disturbed only upon a finding of abuse of the court's discretion. *People v. Baez*, 241 Ill. 2d 44, 109-10 (2011).

¶ 17 Here, defendant contends on appeal he lacked prior exposure to the criminal courts and was confused about the proceedings. He asserts he was not aware that a criminal conviction would result from his plea and instead believed he would continue in the Deferred Prosecution Program. Based on our review of the record of defendant's plea proceeding, defendant's claimed

subjective belief that he would return to the Deferred Prosecution Program as a result of his plea was not supported by any representations made to him.

¶ 18 The record establishes that defendant was fully advised of the consequences of his guilty plea under the requirements of Rule 402. Defendant was made aware of the conditions of the Deferred Prosecution Program, which, pursuant to the document quoted earlier, required his prosecution for the instant offense in a felony courtroom if he did not meet all program requirements, including attendance at all scheduled court dates.

¶ 19 When defendant appeared in court on November 12, 2015, after being arrested upon missing a prior court date, he was fully admonished as required by Rule 402. Defendant was advised of the charge against him and was told the charge was a Class 3 felony. Defendant indicated that he understood the charge and agreed to plead guilty in exchange for a term of two years' probation. The court advised defendant of the rights that he relinquished by entering a plea, and the court heard the factual basis for the plea.

¶ 20 If a defendant is thoroughly admonished pursuant to Rule 402, a guilty plea is not revocable simply because a defendant subjectively believed he would receive a certain sentence. *People v. Barnhill*, 188 Ill. App. 3d 299, 306 (1989); see also *Kraus*, 122 Ill. App. 3d at 888. At the hearing on defendant's motion to withdraw the plea, neither defense counsel nor defendant provided any basis for defendant's claimed misapprehension of the consequences of his plea. Although counsel asserted defendant's belief that he "thought he would be continued on the Deferred Prosecution Program," the record provides no reasonable justification existed for that belief. To the contrary, the record establishes that defendant was informed that felony proceedings would ensue if he did not successfully complete the Deferred Prosecution Program.

Furthermore, the court told defendant he was being charged with retail theft and specified that “[t]he charge I just read to you is a Class 3 felony.” Defendant could not reasonably believe his plea would not result in a felony conviction on his criminal record. The record affirmatively demonstrates that the defendant’s guilty plea was knowingly and voluntarily made.

¶ 21 In conclusion, the trial court did not abuse its discretion in denying defendant’s motion to withdraw his guilty plea. Accordingly, the judgment of the circuit court of Cook County is affirmed.

¶ 22 Affirmed.