2017 IL App (3d) 150784-U

Order filed May 31, 2017

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2017

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois.
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-15-0784 Circuit No. 12-CF-412
JAY V. COX,	)	The Honorable Daniel J. Rozak,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE McDADE delivered the judgment of the court.
Justice Lytton concurred in the judgment.
Justice O'Brien dissented.

ORDER

¶ 1 *Held*: The defendant could not establish that he was prejudiced by counsel's incorrect advice; accordingly, the circuit court properly denied the defendant's motion to withdraw his guilty plea.

¶ 2 Pursuant to a partially negotiated plea agreement, the defendant, Jay V. Cox, pled guilty to aggravated driving while under the influence of alcohol (625 ILCS 5/11-501(a)(1), (d)(1)(F) (West 2012)), and the circuit court sentenced him to 12 years of imprisonment. In Cox's first appeal, this court remanded for appointment of conflict-free counsel to address a motion to

withdraw Cox's guilty plea. *People v. Cox*, 2015 IL App (3d) 130444-U, ¶ 22 (unpublished order under Supreme Court Rule 23). After a hearing, the circuit court denied the motion. On appeal, Cox argues that the court erred when it denied his motion, as he contends that his guilty plea was not knowing and voluntary due to incorrect advice given by his prior counsel. We affirm.

¶ 3 FACTS

¶ 4 On February 15, 2012, Cox was charged by indictment with two counts of aggravated driving while under the influence of alcohol, alleging that his vehicle struck the vehicle of Efren Garcia, thereby causing Garcia's death.

¶ 5 In a partially negotiated plea, Cox pled guilty to count I (625 ILCS 5/11-501(a)(1), (d)(1)(F) (West 2012)) in exchange for the State dropping count II and recommending a sentencing cap of 12 years. This was one of two plea offers the State had proposed to Cox; the other was a fully negotiated plea for a nine-year sentence on count I. After admonishments, the court accepted Cox's guilty plea.

¶ 6 At the sentencing hearing, the circuit court sentenced Cox to 12 years of imprisonment and admonished him that he must file a motion to withdraw his guilty plea if he wished to appeal.

¶ 7 Cox's public defender, Michael Renzi, filed a motion to reconsider the sentence, which he alleged was excessive. The circuit court denied that motion. Renzi sought to appeal that decision, but the court denied his request and explained that if he wanted to appeal, the only option he had was to file a motion to withdraw guilty plea first.

¶ 8 Renzi subsequently filed a motion to withdraw the guilty plea, alleging that Cox was not advised that his sentence was not appealable. Cox also filed a *pro se* motion to withdraw the

guilty plea in which he alleged ineffective assistance of counsel, stating that Renzi "misled Defendant into believing that if he declined the 9 year offer the State was presenting him with and entered a blind plea, Defendant would receive a lower sentence than 9 years."

¶ 9 At a hearing on the *pro se* motion, the circuit court questioned Cox about Renzi's performance. Cox stated that Renzi "misled" him because they had both agreed that the State's offer of nine years was excessive, and that he believed he could get less than that if he entered a blind plea. The court then reminded Cox that at the time of his guilty plea, he told the court that he had discussed the plea agreement with Renzi, that he was satisfied with Renzi's performance, and that Renzi had not promised him anything.

¶ 10 At a later hearing on Renzi's motion to withdraw the guilty plea, the circuit court allowed Renzi to argue the motion, rather than appoint new counsel. Renzi stated that he thought the sentence was appealable so he never told Cox that the sentence was not appealable; thus, he misinformed Cox. The court took the matter under advisement and later ruled that its guilty plea admonishments instructed Cox on the correct steps to perfect an appeal. Accordingly, the court denied the motion. Cox appealed and this court reversed, holding that the circuit court erred by allowing Renzi to argue his own ineffectiveness at the hearing. *Cox*, 2015 IL App (3d) 130444-U, ¶ 22 (unpublished order under Supreme Court Rule 23). This court remanded the case for appointment of new counsel. *Id.* ¶ 23.

¶ 11 On remand, newly appointed counsel filed a motion to withdraw the guilty plea and vacate the sentence, alleging that Renzi was ineffective. The motion stated that: (1) Cox was facing a 3 to 14-year sentence, although probation was possible; (2) Renzi advised Cox that the State's nine-year offer was excessive and that he should consider the 12-year cap offer; (3) Renzi told Cox that he could appeal any sentence the court imposed as a part of the 12-year cap offer;

and (4) that Cox's guilty plea was not knowing and voluntary due to Renzi's defective advice. The motion also alleged that Cox would have gone to trial had he known that he could not appeal the sentence and that the circuit court's proper admonitions were irrelevant because they were given after Cox had made his decision to plead guilty based on Renzi's incorrect advice.

¶ 12 At the hearing on the motion, Renzi testified that he advised Cox that if he took the 12-year cap offer, a motion to reconsider the sentence could be filed and an appeal could be taken from the court's subsequent judgment. Cox testified that had he known he could not appeal the sentence, he would have gone to trial to preserve his right to appeal the sentence. The court took the matter under advisement. When it issued its ruling, the court found that the proper analysis was to determine whether Cox could assert a claim of actual innocence or articulate a plausible defense at a trial. The court found that Cox would have been found guilty "in about five minutes" by a jury had he gone to trial; accordingly, the court denied the motion. After his motion to reconsider was denied, Cox appealed.

¶ 13 ANALYSIS

¶ 14 On appeal, Cox argues that Renzi rendered ineffective assistance of counsel. Cox claims that due to Renzi's incorrect advice, his guilty plea was not knowing and voluntary.

¶ 15 In general, the decision of whether to allow a defendant's motion to withdraw a guilty plea is a matter within the circuit court's discretion; accordingly, we will not disturb that decision absent an abuse of discretion. *People v. Hughes*, 2012 IL 112817, ¶ 32 (2012).

¶ 16 When a defendant raises a claim of ineffective assistance of counsel in connection with a guilty plea, the appropriate standard comes from *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Hall*, 217 Ill. 2d 324, 334-35 (2005). Pursuant to *Strickland*, to establish ineffective assistance of counsel, a defendant must establish both that (1) counsel's performance fell below

an objective standard of reasonableness; and (2) counsel's deficient performance prejudiced the defendant. *Id.* at 335. A defendant's failure to establish either prong is fatal to a claim of ineffective assistance of counsel. *People v. Edwards*, 195 Ill. 2d 142, 163 (2001).

¶ 17 To satisfy the prejudice prong of the *Strickland* standard, a defendant "must show there is a reasonable probability that, absent counsel's errors, the defendant would have pleaded not guilty and insisted on going to trial." *Hall*, 217 Ill. 2d at 335. Significantly, however, it is not sufficient to allege merely that one would have gone to trial absent counsel's deficient performance. *Id.* Rather, the allegation "must be accompanied by either a claim of innocence or the articulation of a plausible defense that could have been raised at trial." *Id.* at 335-36. "Under [*Hill v. Lockhart*, 474 U.S. 52, 59 (1985)], the question of whether counsel's deficient representation caused the defendant to plead guilty depends in large part on predicting whether the defendant likely would have been successful at trial." *Id.* at 336.

¶ 18 Cox's argument on appeal focuses on *Strickland*'s prejudice prong, and he emphasizes that whether this prong has been met requires a contextual analysis. In this light, Cox states that his situation calls for a remedy that recognizes that "going to trial is not a cure-all." Cox cites to *People v. Edmonson*, 408 Ill. App. 3d 880, 886 (2011), in which the Second District held that a defendant's counsel rendered ineffective assistance because she affirmatively misinformed the defendant at the time of the guilty plea. The Second District held that counsel's deficient performance prejudiced the defendant "because he would not have pleaded guilty had he known that he could not challenge his sentence." *Id.*

¶ 19 We acknowledge the Second District's decision in *Edmonson* but note first that we are not bound by the decisions of other districts of the appellate court (*People v. Wilson*, 2014 IL App (1st) 113570, ¶ 39). Second, and more importantly, we note that *Edmonson* was issued in

between our supreme court's decisions in *Hall* and *Hughes*. *Edmonson* did not cite to *Hall* or even recognize the rule that a defendant's allegation of ineffective assistance of counsel in the guilty plea context "must be accompanied by either a claim of innocence or the articulation of a plausible defense that could have been raised at trial" (*Hall*, 217 Ill. 2d at 335-36). After *Edmonson* was decided, *Hughes* reiterated the law as stated in *Hall*. *Hughes*, 2012 IL 112817, ¶ 64. Thus, even though, as Cox points out, *Hughes* stated that:

> "[a]lthough we recognize that there may be circumstances where a defendant could prove that the deficient performance affected the outcome of the plea process in other ways, as with all applications of the second prong of the *Strickland* test, the question whether a given defendant has made the requisite prejudice showing will turn on the facts of a particular case" (*Hughes*, 2012 IL 112817, ¶ 65),

Hughes did not renounce the rule from *Hall* or implicitly validate the *Edmonson* decision from the Second District. For these reasons, we find *Edmonson* to be of suspect validity and decline to adopt its rationale.

¶ 20 In addition, we note that Cox cites to two United States Supreme Court decisions in support of his request for an exception to the *Hall* rule. However, we find these cases to be distinguishable. First, in *Missouri v. Frye*, ___ U.S. ___, ___, 132 S. Ct. 1399, 1409-10 (2012), the United States Supreme Court stated:

> "Frye argues that with effective assistance he would have accepted an earlier plea offer (limiting his sentence to one year in prison) as opposed to entering an open plea (exposing him to a maximum sentence of four years' imprisonment). In a case, such as this,

> where a defendant pleads guilty to less favorable terms and claims that ineffective assistance of counsel caused him to miss out on a more favorable earlier plea offer, *Strickland*'s inquiry into whether 'the result of the proceeding would have been different,' 466 U.S., at 694, requires looking not at whether the defendant would have proceeded to trial absent ineffective assistance but whether he would have accepted the offer to plead pursuant to the terms earlier proposed." *Id.*

Here, Cox has not argued that Renzi's incorrect advice led him to miss out on a more favorable plea offer. Moreover, any claim that the plea offer Cox rejected was more favorable would be without merit. The rejected offer included nine years of imprisonment, while the plea offer he accepted included a sentencing range of 3 to 12 years. Merely because the sentence imposed was greater than nine years does not make the accepted offer less favorable. Cox could have received significantly less than nine years under the plea agreement he accepted. In any event, this instant case is distinguishable from *Frye*.

¶ 21 Second, in *Lafler v. Cooper*, ___ U.S. ___, ___, 132 S. Ct. 1376, 1385 (2012), the United States Supreme Court stated:

> "here the ineffective advice led not to an offer's acceptance but to its rejection. Having to stand trial, not choosing to waive it, is the prejudice alleged. In these circumstances a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the

> prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." *Id.*

The instant case is not a situation in which counsel's incorrect advice led him to reject a plea offer and stand trial. Accordingly, this case is distinguishable from *Lafler*.

¶ 22 Furthermore, an analysis of all three situations (the traditional, trial situation addressed by *Hill*, *Hall*, and *Hughes*; the loss of an earlier, more favorable plea offer situation addressed by *Frye*; and the rejection of a plea offer and choice to stand trial situation addressed by *Lafler*) leads us back to the general principle behind ineffective assistance claims in the guilty plea context—*i.e.*, to the inescapable conclusion that *something more* than a bare allegation is needed to establish prejudice. *Hall*, 217 Ill. 2d at 335-36; *Frye*, ___ U.S. at ___, 132 S. Ct. at 1409-10; *Lafler*, ___ U.S. at ___, 132 S. Ct. at 1385.

¶ 23 In this case, Cox has alleged nothing more than that absent Renzi's incorrect advice, a different outcome would have resulted. We believe that such a claim vastly oversimplifies the law's requirements in this area. Here, Cox was faced with three options: (1) reject the State's plea offers and go to trial; (2) accept the State's nine-year plea offer; or (3) accept the State's 3 to 12-year plea offer. He does not allege and argue that absent Renzi's incorrect advice, he would have gone to trial with a claim of actual innocence or an articulable, plausible defense. He does not allege and argue that Renzi's incorrect advice led him to accept a less favorable plea offer. The mere fact that a defendant had options other than the one he or she chose is not sufficient to establish prejudice in the guilty plea context. See *Hall*, 217 Ill. 2d at 335-36; *Hughes*, 2012 IL

112817, ¶ 64-65; *Frye*, ___ U.S. at ___, 132 S. Ct. at 1409-10; *Lafler*, ___ U.S. at ___, 132 S. Ct. at 1385. Under these circumstances, we hold that Cox has failed to satisfy the prejudice prong of the *Strickland* test. Accordingly, we hold that the circuit court did not err when it denied Cox's motion to withdraw the guilty plea.

¶ 24 CONCLUSION

¶ 25 For the foregoing reasons, the judgment of the circuit court of Will County is affirmed.

¶ 26 Affirmed.

¶ 27 JUSTICE O'BRIEN, dissenting.

¶ 28 I respectfully dissent from the majority because the defendant did show the necessary prejudice in this case. The majority, relying on *Hall*, states that, to satisfy the prejudice prong of *Strickland*, the defendant had to show a reasonable probability that, absent counsel's error, he would have pleaded not guilty and insisted on going to trial. This is the correct standard in cases where a "defendant complains that ineffective assistance led him to accept a plea offer as opposed to proceeding to trial[;] the defendant will have to show 'a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" *Missouri v. Frye*, 566 U.S. 133, 147 (2012) (quoting *Hill*, 474 U.S. at 59); *Hall*, 217 Ill. 2d at 335 (impliedly recognizing this distinction by limiting the necessary showing "in these circumstances."). Recognizing that the standard is that a defendant must establish a reasonable probability that the result of the proceeding would have been different (*Hughes*, 2012 IL 112817, ¶ 63), the U.S. Supreme Court found that a defendant who rejected an earlier plea only needed to show a reasonable probability that ineffective assistance of counsel caused him to miss out on a more favorable earlier plea offer. *Frye*, 566 U.S. at 148.

¶ 29 I disagree with the majority's conclusion that the offer that the defendant rejected was not more favorable; the end result was that the defendant was sentenced to more time (12 years) under the partially negotiated plea than the fully negotiated 9-year plea. *Id.* at 147 ("[I]t is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time."). Since the defendant has established prejudice, I would find that it was an abuse of discretion to deny the defendant's motion to withdraw his plea.