2017 IL App (4th) 151017-U

NOS. 4-15-1017, 4-15-1018, 4-15-1019, 4-15-1020 cons.

FILED
January 5, 2017
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. (No. 4-15-1017) JENNIFER RAE PHINNEY, Defendant-Appellant.	)	Appeal from Circuit Court of McLean County No. 12CF865
THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. (No. 4-15-1018) JENNIFER RAE PHINNEY, Defendant-Appellant.	)	No. 13CF516
THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. (No. 4-15-1019) JENNIFER RAE PHINNEY, Defendant-Appellant.	)	No. 12CF579
THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. (No. 4-15-1020) JENNIFER RAE PHINNEY, Defendant-Appellant.	)	No. 13CF48 Honorable John Casey Costigan, Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Steigmann and Pope concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court's order denying defendant's motion to withdraw her guilty plea is affirmed.

¶ 2 (2) The appellate court declined to reach the merits of defendant's claim of ineffective assistance of counsel, finding the claim better pursued in a postconviction proceeding, where a complete record explaining counsels' conduct can be made.

¶ 3 Defendant, Jennifer Rae Phinney, appeals from the trial court's order denying her motion to withdraw her guilty plea. She claims she should be allowed to withdraw her plea because she was assessed fines not agreed to as part of the plea agreement. She also claims her counsel was ineffective for failing to raise plea counsel's incompetence. We vacate the fines specified below that were improperly imposed by the circuit clerk. Otherwise, we affirm.

¶ 4 I. BACKGROUND

¶ 5 Between July 2012 and May 2013, defendant was indicted on four offenses in four separate McLean County criminal cases: (1) in July 2012, in case No. 12-CF-579, she was charged with theft (720 ILCS 5/16-1(a)(1)(A) (West 2010)); (2) in October 2012, in case No. 12-CF-865, she was charged with burglary (720 ILCS 5/19-1(a) (West 2010)); (3) in January 2013, in case No. 13-CF-48, she was charged with forgery (720 ILCS 5/17-3(a)(2) (West 2012)); and (4) in May 2013, in case No. 13-CF-516, she was charged with theft (720 ILCS 5/16-1(a)(1)(B) (West 2012)). In May 2013, defendant entered into a fully negotiated plea agreement in all four cases. The trial court sentenced her to a total of 15 years in prison and ordered her to pay various fines and fees.

¶ 6 In each case, defendant moved to withdraw her plea, claiming she "had not fully contemplated the consequences of her guilty pleas." The trial court denied her motions, and defendant appealed. This court remanded each cause to the trial court because no Illinois Supreme Court Rule 604(d) (eff. Jan. 1, 2013) certificate had been filed. See *People v. Phinney*, No. 4-13-0876 (McLean County case No. 12-CF-579) (order entered January 3, 2014); No. 4-13-0877 (McLean County case No. 12-CF-865) (order entered January 3, 2014); No. 4-13-0878

(McLean County case No. 13-CF-48) (order entered January 3, 2014); and No. 4-13-0879 (McLean County case No. 13-CF-516) (order entered January 10, 2014).

¶ 7 On remand, on June 16, 2014, in each case, defendant filed a new motion to withdraw her plea. She alleged (1) she had not fully considered the ramifications of the plea agreement; (2) she did not fully understand the consequences of her actions at the time she entered the plea; (3) she was not given adequate consideration for providing assistance to the Bloomington police department; (4) her attorney falsely informed her she would be sentenced to 28 years in prison if she did not enter guilty pleas; (5) she was experiencing substance-abuse withdrawal symptoms at the time she entered her pleas; and (6) generally, her pleas were not voluntary or knowing.

¶ 8 Also on June 16, 2014, the trial court conducted a combined hearing on defendant's motions to withdraw her pleas. Defendant testified in support of her motions. She said, on May 8, 2013, she appeared at a court hearing for what she thought would be a status hearing. Her attorney advised the State had presented a "wrap-up offer" of 28 years in prison, slightly less than the maximum. Defendant declined the offer, thinking she should be entitled to a lesser sentence due to her work as a confidential informant. She also said she was experiencing heroin withdrawal at the time. She said: "Mentally, you're in a state of crazy." The following exchange occurred:

> "Q. When you came before the judge on May 8th to enter into the agreed plea on each of the cases, did you understand what was happening?
>
> A. I don't think I fully understood what was happening, because I was not explained what was happening. I kept asking questions and I didn't understand anything she was saying to me.

Q: Did you ask for clarification?

A. Yes I did. She told me not at this time. Even when the judge was asking me on one of the cases if anybody had promised me anything, I brought up about the police right here in front of her, she's like no that is not what he means. I said but I was promised this. And she said no, that is not what he means; right here in front of the judge I asked her that.

Q. Did you direct any questions to the judge after she told you that is not what he means?

A. No.

Q. When the court asked you if any promises were made other than what he had gone over, what was your response to him? Do you remember?

A. I said no. I know that because I read it in my papers. But I asked her, I asked her at that time and I asked her in that room and she kept coming back and forth to the State's Attorney trying to bargain or what not that they do, trying to negotiate. I asked her then and she said that the State didn't know anything about it and I asked her, I told her exactly who the detective was, the names of the gentlemen, I told her everything that I could possibly think of and then I wrote her a letter asking her and she said no. But to me, now I think that when she said if I don't take the 15 years that I was getting 28 years and the offer would be off the table if I did not take the 15 years. I had her come out and ask my family if I should do that because I didn't want to go for 28 years. So they said if that is the last thing, then okay. So that is why I agreed, because I felt if I didn't I was getting 28 years."

¶ 9 Defendant further described her emotional and mental state during the plea hearing. She said if she would have known about "bench trials" and "was not going through withdrawals," she would have waited until she felt better. She said she did not read any of the documents presented to her because she was "crying so hard, profusely, even signing [she] was crying and crying and crying." She said she knew her attorney was trying to explain things to her, but she told her attorney she did not understand. She said she begged her attorney to get a better deal than 15 years, but her attorney told her "this is the final straw. The 15 is it, if you don't take it now it's off the table." At the close of defendant's testimony, the trial court questioned defendant's counsel about defendant's comment that there were five separate cases, not four. Defendant's counsel confirmed the plea agreement included the dismissal of a fifth case.

¶ 10 The State asked the trial court to take judicial notice of the transcript from the plea hearing. Without objection, the court obliged. After considering the evidence and arguments of counsel, the court took the matter under advisement.

¶ 11 On June 19, 2014, the trial court entered a combined written order denying defendant's motion to withdraw her plea. The court indicated it saw no evidence defendant was experiencing any withdrawal symptoms at the plea hearing. The court noted defendant had been in custody for approximately 17 days at the time of the hearing, yet the court had not received any information or warning from jail staff that defendant was unable to understand or participate in the plea hearing. The court also stated it was unaware defendant had acted as a confidential source until she so alleged in her posttrial motion. The court noted it was also unaware of any other sentencing offers presented to her by the State. Further, the court noted the maximum available sentence for the four cases was 29 years. Defendant had indicated at the plea hearing

no one had forced her to accept the offer and she understood certain offenses carried mandatory consecutive terms. The court found defendant had been properly admonished, understood the nature of the proceedings, and voluntarily entered into the guilty plea.

¶ 12 Defendant appealed. This court entered an order reversing and remanding the cause for noncompliance with Rule 604(d). The June 2014 Rule 604(d) certificate indicated counsel had consulted with defendant in person to ascertain her contentions of error in the sentence *or* the entry of the plea of guilty. Illinois case law provides the certificate must use the word "and" instead of "or," requiring counsel to consult with the defendant about any errors in the sentencing *and* the entry of the guilty plea. See *People v. Tousignant*, 2014 IL 115329, ¶ 20. We reversed the judgment in a consolidated appeal and remanded for the filing of a new postplea motion, a new hearing on the motion, and strict compliance with Rule 604(d). *People v. Phinney*, No. 4-14-0691 cons. (Nov. 24, 2015) (summary order).

¶ 13 On remand, on December 22, 2015, defendant filed a substantially similar motion to withdraw her plea in each case and an amended Rule 604(d) certificate. The trial court conducted a combined hearing on defendant's motion the same day. Defendant asked the court to take judicial notice of the testimony from the previous hearing. The court indicated it reviewed the files and had "come to the same conclusion that [it] did back [on June 19, 2014]." The court denied defendant's motion.

¶ 14 This appeal followed.

¶ 15 II. ANALYSIS

¶ 16 A. Assessment of Fines

¶ 17 As part of the plea agreement, defendant agreed to "pay court costs which include[d] a [violent crime victims assistance fund] (VCVA) fee, $10 drug-court fee, $15 child-

advocacy-center fee, $30 juvenile-records-expungement fee and a $5 State Police operations assistance fee." The sentencing order reflected these amounts. However, the notice to party of fines and court costs prepared by the circuit clerk included an additional $50 court system fee and a $10 probation and court services operations fee in each of the four cases.

¶ 18 On appeal, defendant argues these amounts were not included in the agreed terms of the negotiated plea; the inclusion of these fines denied her the benefit of her bargain; and therefore, she should be allowed to withdraw her guilty plea. Defendant admits she did not raise this issue in her written postplea motion. However, she contends forfeiture does not apply because she is challenging the imposition of a fine, which she claims is an issue that can be raised anytime. In support of her proposition, she cites *People v. Anthony*, 2011 IL App (1st) 091528-B, ¶¶ 19-20. In *Anthony*, the First District held the issue of whether the imposition of alleged fines or fees was authorized by statute was a matter that could be addressed at any time as a challenge to a potentially void sentence. *Anthony*, 2011 IL App (1st) 091528-B, ¶ 20. However, our supreme court in *Castleberry* abolished this void sentencing rule as constitutionally unsound. *People v. Castleberry*, 2015 IL 116916, ¶ 19. A sentence is only void if it is entered without personal jurisdiction or subject matter jurisdiction. *Castleberry*, 2015 IL 116916, ¶ 11.

¶ 19 The issue here is whether defendant's plea was voluntary or involuntary given the fact the trial court added terms, in the form of fines, to the sentence which were not previously agreed to by defendant as part of her fully negotiated plea agreement. Indeed, fines are part of a criminal sentence. *People v. Graves*, 235 Ill. 2d 244, 250 (2009). Further, fines imposed by the circuit clerk are void because the clerk has no authority to do so. *People v. Wade*, 2016 IL App (3d) 150417, ¶ 12. Here, the State concedes the $50 court system fee imposed by the circuit clerk

in each case, pursuant to statute (55 ILCS 5/5-1101 (West 2014)), was actually a fine, and because it was imposed by the clerk, it is void.

¶ 20 Defendant also claims the $10 probation and court services fee imposed by the circuit clerk is a fee in two cases because such services were utilized and a fine in the other two because such services were not utilized. In its brief, the State argues such services *were* utilized in all four cases, thereby constituting fees, not fines. However, no documents appear in the record to support the State's assertion that probation services were actually utilized in case Nos. 12-CF-865 (appellate case No. 4-15-1017) or 13-CF-516 (appellate case No. 4-15-1018). Therefore, we vacate the imposition of the $10 probation assessments in those two cases as improperly imposed fines by the circuit clerk. See *People v. Rogers*, 2014 IL App (4th) 121088, ¶ 38 (whether the probation assessment is a fine or a fee depends on whether the probation office participates in the prosecution).

¶ 21 Accepting defendant's argument that two of the $10 assessments constituted fines and were thereby improperly imposed by the circuit court without authority, and without considering whether defendant forfeited this claim, we cannot say the imposition of $20 was a term with sufficient significance to justify allowing defendant to withdraw her plea as involuntary. See *People v. Scalise*, 2015 IL App (3d) 130720, ¶ 12 (plea agreement stands despite the correction of fines and fees) (quoting *People v. Montiel*, 365 Ill. App. 3d 601, 607 (2006) ("As a matter of common sense, the fines and fees are a minor issue and an inessential term of the agreement.")). As such, we affirm the trial court's order denying defendant's motion to withdraw her plea agreement.

¶ 22 B. Ineffective Assistance of Counsel

¶ 23 Defendant next contends the attorney who represented her at the hearing on her motion to withdraw her guilty plea was ineffective for failing to raise the issue of the incompetence of her guilty-plea attorney. The basis for defendant's claim centers on whether her guilty-plea attorney should have made the State aware of the extent of her cooperation as a confidential informant when negotiating the plea agreement, and whether her attorney at the hearing on her motion to withdraw the plea made a sufficient argument for that as a reason to allow for the withdrawal of her plea. Regardless, the record on appeal is insufficient to properly address this claim. What guilty-plea counsel knew about defendant's cooperation with police and the substance of any conversation between either counsel and defendant are not matters included in the record on appeal.

¶ 24 In *People v. Kunze*, 193 Ill. App. 3d 708, 726 (1990), this court held adjudication of a claim of ineffective assistance of counsel is often better made in proceedings on a petition for postconviction relief, where a complete record can be made. In *Kunze*, the ineffective-assistance-of-counsel claim turned on whether the defendant would have testified had he known in advance that the State would use his prior convictions to impeach him. *Kunze*, 193 Ill. App. 3d at 725. The defendant claimed his counsel was ineffective for failing to investigate his prior criminal history and for consequently advising him to testify. *Kunze*, 193 Ill. App. 3d at 724. Because nothing in the record allowed for a determination as to why counsel advised the defendant to testify, this court declined to adjudicate the defendant's claim. *Kunze*, 193 Ill. App. 3d at 725-26.

¶ 25 As in *Kunze*, the record here contains nothing to review with respect to whether plea counsel did or did not use defendant's cooperation as a negotiating tool, or why postplea counsel did not argue plea counsel's incompetence. Because the answers to those questions are

currently *dehors* the record, we decline to consider them. See *People v. Calvert*, 326 Ill. App. 3d 414, 421 (2001). Rather, defendant's claim of ineffective assistance may be brought under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)). See *People v. Holloman*, 304 Ill. App. 3d 177, 186 (1999) (citing *Kunze*, this court on direct appeal declined to address whether trial counsel's failure to make a motion to suppress evidence constituted ineffective assistance); *People v. Flores*, 231 Ill. App.3d 813, 827 (1992) (this court could not determine whether trial counsel's conduct constituted incompetence or trial strategy and recommended the claim be brought in a postconviction petition); *In re Carmody*, 274 Ill. App. 3d 46, 56 (1995) (noting the record on direct appeal rarely contains sufficient information regarding counsel's tactics).

¶ 26 Accordingly, consistent with the line of authority beginning with *Kunze*, we likewise hold as follows: "Because the answers to the questions pertinent to defendant's claim are currently [*dehors*] the record, we decline to consider them. Instead, defendant may pursue [her] claim under the [Act] (725 ILCS 5/122-1 through 122-8 (West 2002))." *People v. Durgan*, 346 Ill. App. 3d 1121, 1143 (2004).

¶ 27 III. CONCLUSION

¶ 28 For the reasons stated, the fines improperly imposed by the McLean County circuit clerk ($50 court system fee imposed in each of the four cases and the $10 probation and court services operations fee imposed in case Nos. 12-CF-865 (appellate case No. 4-15-1017) and 13-CF-516 (appellate case No. 4-15-1018)) as discussed above are vacated. Otherwise, we affirm the trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 29 Affirmed in part and vacated in part.