2018 IL App (1st) 152350-U

No. 1-15-2350

Order filed October 17, 2018

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. 15 DV 74517
	)	
DARIN WARD,	)	Honorable
	)	Laura Bertucci Smith,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE COBBS delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Howse concurred in the judgment.

ORDER

¶ 1 *Held*: Pursuant to Supreme Court Rule 604(d) (eff. Dec. 11, 2014), any issue not raised in the motion withdraw a guilty plea and vacate the judgment shall be deemed waived on appeal. Defendant's claim of ineffective assistance of counsel must fail when he cannot establish that counsel's complained-of actions fell below an objective standard of reasonableness.

¶ 2 In June 2015, defendant Darin Ward entered a negotiated plea of guilty to domestic battery and was sentenced to one year of probation. On appeal, he contends that the trial court committed plain error when it accepted the plea agreement despite an insufficient factual basis.

He further contends that he was denied the effective assistance of counsel when plea counsel failed to argue, in the motion to withdraw the plea and vacate the judgment, that the trial court "allowed" defendant to enter a plea of guilty to domestic battery without a sufficient factual basis. Defendant finally contends that he was denied the effective assistance of counsel when plea counsel presented a witness's affidavit at the hearing on the motion to withdraw the plea and vacate the judgment rather than the witness. We affirm.

¶ 3 On June 29, 2015, defendant entered a negotiated plea of guilty to domestic battery in exchange for a sentence of one year of probation. The court asked defendant if he understood that he was charged with the offense of domestic battery occurring on June 15, 2015, and he indicated that he did and that he wanted to enter a guilty plea. The court then asked whether defendant was entering a guilty plea of his own free will and defendant answered in the affirmative.

¶ 4 The parties then stipulated to a factual basis for the plea. Specifically, that June 15, 2015, defendant committed the offense of domestic battery in that he without legal justification knowingly made physical contact with the victim Melissa Pinkston, a family member, and that defendant pushed Pinkston with his hands on her chest and such contact was of an insulting or provoking nature.

¶ 5 The court found that defendant understood the nature of the charge, that the plea was given freely and voluntarily, and that a factual basis existed for the plea. The court then accepted the plea, found defendant guilty of domestic battery and sentenced him to one year of probation.

¶ 6 On July 29, 2015, defendant filed through counsel a motion to withdraw the plea and vacate the judgment alleging that since his plea he had discovered new evidence that would have

caused him not to plead guilty. Attached to the motion in support was the affidavit of defendant's sister, Tarla Boyce and counsel's certificate filed pursuant to Illinois Supreme Court Rule 604(d) (eff. Dec. 11, 2014). In her affidavit dated and notarized on July 29, 2015, Boyce averred that she was defendant's sister and that "on or about" June 15, 2015 she had a phone conversation with Pinkston. Boyce further averred that during that phone conversation, Pinkston stated that she "falsely accused" defendant of pushing her because she was angry at defendant for coming home late and wanted him arrested. Boyce finally averred that she did not speak to defendant or tell him about the phone conversation until June 30, 2015, because defendant was in custody. In the certificate filed pursuant to Supreme Court Rule 604(d), counsel stated, *inter alia*, that she had consulted with defendant to ascertain his contentions of error with regard to the entry of the guilty plea, and that she had examined the trial court file and the report of proceedings and had made any necessary amendments to the motion to withdraw the plea necessary in order to adequately present any defects in the guilty plea proceedings.

¶ 7 At the hearing on the motion to withdraw the plea and vacate the judgment, defendant testified that after entering his plea, he learned, through a conversation with his sister, that Pinkston told his sister that the only reason that that victim filed a police report was because Pinkston was mad that defendant did not "come in" at a certain time. Defendant did not know this information on June 29, 2015 when he entered his guilty plea, and if he had known this information, he would not have entered a guilty plea and instead gone to trial. During cross-examination, defendant acknowledged that neither his sister nor Pinkston was present in court and that it was just his "word" that Pinkston made the statement.

¶ 8 Following defendant's testimony, the defense argued, relying on Boyce's affidavit, that if defendant had known about the conversation that his sister had with Pinkston, defendant would not have entered a guilty plea. The State responded that defendant had not produced enough evidence to justify the withdrawal of defendant's plea. The State further noted that defendant's sister was not present in court, and therefore could not be examined as to the conversation; rather, the only evidence before the court was that defendant had a conversation with his sister regarding a conversation that she had with Pinkston and that hearsay was not something that the court should rely on as credible evidence in order to grant defendant's motion.

¶ 9 In denying defendant's motion to withdraw the plea, the court noted that defendant's argument was that his plea was not knowing and voluntary because of possible evidence that he did not know about and concluded that it did not "necessarily" think that made a plea not knowing and voluntary. The court stated that defendant was admonished regarding his "rights," and indicated that he understood and that he was entering a guilty plea voluntarily and knowingly. The court next stated that although defendant argued that the plea was the result of a manifest injustice, the witness was not present in court and was defendant's sister, who "comes from a place of bias right there." The court further noted that the contents of Boyce's affidavit were not "exactly" what defendant testified to, that is, defendant testified that Pinkston called the police because he came home late, but that Pinkston could have called the police because defendant came home late and pushed her. The court then stated that it did not believe that Pinkston told Boyce that she " 'falsely accused' " defendant of pushing her; rather, the court believed that the affidavit was paraphrased. The court concluded that "without further testimony by the witness to really understand what was said when it's inconsistent with what the Defendant

says himself and it comes from a witness who is a bias witness herself being the Defendant's sister and that it's an alleged conversation over a telephone where [the court was] not even sure the foundation for that phone call could be met to come in," that defendant had not met his burden and denied the motion to withdraw the plea and vacate the judgment.

¶ 10 On appeal, defendant first contends that the trial court committed plain error when it accepted the plea agreement despite an "insufficient" factual basis.

¶ 11 Pursuant to Supreme Court Rule 604(d) (eff. Dec. 11, 2014), "any issue not raised by the defendant in the motion to reconsider the sentence or withdraw the plea of guilty and vacate the judgment shall be deemed waived" on appeal. In the case at bar, defendant did not challenge the factual basis for his guilty plea before the trial court, and therefore, has forfeited consideration of that issue on appeal. See *People v. Smith*, 406 Ill. App. 3d 879, 884-86 (2010) (where the defendant argued at the hearing on his motion to withdraw his guilty plea that he wanted to withdraw his plea because the court failed to admonish him about the MSR term and then argued on appeal that his plea agreement was improperly negotiated, the court relied upon Rule 604(d) to find that the defendant forfeited the issue on appeal because the trial court never had an "opportunity to exercise its discretion"); *People v. Davis*, 145 Ill. 2d 240, 250 (1991) (any claim not raised in a motion to withdraw guilty plea is generally deemed waived).

¶ 12 Defendant attempts to overcome this forfeiture by arguing that he was denied the effective assistance of counsel by when plea counsel failed to argue, in the motion to withdraw the plea and vacate the judgment, that that the trial court "allowed" defendant to enter a plea of guilty to domestic battery "without a sufficient factual basis." Defendant relies on the fact that counsel was in possession of an affidavit in which his sister averred that Pinkston admitted that

she "falsely accused" defendant of pushing her to argue that counsel should have challenged the factual basis of the plea. That is, the affidavit gave counsel "reason to believe" there was a chance that Pinkston would not actually testify at trial, and, therefore, counsel should have challenged the factual basis of the plea. We disagree.

¶ 13 In the case at bar, defendant voluntarily entered a negotiated guilty plea, therefore he could only attack the voluntary and knowing nature of the plea in a motion to withdraw the plea. See *People v. Townsell*, 209 Ill. 2d 543, 547-48 (2004) (following the entry of a voluntary guilty plea, a defendant may not raise claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea and may only attack the voluntary and knowing nature of the guilty plea). To the extent that defendant argues that counsel should have attacked the factual basis of the plea based upon Boyce's affidavit, he fails to explain how the fact that Pinkston allegedly admitted to falsely accusing him rendered his plea involuntary or unknowing. In other words, he does not allege that he pled guilty under a mistake of fact regarding what happened or that his plea was involuntary because he was unaware that Pinkston lied; rather, he alleges that he would not have entered a plea of guilty if he had known that Pinkston admitted that she lied because that would mean she would not testify against him if the case went to trial. We therefore disagree that counsel rendered ineffective assistance by not challenging the factual basis of the plea in the motion to withdraw the plea and vacate the judgment. See *People v. Ivy*, 313 Ill. App. 3d 1011, 1018 (2000) (refraining from performing a futile act is not ineffective assistance of counsel).

¶ 14 Defendant finally contends that he was denied the effective assistance of counsel when counsel presented Boyce's affidavit at the hearing on the motion to withdraw the plea and vacate

the judgment rather than Boyce herself. He contends that counsel's failure to present his sister at the hearing was objectively unreasonable considering "the limited value of an affidavit as opposed to live testimony."

¶ 15 Claims of ineffective assistance of counsel are governed by the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To succeed on a claim of ineffective assistance of counsel, a defendant must show (1) counsel's performance fell below an objective standard of reasonableness and (2) the deficient performance resulted in prejudice. *Id*. at 687. To satisfy the deficiency prong, counsel's performance must be so deficient that counsel was "not functioning as the 'counsel' guaranteed by the sixth amendment." *People v. Easley*, 192 Ill. 2d 307, 317 (2000). The failure to satisfy either prong defeats a defendant's claim of ineffective assistance of counsel. *Strickland*, 466 U.S. at 697. Generally, "[t]he decision whether to call particular witnesses is a matter of trial strategy" and will ordinarily not support an ineffective assistance of counsel claim. *People v. Patterson*, 217 Ill. 2d 407, 442 (2005).

¶ 16 Initially, we note that Boyce's affidavit related the contents of a conversation that she had with Pinkston, and, presumably, Boyce's testimony that she had a conversation with Pinkston in which Pinkston admitted to "falsely accusing" defendant of pushing her would be inadmissible hearsay. See *People v. Banks*, 237 Ill. 2d 154, 180 (2010) (hearsay is an out of court statement offered to establish the truth of the matter asserted). Moreover, we are unpersuaded by defendant's argument that counsel's decision to present the affidavit instead of Boyce constituted ineffective assistance because Boyce's testimony would have more "value" than the affidavit.

¶ 17 Defendant has failed to overcome the presumption that counsel's decision to present the affidavit rather than Boyce was sound trial strategy given that the proposed testimony would

have come from defendant's sister and would potentially have carried little weight with the trial court. See *People v. Lacy*, 407 Ill. App. 3d 442, 466 (2011) (counsel could have decided testimony of witness would not be helpful because she was related to defendant); *People v. Dean*, 226 Ill. App. 3d 465, 468 (1992) (counsel's decision not to call witnesses related to defendant was a matter of trial strategy). Additionally, defendant points to nothing in the record indicating that either Boyce or Pinkston was available and willing to testify at the hearing on the motion to withdraw the plea. Although defendant may believe that counsel's decision to present the affidavit rather than Boyce was the wrong one, because counsel's complained-of action was a strategic decision, his claim of ineffective assistance of counsel must fail. See *People v. Perry*, 224 Ill. 2d 312, 344 (2007) ("a reviewing court will be highly deferential to trial counsel on matters of trial strategy, making every effort to evaluate counsel's performance from his perspective at the time, rather than through the lens of hindsight").

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

¶ 19 Affirmed.