2018 IL App (1st) 152954-U

No. 1-15-2954

Order filed February 1, 2018

Fourth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 15 DV 77408
	)	
WILLIAM NELSON,	)	Honorable
	)	Yolande M. Bourgeois,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE ELLIS delivered the judgment of the court.
Presiding Justice Burke and Justice Gordon concurred in the judgment.

ORDER

¶ 1 *Held*: Affirmed. Trial court did not abuse its discretion in denying defendant's motion to withdraw guilty plea, as defendant did not establish that counsel misadvised him regarding collateral consequence of plea.

¶ 2 Defendant William Nelson entered a plea of guilty to domestic battery and was sentenced to 18 months of conditional discharge. Defendant later filed a motion to withdraw the plea and vacate the judgment. After a hearing, the trial court denied the motion. On appeal, defendant contends that the trial court erred when it denied the motion to withdraw the plea and vacate the judgment because he was denied the effective assistance of counsel when counsel erroneously

told him that his conviction could be expunged upon the satisfactory completion of the conditional discharge. We affirm.

¶ 3 Defendant entered a plea of guilty to domestic battery and was sentenced to 18 months of conditional discharge. Defendant was represented at this hearing by Bernard Armel. Upon questioning by the court, defendant indicated that he was pleading guilty of his own free will and that no one threatened him or promised him anything to get him to plead guilty. The factual basis for the plea was that, if called to testify, Angela Mui would swear that defendant "without legal justification knowingly and intentionally made physical contact with" Mui, a family or household member, when he "pushed her out of a parked car."

¶ 4 A month later, through new counsel, defendant filed a motion to withdraw the plea and vacate the judgment. The motion alleged, in pertinent part, that defendant was advised by plea counsel that, after he complied with the terms of the conditional discharge he could have his record expunged and "his fingerprints returned."

¶ 5 The trial court held a hearing on defendant's motion. Defendant testified that he entered a guilty plea because he thought it was his "only option." He did not understand that he could "take it further" and go to trial. Plea counsel told him that "after the 18 months, [defendant] would be able to remove everything and erase it off of the system just like it never happened." He thought the words "expungement" or "expunge" were used, but was not "100 percent sure."

¶ 6 Defendant said he changed his mind about his guilty plea 20-30 minutes after it happened, when he spoke to someone in the Social Services Office and learned that "this" was going to stay on his record. He thought "it seemed pretty harsh." It was at this point that defendant "decided to go and seek other help" because the statement that the conviction would

stay on his "record forever" was different from what plea counsel said. Specifically, plea counsel stated that, after 18 months, counsel "would go and *** erase everything." Defendant decided to accept a plea because he believed that the conviction would be "erased" after 18 months. He denied pushing or shoving Mui and said he would not have entered a guilty plea if he had known that he could not have his record expunged.

¶ 7 During cross-examination, defendant testified that he was a 38-year-old college graduate. He acknowledged that he never told plea counsel that he wanted a trial, nor did he ever tell the court that he did not want to enter a plea.

¶ 8 Aaron Bromberg, defendant's friend, testified that he was present when defendant and plea counsel discussed defendant's plea. During the discussion, plea counsel said that the "State offered an offer" of conditional discharge, and that "if everything goes good, [defendant] complies, after 18 months [counsel] would come back after that 18 months and get his fingerprints and everything taken out of the system." In other words, "it would be as if it never happened." During cross-examination, Bromberg clarified that counsel said "he'd get all the records removed from the court and from the police."

¶ 9 The State then presented the testimony of Bernard Armel, who represented defendant during the plea. Armel testified that defendant was referred to him by Bromberg, a former student. He met with defendant twice at his office prior to defendant's plea to discuss the charge and the facts of the case. When defendant asked what could happen, Armel responded that they would go to court, and that there might be a trial. However, Armel did not know if the complaining witness would show up. They also discussed the two types of trials available to defendant, that is, a bench or a jury.

¶ 10 On May 26, 2015, Armel came to court with defendant. He approached the assistant State's Attorney (ASA), and the ASA "indicated an offer." Armel went back to defendant and discussed the offer. Bromberg was present for this discussion. Defendant did not know what to do and asked what Armel recommended. He responded that he did not "have anything to do with that." When defendant asked what would happen if he did not take the offer, Armel responded that a trial would be held. Armel denied forcing defendant to plead guilty. When the issue of expungement came up, Armel indicated to defendant that he did not "do" expungements and that it was not something he wanted to "talk about now." Armel told defendant that there is an office at the Daley Center where one could file a petition for expungement, but he denied telling defendant that defendant "for certain" could expunge the conviction. He does not practice expungements in his regular practice.

¶ 11 During cross-examination, Armel testified that he made a counteroffer to the ASA but could not recall the details. He had not previously discussed a plea bargain with defendant. Armel told defendant that at the conclusion of the conditional discharge, defendant could go to the Daley Center and file a petition for expungement. He did not tell defendant that defendant could have his record expunged. The following exchange then took place:

"Q: Did you tell him that he's not eligible to have his record expunged when he's convicted of domestic battery?

A: That didn't come up and I did not say that.

Q: When you told him he could go to the Daley Center to file a petition, did you mention to him that it would be silly because it's not expungeable?

A: The answer is no.

Q: Did you ever tell him that it was not expungeable?

A: No.

Q: Did you read the law on it before you told him—

A: That's why I don't do expungements, sir.

Q: Did you tell him—

A: The answer is no.

Q: Did you tell him that we can hold off on taking this plea until I have time to check on this expungement issue?

A: No."

¶ 12 In denying the motion to withdraw the plea and vacate the judgment, the trial court noted the conflict in the testimony, that there were "two different stories about whether expungement was discussed," that "saying go file [the expungement petition] and saying absolutely this will be wiped clean are totally different." The court credited Armel's testimony over the evidence proffered by defendant. Defendant now appeals.

¶ 13 On appeal, defendant contends that the trial court erred when it denied his motion to withdraw the plea and vacate the judgment because he received ineffective assistance of counsel. Specifically, defendant contends that plea counsel incorrectly advised him that "the charges could be expunged from his record upon satisfactory completion of the Conditional Discharge." Defendant acknowledges that the inability to expunge a conviction is a collateral consequence of a guilty plea, but he argues that counsel still had the responsibility to "give proper advice."

¶ 14 A defendant does not have an automatic right to withdraw his guilty plea. *People v. Manning*, 227 Ill. 2d 403, 412 (2008). To withdraw a guilty plea, a defendant must demonstrate a

manifest injustice under the facts involved. *People v. Baez*, 241 Ill. 2d 44, 110 (2011). Ordinarily, the decision to allow a defendant to withdraw his guilty plea is "a matter within the discretion of the trial court and will not be disturbed absent an abuse of that discretion." *Manning*, 227 Ill. 2d at 411-12. An abuse of discretion occurs only if the court's ruling is so arbitrary or unreasonable that no reasonable person would take the view adopted by the trial court. *People v. Delvillar*, 235 Ill. 2d 507, 519 (2009).

¶ 15 When a defendant pleads guilty as a consequence of the ineffective assistance of counsel, the plea is not knowingly and voluntarily made, and the defendant should be allowed to withdraw it. *Id.* at 412. A challenge to a guilty plea alleging ineffective assistance of counsel is subject to the two-prong standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). See *People v. Rissley*, 206 Ill. 2d 403, 457 (2003). First, counsel's conduct is deficient under *Strickland* if he failed to ensure that the defendant entered the guilty plea voluntarily and intelligently. *Id.* at 457. Second, to establish prejudice, the defendant must show that there is a reasonable probability that, absent counsel's error, he would not have pleaded guilty and would have insisted upon going to trial. *People v. Hall*, 217 Ill. 2d 324, 335 (2005).

¶ 16 Whether an attorney has an obligation to inform a defendant of the consequences of a guilty plea largely depends on whether the consequences are direct or collateral. "[A] direct consequence of a guilty plea is one which has a definite, immediate and largely automatic effect on the range of a defendant's sentence." *People v. Hughes*, 2012 IL 112817, ¶ 35. A collateral consequence, on the other hand, "is one which the circuit court has no authority to impose, and 'results from an action that may or may not be taken by an agency that the trial court does not control.' " *Id*. ¶ 36 (quoting *Delvillar*, 235 Ill. 2d at 520). Counsel's failure to advise a client

regarding collateral consequences of a plea generally falls "outside the requirements of the sixth amendment." *Id.* ¶ 45. But an attorney's affirmative misadvice regarding a collateral consequence can amount to constitutionally deficient performance. See *People v. Correa*, 108 Ill. 2d 541, 550-53 (1985) (where counsel affirmatively provided "unequivocal, erroneous, misleading representations" about the consequences of plea, such advice amounted to ineffective assistance that rendered defendant's plea involuntary).

¶ 17 Here, the basis for defendant's claim of ineffective assistance is that counsel affirmatively misadvised him that he could expunge the instant conviction upon the successful completion of the 18-month conditional discharge when, in fact, a conviction for domestic battery is not eligible for expungement. In other words, counsel's performances was deficient because counsel gave defendant inaccurate advice about a collateral consequence of his guilty plea.

¶ 18 At the hearing on the motion to withdraw the plea, defendant testified that Armel told him that, after 18 months, he "would be able to remove everything and erase it off the system." Bromberg also testified that Armel said that if defendant completed the conditional discharge successfully, Armel would get defendant's "fingerprints and everything taken out of the system."

¶ 19 Armel, on the other hand, testified that he told defendant that he did not "do" expungements. Although he admitted that he told defendant that there was an office at the Daley Center where a person could go and file a petition for an expungement, he denied telling defendant that defendant "for certain" could expunge the conviction. He told defendant about the procedure for expungement, in other words, but did not guarantee a result.

¶ 20 After hearing and weighing the conflicting testimony, the trial court decided that it believed defense counsel's version of the events over that of defendant, and thus denied the motion to withdraw, finding that defense counsel never promised defendant an expungement. The trial court is in a far superior position than this court to observe the demeanor and conduct of the witnesses and, thus, to weigh the evidence and make credibility determinations. See *In re R.G.*, 2012 IL App (1st) 120193, ¶ 31. In addition, the court could have taken into account that defendant had told the trial court, at the time of the plea, that he was not promised anything in exchange for his guilty plea. See *People v. Ramirez*, 162 Ill. 2d 235, 243 (1994) (defendant's assertions at time of plea contradicted later assertion that defense counsel improperly promised him probation upon plea of guilty). On this record, we are in no position to hold that the trial court's ruling was so arbitrary or unreasonable that no rational fact finder would have adopted that position. See *Delvillar*, 235 Ill. 2d at 519.

¶ 21 As we uphold the trial court's finding that defense counsel never misadvised defendant about the collateral consequence of his guilty plea, it follows that defense counsel's performance was not deficient in the first instance, and thus defendant cannot establish ineffective assistance. *Rissley*, 206 Ill. 2d at 457 (ineffectiveness requires showing of deficient performance).

¶ 22 We affirm the judgment of the circuit court of Cook County.

¶ 23 Affirmed.