2018 IL App (2d) 160363-U
Nos. 2-16-0363 & 2-16-0364 cons.
Order filed June 21, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. FRANK E. BELLINE, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 15-CF-195 Honorable John J. Kinsella, Judge, Presiding.

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. FRANK E. BELLINE, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 15-CF-235 Honorable John J. Kinsella, Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justice Burke concurred in the judgment.
Justice Jorgensen specially concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly denied defendant's motion to withdraw his guilty plea.

¶ 2 Defendant, Frank E. Belline, pleaded guilty to retail theft (720 ILCS 5/16-25(a)(1) (West 2014)) and attempted theft of property under $500 (720 ILCS 5/8-4(a), 16-1(a)(1), (b)(4) (West 2014)), in exchange for concurrent sentences of 30 months' imprisonment. Defendant moved to withdraw his guilty plea, arguing that his attorney was ineffective. More specifically, he claimed that, because his attorney told him that he would have to serve only nine months of his sentence, which turned out not to be the case, his plea was not knowingly and voluntarily entered. Following a hearing, the trial court denied the motion, and this timely appeal followed. We affirm.

¶ 3 On January 23, 2015, while defendant was on felony probation, he took a suit and other items from a Men's Wearhouse. A few days later, he took a Mercedes Benz from a car dealership. He was charged with retail theft and theft of property exceeding $10,000 and not exceeding $100,000 (720 ILCS 5/16-1(a)(1), (b)(5) (West 2014)) and was taken into custody at the very end of January 2015.

¶ 4 Thereafter, defense counsel and the State participated in a conference pursuant to Illinois Supreme Court Rule 402 (eff. July 1, 2012). Counsel relayed to defendant what was addressed, advising him in a letter dated May 7, 2015, that the State was offering him a sentence of four years' imprisonment. Counsel told defendant that, because he would have to serve only half of his sentence, defendant's projected release date would be January 30, 2017. Further, counsel advised defendant that he could be released "potentially sooner if [he] qualif[ied] for any additional discretionary good time credits." Counsel listed various options defendant could take, which included trying to negotiate a better sentence, and asked defendant how he wanted counsel to proceed.

¶ 5 On May 22, 2015, pursuant to a new plea agreement, defendant pleaded guilty to retail theft and attempted theft. With regard to the attempted theft, the State explained that the Class 2 offense with which defendant was charged was reduced to a Class 3. Moreover, the State asked that defendant's felony probation, which was subject to a petition to revoke, be unsatisfactorily terminated with an unsatisfied judgment. In exchange for pleading guilty to these charges, the parties agreed to a 30-month sentence. At no point was sentencing credit mentioned as part of the plea agreement.

¶ 6 After hearing the details of the agreement and a factual basis for the plea, the court admonished defendant. In doing so, the court asked:

> "THE COURT: Is there anyone, sir, who is forcing you or threatening you or making promises to you in order to get you to plead guilty here today?
>
> DEFENDANT BELLINE: No, your Honor."

The court found the plea knowingly and voluntarily made and imposed the agreed-upon sentence of 30 months, which carried with it a one-year term of mandatory supervised release (see 730 ILCS 5/5-8-1(d)(3) (West 2014)). The court then admonished defendant about his right to appeal, but failed to tell defendant that, if he wanted to appeal, he was *required* to file a motion to withdraw his guilty plea first. See Ill. S. Ct. R. 605(c)(2) (eff. Oct. 1, 2001).

¶ 7 In August 2015, defendant moved to withdraw his guilty plea; the trial court struck the motion, finding it untimely filed; we allowed defendant to file a late notice of appeal; and we granted defendant's request for a summary remand for compliance with Illinois Supreme Court Rule 605(c). *People v. Belline*, No. 2-15-1000 (Feb. 3, 2016) (minute order).

¶ 8 Around this same time, defendant sent a letter to his attorney, accusing the attorney of misrepresenting to him the amount of time he would actually serve. Defendant asserted that

counsel told him that he would receive day-for-day credit (see 730 ILCS 5/3-6-3(a)(2)-(2.6) (West 2014)), which would require him to serve 15 months of his sentence, in addition to good-conduct credit (see 730 ILCS 5/3-6-3(a)(3) (West 2014)), which would further reduce his sentence by 6 months. Thus, according to defendant, his attorney told him that he would have to serve only 9 months of his 30-month sentence. When defendant arrived at the Department of Corrections (the Department), he was told that "it may be possible to receive" the good-conduct credit, "but [it was not] a guarantee." Defendant claimed that he never would have pleaded guilty had he known that he might not receive good-conduct credit.

¶ 9 In response to this letter, counsel sent a letter to defendant in September 2015. In that letter, counsel asserted that "[he] never guaranteed that [defendant] would receive these additional credits." In a "p.s." at the end of the letter, counsel stated that he "still believe[s] that [defendant] will receive the additional good time credits at the discretion of [the Department], because [counsel] do[es] believe that [defendant] do[es] in fact qualify."

¶ 10 Thereafter, defendant sent two letters to his attorney addressing the same issue. In one of these letters, defendant indicated that he had "done everything required by [the Department] so not to jeopardize [his good-conduct credit]." Defendant also noted that his "[e]mployment will be terminated if [he does not] return to work on 11/2/15 as [he] stated to the Union by mail per [the attorney's] explanation of [his] release."

¶ 11 Defendant was released from prison on March 18, 2016; new counsel was appointed to represent him; and that attorney filed a new motion to withdraw defendant's guilty plea, claiming that his plea was invalid because of counsel's misrepresentations as to good-conduct credit. At the May 2016 hearing held on that motion, defendant testified that, when his attorney told him that he would receive six months of good-conduct credit, his attorney did not say that that was

his opinion. Rather, counsel stated it as a "fact." Because counsel's assertion was a "fact" and not a "promise," defendant did not tell the court about this exchange when the court asked him before accepting his plea if any promises had been made to him to get him to plead guilty. With regard to the May 7, 2015, letter, defendant stated that he received that letter only after he was sent to the Department.

¶ 12 Counsel, who had worked in the Public Defender's office for eight years and had handled thousands of cases, testified that he listened to defendant's testimony, and said that was "pretty much how [he] recall[ed] it as well." However, counsel clarified that he never "guarantee[d]" that defendant would get the six months of good-conduct credit, as that credit is awarded at the discretion of the Department. Rather, counsel "probably presumed that to be true, but [he] never said, you know, absolutely you will get it." At a "bare[ ]minimum," counsel believed that it was "highly likely" that defendant would get that credit, and thus counsel "probably strongly suggested" that defendant would "because that was [counsel's] understanding at the time." Indeed, counsel asserted that, "to this day," he "still believe[s that defendant] should have gotten this credit." Concerning the May 7, 2015, letter, counsel asserted that he mailed the letter to defendant on that date and that nothing in the letter was inconsistent with what counsel told defendant before he pleaded guilty. Likewise, counsel testified that the September 2015 letter, in which counsel indicated that credit was awarded at the Department's discretion, was consistent with what counsel told defendant.

¶ 13 The trial court denied defendant's motion to withdraw his guilty plea. In doing so, the court credited the attorney's testimony over defendant's, noting that it did not believe that the attorney made any guarantee or promise to defendant to induce him to plead guilty. Because the court found that no such promise was made, it determined that counsel was not ineffective.

¶ 14 At issue in this appeal is whether defendant should be allowed to withdraw his guilty plea because he pleaded guilty based on his attorney's representation that he would serve only 9 months of his 30-month sentence. "When a trial court reaches the merits of a motion to withdraw a guilty plea, the decision to grant or deny that motion 'rests in the sound discretion of the [trial] court and, as such, is reviewed for an abuse of discretion.' " *People v. Glover*, 2017 IL App (4th) 160586, ¶ 29 (quoting *People v. Hughes*, 2012 IL 112817, ¶ 32). A trial court abuses its discretion when its ruling is so arbitrary or unreasonable that no reasonable person would adopt the court's view. *People v. Boyd*, 2018 IL App (5th) 140556, ¶ 14.

¶ 15 "One basis for the withdrawal of a guilty plea is where defense counsel gives the defendant inadequate advice prior to entering the plea." *Glover*, 2017 IL App (4th) 160586, ¶ 39. " 'A defendant may enter a guilty plea because of some erroneous advice by counsel, but that fact alone does not destroy the voluntary nature of the plea.' " *Id.* (quoting *People v. Cunningham*, 286 Ill. App. 3d 346, 349 (1997)). Rather, " 'it must be shown that defendant was denied the effective assistance of counsel.' " *Id.* (quoting *Cunningham*, 286 Ill. App. 3d at 349).

¶ 16 To establish that counsel was ineffective in such a circumstance, a defendant must satisfy the two-prong test articulated in *Strickland v. Washington*, 466 U.S. 688 (1984). See *People v. Valdez*, 2016 IL 119860, ¶¶ 13-14. Under the first prong of that test, a defendant must demonstrate that his attorney's performance " 'fell below an objective standard of reasonableness.' " *Id.* ¶ 14 (quoting *Strickland*, 466 U.S. at 688). As has been noted, surmounting *Strickland*'s high bar is no easy task, as judicial scrutiny of counsel's performance is highly deferential. *People v. Hughes*, 2012 IL 112817, ¶ 63 (quoting *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010)). To satisfy the second prong, a defendant must establish that he was prejudiced as a result of his counsel's deficient performance. *Id.* Prejudice in guilty-plea

proceedings is evaluated in light of the surrounding circumstances. *People v. Brown*, 2017 IL 121681, ¶ 48. To establish prejudice based on a claim that counsel provided erroneous advice, a defendant who pleaded guilty based on that advice must show that a decision to reject the plea offer would have been rational under the circumstances. *Id.*

¶ 17 The defendant bears the burden of establishing both parts of the *Strickland* test. *People v. Jones*, 219 Ill. App. 3d 301, 305 (1991). "[F]ailure to make the requisite showing of either deficient performance or sufficient prejudice defeats an ineffectiveness claim." *People v. Palmer*, 162 Ill. 2d 465, 475 (1994). Similarly, claims that are refuted by the record cannot succeed. *People v. Strickland*, 363 Ill. App. 3d 598, 607 (2006).

¶ 18 Here, we first consider the deficient-performance prong. In doing so, we note that defendant assured the court that his plea was not the product of any off-the-record promise. Although defendant now claims that counsel's alleged statement about the amount of time he would have to serve on his 30-month sentence was not a "promise" but a "legal fact," it is clear that, regardless of the label he attaches, defendant alleged that he was told something different from what was detailed in court as the agreement. Thus, defendant was required to alert the court to the fact that counsel allegedly told him something else that, at a minimum, influenced his decision to plead guilty. See *People v. Krantz*, 58 Ill. 2d 187, 194-95 (1974) ("Rule 402 was designed to insure properly entered pleas of guilty, not to provide for merely an incantation or ceremonial."); *People v. Robinson*, 157 Ill. App. 3d 622, 629 (1987) ("If a plea of guilty is to have any binding effect or is to be given any subsequent weight, the extensive and exhaustive admonitions given by the circuit court in this case and acknowledged by petitioner must be held to overwhelm petitioner's current assertion that he entered his plea involuntarily").

¶ 19 In any event, the trial court discredited defendant's testimony that counsel made any such promise, and we have no basis to disturb that ruling. See *People v. Mercado*, 356 Ill. App. 3d 487, 497 (2005) (the trial court "bears the burden of assessing the credibility of witnesses who testify at a hearing on a motion to withdraw a guilty plea"). According to counsel's testimony, counsel never *guaranteed* that defendant would receive six months of good-conduct credit. Rather, counsel *strongly believed* that defendant would. It is well settled that an attorney's honest assessment of a defendant's case, even when the attorney's predictions are not realized, cannot be grounds for finding counsel ineffective. See, *e.g.*, *People v. Hobson*, 386 Ill. App. 3d 221, 243 (2008) (counsel's recommendation to the defendant to waive his right to a jury trial because counsel "knew" the judge and believed he would not find the defendant guilty did not constitute ineffective assistance, because, among other things, such advice was "a prediction based upon counsel's *** knowledge by reputation and/or by experience of the trial judge's previous record"). Here, too, counsel's belief, based on his experience, that defendant would get six months of good-conduct credit, which the Department refused in its discretion to award, cannot serve as a basis for concluding that counsel was ineffective.

¶ 20 For this reason, *Boyd*, which defendant moved to cite as additional authority, is inapplicable. There, the defendant pleaded guilty based on counsel's statement that he could receive various sentencing credits. *Boyd*, 2018 IL App (5th) 140556, ¶¶ 3, 6-7. In his testimony, counsel agreed that he had so informed the defendant. *Id.* ¶ 21. In actuality, the defendant was ineligible for such discretionary credit because he had been convicted of armed robbery. *Id*. ¶ 22 (citing 730 ILCS 5/3-6-3(a)(2)(iii) (West 2012)). Thus, even though counsel had no obligation to advise the defendant about sentencing credit, which was a collateral consequence of his plea,

counsel nevertheless provided ineffective assistance when he provided the defendant with patently incorrect information. *Boyd*, 2018 IL App (5th) 140556, ¶ 23.

¶ 21 Here, unlike in *Boyd*, defendant *was* eligible to receive the credit, and the trial court found that counsel did not give defendant inaccurate information. Rather, counsel merely told defendant what, in his experience, he believed would happen with defendant's case. The fact that counsel's prediction, which defendant interpreted as a guarantee, did not ultimately materialize cannot serve as a basis for concluding that counsel's performance was *objectively* unreasonable.

¶ 22 Defendant also claims that counsel was deficient because, although good-conduct credit was awarded quite regularly in the past, it is now awarded only in the most exceptional cases. See Jamey Dunn, *State of the State: Gov. Quinn Takes a Pass on Early Release Plan* Illinois Issues, Jan. 2012. Thus, defendant suggests that counsel should not have told him even that it was likely that he would receive six months of additional credit. Again, we note that in contrast to *Boyd*, defendant here was eligible to receive the credit, and the applicable statute says nothing about the likelihood that such credit will be awarded. It merely provides that an inmate convicted of a non-excluded offense, such as defendant, "*may* be selected to receive the credit" at the Director's discretion. (Emphasis added.) 730 ILCS 5/3-6-3(a)(3) (West 2014).

¶ 23 We also find misplaced defendant's reliance on *People v. Correa*, 108 Ill. 2d 541 (1985), and *People v. Young*, 355 Ill. App. 3d 317 (2005). In *Correa*, the trial court credited the defendant's testimony over the attorney's in finding that the attorney made "unequivocal, erroneous, misleading representations" that the defendant would not be deported. See *Correa*, 108 Ill. 2d at 544-52. Here, the court credited the attorney's testimony over defendant's, and found that counsel's advice was not misleading; and, as noted that finding was not improper. In *Young*, the issue was whether the defendant had made a legally sufficient claim under the Post-

Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2016)) that his attorney was ineffective for providing the defendant with allegedly erroneous advice about sentencing credit. *Young*, 355 Ill. App. 3d at 323-24. There, we made clear that "whether [the] defendant can actually prove his contention must be resolved at an evidentiary hearing." *Id.* at 324. Here, there was a hearing on defendant's claim, and the evidence showed that the claim was properly rejected.

¶ 24 Because we determine that counsel's performance was not deficient, we do not address whether defendant was prejudiced. See *Palmer*, 162 Ill. 2d at 475-76. For the reasons stated, we affirm the judgment of the circuit court of Du Page County denying defendant's motion to withdraw his plea. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 25 Affirmed.

¶ 26 JUSTICE JORGENSEN, specially concurring.

¶ 27 I agree with the outcome and analysis here. Under current authority, defendant's argument that his attorney was ineffective fails, and his motion to withdraw his plea was properly denied. I write separately to comment on the predicament that defendant faced here, a plight which boils down to the difference between what he believes his attorney represented as *fact* and what the Department of Corrections (DOC) ultimately did. Defendant's dilemma is not uncommon and could easily be avoided.

¶ 28 Supreme Court Rule 402 requires the court to inquire whether "any force or threats or any promises, apart from a plea agreement, were used to obtain the plea." The point of the rule is not merely to recite a series of words and obtain the necessary "no." The purpose is to ensure that entry of the guilty plea (and acceptance of the terms of the tendered agreement) was

knowing and voluntary. Indeed, Rule 402 requires that a defendant enter into a plea agreement knowingly and voluntarily, meaning that he or she must *know* and voluntarily accept the terms. Nevertheless, although it is important that the defendant know what an imposed term of years in the DOC really means, in terms of how much time he or she will actually be imprisoned, the sentence as articulated when the agreement is summarized in court often fails to reflect the *actual time* a defendant will serve.

¶ 29 Perhaps it is time to expand admonitions to require inquiry into whether any representations have been made regarding the time the defendant will actually serve in the DOC, and whether the defendant is entering the plea in reliance on those representations.[1] Indeed, when a plea agreement includes a term of imprisonment, the paramount interest of most (if not all) defendants is not what the sentence is; it is how much time will actually be served? That was clearly defendant's issue of concern here. Indeed, at the hearing on defendant's motion to withdraw his plea, there was little difference between his recollections and those of his attorney. Defendant testified that his attorney represented, as *fact*, that he would receive the six-month good-conduct credit; thus, with day-for-day credit, defendant would serve only nine months and he would be released in time to report to his job on November 2, 2015. Counsel agreed that

[1] I note that the obligatory admonitions designed to fully inform a defendant of the consequences of a guilty plea have already been expanded in other ways, including to include a collateral admonition regarding the impact of a plea on the defendant's immigration status. See 725 ILCS 5/113-8 (2004) (court must admonish a defendant entering a guilty plea that if he or she is not a citizen of the United States, a conviction on the charged offense "may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization under the laws of the United States").

defendant's summary was "pretty much how he recalled it as well," but counsel qualified that his representation regarding the six-month good-conduct credit was his opinion, not a fact and never a guarantee. Nevertheless, defendant, rightly or wrongly, believed that his attorney represented, as fact, that he would receive a six-month good-conduct credit, and it is apparent that defendant's motivation to accept the agreement was based on what he believed counsel represented to him and, thus, his release by November 2, 2015.

¶ 30 Prudently ensuring that the record reflects any representations made to a defendant concerning the *actual time* to be served benefits both the State and defense counsel. For example, these issues could be avoided if the State were to explain, on the record at the plea hearing, whether the sentence will be served at 50%, 85%, or 100%, which counts will run consecutively or concurrently, etc. Similarly, the record should reflect any statements made by defense counsel to the defendant concerning *discretionary* credits, and whether counsel relayed to the defendant that his or her *opinion* concerning application of factors that might reduce the defendant's actual time served is no guarantee that those factors will, in fact, be applied. Having these points on record at the hearing would also protect against prospective postconviction arguments that a defendant's attorney never discussed potential credits and that, if he or she had known about even the discretionary credits that could have reduced the actual sentence, the defendant would have accepted the State's offer.

¶ 31 In sum, one simple, additional question—"Has anyone told you that you will *actually* serve less than the 30 months to which you are being sentenced?"—would have foreclosed defendant's claim here. If he had responded affirmatively, further dialogue would have clarified that receiving the six-month good-conduct credit (or any other credit) was not guaranteed, and that any comment about the likelihood of receiving it was only counsel's opinion and not binding

upon the DOC. Defendant could then have elected to proceed with the agreement, fully informed of what he was accepting, or to reject the offer and proceed otherwise. Proceeding in the manner would allow courts to rest assured that, if the defendant accepts the terms of the plea, he or she does so fully informed and *knowingly*.