2018 IL App (2d) 170461-U
No. 2-17-0461
Order filed February 6, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. VINCENT A. MYERS, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of McHenry County. No. 15-CF-765 Honorable Michael W. Feetterer, Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices McLaren and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly denied defendant's motion to withdraw his guilty plea, which defendant asserted was induced by his counsel's unfulfilled promise: defendant had assured the court that no promise had induced his plea, and the court found that no such promise had been made; in any event, defendant did not and could not support his claim that, had he known that the promise would not be fulfilled, he would have insisted on going to trial.

¶ 2 Defendant, Vincent A. Myers, pleaded guilty to two counts of aggravated driving while under the influence of alcohol (625 ILCS 5/11-501(a)(2), (d)(1)(C) (West 2014)), and he was sentenced to concurrent terms of eight years' imprisonment. He moved to withdraw his guilty plea, arguing that his counsel was ineffective when he promised defendant, in return for pleading

guilty, that counsel would (1) obtain the toxicology report on one of the victims and (2) submit at sentencing (a) that report, (b) the toxicology report prepared for the other victim, and (c) defendant's version of the nature of the accident. The trial court denied the motion, and this timely appeal followed. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In November 2016, the court and the attorneys, with defendant's consent, held a conference pursuant to Illinois Supreme Court Rule 402 (eff. July 1, 2012). The court verified that, during that conference, "information *** was given to [the court] by [defense counsel] as well as the State in terms of what they expected the evidence to show."

¶ 5 In January 2017, the attorneys and the court, again with defendant's consent, held another Rule 402 conference, and immediately thereafter defendant executed a "Waiver of Trial and Acknowledgement." This form provided that "no force, threats or promises—apart from any plea agreement made known to the Court—were used to obtain this waiver." At the following guilty-plea proceedings, the court advised defendant of the offenses with which he was charged, the minimum and maximum penalties he faced, and the rights he was giving up by pleading guilty. The court showed defendant the waiver form he executed, and defendant assured the court that he signed it voluntarily. The court then heard a factual basis for the plea, which provided concisely, in relevant part, that defendant was driving a vehicle on September 6, 2015, while he was under the influence of alcohol; that at that time he struck Juan Martinez and Zachary Feltman; that defendant's acts caused great bodily harm to both of these men; and that defendant's acts were the proximate cause of these men's injuries. The court accepted the guilty plea, finding it voluntarily entered.

¶ 6 At the subsequent sentencing hearing, a presentence investigation report (PSI) was presented to the court. That PSI contained an "Official Version" of the incident. This "Official Version" indicated that Feltman and Martinez "were standing at the back of their vehicle on the roadway" with the car's "hazard[lights] on" when defendant "drove into" the men, "striking the two men at the trunk of the vehicle." Feltman and Martinez were taken to a nearby hospital and later airlifted to other hospitals. Both men suffered many extensive and grave injuries. For example, Martinez's left leg had to be amputated below the knee. When questioned by the police about the accident, defendant said that he had been " 'on the lake all day' " and had consumed three or four alcoholic beverages, with the last drink being consumed two to three hours before the accident. Police detected the smell of alcohol emanating from defendant's breath and noticed that defendant's eyes were red, bloodshot, and glassy. A preliminary breath test revealed a breath-alcohol concentration of 0.173. Although the PSI also provided a section where defendant could relay his account of what happened, defendant opted not to give one.

¶ 7 Also presented at the hearing was the character letter of defendant's stepmother. That statement provided that "[defendant's] counsel has informed [defendant] that *** the victims' actions, inactions and probable state of their impairment on the night in question[ ] are irrelevant."

¶ 8 After defendant was sentenced, he obtained new counsel and filed a motion to withdraw his guilty plea, arguing that, before he pleaded guilty, he was told that certain evidence would be presented at the sentencing hearing. This included evidence detailing how the accident happened and that Martinez had marijuana and cocaine in his system. Defendant also claimed that he was told that records concerning whether Feltman was under the influence of drugs and alcohol would be obtained and presented to the court if such records existed. Defendant noted that such

evidence was never presented to the court, and he contended that he would not have pleaded guilty if he had known that such evidence would not be submitted. Defendant's new counsel prepared an affidavit supporting the allegations in the motion, and, at a hearing, defendant testified that the affidavit was correct.

¶ 9 The trial court denied the motion. In doing so, the court observed that it was aware of each party's version of the facts. The court also noted that no evidence was presented indicating what the toxicology reports would reveal, and the court questioned how such evidence would be relevant. Elaborating on this point, the court noted that, although defendant alleged that Martinez had drugs and alcohol in his system, this would not mean that Martinez contributed to the cause of the accident. Given all of that, the court did not believe that any promises were made to defendant to induce him to plead guilty.

¶ 10 II. ANALYSIS

¶ 11 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 unfulfilled promises. "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).

¶ 12 "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 346 at 349-50).

¶ 13 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). To satisfy the second prong, a defendant must establish that he was prejudiced as a result of his counsel's deficient performance. *Id.* " 'In order to satisfy the 'prejudice' requirement in a plea proceeding, the defendant must show that there is a reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial.' " *Glover*, 2017 IL App (4th) 160586, ¶ 39 (quoting *People v. Pugh*, 157 Ill. 2d 1, 15 (1993)). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *People v. Manning*, 227 Ill. 2d 403, 418 (2008).

¶ 14 A defendant claiming ineffective assistance of counsel bears the burden of establishing both parts of the *Strickland* test. *People v. Jones*, 219 Ill. App. 3d 301, 305 (1991). Claims that are not substantiated in some way by factual allegations must fail. *Id.* Likewise, claims that the record refutes cannot succeed. *People v. Strickland*, 363 Ill. App. 3d 598, 607 (2006).

¶ 15 First, we must reject defendant's claim of deficient performance. We initially observe that, in his waiver of trial, defendant assured the court that his plea was not the product of any off-the-record promise. (Further, in allocution at sentencing, defendant did not complain that any such promise went unfulfilled.) In his motion, however, he asserted that his plea was based on such a promise. He was not permitted to change positions this way. 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."). In any event, the trial court discredited defendant's testimony that counsel made any such promise. 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").

¶ 16 Second, defendant has failed to establish that he was prejudiced. To support his claim that he would have insisted on going to trial, defendant needed to articulate a plausible defense or a claim of actual innocence. See *Hughes*, 2012 IL 112817, ¶ 64; *cf. Lee v. United States*, 582 U.S. ___, 137 S. Ct. 1958 (2017) (no such showing needed in deportation context). Defendant has not done so here.

¶ 17 Indeed, defendant's claim is particularly implausible on this record. As to his contention that counsel promised him that he would advise the court at sentencing about his version of the circumstances of the accident, the record reveals that the court was already aware of that version. Specifically, two months before defendant pleaded guilty, counsel, with defendant's on-the-record consent, participated in a Rule 402 conference with the court and the State. During those proceedings, the court was given both defendant's and the State's versions of what transpired on the night the victims were injured. Further, both in the PSI and in allocution, defendant declined to reiterate his own account. This is inconsistent with his contention that the presentation of that

account at sentencing was so important that, had he known that it would not be presented, he would have insisted on going to trial.

¶ 18 Regarding his claim that counsel promised him that the toxicology reports would be submitted, it appears that counsel told defendant that the victims' "actions, inactions and probable state of their impairment on the night in question[ ] are irrelevant." Indeed, defendant would have gained nothing by attempting to blame the victims. See *People v. Hill*, 2012 IL App (5th) 100536, ¶ 28 ("[The d]efendant's attempt to blame the victim for his own choices on that night is without merit and is not worthy as a mitigating factor."). In any event, there is nothing to indicate that such reports existed or what they would have shown. Under these circumstances, defendant cannot support his claim that the anticipated presentation of such reports at sentencing was a crucial factor in his decision to plead guilty.

¶ 19 Given all of the above, we simply cannot conclude that the trial court abused its discretion when it denied defendant's motion to withdraw his guilty plea.

¶ 20 III. CONCLUSION

¶ 21 For the above-stated reasons, we affirm the judgment of the circuit court of McHenry County. 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).

¶ 22 Affirmed.