2018 IL App (3d) 160359-U

Order filed October 2, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 13th Judicial Circuit, La Salle County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-16-0359
v.	)	Circuit No. 15-CF-129
	)	
LISA M. GONZALEZ,	)	Honorable Howard C. Ryan Jr., Judge, Presiding.
Defendant-Appellant.	)	

JUSTICE LYTTON delivered the judgment of the court.
Justices Holdridge and McDade concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant received effective assistance of plea counsel.

¶ 2 Defendant, Lisa M. Gonzalez, appeals from the circuit court's denial of her motion to withdraw her guilty plea. Defendant argues that she received ineffective assistance of plea counsel because counsel failed to investigate and advise defendant of the affirmative defense of not guilty by reason of insanity. We affirm.

¶ 3 FACTS

¶ 4 The State charged defendant with one count of retail theft (720 ILCS 5/16-25(a)(1) (West 2014)). The court appointed the public defender to represent defendant. Defendant entered an open plea of guilty to the charged offense. Before accepting the plea, defendant told the court that she understood the potential punishments, her rights, and was not threatened or coerced into entering the plea. The court accepted defendant's plea and ordered a presentence investigation report (PSI).

¶ 5 Before the sentencing hearing, defendant retained private counsel. At that hearing, defendant testified that she had been diagnosed with kleptomania in 2010. Defendant explained that her condition was an "impulse control disorder" and she neither "pre-planned" nor intended to commit the theft at issue. On the day of the theft, defendant dropped off a prescription at the Walmart pharmacy. While the pharmacy filled defendant's prescription, defendant shopped throughout the store. Defendant placed some items in her shopping cart and other items into her purse. At one point, defendant looked

> "at [her] hands and [her] arm and it was like—almost like an auto baton-type, like a robotic-thing, and I remember go—you know, and I'm like what am I doing, you know, and then I went to the—I went to the next aisle and picked up the blankets and put them in the cart and paid for them. I mean it just doesn't make any sense."

Defendant picked up her prescription, and paid for it and the items in her cart. Defendant did not pay for the items that she placed into her purse and was subsequently arrested for retail theft. After her arrest, defendant began attending Kleptomaniacs Anonymous and psychiatric therapy.

¶ 6 Defendant's PSI included hundreds of pages of medical reports. The reports included a July 20, 2015, clinical evaluation, in which defendant said that she could not resist the urge to

steal items and she felt guilt, shame, and fear of arrest after committing a theft. In a July 7, 2015, letter, Terrence Shulman of the Shulman Center for Compulsive Theft, Spending and Hoarding, stated that defendant had admitted to having "a problem with stealing." Shulman also noted that defendant felt "very ashamed of her shoplifting behavior." The court sentenced defendant to six years' imprisonment.

¶ 7 Defendant filed a *pro se* motion to withdraw her guilty plea. The court appointed a different public defender to represent defendant in the postplea proceeding. Defendant's new counsel filed an amended motion to withdraw her guilty plea. In the amended motion, defendant argued that plea counsel had coerced her into entering an open plea, and because of her medical issues, she was unable to fully understand the concept of an open plea.

¶ 8 At the hearing on defendant's motion, plea counsel testified that he had discussed the facts of the case with defendant and the State's offer to recommend a sentence of five years' imprisonment in exchange for defendant's guilty plea. Defendant rejected the State's offer. Defendant told counsel that she was a kleptomaniac. Counsel explained that defendant's condition might be "an issue in mitigation at a sentencing hearing but it wasn't a defense to the charge of retail theft." Defendant chose to enter an open plea and argue for a lesser sentence. Defendant told counsel that she understood the plea procedure "very well" as she had been through it before.

¶ 9 Defendant testified that she wanted to take her case to trial and call her mental health counselor and a certified addiction counselor to testify on her behalf. Plea counsel ignored defendant's requests to investigate these witnesses to testify in her defense.

¶ 10 The court denied defendant's motion to withdraw her guilty plea noting that kleptomania was not a defense to a retail theft charge. Defendant appeals.

¶ 11 ANALYSIS

¶ 12 Defendant argues that she received ineffective assistance of plea counsel in that counsel did not investigate and advise defendant of the affirmative defense of not guilty by reason of insanity based on her kleptomania diagnosis. We find that defendant has failed to establish that counsel's performance was deficient or that she suffered prejudice because her diagnosis of kleptomania would not support a viable insanity defense in this case.

¶ 13 To prevail on a claim of ineffective assistance of counsel, defendant must show that: (1) counsel's performance was deficient, and (2) this deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 694 (1984). Defendant must establish both prongs of the *Strickland* test. *People v. Cherry*, 2016 IL 118728, ¶ 24. To establish the prejudice prong in a challenge to plea counsel's assistance, defendant must show that "there is a reasonable probability that, but for counsel's errors, [s]he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). "[W]here the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the 'prejudice' inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial." *Id.*

¶ 14 For an insanity defense to have any likelihood of success, defendant must be able to prove by clear and convincing evidence that she was not criminally responsible for her conduct because "at the time of such conduct, as a result of mental disease or mental defect, [s]he lack[ed] substantial capacity to appreciate the criminality of [her] conduct." 720 ILCS 5/6-2(a) (West 2014).

¶ 15 Defendant argues that her kleptomania diagnosis provided a reasonable ground for plea counsel to investigate and advise her on the affirmative defense of insanity. Defendant's claim

that plea counsel did not advise her as to an insanity defense is refuted by the record. Plea counsel testified that he advised defendant that an insanity defense based on her kleptomania condition would not be successful. Counsel's advice and subsequent decision not to further pursue this potential defense was reasonable as kleptomania does not fit within the section 6-2(a) insanity defense definition.

¶ 16 "The essential feature of kleptomania is the recurrent failure to resist impulses to steal items even though the items are not needed for personal use or for their monetary value." American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, DSM-5 *Disruptive, Impulse-Control and Conduct Disorders* 478 (2013). A kleptomania sufferer's decision to steal is not the result of delusion or hallucination, and "[a]lthough individuals with this disorder will generally avoid stealing when immediate arrest is probable (*e.g.*, in full view of a police officer), they usually do not preplan the thefts or fully take into account the chances of apprehension." *Id.* As such, kleptomania does not render a defendant unable to "appreciate the criminality of [her] conduct." 720 ILCS 5/6-2(a) (West 2014). Moreover, at the time of defendant's offense, the Criminal Code of 2012 did not provide for an insanity defense based on an irresistible impulse. See Pub. Act 89-404 (eff. Aug. 20, 1995) (amending 720 ILCS 5/6-2(a)).

¶ 17 The record establishes that defendant's condition aligned with the above definition of kleptomania, and therefore, made a defense of insanity not viable. During the sentencing hearing, defendant testified that her decision to shoplift was "not a pre-planned crime" but an "impulse control disorder." In a subsequent clinical evaluation, defendant expressed that she could not resist the urge to steal items, and she felt guilt, shame, and fear of arrest after committing a theft. Defendant's statement to Shulman, that she felt "very ashamed of her

shoplifting behavior," further established that she was well aware of the criminality of her actions.

¶ 18 CONCLUSION

¶ 19 The judgment of the circuit court of La Salle County is affirmed.

¶ 20 Affirmed.