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2018 IL App (3d) 170148-U

Order filed February 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 10th Judicial Circuit, Peoria County, Illinois.
Plaintiff-Appellee,)	
v.)	Appeal No. 3-17-0148
KENON L. ALLEN,)	Circuit No. 11-CF-792
Defendant-Appellant.)	The Honorable Kevin W. Lyons, Judge, presiding.

PRESIDING JUSTICE CARTER delivered the judgment of the court.
Justices Lytton and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err in denying defendant's motion to withdraw his guilty plea where defendant failed to establish that he was prejudiced by his guilty-plea counsel's alleged erroneous advice that he could appeal his sentence after entering a negotiated plea.

¶ 2 Defendant, Kenon L. Allen, entered a partially negotiated guilty plea to first degree murder (720 ILCS 5/9-1(a)(2) (West 2010)) and attempted murder (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2010)). Under the plea agreement, defendant pled guilty in exchange for a sentencing cap of 70 years of imprisonment. He was sentenced to the maximum sentence available under the

sentencing cap of 70 years of imprisonment. On appeal, defendant argues that the trial court erred in denying his motion to withdraw his negotiated guilty plea because he had been induced into entering the plea by his counsel's alleged ineffective assistance. We affirm.

¶ 3

FACTS

¶ 4

By way of indictment, defendant was charged with five criminal offenses: three counts of first degree murder (720 ILCS 5/5-9-1(a)(1), 1(a)(2), 1(a)(3) (West 2010)), attempted murder (720 ILCS 5/8-4(a)), 9-1(a)(1) (West 2010)), and aggravated battery (720 ILCS 5/2-3.05(a)(1) (West 2010)). Defendant entered a partially negotiated guilty plea that included a sentencing cap of 50 years of imprisonment on one first-degree murder charge, 20 years of imprisonment on the attempted first degree murder charge, and an agreement that the State would not prosecute the remaining three charges. The factual basis for the plea showed that defendant entered a business and stabbed his estranged wife and her female co-worker, who had tried to intervene, resulting in the eventual death of her co-worker. After the attack, defendant fled and his wife called 9-1-1. The attack was recorded on a security camera. A knife box that matched the brand of knife used in the attack was found in defendant's home. When police contacted defendant by phone on the day of the attack, he admitted that he "f*** up" and asked if his wife was still alive.

¶ 5

A psychological examination was performed on defendant to determine whether he was fit to stand trial. The expert concluded that although defendant suffered from post-traumatic stress disorder resulting from his parents' murder suicide, he was fit to stand trial. The presentence investigation report showed that defendant was hospitalized for suicide attempts prior to the offenses in this case. Defendant's criminal history indicated a 1999 misdemeanor conviction for possession of controlled substances and traffic violations.

¶ 6 The trial court sentenced defendant to 50 years of imprisonment for first degree murder and a consecutive term of 20 years of imprisonment for attempted murder, which was the maximum aggregate sentence available under the sentencing cap of the plea bargain. Defense counsel filed a motion to either reduce the sentence or withdraw the guilty plea, which the trial court denied. On appeal, defendant argued defense counsel’s Rule 604(d) certificate was deficient and the trial court should have known defense counsel had a conflict of interest where defense counsel had filed a motion to reconsider sentence but no such motion was permitted following a negotiated guilty plea with a sentencing cap. *People v. Allen*, 2016 IL App (3d) 140189-U. This court reversed the trial court’s denial of defendant’s postplea motion and remanded the case for the filing of a compliant Rule 604(d) certificate, with instructions for defense counsel to file a properly amended postplea motion. *Id.* ¶ 13.

¶ 7 On remand, defendant’s new counsel filed a compliant Rule 604(d) certificate and a motion to withdraw guilty plea. In the motion to withdraw guilty plea, defendant argued he entered into the negotiated guilty plea after he had been misled by his previous defense counsel, who told defendant that he could appeal his sentence after entering the partially negotiated guilty plea. At the hearing on the motion, defendant testified that it was his understanding that if he got “hit too hard with [under] the cap,” then he would be able to appeal the sentence. Defendant testified that part of the inducement for him entering into the plea agreement with the State was his understanding that he could appeal his sentence if he did not like it. The trial court denied defendant’s motion to withdraw his guilty plea. Defendant appealed.

¶ 8 ANALYSIS

¶ 9 On appeal, the issue is whether defendant should have been allowed to withdraw his guilty plea. Defendant contends that because his counsel’s deficient performance (counsel’s

erroneous advice that defendant could appeal the sentence after entering into the partially negotiated plea) had induced defendant into entering the partially negotiated guilty plea under a misapprehension of the law, his plea was not voluntarily made and the trial court erred in denying his motion to withdraw his guilty plea. Defendant claims that he was prejudiced by his counsel's deficient performance because, but for his counsel's erroneous advice, he would not have entered into the plea agreement and, instead, would have preserved his right to appeal his sentence by either going to trial or by entering a blind guilty plea (pleading guilty with no sentencing agreement).

¶ 10 The State argues that defendant cannot show that he was prejudiced by his counsel's alleged deficient performance. The State contends that the factual basis for defendant's plea shows that it was not possible for defendant to claim actual innocence or claim a plausible defense and, therefore, there was no reasonable probability that defendant would have prevailed at trial.

¶ 11 Generally, a trial court's decision to allow a defendant to withdraw his guilty plea is a matter of the trial court's discretion and is reviewed only for an abuse of discretion. *People v. Pullen*, 192 Ill. 2d 36, 39-40 (2000). In considering a defendant's motion to withdraw his guilty plea, the trial court shall evaluate whether the guilty plea was entered through a misapprehension of the facts or of the law, or if there is doubt as to the guilt of the defendant and the ends of justice would be better served by submitting the case to trial. *Id.* at 40. A defendant may have entered a guilty plea because of some erroneous advice by counsel, but that fact alone will not destroy the voluntary nature of the guilty plea. *People v. Beasley*, 2017 IL App (4th) 150291, ¶ 32. Rather, to establish that his plea was involuntary, the defendant must establish he was provided ineffective assistance of counsel. *Id.*

¶ 12 To prevail on an ineffective assistance of counsel claim, a defendant must show: (1) his counsel's performance fell below an objective standard of reasonableness, and (2) he was prejudiced by his counsel's deficient performance. *People v. Brown*, 2017 IL 121681, ¶ 25 (citing *Strickland v. Washington*, 466 U.S. 688, 687 (1984)). In order for a guilty-plea defendant to show he was prejudiced by counsel's deficient performance to support an ineffective assistance of counsel claim, the guilty-plea defendant must show that there was a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have, instead, insisted on going to trial. *Brown*, 2017 IL 121681, ¶ 26, 28. A conclusory allegation by the defendant that he would not have entered a guilty plea and would have demanded trial is insufficient to establish prejudice for the purposes of an ineffective assistance of counsel claim. *Id.*

¶ 13 When a defendant does not have a viable defense strategy or the chance of an acquittal and his ineffective assistance claims relates to his understanding of the consequences of pleading guilty, the defendant's decision to plead guilty requires an assessment of the respective consequences of both a conviction after trial and a conviction under the plea. *Id.* ¶ 41; *cf. People v. Hall*, 217 Ill. 2d 324, 335-36 (2005) (requiring a claim of innocence or of a plausible defense to establish prejudice where the ineffective assistance of counsel claim is related to counsel's alleged deficient performance in regard to defense strategy or the chance of an acquittal); *People v. Rissley*, 206 Ill. 2d 403, 459-62 (2003) (requiring a claim of innocence or plausible defense to establish prejudice where plea counsel's deficient performance was based upon allegations that counsel failed to investigate an insanity defense and misunderstood procedures used in capital cases). The requirement of a claim of innocence or of a plausible defense does not apply to allegations regarding plea counsel's alleged errors pertaining to the defendant's understanding of

the consequences of pleading guilty. *Brown*, 2017 IL 121681, ¶ 46 (citing *Lee v. United States*, 582 U.S. ___, ___, 137 S. Ct. 1958, 1965 (2017) (distinguishing between guilty plea counsel's errors related to a defendant's chance of acquittal or prospects at trial and plea counsel's errors related to a defendant's understanding of the consequences of pleading guilty). For a defendant to support a claim that he was prejudiced by his reliance on counsel's erroneous advice about the consequences of pleading guilty, the defendant must show that a decision to reject the plea offer would have been rational under the circumstances. *Brown*, 2017 IL 121681, ¶ 48.

¶ 14 In this case, defendant alleges that he was prejudiced by his counsel's failure to advise him correctly as to his ability to appeal his sentence, which involved his understanding of the consequences of his guilty plea. See *id.* ¶¶ 41-46. In considering the relevant surrounding circumstances of defendant's guilty plea, given that the factual basis for the plea was that defendant stabbed his wife (a surviving victim who could presumably testify) and her coworker, who died after the attack, and that the incident had been captured on video, there appears to be no plausible claim of innocence or plausible claim of a viable defense to indicate defendant would possibly have escaped a finding of guilty at trial. The applicable sentencing range for murder was 20 to 60 years of imprisonment (730 ILCS 5/5-4.5-20(a) (West 2010)) and the applicable sentencing range for attempted murder was 6 to 30 years (730 ILCS 5/5-4.5-25(a) (West 2010)). Therefore, defendant was eligible to receive 90 years of imprisonment had he gone to trial, but under the negotiated guilty plea his sentence was capped at 70 years of imprisonment (capped at consecutive terms of 50 years for murder and 20 years for attempted murder). Considering the fact that defendant was given the maximum sentence available under the sentencing cap of the negotiated plea, even after the trial court considered any mitigating circumstances, it cannot reasonably be argued that defendant would have been given a lower

sentence if the cap was not in place if he had gone to trial or had entered a blind guilty plea.

Thus, based on these circumstances, defendant failed to establish that he was prejudiced by his counsel's alleged deficient performance because he is unable to show that a decision to reject the plea bargain would have been rational under the circumstances. See *Brown*, 2017 IL 121681, ¶ 52.

¶ 15 Defendant argues that the prejudice prong of *Strickland* was satisfied because, but for his counsel misinforming him that he could challenge his sentence after entering the negotiated guilty plea, he did not preserve his right to appeal his sentence. As noted above, if defendant had gone to trial or had entered a blind plea for the purpose of appealing any resulting sentence, his sentence could have been up to 20 years more than the aggregate 70-year term of imprisonment that he received under the plea bargain. There is no indication that defendant would have received a lower sentence after a trial or after entering a blind plea where there would be no sentencing cap when the trial court gave him the maximum available sentence under plea bargain with a sentencing cap in place. Under the circumstance of this case, there is also no indication that defendant being sentenced to at least 70 years of imprisonment, after a trial or after entering blind guilty plea, would have been an abuse of the trial court's discretion to support an excessive sentence argument on appeal. See *People v. Colbert*, 2013 IL App (1st) 112935, ¶ 22 (the imposition of a sentence is a matter of judicial discretion); *People v. Flambeau*, 134 Ill. App. 3d 932, 936-37 (1985) (an appellate court will only reduce a sentence to prevent arbitrary or oppressive sentencing that is disproportionate to the crime). Consequently, defendant is unable to show that a decision to reject the plea bargain so that he would be able to appeal the resulting sentence would have been rational under the circumstances of this case. Thus, the trial court did not abuse its discretion in denying defendant's motion to withdraw his guilty plea.

¶ 16

CONCLUSION

¶ 17

The judgment of the circuit court of Peoria County is affirmed.

¶ 18

Affirmed.