2018 IL App (5th) 14-0597-U

NO. 5-14-0597

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Clinton County.
	)	
v.	)	No. 12-CF-117
	)	
JERRY W. BIEGELEISEN,	)	Honorable
	)	Dennis E. Middendorff,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Presiding Justice Barberis and Justice Overstreet concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant was not prejudiced by the trial court's failure to admonish him, at the time of his guilty plea, of the possibility of a restitution order. Thus, the trial court's denial of his motion to withdraw the guilty plea is affirmed.

¶ 2 The defendant, Jerry Biegeleisen, appeals the circuit court's denial of his motion to withdraw his guilty plea. He argues that he is entitled to withdraw his guilty plea because the trial court failed to admonish him, before accepting his guilty plea, that he may be ordered to pay restitution as part of his sentence. For the following reasons, we affirm.

¶ 3 On January 15, 2013, the State charged the defendant with five counts of predatory criminal sexual assault of a child (720 ILCS 5/11-1.40 (West 2012)) and one

count of criminal sexual assault (*id.* § 11-1.20(a)(3)). On January 22, 2013, the defendant entered into an *Alford* plea[1] to one count of predatory criminal sexual assault. According to the terms of the partially negotiated plea, the remaining predatory criminal sexual assault charges were dismissed so that the defendant would avoid mandatory consecutive sentences, no charges relating to a house fire affecting the victim's family were pursued, and the defendant was not charged with similar sexual assault offenses in Marion County.

¶ 4 During the guilty plea hearing, the trial court admonished the defendant pursuant to Illinois Supreme Court Rule 402(a) (eff. July 1, 1997). In describing the minimum and maximum sentences prescribed by law, the trial court stated as follows:

> "This charge is a class X felony. Carries a minimum term of imprisonment of six years in the Illinois Department of Corrections, a maximum sentence of not more than 60 years in the Illinois Department of Corrections. Any sentence to the department of corrections would be followed by a period of mandatory supervised release [(MSR)], what most people call parole. As to this particular charge, it would be the determination of the Illinois Department of Corrections upon your release to determine the period of mandatory supervised release, but it could be for the remainder of your natural life. Do you understand that, sir?"

The defendant indicated that he understood the possible penalties. The court also admonished that the charge carried a possible fine of up to "$25,000 or any combination of fines and sentences of imprisonment up to those maximums." The court did not admonish him that he may be ordered to pay restitution as part of his sentence, and it was not discussed as part of the plea deal.

[1]An *Alford* plea is a guilty plea where a defendant maintains his innocence. See *North Carolina v. Alford*, 400 U.S. 25, 37-38 (1970).

¶ 5 The trial court then inquired about the voluntariness of the plea and admonished the defendant as to the rights he was giving up by pleading guilty. The State then provided the factual basis for the charge, and the court found the factual basis sufficient to support the plea and found the plea knowingly and voluntarily made.

¶ 6 At the March 6, 2013, sentencing hearing, the State recommended a sentence of 60 years' imprisonment, the maximum sentence. Also, the State requested that the defendant be ordered to reimburse Sexual Assault and Family Emergencies (SAFE) the costs of the victim's counseling services, which totaled $2892.50. In response, the defendant's counsel stated that the issue of restitution was "not in contest," and counsel recommended a sentence of 10 years' imprisonment. The court ultimately sentenced him to 40 years' imprisonment to be followed by 3 years of MSR. The court also ordered him to pay $2892.50 in restitution.

¶ 7 Thereafter, the defendant obtained new counsel, who filed a motion to withdraw the guilty plea and vacate judgment, or in the alternative, a motion to reconsider sentence on April 5, 2013. The motion argued that the defendant "contends that there is doubt as to his guilt," that he "has a defense worthy of consideration," that the "ends of justice would be served by holding a trial," and that his sentence was excessive.

¶ 8 On October 30, 2014, the defendant's new counsel filed a certificate pursuant to Illinois Supreme Court Rule 604(d) (eff. Feb. 6, 2013), which stated that he had consulted with the defendant in person to ascertain his contentions of error in the guilty plea and the imposed sentence, had examined the trial court file and report of proceedings on the

guilty plea hearing, and had made any necessary amendments to the motion for the adequate presentation of any defects in those proceedings.

¶ 9 On November 7, 2014, counsel filed a first amended motion to withdraw the guilty plea and vacate judgment or, in the alternative, a motion to reconsider sentence and a first amended certificate pursuant to Rule 604(d). The motion reiterated the arguments raised in the first motion. In addition, the amended motion argued that the defendant's previous trial counsel was ineffective in that counsel had not adequately investigated the medical evidence and that his counsel only called one witness in mitigation and had not presented other mitigation evidence even though several of the defendant's family members were available to testify as to his good character.

¶ 10 At the November 10, 2014, hearing on the amended motion, the defendant testified that he spoke to his attorney twice for approximately 15 minutes before entering his guilty plea, that he did not know that he would be entering into an *Alford* plea until the morning of the guilty plea hearing, and that he only had five minutes to decide whether to enter a guilty plea. He testified that, after the guilty plea hearing, he did not meet with his attorney again until the day of the sentencing hearing. At the sentencing hearing, his counsel did not call witnesses to testify about his good character even though he had approximately 20 people there to testify. After hearing the defendant's testimony and counsels' arguments, the trial court denied the defendant's motion. The defendant appeals.

¶ 11 On appeal, the defendant contends that he is entitled to withdraw his guilty plea because his plea was involuntary and unintelligent where the trial court failed to

admonish him that he may be ordered to pay restitution as part of his sentence. He acknowledges that his trial counsel did not raise the contention of error in a posttrial motion and that the contention of error is subject to principles of forfeiture. However, he alleges that the error is preserved under the plain-error doctrine, and that in any case, the failure to raise the issue in his motion to withdraw his guilty plea constituted ineffective assistance of counsel. The State, on the other hand, acknowledges that the admonishments were incomplete in that the defendant was not admonished as to the possibility of restitution. However, the State argues that the defendant was not prejudiced by the incomplete admonishments. We agree with the State.

¶ 12 The plain-error doctrine is a mechanism that allows a defendant, in certain cases, to avoid forfeiture and thereby allows a reviewing court to consider an unpreserved contention of error where (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against a defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of a defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). The first step is determining whether any error occurred at all. *People v. Taylor*, 2011 IL 110067, ¶ 30.

¶ 13 To satisfy due process, a guilty plea must be affirmatively shown to have been made voluntarily and intelligently. *People v. Fuller*, 205 Ill. 2d 308, 322 (2002). Illinois Supreme Court Rule 402, which was adopted to ensure that these due process requirements are satisfied, requires that the trial court give certain admonishments before

accepting a guilty plea, which includes informing a defendant of "the minimum and maximum sentence prescribed by law." Ill. S. Ct. R. 402(a)(2) (eff. July 1, 1997); *Fuller*, 205 Ill. 2d at 322. The Rule 402 admonishments are designed to ensure that a defendant understands his plea, the rights he waives by pleading guilty, and the consequences of a guilty plea. *People v. Dougherty*, 394 Ill. App. 3d 134, 138 (2009).

¶ 14 In support of the defendant's position that he should be allowed to withdraw his guilty plea because the trial court failed to admonish him as to the possibility of restitution before accepting his plea, he cites *People v. Snyder*, 2011 IL 111382, and *People v. Wigod*, 406 Ill. App. 3d 66 (2010). In *Snyder*, our supreme court concluded that "the appropriate remedy for the trial court's failure to admonish defendant, who entered a partially negotiated guilty plea, as to the possibility that she would be ordered to pay restitution is to allow her the opportunity to withdraw her plea." 2011 IL 111382, ¶ 31. The supreme court declined to address the issue of whether the guilty plea should be vacated because defendant expressly represented that she did not want to withdraw her plea. *Id.* ¶ 33.

¶ 15 In *Wigod*, defendant pled guilty to failure to support pursuant to the Non-Support Punishment Act (Act) (750 ILCS 16/15(a)(4) (West 2006)). 406 Ill. App. 3d at 68. During sentencing, the trial court ordered defendant to pay $88,502 in restitution in accordance with section 15(d) of the Act (750 ILCS 16/15(d) (West 2006)), which provided that, in addition to a sentence of imprisonment, the court shall order restitution of unpaid support and may impose fines. *Id.* at 75. Although restitution is an aspect of the penalty to be imposed upon conviction of failure to support, the trial court made no

mention of the possibility of a restitution order or even a fine during the Rule 402 admonishments. *Id.*

¶ 16 The appellate court, vacating the trial court's judgment and allowing defendant to withdraw his guilty plea, concluded that the trial court was required to admonish defendant of the spectrum of potential consequences of his guilty plea, which included restitution, before accepting his guilty plea, that defendant was not properly admonished as to restitution, and that he could have misinterpreted the admonishment he received as removing restitution from the table. *Id.* at 76-77. The appellate court further concluded that defendant's claim of error could be resolved under the rule recited in *People v. Whitfield*, 217 Ill. 2d 177, 188 (2005), which stated that every defendant who enters a guilty plea has a due process right to be properly and fully admonished. In *Whitfield*, our supreme court concluded that defendant was prejudiced by the trial court's failure to admonish him about a MSR term where he received a more onerous sentence than the one he was told he would receive. *Id.* at 201.

¶ 17 The State in the present case acknowledges a trial court is obligated, pursuant to *Snyder*, to admonish a defendant about the possibility of restitution as part of the Rule 402 admonishments and that the defendant was not admonished as to that possibility. However, the State contends that the failure to properly admonish the defendant does not automatically establish grounds for reversing the judgment or vacating the plea. Instead, the State argues that the defendant has failed to show that he was prejudiced by the inadequate admonishment.

¶ 18 Where the trial court fails to give a defendant the requisite admonishments under Rule 402, it is possible that the action can amount to plain error. *Fuller*, 205 Ill. 2d at 322. However, the failure to properly admonish a defendant under Rule 402 does not, by itself, automatically establish grounds for vacating a guilty plea. *Id.* at 323. Substantial compliance with Rule 402 is sufficient to establish due process. *Dougherty*, 394 Ill. App. 3d at 138. Whether reversal is required for an imperfect admonishment depends on whether a defendant has been denied real justice or whether a defendant has been prejudiced by the inadequate admonishments. *Id.* at 139. The defendant has the burden to establish prejudice. *Id.* Moreover, a defendant is not granted leave to withdraw a guilty plea as a matter of right and bears the burden of showing the withdrawal is necessary. *People v. Canterbury*, 313 Ill. App. 3d 914, 917 (2000).

¶ 19 Here, pursuant to *Snyder*, the defendant is requesting the appropriate relief for the incomplete admonishments, *i.e.*, withdrawal of his guilty plea. However, we conclude that he has failed to establish that he suffered any prejudice by the incomplete admonishments. Although we recognize that the defendant was not admonished as to the possibility of restitution, we note that he was otherwise fully and properly admonished. In addition, unlike the *Whitfield* defendant, he did not receive a more onerous sentence than what he was told he would receive. The defendant entered into a partially negotiated *Alford* plea to one count of predatory criminal sexual assault. There was no agreement about a specific sentence. As to potential sentences, the trial court advised the defendant that the predatory criminal sexual assault charge carried a minimum term of 6 years' imprisonment and a maximum term of 60 years' imprisonment, which would be followed

by a period of MSR. The court also advised that the charge carried a possible fine of up to $25,000.

¶ 20 The court later sentenced the defendant to 40 years' imprisonment to be followed by 3 years of MSR. The court ordered him to pay $2892.50 in restitution, which was taken out of his posted bond. Thus, his sentence was within the sentencing range. Further, although we recognize that the SAFE restitution is not classified as a fine, the total amount of fines, costs, and restitution was significantly less than the admonished fine of up to $25,000. We further note that the defendant's counsel acquiesced to the propriety of the restitution order during sentencing by stating that restitution was not "in contest."

¶ 21 Moreover, the defendant is essentially arguing that had he known at the time of his plea that he would be liable for approximately $2900 in restitution, he would not have pled guilty to a disposition that spared him mandatory consecutive sentences, prosecution on arson charges, and prosecution on similar sexual assault charges in another county. We find this unlikely. Accordingly, we conclude that the defendant has failed to show that he suffered any prejudice as a result of the inadequate admonishment.

¶ 22 We turn now to the defendant's claim of ineffective assistance of counsel. The defendant argues that trial counsel was ineffective for not raising the Rule 402 admonishment claim in his amended motion to withdraw guilty plea. We disagree.

¶ 23 To prevail on a claim of ineffective assistance of counsel, a defendant must prove both that defense counsel's performance fell below an objective standard of reasonableness, and that defendant was prejudiced by counsel's deficient performance.

People v. Manning, 241 Ill. 2d 319, 326 (2011). Prejudice is established when there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *People v. Graham*, 206 Ill. 2d 465, 476 (2003). Where defendant's ineffective-assistance-of-counsel claim can be disposed of because defendant suffered no prejudice, we need not determine whether counsel's performance was deficient. *Id.*

¶ 24 In this case, as explained in detail above, the defendant has failed to show that he suffered any prejudice from the incomplete admonishments. Thus, we conclude that trial counsel provided effective assistance of counsel.

¶ 25 For the foregoing reasons the judgment of the circuit court of Clinton County is hereby affirmed.

¶ 26 Affirmed.