2019 IL App (1st) 19-0411-U

FIRST DIVISION
December 31, 2019

No. 1-19-0411

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 18 CR 49801
	)	
	)	
BLAKE WELSH,	)	Honorable
	)	Stanley Sacks,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
PRESIDING Justice Griffin and Justice Walker concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in denying defendant's motion to withdraw his guilty plea.

¶ 2 Defendant, Blake Welsh, appeals from the denial of his motion to withdraw his guilty plea. He argues that he received ineffective assistance of counsel which made his plea involuntary. He also argues that the trial court erred by prejudging his motion to withdraw his

guilty plea and by acting as a prosecutor during the hearing on the motion. For the following reasons, we affirm the judgment of the trial court.

¶ 3 BACKGROUND

¶ 4 Defendant was charged with one count of the armed robbery of Carl Welsh with a firearm. On July 10, 2018, defendant, with the assistance of counsel, Mr. Frank Cece, Jr., entered into a negotiated guilty plea to armed robbery with a bludgeon and received 13 years' imprisonment. On August 8, 2018, with the assistance of new counsel, Mr. Stephen Richards, defendant filed a motion to withdraw his guilty plea. The next day, on August 9, 2018, Mr. Cece filed a motion on behalf of defendant to withdraw his guilty plea. On October 24, 2018, through Mr. Richards, defendant filed an amended motion to withdraw his guilty plea. In his amended motion, defendant argued, *inter alia*, that Mr. Cece deprived defendant of effective assistance of counsel because he failed to answer ready for a jury trial on July 10, 2018 and as a result his guilty plea was not voluntary. Therefore, the trial court "should either grant the motion to withdraw the guilty plea and/or order an evidentiary hearing with respect to the motion."

¶ 5 On January 8, 2019, the trial court held an evidentiary hearing on defendant's amended motion to withdraw his guilty plea. Before hearing testimony, the trial court informed Mr. Richards, "I read the transcript of the plea of guilty." Defendant then testified about the events of December 6, 2017, which was the date of the offense. The State objected, arguing that defendant's testimony about the incident itself was irrelevant given the fact that the case was before the court on a motion to withdraw defendant's guilty plea. After being questioned by the trial court if "this is about the incident itself," Mr. Richards responded, "Well, it's about both, but . . . before I make an argument as to why I can go into that let me go to July 10, 2018."

¶ 6 Defendant then testified that on July 10, 2018, he was represented by Frank Cece, Jr., and that he understood that as of that date, he had been demanding trial. Defendant testified that he understood that by demanding trial, the State could go to trial if they had witnesses or otherwise were ready to proceed. Defendant testified that he had discussions with Mr. Cece about demanding trial and when the State's term would conclude. The State objected to defendant's testimony on three grounds: "Number 1. If this is offered for the truth of the matter asserted (indecipherable) – completely not true. Secondly, his belief as to what the term was, completely irrelevant. And, thirdly, there is no foundation." The trial court overruled the State's objection and allowed defendant to continue to testify, though the trial court noted, "I'm not sure the relevance of any of it."

¶ 7 Defendant testified that he understood his case was set for trial on July 10, 2018, and expected that the trial was going to happen on that day because he had a conversation with Mr. Cece "in the back" about doing a jury trial that day. On July 10, 2018, Mr. Cece told defendant that a jury trial would take 3 or 4 days and that "all he could do was a bench trial, which was one day." Defendant testified that this was the first time Mr. Cece told him he could not do a jury trial that day. Defendant testified that he wanted a jury trial on July 10th but admitted that he did plead guilty to the charge against him on July 10, 2018, "[b]ecause of what happened in the courtroom between my father's side of the family, the family trying to fight my cousin, which is on my mother's side of the family, so."

¶ 8 Defendant then testified that on December 6, 2017, he met with the victim, his cousin, Carl Welsh, and Carl gave him $450 in cash because he owed defendant money. Defendant testified that he did not threaten Carl to get the money from him. On cross-

examination, defendant claimed that he talked with Carl on the phone the day before and agreed to meet to exchange the money and when they met, Carl gave him the money voluntarily. Defendant claimed that he was alone, and Carl was with other people, but defendant could not remember how many there were. Defendant claimed that he and Carl did not say anything during the exchange, that Carl did not give him anything else, and defendant left immediately upon getting the money. Defendant testified that he did not remember what he did with the money.

¶ 9 Defendant admitted that he knew he was facing a minimum sentence of 21 years imprisonment for the charge of armed robbery with a firearm and stated that when he pled guilty in exchange for a sentence of 13 years, he was receiving a sentence that was less than the minimum sentence. Defendant also admitted that when he pled guilty, he acknowledged that he was doing so freely and voluntarily and that there were no threats or promises made to him in exchange for pleading guilty.

¶ 10 Defendant acknowledged that he met with Mr. Cece three separate times during the time he was in court on July 10, 2018 and admitted that he did not ask Mr. Cece when he could do a jury trial. When defendant talked with Mr. Cece about pleading guilty, he told Mr. Cece that he wanted to take the 13 years. Mr. Cece never threatened him or promised him anything in exchange for pleading guilty.

¶ 11 Following arguments from both parties, the trial court denied defendant's motion to withdraw his guilty plea stating, "Since I was here when the plea was taken, I think I have some personal knowledge as to what occurred at the time of the plea." The trial court then recounted the prior dates that the case had been in court and stated that the issue about term

for speedy trial demand was a "nonissue." The trial court then recounted the events of July 10th and read the transcript of the guilty plea into the record.

¶ 12 After recounting the events of July 10, 2018, and considering defendant's testimony at the motion to withdraw his guilty plea, the court denied defendant's motion.

> "Leave to withdraw a plea of guilty is not granted as a matter of right. It's required to correct the manifest injustice.
>
> Keep that phrase in mind, manifest injustice of the facts involved.
>
> The standard which the Appellate Court will review the denial by a trial court motion to withdraw the plea of guilty has been established. The general rule is that within the sound discretion of the trial court to decide whether a plea of guilty may be withdrawn. (Indecipherable) -- will not be disturbed unless it appears that the guilty plea was entered through misapprehension of the facts or the law, or there is doubt of guilt of the accused and justice would be better served by sending the case to trial."

¶ 13 Regarding defendant's misapprehension of the facts or the law, the trial court found, "In this case there is no misapprehension of the facts or the law. Defendant was admonished numerous times what the sentence could possibly be." With respect to the doubt of defendant's guilt, the trial court found:

> "Every case you hear the guy says he didn't do it at one point another. He wants -- he maintains from his viewpoint that the guy owed him some money, guy gave him the money, his cousin.
>
> The State's version is somewhat different from that however, that he got

the money from his cousin, he got it at the end of a bludgeon or a weapon of some sort or another, which would make it an armed robbery.

So that's what trials are all about.

Victim says I was armed robbed, defendant says there was no armed robbery. That's what trials are all about.

So the mere fact that he maintains the guy gave him the money without a weapon being used to get it, is really basically insignificant because every single case you get the guy is going to say I didn't do it up to a certain point. Doesn't mean he didn't do it. It merely means that's what he wants to maintain. That's all. That's what trials are all about."

¶ 14 The trial court also rejected defendant's claim of ineffective assistance of counsel:

"As a matter of fact, when the defense suggests now the lawyer was ineffective, Cece that is, I think he was more than effective. He was extremely effective. He got a case broken down charged (indecipherable) – 21 years to 45 to a plea your client was more than happy to accept, 13.

That saved him -- if he would have got the minimum of 21, he'd do approximately 10-and-a-half years. A 13-and-a-half sentence he would do 6-and-a-half, so it saved him 4 years right off the top and possibly more. With the prior conviction for second-degree murder, probably be something else, probably wouldn't be talking about 21 necessarily. Even if you were, it's 4 years more than you got to begin with in this case."

¶ 15 The trial court found that defendant's plea was voluntary. The court noted that defendant had the opportunity to discuss the case with his lawyer three times.

> "I don't think [defendant] was forced to do anything whatsoever. I don't think he was forced to do anything whatsoever. He did what he wanted to do. Now he gets down to the joint. Hey, man, I got 13 years, maybe my cousin wouldn't show up. I issued a warrant for his cousin to being with in this case. Maybe he won't show up. Maybe he will recant. That's the risk you run. That's why they have plea negotiations in a given case. State says we'll break it down to this because we might have a problem with so and so. Defense says I'm not taking any chan[ces] like that, may be found guilty.
>
> And the fact that some other lawyer perhaps now might say he should have gone to trial, it's too late now. You had any chance you wanted to have, Mr. Welsh. Now, it's buyer's remorse."

¶ 16 The trial court then denied defendant's motion to withdraw his guilty plea. This appeal followed.

¶ 17 ANALYSIS

¶ 18 Defendant argues he received ineffective assistance of counsel where his trial counsel "fail[ed] to answer ready for a jury trial on last day of the speedy trial term" and defendant "plead guilty only because counsel did not answer ready."

¶ 19 It is well established that leave to withdraw a plea of guilty is not granted as a matter of right, but as required to correct a manifest injustice under the facts involved. *People v. Pullen*, 192 Ill. 2d 36, 39 (2000). A defendant has no absolute right to withdraw a guilty plea and bears

the burden of showing the necessity for withdrawal. *People v. Canterbury*, 313 Ill.App.3d 914, 917 (1993). "A court should allow a defendant to withdraw his plea where the plea was entered based on a misapprehension of the facts or the law or because of misrepresentations by counsel, where there is doubt of the defendant's guilt, where he has a defense worthy of consideration, or where the ends of justice will be better served by submitting the case to a jury." *Id.* It is within the sound discretion of the trial court to determine whether a guilty plea may be withdrawn, and, on appeal, this decision will not be disturbed unless the decision is an abuse of that discretion. *People v. Davis*, 145 Ill.2d 240, 244 (1991).

¶ 20 A criminal defendant personally possesses a constitutional right to elect what plea to enter. *People v. Williams*, 2016 IL App (4th) 140502, ¶ 33. Although a defendant does not have a constitutional right to a plea bargain, if the State elects to make a guilty plea offer, the defendant has a constitutional right to the effective assistance of counsel during the ensuing negotiations. *People v. Guerrero*, 2011 IL App (2d) 090972, ¶ 61. In order for a defendant's decision to plead guilty to be a knowing and voluntary one, a criminal defense attorney must fully inform herself of the facts and the law relevant to the State's offer and candidly advise her client as to the direct consequences of accepting or rejecting the guilty-plea offer. *People v. Brown*, 309 Ill.App.3d 599, 605 (1999).

¶ 21 A challenge to a guilty plea alleging ineffective assistance of counsel is subject to the standard set forth in *Strickland v. Washington*, 104 S. Ct. 2052 (1984). *People v. Rissley*, 206 Ill.2d 403, 457 (2003) (citing *Hill v. Lockhart*, 106 S. Ct. 366, 369-70 (1985)). Under *Strickland*, a defendant must establish that counsel's performance fell below an objective standard of reasonableness and the defendant was prejudiced by counsel's substandard performance. *People v. Lawton*, 212 Ill.2d 285, 302 (2004).

¶ 22 An attorney's assistance is considered ineffective if the attorney failed to ensure that the defendant's guilty plea was entered voluntarily and intelligently. *Rissley*, 206 Ill.2d at 457. To establish the prejudice prong of an ineffective assistance claim, a defendant must show there is a reasonable probability that, absent counsel's errors, the defendant would have pleaded not guilty and insisted on going to trial. *Id.* However, a mere allegation that the defendant would have pleaded not guilty and insisted on a trial if counsel had not been deficient is not enough to establish prejudice. *Id*. at 458-59. Instead, a defendant's claim must be accompanied by either a claim of innocence or the articulation of a plausible defense that could have been raised at trial. *Id*. at 459-60. The question of whether counsel's deficient representation caused the defendant to plead guilty depends in large part on predicting whether the defendant likely would have been successful at trial. *People v. Pugh*, 157 Ill.2d 1, 15 (1993), (citing *Hill*, 474 U.S. at 59.)

¶ 23 We look to the record from July 10, 2018, to determine whether trial counsel's representation of defendant on July 10, 2018, was effective. On July 10, 2018, the following colloquy occurred:

> "MR. CECE: Well, Judge, my client is considering a jury. However –
>
> TRIAL COURT: Fine. Bring them up.
>
> MR. CECE: Judge, if I may, it is a demand status at this time.
>
> TRIAL COURT: Fine.
>
> MR. CECE: We are willing to break the demand and ask for a short date so I can discuss with [defendant] exactly what to expect going forward with a jury or bench trial.
>
> TRIAL COURT: Denied. If you want a jury, we will bring them up today.

MR. CECE: My calendar does not allow a jury today. I'm sorry.

***

TRIAL COURT: Okay. The State made your client an offer. If he wants to accept it or not, it's up to him. I don't care about that one way or the other. The State is ready.

MR. CECE: Judge, I need an opportunity to talk to my client.

TRIAL COURT: You just talked to him for half an hour.

MR. CECE: I did not. I talked to the family for most of the time and I went back there for a few minutes.

TRIAL COURT: Pass it and talk to him."

¶ 24 When the case was recalled, Mr. Cece informed the trial court, "My client is executing a jury waiver and we are seeking a bench trial this afternoon." The State informed the court that "we did make an offer under the minimum which he's rejecting," and "[w]e offered 13 at 50 percent on armed robbery, his minimum . . . is 21 with 45 at the top if he were convicted of this charge." The judge then then addressed defendant:

TRIAL COURT: All right. Your lawyer told you this, Mr. Welsh? Mr. Welsh, your lawyer told you this?

DEFENDANT: Yes.

TRIAL COURT: You don't wish to accept that?

DEFENDANT: (Shaking head)

TRIAL COURT: You have to answer out loud, sir. You don't wish to accept that, Mr. Welsh? I'm not trying to convince you. I'm just asking you. Mr. Welsh, the State made an offer—

MR. CECE: Judge –

TRIAL COURT: One second. -- of 13 years.

STATE: Yes.

TRIAL COURT: At 50 percent. That will be about 6 and a half years inside. The minimum sentence if you're found guilty of the charge as it is now is 21 years on the bottom and 45 years on the top. Do you understand, Mr. Welsh? Do you understand, Mr. Welsh?

DEFENDANT: Yes.

TRIAL COURT: You don't wish to accept the [S]tate's offer of 13? I'm not saying you should or should not. I'm just asking. Mr. Welsh, you don't wish to take the offer of 13; is that correct? Mr. Welsh, when I ask you a question would you mind answering it, please?

MR. CECE: Judge, if I may, I mean, he's indicated that he may take it so he just wants a minute just to talk to me right here.

TRIAL COURT: All right. Go talk to him.

¶ 25 The case was then passed again for Mr. Cece to talk to defendant to talk to Mr. Cece. After the case was recalled, the following exchange occurred:

"MR. CECE: Judge, thank you for the opportunity to converse with my client. At this time, he's willing to enter a plea of guilty.

TRIAL COURT: Okay. To the State's offer of 13?

MR. CECE: Yes, Your Honor.

TRIAL COURT: Sir, you're sure you want to proceed in that fashion?

DEFENDANT: Yes."

¶ 26 The State then amended the armed robbery count to strike "the language indicating firearm" and added language indicating that the armed robbery was committed with "a bludgeon." In aggravation, the State offered defendant's prior convictions for aggravated discharge in 2002 and second-degree murder in 2005. The trial court read defendant the amended charge and confirmed that defendant understood. The court then reiterated the term of the State's office and asked defendant if he wished to plead guilty to the charge. Defendant responded that he did. The trial court then confirmed that defendant understood that he could have either a bench or a jury trial and that by pleading guilty he was giving up his right to trial. Defendant also confirmed that no one had forced him or promised him anything in order to give up his rights. Defendant agreed that he understood the effects of his written waivers of his rights to a jury trial and a presentence investigation report, and the court accepted his waivers as having been made knowingly and voluntarily. The trial court requested a factual basis for the plea and the State provided one, stating:

> "Your Honor, if this matter were to proceed to trial, the State would call Carl Welsh. He would testify that on or about December 6 of 2017 a little after 9:00 o'clock in the morning he was near 92nd and Cottage Grove in Chicago, Illinois, Cook County. That's where he came into contact with the Defendant Blake Welsh whom he would identify in court as his cousin. The defendant had a bludgeon with him and demanded money and the defendant took over $300 from him without his permission."

¶ 27 Defense counsel stipulated to the factual basis for the plea and the trial court found a factual basis for defendant's plea existed. The trial court then sentenced defendant to 13

years' imprisonment with 3 years of mandatory supervised release, and 215 days of credit, in accordance with the State's offer.

¶ 28 Defendant in unable to demonstrate how his trial counsel was ineffective at the guilty plea where defendant plead guilty knowingly and voluntarily. The record clearly establishes that prior to any trial commencing in this case, the State offered defendant a plea deal to a reduced charge and a sentence of 13 years' imprisonment, 7 years less than the minimum sentence defendant would have faced had he gone to trial. The record establishes that defendant chose to plead guilty to this reduced charge after conferring with trial counsel on three separate occasions, and after counsel had already answered ready for a bench trial.

¶ 29 Prior to pleading guilty, the trial court advised defendant of the amended charge against him, and admonished defendant that he could receive a sentence from between six to 30 years' imprisonment. Defendant was also advised of his right to plead not guilty and go to trial. The trial court explained the difference between a bench and a jury trial and informed defendant that by pleading guilty he would be giving up his right to both. Defendant stated that he understood the rights he was relinquishing by pleading guilty. The trial court then confirmed that defendant had not been forced or threatened to plead guilty. Then, the trial court asked defendant, "Are you pleading guilty, therefore, freely and voluntarily?" Defendant answered in the affirmative. The State and defense counsel then stipulated to the facts, the court found that, "defendant understands the nature of the charge, the charge he's pleading to, and I find a factual basis." The record clearly shows that defendant was well aware of the consequences of his guilty plea. Defendant simply has not demonstrated how defense counsel's performance was deficient.

¶ 30 Likewise, defendant has failed to establish that he was prejudiced by counsel's actions. Defendant failed to articulate a plausible defense that he could have successfully raised at trial. Defendant was originally charged with armed robbery with a firearm. To sustain a conviction for armed robbery with a firearm, the State was required to prove that defendant took property from the person or presence of another by the use of force or by threatening imminent force while armed with a firearm. 720 ILCS 5/18-2 (West 2016).

¶ 31 Had defendant gone to trial, the State would have called Carl Welsh to testify. Carl would have testified that he knew defendant, who on December 6, 2017, while armed with a firearm, demanded Carl's money and took over $300 from him without his permission. This evidence would have been sufficient to convict defendant of armed robbery with a firearm. Had defendant been convicted of armed robbery with a firearm, a class X felony, he could have been sentenced to a minimum of 21 years' imprisonment and a maximum of 45 years' imprisonment. 720 ILCS 5/18-2(b) (West 2016); 730 ILCS 5/5-4.5-25(a) (West 2016). Defendant had been previously convicted of two felonies: reckless discharge and second-degree murder. Defendant had been sentenced to 20 years for the second-degree murder and had just been released in 2016, a year prior to the offense in this case. Based on defendant's criminal history, it is unlikely that defendant would have received the minimum sentence of 21 years' imprisonment in this case.

¶ 32 Defendant contends that at the evidentiary hearing on this motion to withdraw his guilty plea, he demonstrated that "he had a defense to the charge which is worthy of consideration" and that "he was articulating a plausible defense which could have been raised at trial." At the hearing, defendant stated that Carl called defendant and told him he would give defendant the

$450 he owned him. According to defendant, he met with Carl and Carl handed over the cash without saying anything and then left. Defendant could not remember what he did with the money or if he spent the money. There is no reason to believe that this defense would have been successful at trial.

¶ 33 Defendant has failed to meet his burden to demonstrate that trial counsel was ineffective during the plea proceedings. The record establishes that defendant's plea was knowingly and intelligently entered.

¶ 34 Defendant next argues that the trial judge erred by "prejudging" his motion to withdraw his guilty plea and by acting as a prosecutor during the hearing on the motion to withdraw the guilty plea. Defendant cites comments and questions made by the trial court during the hearing to support his contention. The State argues that defendant has forfeited this argument as he did not object to any of the trial court's comments or questions. Defendant acknowledges that he has failed to preserve this issue for review but urges this court to consider it for plain error.

¶ 35 The defendant bears the burden of establishing plain error. *People v. Herron*, 215 Ill. 2d 167, 182 (2005). He must establish that the forfeited issue should be considered because (1) regardless of the seriousness of the error, the evidence is close, or (2) regardless of the closeness of the evidence, the error is serious. *People v. Holmon*, 2019 IL App (5th) 160207, ¶ 46. Under the first prong, we must consider whether the evidence was so closely balanced that the error alone tipped the scales of justice against the defendant. Id. Under the second prong, we must consider whether the error was of such magnitude that the error undermined the fairness of the defendant's trial or the integrity of the judicial process. *Id.* All of that said,

before considering either prong, we must consider whether there was reversible error. *People v. Nicholas*, 218 Ill. 2d 104, 121 (2005).

¶ 36 As previously stated, leave to withdraw a plea of guilty is not granted as a matter of right (*Pullen*, 92 Ill. 2d at 39) and a defendant has no absolute right to withdraw a guilty plea and bears the burden of showing the necessity for withdrawal (*Canterbury*, 313 Ill. App. 3d at 917).

¶ 37 When a judge makes improper comments during a jury trial, the comments themselves may constitute reversible error, since "the trial judge has a duty to refrain from conveying improper impressions to the jury." *People v. Brown*, 172 Ill. 2d 1, 38 (1996). Where there is no risk of conveying an improper impression to the jury, as in a bench trial, we will order a new trial where a trial court's comments show that it denied defendant a fair and impartial trial. *People v. Heiman*, 286 Ill. App. 3d 102, 113 (1996).

¶ 38 This case arises in the context of a hearing on a motion to withdraw a guilty plea and therefore no jury was present for any of the trial judge's remarks. We therefore we find it appropriate to apply those standards that we have applied when reviewing a judge's comments during a bench trial. Defendant thus must show that the trial court's improper comments in this case denied him a fair and impartial hearing on his motion to withdraw his guilty plea.

¶ 39 Defendant contends that the trial court's comments show that it "prejudged" his motion and during the hearing was "biased in favor of the prosecution" as demonstrated by the court's interrupting "to ask questions and make statements" during defendant's testimony. We disagree.

¶ 40 We have reviewed the numerous complained of comments and find that the trial court's comments during the hearing did not indicate that it prejudged the motion. The trial court was present when defendant initially pled guilty in open court and clearly remembered the circumstances surrounding the entry of defendant's guilty plea. The record shows that the trial court was prepared for the hearing, had carefully read the transcripts and addressed the key points of defendant's motion and testimony. Nothing in the record supports defendant's accusation of bias on the part of the trial court. The comments did not indicate that the trial court improperly disregarded or failed to consider any evidence or argument. Rather, the court was clearly questioning defendant's credibility. Although the court arguably displayed impatience with defendant during the hearing, defendant cannot establish that these comments negatively affected the hearing on his motion to withdraw his plea. No error occurred here, and we therefore decline defendant's invitation to review his claim for plain error.

¶ 41 CONCLUSION

¶ 42 Considering the foregoing, we affirm the trial court's denial of defendant's motion to withdraw his guilty plea.

¶ 43 Affirmed.