2018 IL App (1st) 170220-U

No. 1-17-0220

August 14, 2018

Second Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 11 CR 19771
	)	
KENYADA CLAIR,	)	Honorable
	)	Angela M. Petrone,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE WALKER delivered the judgment of the court.
Presiding Justice Mason and Justice Pucinski concurred in the judgment.

ORDER

¶ 1 *Held*: Two of defendant's arguments on appeal are forfeited under Illinois Supreme Court Rule 604(d). The trial court did not abuse its discretion when it denied defendant's motion to withdraw his guilty plea.

¶ 2 Pursuant to a negotiated plea agreement, Kenyada Clair, the defendant, pled guilty to conspiracy to commit first degree murder (720 ILCS 5/8-2(a) (West 2010); 720 ILCS 5/9-1(a)(1) (West 2010)) and was sentenced to 12 years' imprisonment. The trial court denied defendant's

motion to withdraw his guilty plea. Defendant appeals and contends the trial court erred in denying his motion. We affirm, as modified.

¶ 3 Defendant was charged with 12 counts of first degree murder for the shooting death of Lorenzo Beasley (Beasley). Relevant here is Count 5, which charged defendant with first degree murder in that he, without lawful justification, knowingly or intentionally shot and killed Beasley while armed with a firearm and personally discharged the firearm that proximately caused Beasley's death.

¶ 4 BACKGROUND

¶ 5 On May 9, 2016, the day of defendant's jury trial, the parties informed the court they had reached a plea agreement. Defendant would plead guilty to Count 5, which the State agreed to reduce to conspiracy to commit first degree murder, in exchange for a 12-year prison sentence. The amended count charged defendant, with the intent to commit first degree murder of Beasley, conspired with Rayford Shearer (Shearer) to commit the first-degree murder and commit an act in furtherance of the conspiracy by obtaining a deadly weapon, going to the place where Beasley was attacked, and attacking Beasley with the deadly weapon. The 12-year sentence would be served consecutively to four sentences defendant was already serving: a 2-year sentence for possession of cannabis in a penal institution (12 CR 6729), which was consecutive to a 2-year sentence for resisting a police officer (11 CR 15344), which was consecutive to a 30-year sentence for armed robbery (11 CR 13466), which was concurrent with a 15-year sentence for aggravated possession of a stolen motor vehicle (11 CR 13465).

¶ 6 As the victim's family was not present in court, the trial court agreed to take the guilty plea on that day, and hold sentencing over to the following day so the family could be present. Prior to accepting the plea, the court asked the State:

> "THE COURT: I said I take it that in coming off the charge of first degree murder you have evaluated your case and you believe this is a proper disposition.
>
> THE STATE: Yes, we do."

¶ 7 The court informed defendant of the rights he was giving up by pleading guilty. It explained to him, had he gone to trial on the original charge and been found guilty of first degree murder, the sentencing range would have been 45 years imprisonment served at 100% time to natural life. It explained the new charge to defendant and told him the Class 1 felony carried a sentencing range of 4 to 15 years imprisonment but, because of his criminal background, he could be given an extended term of up to 30 years imprisonment. It also informed him that he would be assessed $672 in fines, fees, and costs and receive 1659 days of credit for time served and two years of mandatory supervised release. Defendant acknowledged he understood, no one threatened or coerced him to plead guilty, and he was pleading guilty freely and voluntarily.

¶ 8 The State provided a factual basis for the plea. If the State were to proceed to trial, the evidence would have shown, on July 16, 2011, Beasley was sitting in his car when defendant and Shearer drove by him. Defendant and Shearer were opposing gang members to Beasley. After seeing Beasley, defendant and Shearer conspired to go back and kill him. They possessed a deadly weapon in the car and drove back to where Beasley was sitting in his car. As they passed Beasley's car, defendant attacked him with a deadly weapon.

¶ 9 Defendant acknowledged he was pleading guilty to these facts. Counsels stipulated defendant would be identified in open court as the person who attacked Beasley with a deadly weapon. Defendant agreed he was the person who attacked Beasley with a deadly weapon, and that he was pleading guilty to the recited facts and stipulation.

¶ 10 The court found a factual basis for the plea. It found defendant understood the nature of the charge and possible penalties, and he made the plea knowingly and voluntarily. The court accepted defendant's plea and found him guilty of conspiracy to commit first degree murder. Defendant waived his right to a pre-sentence investigation and the court continued the sentencing hearing to the next day.

¶ 11 At the hearing on the following day, defendant immediately told the court he wanted to "take [his] plea back." The court informed defendant of his right to file a written motion to withdraw his guilty plea within 30 days and proceeded with sentencing. The court asked defendant if he wished to say anything regarding the agreed sentence. Defendant stated, "that's too much time. I have to get my mind together. I don't want to take nothing for something I didn't do. I just don't want to take all that time for something I didn't do."

¶ 12 Pursuant to the plea agreement, the court sentenced defendant to 12 years' imprisonment, to run consecutive to the sentences he was already serving, for a total of 46 years. The State *nolle prossed* the remaining 11 counts. Defendant indicated that he understood all the terms of his sentence. The court informed him of his right to file a motion to withdraw the plea and of his appeal rights.

¶ 13 On June 7, 2016, defendant filed a motion to withdraw his guilty plea, arguing he "was overwhelmed, under pressure, his mind was racing, and he was not in his right state of mind" and

he was "innocent of the crime charged."[1] The State filed a written response and a hearing on the motion was held on August 15, 2016.

¶ 14 At the hearing, following argument on the motion, the trial court told defendant several times that it was considering letting him withdraw his plea, but stressed he would be sentenced to at least 45 years in prison served at 100% if he was found guilty at trial. Knowing the penalty was, "45 to life, no reducers, no good time," defendant still wanted to withdraw his plea. Having reviewed the transcript of the plea hearing, the court found "[d]efendant was given his rights very, very thoroughly." The court then granted defendant's motion to withdraw the guilty plea, telling defendant, "It's going to trial. The 12 year sentence is vacated. *** It was a very, very sweet deal the lawyer worked out. You don't want it, you don't have to have it. I'm not going to force you. You're going to trial." The court stated that it found no deficient performance by counsel, but was "going to let the [d]efendant do this, because he did say the very next day before he was even sentenced that he wanted to withdraw." Defendant requested a jury trial.

¶ 15 The following colloquy then took place between the court and defendant:

> "THE COURT: This was a very, very good deal your lawyer worked out. I'm not going to force you to take it. You're facing 45 to life. We'll go to trial. I have never seen such a low offer ever on a murder.
>
> DEFENDANT: I'm sorry. I'll just keep it.

[1] Defendant did not include a copy of his motion to withdraw in the record. Although he included a copy in the appendix to his opening brief, this court generally does not consider information contained solely in an appendix. *People v. Wright*, 2013 IL App (1st) 103232, ¶ 38 (inclusion in an appendix is an improper supplementation of the record with information *dehors* the record). However, the State's brief specifically references the contents of the motion in the appendix, and there is no dispute that the motion in the appendix is an accurate copy. Further, the record shows that both parties and the court had possession of the motion, and it contents are clear from the State's responses thereto and the parties' argument's thereon. Accordingly, we choose to take judicial notice of the motion for purposes of disposing of this appeal. *Id.*

> THE COURT: No, no. You want to go to trial, 45 to life? You go. I'm not forcing you. You're going to trial. You're going to trial. You put it in writing. You want to go to trial. Go to trial. Nobody is forcing you. Go to trial. I'm giving it a status date. You can withdraw the plea of guilty. Your mind was racing. I don't want anyone to force you. Go to trial. State, I'll give you a status date. We'll set it for trial."

¶ 16 However, the court then stated, given defendant's statement that he "now" did not want to go to trial, it would not force defendant to go to trial and wanted him to make his decision with his eyes open. The court held the case over for three days, telling defendant it wanted him to think, without having his mind racing or being pressured or rushed, about whether he really wanted to withdraw his guilty plea.

¶ 17 At the August 18, 2016 hearing, the court informed defendant again of his options and the potential consequences to keeping or withdrawing his plea, telling him the negotiated sentence was "the lowest I've ever seen the State come down on a murder case ever." When asked whether he wanted to withdraw his plea, defendant told the court he was "confused" about the sentence. He stated, "in the six year [12 years served at 50%], you credited me four and a half years. They [the Illinois Department of Corrections] are making me do the whole six. That's what I am saying. I don't know how is that possible." The court responded the sentence was 12 years and the court does not "get into what dates they" would be releasing him. It reiterated, if defendant was convicted at trial, he would receive 100% time of the sentence. Defendant indicated he wanted to withdraw his plea. The court stated, "[y]our plea is vacated."

¶ 18 Defendant then noticed his mother in the courtroom and asked if he could speak with her. The court allowed defendant to meet with his mother behind the courtroom. When the parties reconvened, defendant requested more time to properly discuss his decision with his mother and father. The court agreed, continuing the case for approximately two weeks so defendant could meet with them.

¶ 19 While discussing the next trial date, defendant's mother told the court, "my son don't look right. I think he needs to talk to somebody. He needs an evaluation." The court ordered an evaluation to determine defendant's fitness to plead on the date of the original plea hearing and his then-current fitness to plead and to stand trial.

¶ 20 On October 12, 2016, the evaluation was returned indicating defendant was fit to stand trial, fit to withdraw his guilty plea, and fit to plead guilty on May 9, 2016, when he took the plea. The parties stipulated to the contents of the report and the court adopted the findings therein. The court stated for the record defendant, *inter alia*, did not manifest symptoms of a mental condition, was aware of the pending charges, had sufficiently understood the nature and purpose of legal proceedings, and was capable of rationally assisting counsel in his own defense.

¶ 21 Defendant told the court he wanted to go to trial because he did not want the court "mad at" him. The court repeatedly told defendant it was not mad at him, explained again the sentence defendant would be facing if convicted, and told him it did not want him to make a decision he would regret later. Defendant, 23 years old at the time, stated, "I agree to that because I was only a year and a half. They making me do a whole six. It's 2034 right now. I will be 41 when I get home. That's too long for something I ain't do. So I rather go to trial." Asserting defendant's

motion was baseless, the State sought leave to amend its response to defendant's motion to withdraw. The court granted the request and continued the hearing for a month.

¶ 22 On December 8, 2016, the court issued a four-page written order denying defendant's motion to withdraw his plea. After setting out in detail the plea proceedings, the court found:

> "Despite defendant's claim that his mind was 'racing,' he was fit to plead guilty, per this court's own observations of defendant, including his ability to understand what was being said and to respond appropriately, and found fit to plead guilty on May 9, 2016 after a hearing.
>
> There has never been shown a misapprehension of the facts or the law or by counsel. There has been no doubt shown of the defendant's actual guilt of the offense to which he pled and he has not alleged or shown that he has a defense worthy of consideration.
>
> There is no indication that the ends of justice would better be served by allowing defendant to withdraw his guilty plea and submit this case to a trial. Despite defendant's recent profession of innocence, this court has no reason to doubt the truth of the plea. Defendant told this court he was the person who committed the acts that performed the factual basis for the plea."

¶ 23 Defendant timely appealed. He contends the trial court erred by denying his motion to withdraw his guilty plea.

¶ 24 ANALYSIS

¶ 25 We review a trial court's ruling on a motion to withdraw a guilty plea for an abuse of discretion. *People v. Feldman*, 409 Ill. App. 3d 1124, 1127 (2011). We find an abuse of

discretion only when the "ruling is arbitrary, fanciful, unreasonable, or no reasonable person would take the view adopted by the trial court." *People v. Delvillar*, 235 Ill. 2d 507, 519 (2009).

¶ 26 A defendant does not have an automatic right to withdraw a guilty plea. *People v. Baez*, 241 Ill. 2d 44, 110 (2011). "The mere fact * * * that an accused knowing his rights and the consequences of his act, hopes and believes that he will receive a shorter sentence or milder punishment by pleading guilty than he would upon a trial and conviction by a jury, presents no ground for permitting withdrawal of the plea after he finds that his expectation has not been realized." *People v. Morreale*, 412 Ill. 2d 528, 532 (1952). Rather, "a defendant must show a manifest injustice in his or her circumstances." *People v. Glover*, 2017 IL App (4th) 160586, ¶ 31.

¶ 27 The court should allow a defendant to withdraw his guilty plea and plead not guilty only when

> "it appears that the plea of guilty was entered on a misapprehension of the facts or of the law, or in consequence of misrepresentations by counsel or the State's Attorney or someone else in authority, or the case is one where there is doubt of the guilt of the accused, or where the accused has a defense worthy of consideration by a jury, or where the ends of justice will be better served by submitting the case to a jury." *Morreale*, 412 Ill. 2d at 531-32.

We will not disturb a trial court's ruling on a motion to withdraw a guilty plea "unless the plea was entered through a misapprehension of the facts or of the law, or if there is doubt as to the guilt of the accused and justice would be better served by conducting a trial." *Delvillar*, 235 Ill.

2d at 520. Defendant bears the burden of demonstrating sufficient grounds to permit the withdrawal of the plea. *People v. Thurmond*, 262 Ill. App. 3d 200, 203 (1994).

¶ 28 Defendant does not argue that he entered his plea under a misapprehension of the law or the facts and concedes the court's admonishments "were proper." Instead, he argues the court abused its discretion in denying his motion where (1) there was doubt of his guilt, (2) he had a defense worthy of consideration, and (3) the ends of justice would be better served by allowing him to change his plea and submit his case to a jury. Defendant requests we set aside his conviction, allow him to withdraw his guilty plea, and remand the case for trial.

¶ 29 The State asserts defendant's first two claims on appeal are forfeited as defendant failed to raise these arguments in the trial court. Supreme Court Rule 604(d) provides that "[u]pon appeal any issue not raised by the defendant in the motion to reconsider the sentence or withdraw the plea of guilty and vacate the judgment shall be deemed waived." Ill. S. Ct. R. 604(d) (eff. Mar. 8, 2016). Defendant has not filed a reply brief and thus does not challenge the State's assertion. We agree with the State that the two claims are forfeited.

¶ 30 In defendant's motion to withdraw, he asserted he should be allowed to withdraw his guilty plea because he "was overwhelmed, under pressure, his mind was racing, and he was not in his right state of mind" and, without further elaboration, that he was "innocent of the crime charged." Although his assertion that he was innocent arguably encompasses his arguments on appeal that there is doubt of his guilt and a defense worthy of consideration, both of which concern his innocence, neither argument was specifically made or argued to the trial court.

¶ 31 In the initial hearing on the motion, defendant argued only, "under the pressures of the situation," he was "overwhelmed" and not "in his right state of mind when he agreed to the

guilty plea." While defense counsel did cursorily mention defendant also claimed he was innocent of the charges, neither counsel nor defendant expanded on this assertion in any of the subsequent hearings on defendant's motion to withdraw. Besides his assertion that he was not thinking clearly when he accepted the plea offer, defendant's repeated concern was, although the court awarded him 4 1/2 years credit toward his 6-year prison term (12-year sentence served at 50%), the Illinois Department of Corrections wanted him to serve the full 6 years rather than only 1 1/2 years.[2] He did not raise any substantive issues regarding the evidence or his innocence, let alone argue that there was doubt of his guilt or a defense worthy of consideration. Accordingly, because defendant did not raise these arguments in the trial court, they are forfeited under Rule 604(d). See *People v. Smith*, 406 Ill. App. 3d 879, 884-86 (2010); *People v. Jolly*, 357 Ill. App. 3d 884, 885-86 (2005).

¶ 32 Even if we consider these two arguments, they fail as they are entirely speculative. Defendant asserts there is doubt of his guilt because "the court's questioning of the State prior to accepting the plea evinced a deep understanding of the frailties of the State's case." He points out, under questioning by the court, the State conceded it evaluated the case and believed the charge of conspiracy to commit first degree murder to be the "proper disposition." Defendant contends the only reason the State reduced the offense and sentence to, as the trial court stated, "the lowest offer ever on a murder," was because there was doubt about his guilt. His argument is entirely speculative, unsupported by citation to any authority holding that a plea offer by the State demonstrates doubt of a defendant's guilt. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008) (the argument section of an appellant's brief "shall contain the contentions of the appellant and

[2] As the State points out, there is an error in Defendant's mittimus. The court awarded him credit for 1659 days of time served but the mittimus incorrectly states he should receive credit for 672 days.

the reasons therefor, with citation of the authorities and pages of the record relied on"). His argument is, therefore, forfeited. See *Kic v. Bianucci*, 2011 IL App (1st) 100622, ¶ 23.

¶ 33 Defendant's argument that he has a defense worthy of consideration fails for the same reason. He asserts, unsupported by citation to authority, he has a defense worthy of consideration because there was no reason for the trial court to ask the State if it believed a plea to conspiracy to commit first degree murder was the proper disposition aside from the State's case being weak. Defendant states "the prosecutor foresaw a case where the defendant presented a defense worthy of consideration * * * [and] conveyed that message to the judge as clear as day otherwise [the judge] would never have went along with that agreement." Again, this argument is speculative and unsupported and therefore forfeited. See *Id*.

¶ 34 Defendant's final argument is the ends of justice would better be served by allowing him to withdraw his plea based on the "extraordinary series of events" that followed his guilty plea. He notes the trial court repeatedly told him he could have a trial and it "acknowledged the possibility that [his] 'mind was racing,' that he was 'pressured,' and that there was some degree of haste when he took the plea." Thus, defendant asserts the plea was not knowing and voluntary. He acknowledges the court's admonishments were proper, but argues the "peculiar record" in regard to the "haste and manner" in which his plea was taken is conclusive that the ends of justice would be better served through having a trial.

¶ 35 We conclude the ends of justice would not be better served by allowing defendant to go to trial as the record rebuts defendant's assertion that his guilty plea was not knowing and voluntarily made. Nothing in the transcript of the plea hearing indicates the hearing was rushed or hasty, or that defendant was pressured into accepting the plea. After the court properly

admonished him, defendant agreed he was pleading guilty to the stipulated facts and that he was the person who attacked Lorenzo Beasley. He told the court he understood the newly reduced charge and plea offer, as well as the 45-year minimum sentence he would have to serve at 100% if he went to trial and was found guilty. Defendant told the court no one threatened or coerced him to plead guilty, and he was pleading guilty freely and voluntarily.

¶ 36 The trial court had no reason to doubt the truthfulness and voluntariness of defendant's plea. As the trial court subsequently noted in its ruling on defendant's motion to withdraw, although defendant later claimed his mind was racing at the time of the plea, the court found him fit to plead guilty at that time based on its own observations of defendant, as was subsequently verified by a fitness evaluation finding him fit at the time of the plea hearing. We find no reason in the record of the plea hearing to disturb that finding.

¶ 37 Similarly, notwithstanding defendant's claim to the contrary, the transcripts of the numerous hearings regarding defendant's motion to withdraw his guilty plea do not demonstrate defendant was rushed at the plea hearing. The transcripts indicate the court gave defendant the benefit of the doubt and granted him additional time to consider whether he did want to withdraw his plea. Accordingly, the record does not demonstrate defendant's plea was unknowing or involuntary such that the ends of justice would be better served by allowing defendant to proceed to trial.

¶ 38 CONCLUSION

¶ 39 Defendant has not met his burden to show sufficient grounds to permit the withdrawal of his guilty plea. We conclude the trial court did not abuse its discretion by denying defendant's motion to withdraw the plea.

¶ 40 As the State correctly points out, defendant's mittimus incorrectly lists his credit for time served as 672 days. At sentencing, the court told defendant the total fines, fees, and costs assessed against him was $672 and he had credit for 1659 days of time served. The court's verbal pronouncement controls (*People v. Smith*, 242 Ill. App. 3d 399, 402 (1993)), and the notation on the mittimus is clearly a clerical error. Accordingly, pursuant to our authority under Illinois Supreme Court Rule 615(b), we direct the clerk of the circuit court to correct defendant's mittimus to reflect credit for 1659 days of time served.

¶ 41 For the reasons above, we affirm the judgment of the trial court and order correction of the mittimus.

¶ 42 Affirmed as modified.