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2014 IL App (3d) 130072-U

Order filed November 20, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE OF)	Appeal from the Circuit Court
ILLINOIS,)	of the 10th Judicial Circuit,
)	Peoria County, Illinois,
Plaintiff-Appellee,)	
)	Appeal No. 3-13-0072
v.)	Circuit No. 12-CF-90
)	
ROBERT KNEER,)	Honorable
)	Stephen A. Kouri,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Presiding Justice Lytton and Justice O'Brien concurred in the judgment.

ORDER

¶ 1 *Held:* Defense counsel's failure to disclose his forecast of the sentence defendant would receive pursuant to a partially negotiated guilty plea did not render the plea involuntary, and the trial court, therefore, did not abuse its discretion in denying defendant's motion to vacate the plea.

¶ 2 Defendant, Robert Kneer, was charged with two counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2010)) and two counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(1) (West 2010)). After the first day of a bench trial, the State extended a plea offer to defendant. Under the terms of the offer, defendant would plead guilty to

one charge of predatory criminal sexual assault of a child, and his sentence would be capped at a possible 20-year term of imprisonment. Defense counsel suggested that defendant accept the offer, informing defendant that the agreement would allow counsel to argue for a minimum sentence. Defendant accepted the State's offer and entered a guilty plea. Defendant was sentenced to a term of 20 years' imprisonment. Soon thereafter, defendant moved to withdraw the plea, arguing that ineffective assistance of counsel had rendered the plea unknowing and involuntary. The trial court denied the motion. Defendant now appeals, arguing that he was misled by counsel, and that such ineffectiveness rendered his plea unknowing and involuntary. We affirm.

¶ 3

FACTS

¶ 4

The State charged defendant in a four-count indictment with two counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2010)) and two counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(1) (West 2010)). All charges related to one victim, M.S.

¶ 5

A bench trial commenced on the afternoon of July 9, 2012. The only witness heard that day was Tammy Maher, a detective with the Peoria County sheriff's department. Maher testified that she interviewed defendant in his home. In this interview, defendant admitted that he had sexual contact with M.S., beginning in 2010, when she was four years old. Defendant told Maher he would watch pornography with M.S. and that she had once touched his genitals.

"He said that [M.S.] had wanted to know if anything could come out of his pee pee and that he told her that he didn't know if it could or not, so that she wanted to see if anything would. He'd taken his pants down. She put his hands on his—her hand

on the penis and that he was rubbing it up and down. She'd gotten tired at one point, so he'd taken his hand, placed it over hers and continued rubbing until he ejaculated."

Defendant also admitted to Maher that he had used a hand-held massager on M.S., rubbing it on her groin area.

¶ 6 After the interview at defendant's house, he was transported to the Peoria County sheriff's office. Maher testified that she interviewed M.S. at the child advocacy center, then returned to the sheriff's office to interview defendant further. She would interview defendant again the next day. All three interviews were recorded, and the DVDs were entered into evidence.

¶ 7 The first of these DVDs, showing Maher's first interview with defendant at the sheriff's office, was played in court. In that interview, defendant admitted to "accidentally" touching the victim's vagina three times. He added that he also kissed the victim's vagina after asking her if he could. Aside from the occasion in which M.S. rubbed his penis to the point of ejaculation, there were five or six times when M.S. held his penis as he went to the bathroom. Defendant also admitted that M.S. had sat on his penis and that he had rubbed her vagina with his penis. The court adjourned for the day before the recording of the first interview ended.

¶ 8 Upon appearing in court the next day, the parties informed the court that defendant had accepted the State's plea offer. Under the terms of the deal, defendant would plead guilty to one count of predatory criminal sexual assault of a child, a Class X felony. Defendant's sentence would be capped at a possible term of 20 years' imprisonment. Defendant agreed with this recitation of the agreement.

¶ 9 The court then began delivering a series of admonishments to defendant. Upon the court's questioning, defendant indicated that he had discussed the agreement with his attorneys and that he was satisfied with their representation. The court informed defendant that the

sentencing range for the Class X felony, absent the agreement, was between six and thirty years' imprisonment. The court also noted that the potential maximum sentence, had defendant chosen to proceed with the trial, would be 60 years' imprisonment, owing to the possibility of consecutive sentences on two Class X charges. Following the State's presentation of the factual basis for the plea, the court accepted the plea as knowing and voluntary.

¶ 10 The matter was scheduled for sentencing on August 31, 2012. On July 23, defendant's attorneys—Matthew Miller and Caryn Kamp—filed a motion to withdraw. In the motion, counsels asserted defendant continually argued with and insulted them while refusing to acknowledge any evidence of his guilt. At a hearing on the motion, the court asked defendant if he had any objection to the withdrawal, and the following exchange occurred:

"THE DEFENDANT: Can I get a trial from the other attorney?

THE COURT: Well, you'll have to go—why didn't you say this to me, by the way, when you pled guilty?

THE DEFENDANT: Because they made it sound like that was my only alternative.

THE COURT: Well, I asked you pointblank was it your desire to plead guilty, and you said yes, didn't you?

THE DEFENDANT: Yes."

The court granted the motion to withdraw, and appointed an assistant public defender to represent defendant.

¶ 11 Following a continuance, newly appointed defense counsel informed the court that he expected to present a motion to withdraw guilty plea, but would wait to file the motion until after

the sentencing hearing. At the conclusion of the sentencing hearing, the court imposed a sentence of 20 years' imprisonment.

¶ 12 On November 15, 2012, defendant filed a motion to withdraw his guilty plea. In the motion, defendant asserted that his plea had been neither knowing nor voluntary, he received ineffective assistance of counsel, and he would not have pled guilty if he had competent counsel. Defendant also claimed he was innocent of the charge to which he pled guilty. A hearing on the motion was held on January 18, 2013.

¶ 13 At the hearing, defendant testified that on the day of his bench trial, Miller communicated to him an offer made by the State in which his possible sentence would range from 6 years to a cap of 20 years. Although this offer was initially only on the table until 5 p.m. that day, the State later extended the deadline to the next morning. The State had previously made an offer of 18 years' imprisonment in exchange for a guilty plea, but defendant rejected it. Regarding the offer made on the day of trial, Miller and Kamp suggested defendant accept the offer. According to defendant, that was the first time they had suggested entertaining the idea of a plea agreement to him.

¶ 14 Defendant testified that Miller told him that under the terms of the proposed plea agreement, Miller would be able to argue for the minimum of six years' imprisonment. Defendant testified that Miller "made it sound like [successfully arguing for the minimum sentence] was going to be an easy thing for him to do." Defendant claimed Miller did not explain to him the possibility of receiving a sentence of 20 years' imprisonment. The next morning, both Miller and Kamp urged defendant to accept the offer, reiterating to him that much of M.S.'s statement matched up with defendant's statement. Defendant admitted he had not been promised a sentence of six years' imprisonment.

¶ 15 Defendant explained that he eventually chose to plead guilty because his family had "been tortured pretty badly this past year." After pleading guilty, defendant talked to his wife, who told him that she had spoken to Miller. Defendant testified that his wife said that Miller told her that the judge had been considering the maximum sentence, but for the plea agreement. It was at this time that defendant decided to withdraw his plea.

¶ 16 The State called Miller as its lone witness. Miller testified that he and Kamp had repeated conversations with defendant in which they explained they did not believe he would be successful if he proceeded to trial. Miller discussed the 18-year sentencing offer with defendant. Miller also raised the possibility of a guilty plea on a Class 2 felony charge, which would have carried a maximum sentence of seven years' imprisonment. Defendant indicated he was not interested. Miller testified that he "had on multiple occasions talked about discussing a plea, but there would reach a point where [defendant] was not even remotely interested in that. So there was a time period where we didn't discuss plea negotiations due to that fact."

¶ 17 Miller testified that he and Kamp discussed the 20-year-cap plea offer with defendant for 15 to 40 minutes before the trial began, again after the court had adjourned for the day, and also the next morning. Miller made no assurances that defendant would receive the minimum sentence of six years' imprisonment, but did assure defendant that he would argue to the best of his ability for the minimum sentence.

¶ 18 On cross-examination, Miller testified he informed defendant that a sentence of 20 years' imprisonment was a possibility. Based on defendant's lack of prior convictions and his cooperation, Miller and Kamp "thought the likely range would probably be around 13, 14 years." Miller did not relay this expectation to defendant. Miller told defendant that, if he did not plead

guilty, he would probably be sentenced to a term of 30 to 40 years' imprisonment out of a maximum of 60 years.

¶ 19 After taking the matter under advisement, the court denied defendant's motion to withdraw the guilty plea. Defendant appeals, arguing that defense counsel's ineffectiveness rendered his guilty plea unknowing and involuntary. Specifically, defendant contends that he was affirmatively misled by counsel regarding the plea agreement, including counsel's failure to provide defendant with an estimate of the eventual sentence he would receive under that agreement.

¶ 20 ANALYSIS

¶ 21 Leave to withdraw a guilty plea is not granted as a matter of right, but as required to correct a manifest injustice under the facts involved. *People v. Clark*, 386 Ill. App. 3d 673 (2008). Whether to permit a guilty plea to be withdrawn is a matter of the trial court's sound discretion, and the court's ruling will not be disturbed on appeal absent an abuse of that discretion. *People v. Pugh*, 157 Ill. 2d 1 (1993). An abuse of discretion will be found only where the trial court's ruling is arbitrary, fanciful, or unreasonable, or where no reasonable person would take the view adopted by the trial court. *People v. Sharifpour*, 402 Ill. App. 3d 100 (2010).

¶ 22 Leave to withdraw a plea of guilty should be granted where the plea was induced by a misapprehension of law or fact. *E.g., People v. Davis*, 145 Ill. 2d 240 (1991). Similarly, withdrawal may be appropriate where a defendant enters a guilty plea based upon misrepresentations or erroneous advice from counsel. *Pugh*, 157 Ill. 2d 1; *People v. Edmonson*, 408 Ill. App. 3d 880 (2011). When a defendant enters a guilty plea based upon such misinformation, this fact alone does not render the plea involuntary. *Pugh*, 157 Ill. 2d 1. "The

resolution of the question of whether the defendant's pleas, made in reliance on counsel's advice, were voluntarily, intelligently, and knowingly made depends on whether the defendant had effective assistance of counsel." *Id.* at 14.

¶ 23 Whether counsel provided ineffective assistance turns on the well established two-pronged test of *Strickland v. Washington*, 466 U.S. 668 (1984). See also *Hill v. Lockhart*, 474 U.S. 52 (1985) (holding that the *Strickland* test was applicable in the plea process). To establish that counsel was ineffective, a defendant must show that: (1) counsel's performance was objectively unreasonable; and (2) the defendant suffered prejudice as a result. *Strickland*, 466 U.S. 668.

¶ 24 In *Edmonson*, 408 Ill. App. 3d 880, the defendant's attorney repeatedly informed him that, pursuant to a negotiated plea, the defendant would be able to challenge his sentence if he did not agree with it. This advice was given despite the fact that the law was clear that defendant could *not* challenge his sentence. After the defendant pled guilty, he sought leave to withdraw the plea, citing this misrepresentation as the basis for an ineffective assistance claim. The appellate court agreed, finding that "defendant's counsel affirmatively misinformed him of the law." *Id.* at 887.

¶ 25 In the case *sub judice*, defendant attempts to draw parallels between his case and *Edmonson*, arguing that he too had been "affirmatively misled." These attempts are misguided. Miller gave defendant nothing but truthful information, nor did Miller withhold any actual information. Defendant was made fully aware of the possibility of a 20-year sentence by the very terms of the offer. Miller truthfully informed defendant that the plea would allow him to argue that defendant should only receive the minimum sentence of six years. Because defendant chose to fixate on the possibility of a shorter sentence does not render counsel ineffective.

¶ 26 We also do not find it was objectively unreasonable that Miller did not share with defendant his estimate of the actual sentence defendant would receive. Defendant contends that Miller chose to withhold this estimate in order to secure defendant's guilty plea, thus taking the decision out of defendant's hands. Defendant's argument assumes that Miller *knew* that defendant would reject the offer if he learned Miller's estimate of the eventual sentence. This is unsupported by the record. The offer presented to defendant was unlike any previously offered by the State; it allowed the possibility that defendant would be sentenced to only six years. Indeed, Miller's estimate of 13 to 14 years was still a significantly smaller sentence than the one defendant had previously rejected.

¶ 27 Further, in the time since defendant rejected the State's initial offer, defendant was able to observe the testimony of Maher and watch a portion of his interview—damning evidence that might lead him to reevaluate his position in plea negotiations. Miller even informed defendant that his probable sentence, should he choose to proceed with the trial, would be in the range of 30 to 40 years' imprisonment. Based on this information, defendant knew that any sentence in the range proposed by the State would likely be preferable to proceeding with the trial. Given these facts, no ill intent from Miller can be inferred.

¶ 28 A guilty plea made in reliance on counsel's estimate of the sentence to eventually be imposed is not involuntary. *E.g., People v. Roesler*, 195 Ill. App. 3d 1007 (1990). It should be considered a corollary that a lack of any estimate should not be considered coercive. An estimate, by its very nature, is speculative. To find that Miller was objectively unreasonable for failing to provide such an estimate would be to impose upon defense attorneys a duty to speculate. Especially where, as here, there is no indication that a defendant even *requested* such an estimate and no indication that counsel withheld an estimate for deceptive purposes, we

cannot find that defense counsel's decision not to provide an estimate for an eventual sentence is objectively unreasonable.

¶ 29 Because Miller's conduct in the present case cannot be considered objectively unreasonable under the first prong of *Strickland*, defendant did not receive ineffective assistance of counsel. The trial court, therefore, did not abuse its discretion in denying defendant's motion to vacate his guilty plea.

¶ 30 CONCLUSION

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

¶ 32 Affirmed.