2013 IL App (4th) 110804-U

NO. 4-11-0804

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
March 26, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
DERRICK D. KIRBY,	)	No. 11CM36
Defendant-Appellant.	)	
	)	Honorable
	)	Richard P. Klaus,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Knecht and Turner concurred in the judgment.

ORDER

¶ 1 *Held*: Because the amended motion to withdraw the guilty plea raises no arguable issue and because the trial court's admonitions to defendant substantially complied with Illinois Supreme Court Rule 402 (eff. July 1, 1997) and Illinois Supreme Court Rule 605(b) (eff. Oct. 1, 2001), appellate counsel's motion to withdraw is granted, and the trial court's judgment is affirmed.

¶ 2 Defendant, Derrick D. Kirby, pleaded guilty to one count of resisting a peace officer (720 ILCS 5/31-1 (West 2010)). Pursuant to a plea agreement, the trial court sentenced him to conditional discharge for 12 months along with fines, costs, and public service. Defendant then moved to withdraw the guilty plea and to vacate the judgment. The trial court denied the motion. He appeals.

¶ 3 The office of the State Appellate Defender (OSAD) has filed a motion to withdraw from representing defendant in this appeal, because, in OSAD's opinion, no reasonable argument

could be made in support of this appeal. See *Anders v. California*, 386 U.S. 738 (1967); *People v. Jones*, 38 Ill. 2d 384, 385 (1967). OSAD has submitted a memorandum in support of its motion.

¶ 4 We notified defendant of his right to respond, by a certain date, with additional points and authorities. He has not done so.

¶ 5 After reviewing the *Anders* brief and the record, we conclude that OSAD is correct in its assessment of the merits of this appeal. Therefore, we grant OSAD's motion to withdraw, and we affirm the trial court's judgment.

¶ 6 I. BACKGROUND

¶ 7 A. The Information

¶ 8 The information alleged that on January 9, 2011, in Champaign County, defendant committed the Class A misdemeanor of resisting a peace officer in that defendant "knowingly resisted the performance by Sgt. Crane of an authorized act within his official capacity, namely: the investigation of a traffic stop, knowing Sgt. Crane to be a peace officer engaged in the execution of his official duties, in that the defendant refused to exit the vehicle and remained at the scene after being told to leave."

¶ 9 B. The Pretrial Hearing of April 7, 2011

¶ 10 On April 7, 2011, in a pretrial hearing, defense counsel, Lindsey Yanchus, requested to postpone the trial until May 3, 2011, because she had not yet received a video from someone named Nelson, apparently an assistant State's Attorney. Yanchus had received one video of the traffic stop, but she was under the impression that a second video existed. She told the trial court:

"MS. YANCHUS: Ms. Nelson did provide me with a video.

However, my request was for videos from both of the squad cars that

responded. I only have one. After reviewing it, I'm unable to tell whether or not the angle of the other squad car is going to show me something or not.

I'm gonna ask that this be set to the May 3rd trial call and to be given a subpoena return date in about two weeks. I will just subpoena (inaudible) myself if that's all right with the Court."

¶ 11 The trial court gave Yanchus permission to "propound a subpoena duces tecum returnable to pretrial on April 20th at 8:30," and the court put the case "on the trial call on May 3rd at 9:00."

¶ 12 C. The Guilty-Plea Hearing

¶ 13 On June 8, 2011, defendant and Yanchus appeared at a guilty-plea hearing. Before accepting defendant's guilty plea, the trial court admonished him pursuant to Rule 402, except that the court did not tell him the "minimum *** sentence prescribed by law" for resisting a peace officer. See Ill S. Ct. R. 402(a)(2).

¶ 14 The prosecutor provided the following factual basis:

"MS. BERGSTROM: January 9th of this year at approximately one o'clock in the morning the defendant was a passenger in a vehicle that was stopped. The driver of that vehicle admitted that he was suspended. The defendant was told that he was free to leave. He refused to get out of the car and refused to leave. Once he was out of the car, he again refused to leave the scene. Officers arrested the defendant, and he struggled with officers, and

pulled his arms away."

¶ 15 Yanchus stipulated that the State could call witnesses who would testify substantially as set forth in the factual basis.

¶ 16 The trial court next asked the parties if there was a plea agreement. The prosecutor answered:

> "MS. BERGSTROM: We agree to 12 months conditional discharge. The defendant would pay a fine of $200, with all other fines, fees, and costs per statute. He would receive five dollars credit for the one day spent in custody. He would perform 100 hours of community service work, and refrain from possessing in [*sic*] his body any alcohol or illicit drugs."

Yanchus and defendant acknowledged that those were the terms of the plea agreement.

¶ 17 After confirming with defendant that he wanted to plead guilty, the trial court said:

> "THE COURT: The record will reflect that the defendant has been advised of his rights; knowingly, intelligently, and voluntarily waives those rights. The plea is made voluntarily. There's a factual basis for the plea. Based on those findings I accept the plea."

¶ 18 Having admonished defendant pursuant to Rule 605(b), the trial court imposed the agreed-upon sentence.

¶ 19 D. The Motions To Withdraw the Guilty Plea

¶ 20 On July 8, 2011, defendant filed a *pro se* motion to withdraw his guilty plea. In his motion, he complained that Yanchus had not "represented [him] fairly" and had not given enough

attention to his case.

¶ 21 On August 17, 2011, a different attorney, Chris Mellon, appeared for defendant and filed an amended motion to withdraw the guilty plea. (Both Yanchus and Mellon were assistant public defenders.) In the amended motion, Mellon alleged that defendant's guilty plea was the result of ineffective assistance by Yanchus. Specifically, Mellon alleged as follows:

> "(a) That his previous counsel, Assistant Public Defender Lindsey Yanchus, represented to the Defendant that she had viewed a squad car video of the alleged incident outside of his presence, and that she advised the Defendant to plead guilty based primarily upon the contents of the video.
>
> (b) That the Defendant came to the Public Defender's Office on two occasions prior to entering a guilty plea and asked to watch the aforementioned video, but that he was denied the opportunity to view it.
>
> (c) That the Defendant came to the Public Defender's Office subsequent to pleading guilty and again asked to watch the video, at which point he was informed by Ms. Yanchus that the video could not be located.
>
> (d) That although the Defendant initially relied upon the representations of Ms. Yanchus as to the contents of the aforementioned video, the Defendant now has a serious doubt as to the existence of the video in question.

(e) That if video of the alleged incident in this matter does not actually exist, the Defendant would not have entered his plea of guilty.

(f) That if video of the alleged incident in this matter does in fact exist, and if Defendant had been allowed the opportunity to view the video, the Defendant would not have entered his plea of guilty.

(g) That Defendant had repeatedly maintained his innocence to Ms. Yanchus during the handling of his case, and had informed her on several different occasions that he wished to have a jury trial in this matter."

¶ 22 On August 17, 2011, the trial court held a hearing on the amended motion to withdraw the guilty plea. At the beginning of the hearing, Mellon told the court: "As to Mr. Kirby, he is not here, Your Honor. I have no representations as to his whereabouts." Mellon decided to "stand on what [he had] written in the motion."

¶ 23 After reviewing the amended motion, the trial court told Mellon:

THE COURT: "Mr. Mellon, I have to say I notice in this that there's no recitation whatsoever of any error in the taking of the plea in this case.

MR. MELLON: I reviewed the transcript plea, and noted no error in the taking of the plea. Simply his argument now is that he would not have pleaded guilty. Essentially, after he pled guilty, he went to the public defender's office and asked to see the video again.

He was told the video was not there.

He has some doubt about whether the video existed in the first place at all. He relied on Ms. Yanchus's representation about the video when he pled guilty. That is the primary reason he would like to do that now.

MS. NELSON [(assistant State's Attorney)]: Your Honor, we have had representations from Ms. Yanchus that she watched the video with the defendant. So, we think that the defendant is not accurate in his recitations to Mr. Mellon.

THE COURT: Yeah. Well, number one, Mr. Kirby is not here to give me his side of this. Number two, if it's a credibility contest between Mr. Kirby and Ms. Yanchus, they are not even in the same ballpark.

The motion is denied on the merits."

¶ 24 Mellon filed a certificate that conformed to Illinois Supreme Court Rule 604(d) (eff. July 1, 2006).

¶ 25 This appeal followed.

¶ 26 II. ANALYSIS

¶ 27 In his amended motion to withdraw his guilty plea, defendant suggests that, because the public defender's office could not locate the video after he pleaded guilty, the video possibly never existed in the first place. That reasoning seems shaky, especially considering that Yanchus represented to the trial court that she had watched a video of the traffic stop. In any event, defendant

alleges that, had he known that a video of the traffic stop possibly did not exist, he never would have pleaded guilty. So, on the one hand, in his amended motion, he claims that the purported existence of the video mattered to him in his decision to plead guilty, and he argues that his guilty plea is invalid because he entered the plea under a misapprehension of fact, a delusion that the incriminating video actually existed. See *People v. Jamison*, 197 Ill. 2d 135, 163 (2001) (a defendant should be allowed to withdraw the guilty plea if the defendant entered the plea "through a misapprehension of the facts").

¶ 28 On the other hand, defendant claims, in his amended motion, that if he actually had watched the video, he would have decided not to plead guilty. He alleges: "[I]f video of the alleged incident in this matter does in fact exist, and if Defendant had been allowed the opportunity to view the video, the Defendant would not have entered his plea of guilty." This allegation is difficult to believe because, in reality, without having personally watched the video himself, defendant was concerned enough about what it might reveal that he decided to plead guilty. Apparently, he was aware that he had in fact resisted a peace officer and that there was a good chance this resistance was captured on camera. Because defendant pleaded guilty without any firsthand knowledge of what the video depicted, the trial court could have reasonably disbelieved him when he alleged—still without having seen the video—that he would have insisted on going to trial had he watched the video. Arguably, this contradiction destroyed defendant's credibility, that is, whatever credibility he still had after failing to show up the hearing on his amended motion to withdraw the guilty plea. We defer to the trial court's determination of credibility. See *People v. Freeman*, 84 Ill. App. 3d 261, 264-65 (1980); *People v. White*, 57 Ill. App. 3d 147, 151 (1978).

¶ 29 We are limited to the issues in the amended motion to withdraw the guilty plea. Any

other issue is forfeited. See Ill. S. Ct. R. 604(d) (eff. Feb. 6, 2013) ("Upon 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."). The amended motion offers little to work with.

¶ 30 Granted, a failure to give a defendant all the admonitions that Rule 402 requires *can* qualify as plain error, which the appellate court may review even though the motion to withdraw the guilty plea makes no mention of the error. *People v. Hayes*, 336 Ill. App. 3d 145, 151 (2002). The inadequate admonishment, however, has to cause injustice or prejudice (*id.*), and we cannot see how defendant arguably suffered any injustice or prejudice from not being told the *minimum* penalty for a Class A misdemeanor. Besides, it is unclear what the trial court could have stated as a minimum penalty. For a Class A misdemeanor, the statute does not specify a minimum period of imprisonment; it just says: "The sentence of imprisonment shall be a determinate sentence of less than one year." 730 ILCS 5/5-4.5-55(a) (West 2010). The appellate court has held: "While it is true that under Illinois Supreme Court Rules, information as to the minimum and maximum sentences prescribed by law should be directed to a defendant's attention, it is not necessary that the court specify the minimum when no minimum is in fact specified in the statute, and it is sufficient under such circumstances that the attention of the defendant be directed to the maximum penalty which might be imposed for such offense." *People v. Trinka*, 10 Ill. App. 3d 183, 185-86 (1973).

¶ 31 III. CONCLUSION

¶ 32 For the foregoing reasons, we grant OSAD's motion to withdraw, and we affirm the trial court's judgment.

¶ 33 Affirmed.