2014 IL App (5th) 130133-U

NO. 5-13-0133

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Massac County.
	)	
v.	)	No. 12-CF-53
	)	
KEVIN BALLARD,	)	Honorable
	)	Joseph Jackson,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Justices Chapman and Stewart concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court did not err in denying defendant's amended motion to withdraw his guilty plea, and where no meritorious argument can be made on appeal, OSAD's motion to withdraw is granted.

¶ 2 Defendant, Kevin Ballard, appeals the circuit court's dismissal of his amended motion to withdraw his guilty plea. The Office of the State Appellate Defender (OSAD) has been appointed to represent him. OSAD has filed a motion with an attached memorandum pursuant to *Anders v. California*, 386 U.S. 738 (1967), alleging that there is no merit to the appeal and requesting leave to withdraw as counsel. See *McCoy v. Court of Appeals*, 486 U.S. 429 (1988). The defendant was given proper notice and was

granted an extension of time to file briefs, objections, or any other documents supporting his appeal. He has not filed a response. We have considered OSAD's motion to withdraw, the attached memorandum, and the entire record on appeal and find no error or potential grounds for appeal. For the following reasons, we now grant OSAD's motion to withdraw as counsel and affirm the judgment of the circuit court of Massac County.

¶ 3 BACKGROUND

¶ 4 On May 9, 2012, defendant was charged with participating in the manufacture of methamphetamine in violation of section 15(a)(1) of the Methamphetamine Control and Community Protection Act (720 ILCS 646/15(a)(1) (West 2012)) in that he knowingly participated in the manufacture of 900 grams or more of a substance containing methamphetamine with the intent that a substance containing methamphetamine be produced. Attorney Steven Walters was appointed to represent defendant.

¶ 5 On June 22, 2012, defendant filed a motion *in limine*. In that motion, defendant asked the court to exclude all evidence and testimony relating to any "shake and bake" bottles, HCL gas generators, or any other unknown substance that was not tested for the presence of methamphetamine. On June 25, 2012, the court held a hearing on a petition to revoke defendant's probation in case number 07-CF-63. Though that is an unrelated case, the facts derived at that hearing were the facts relating to the instant case.

¶ 6 Before addressing the petition to revoke defendant's probation, the court addressed defendant's oral motion for new counsel. Defendant told the court that he did not believe Walters, his current attorney, was experienced because Walters had never tried a jury trial, and Walters did not have faith in his case. The court denied defendant's oral motion

for a new attorney, stating that defendant's reason for requesting a new attorney was not adequate, and that Walters was a competent, qualified attorney.

¶ 7 The next issue the court took up at the June 25, 2012, hearing was defendant's motion *in limine* requesting all evidence relating to "shake and bake" bottles be excluded at trial. Defense counsel argued that substances found but not chemically tested to detect the presence of methamphetamine when a task force executed the search warrant should not be permitted to be presented at trial. In response, the State argued that the failure to take a sample of the substance contained within the "shake and bake" bottles was excused, and called Special Agent Mazur to testify in support of that argument. His testimony was as follows. He had served with the Methamphetamine Response Team since 2005. When a person uses the "shake and bake" method of manufacturing methamphetamine it means that he or she used only one bottle to make the methamphetamine. "Shake and bake" bottles are extremely flammable at every stage of the methamphetamine production. The bottles have a tendency to either explode or catch fire. When the response team encounters a "shake and bake" bottle, the process is to weigh the bottle, place it in a metal bucket, cover it with vermiculite, and transport it to a hazardous materials container where it can be safely destroyed. This method prevents the bottle from exploding or catching fire. Mazur had been involved in four different cases where the "shake and bake" bottle had caught fire. The Drug Enforcement Administration (DEA) as well as the higher command at the Illinois State Police issued a directive that until the agencies could find a way to safely test the "shake and bake" bottles, the agents could not sample any of them.

¶ 8 Mazur further testified that in the present case, he was involved in the execution of the search warrant at the home where defendant was present and where the "shake and bake" bottles were found. He identified approximately three "shake and bake" bottles when executing the search warrant. He identified them by their appearance. The task force took two samples of substances suspected to be methamphetamine that were not in the "shake and bake" bottles. However, the task force did not take samples of the "shake and bake" bottles because of the directive regarding the bottles' volatile nature.

¶ 9 The court denied defendant's motion *in limine*, finding that the "shake and bake" method was dangerous and not taking samples of the substance was justified.

¶ 10 The next issue the court addressed at the June 25, 2012, hearing was a petition to revoke defendant's probation in case number 07-CF-63. Investigator Kaylor, with the Massac County sheriff's department, testified for the State as follows. The Methamphetamine Response Team executed a search warrant at a home in Massac County. When executing the search warrant, he found defendant in a small room with a woman named Megan Morgan. A few feet away from defendant, he saw a Gatorade bottle that he recognized as a "shake and bake" or "one pot meth cook." He found material related to the manufacture of methamphetamine and at least three bottles known as "shake and bake" bottles that had been used in the manufacture of methamphetamine. He advised defendant of his rights and then he and a deputy interviewed defendant. Over objection by defense counsel, Kaylor testified that defendant admitted he had been cooking methamphetamine for four to six months. He did not sell methamphetamine, but traded it for boxes of Sudafed, which is used in the manufacture of methamphetamine.

¶ 11 On cross-examination, Kaylor recalled defendant saying that he wanted his girlfriend out of jail, but did not recall defendant saying that he had lied about making methamphetamine. Kaylor also recalled that defendant may have said something about "falling on his sword," which Kaylor took to mean defendant was "taking the fall."

¶ 12 Mazur testified again. He identified several photos that included the alleged "shake and bake" bottles, an HCL generator, blister packs, needle caps, lithium ribbons, syringes, and other materials typically associated with methamphetamine production.

¶ 13 The court took a recess. When the parties returned, the parties informed the court that they had reached an agreement. Defendant entered into a negotiated plea agreement with the State, wherein the State would change the amount of methamphetamine from 900 grams or more to less than 15 grams, and reduced the charge from a Class X felony to a Class 1 felony in exchange for defendant's guilty plea. The State recommended nine years in the Illinois Department of Corrections to be followed by a two-year period of mandatory supervised release (MSR).

¶ 14 The court then asked defendant, *inter alia,* whether he had an opportunity to discuss the plea with his attorney. Defendant stated that he had. He also stated that it was his intention to plead guilty. The court read the charge to defendant and asked if defendant understood the charge. Defendant said that he understood the charge as well as the possible penalties. Defendant said that no one had made any threats or promises and the he was pleading freely and voluntarily. He signed a guilty plea agreement.

¶ 15 The court asked for defendant's criminal history, which included a Class A misdemeanor for domestic battery. At the time of the hearing, he was on conditional

discharge for a burglary conviction. According to the plea agreement, the petition to revoke probation in the burglary case, case number 07-CF-63, was dismissed. The court sentenced defendant to nine years' imprisonment and two years' MSR.

¶ 16 On November 30, 2012, defendant filed a *pro se* motion to withdraw his guilty plea and to vacate his sentence. The court appointed new counsel for defendant. On February 8, 2013, defendant's new counsel filed an amended motion to withdraw defendant's guilty plea in accordance with Supreme Court Rule 604(d) (eff. Feb. 6, 2013). In that motion, counsel argued that due to the inexperience of defendant's original counsel, defendant was denied his constitutional right to be apprised of the evidence which the State would have purportedly used against him had he gone to trial.

¶ 17 At a hearing on the amended motion to withdraw defendant's guilty plea, defendant's new counsel called his previous counsel, Walters, as a witness. Walters testified that he had been a licensed attorney since November 2010. He admitted that he had never obtained copies of the audiotapes of Morgan and Anderson's interviews listed in the State's discovery answer. He admitted telling defendant something to the effect that defendant would never be able to beat the State's case against him.

¶ 18 On cross-examination, Walters said that he did review the reports that reiterated what was said in the interviews with Morgan and Anderson. He did not accept the State's first plea agreement. He informed defendant that he was willing to go to trial, but if they went to trial and defendant lost, defendant would do more time than if he would take the negotiated plea. He never stated that he was unwilling to take the case to trial. He also testified that he had spoken to codefendant Morgan on the day of the hearing for the

petition to revoke and learned that she intended to testify that defendant was the one manufacturing the methamphetamine. Walters also found out that Anderson would invoke the fifth amendment if he was asked to testify. Thus, Walters determined that it was not a good idea to have either Morgan or Anderson testify.

¶ 19 Defendant testified on his own behalf that Walters never told him about the tapes and told him that defendant could not win the case. Defendant found out after his plea that there were audiotapes of his codefendants' interviews.

¶ 20 In closing, defense counsel argued that defendant's plea was not knowing and voluntary because defendant did not have the opportunity to review some of the evidence, namely the audiotapes of Morgan and Anderson, which could have been used against him at trial and could have been exculpatory.

¶ 21 On March 12, 2013, the court entered an order finding that defendant's plea was knowingly, voluntarily, and intelligently made. Thus defendant's amended motion to withdraw his guilty plea was denied. This appeal followed.

¶ 22 ANALYSIS

¶ 23 OSAD has identified three potential issues on appeal: (1) whether the circuit court erred when it summarily denied defendant's pretrial oral request for new counsel, (2) whether the circuit court erred in denying the motion *in limine* regarding the State's failure to test the contents of a "shake and bake" bottle, and (3) whether the circuit court erred when it denied defendant's motion and amended motion to deny his guilty plea based on ineffective assistance of counsel. We address each potential issue in turn.

¶ 24 When a defendant raises a *pro se* claim of ineffective assistance of counsel prior to trial, the circuit court need not automatically appoint new counsel. *People v. Whitaker*, 2012 IL App (4th) 110334, ¶ 14. Under the rule that was developed beginning with *People v. Krankel*, 102 Ill. 2d 181 (1984), if the court determines that the defendant's ineffective assistance of counsel claims lack merit or pertain only to matters of trial strategy, the court does not need to appoint new counsel. *Id.* However, if a factual inquiry into the defendant's ineffective assistance allegations shows that trial counsel possibly neglected the case, new counsel should be appointed to argue the defendant's ineffective assistance claims. *Id.* In *People v. Jocko*, our supreme court held that a court is not required to apply *Krankel* before trial. *People v. Jocko*, 239 Ill. 2d 87, 92-93 (2010). The court reasoned that a *Strickland* (*Strickland v. Washington*, 466 U.S. 668 (1984)) analysis could not be conducted prior to trial because it would not be clear whether the defendant was prejudiced as a result of alleged ineffectiveness of counsel. *Jocko*, 239 Ill. 2d at 92-93. However, the court gave two instances in which a full-blown hearing into a defendant's pretrial claim of ineffective assistance should be held: first, if there appears to be a conflict of interest, or second, when a defendant is wholly deprived of counsel. *Id.* at 92.

¶ 25 Here, defendant's argument regarding counsel was that counsel was inexperienced in that he had never represented a defendant in a jury trial. Defendant also claimed that counsel had no faith in the case. Defendant did not claim that counsel had a conflict of interest in representing him or that defendant was wholly deprived of counsel at some point during the proceedings. The court questioned defendant as to why he wanted new

counsel, and the court deemed that defendant's claims were insufficient. Thus, the court did not err in not conducting a full hearing regarding defendant's *pro se* allegations of ineffective assistance of counsel.

¶ 26 The next potential issue OSAD identifies is whether the circuit court erred in denying the motion *in limine* regarding the State's failure to test the contents of a "shake and bake" bottle.

¶ 27 In *People v. Gallaher*, the State destroyed a dangerous substance before it could be tested. *People v. Gallaher*, 348 Ill. App. 3d 1023, 1030 (2004). The court held that to dismiss the charges relating to the dangerous substance, the defendant first had to show that the substance the State did not test and did not preserve was essential to and determinative of the outcome of his case, not just potentially useful. *Id.* If the defendant shows that the substance was determinative to the outcome of his case, the burden shifts to the State to show that the destruction of the substance was necessary. *Id.* If the defendant cannot show that the substance was determinative to the outcome of his case, he must show that the State acted in bad faith. *Id.*

¶ 28 Here, defendant did not show that the substance was determinative to his case because there were two other samples that were able to be taken. Further, during an interview with the police, the defendant admitted that he was making methamphetamine. Even if the defendant had shown that the substance that the State destroyed was determinative of and essential to the outcome of his case, the State's destruction of the "shake and bake" bottles was necessary. Mazur testified that the bottles were volatile at every stage of production. The Illinois State Police and the DEA issued directives that

instructed agents not to attempt to take samples from "shake and bake" bottles because the bottles would explode or catch fire. The State showed that destroying the bottles before a sample could be taken and tested was necessary.

¶ 29 The final potential issue that OSAD identified was whether the circuit court erred when it denied defendant's motion and amended motion to withdraw his guilty plea based on ineffective assistance of counsel. Defendant argued that his original counsel lacked trial experience, told defendant that he could not "beat the case" against him, and failed to review audiotaped statements from defendant's codefendants or give defendant the opportunity to review the audiotapes.

¶ 30 To prevail on an ineffective assistance of counsel claim, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that he was prejudiced as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668 (1984); *People v. Albanese*, 104 Ill. 2d 504 (1984). The suggestion that a court would impose a larger sentence if a defendant did not plead guilty is not enough to invalidate a plea. *People v. Algee*, 228 Ill. App. 3d 401, 404-05 (1992). Attorneys have a duty to explore readily available sources of evidence that may benefit their clients, and the failure to investigate those sources may constitute ineffective assistance of counsel. *People v. Morris*, 335 Ill. App. 3d 70, 79 (2002). However, the reasonableness of counsel's investigation is given great deference, and whether a failure to investigate amounts to ineffective assistance is determined by the value of the evidence and the closeness of the case. *Id.*

¶ 31 In this case, Walters did not give defendant the audiotapes, nor did he listen to the interviews of Morgan and Anderson. However, Walters did determine that if Morgan were to testify at trial, she would have further incriminated defendant, and Anderson would have invoked his fifth amendment privilege against self-incrimination. The evidence in this case was not closely balanced. Defendant admitted that he had cooked the methamphetamine found when the search warrant was executed and that he had been cooking for four to six months. While Walters should have reviewed the tapes and allowed defendant to review them, we cannot say that defendant was at all prejudiced by Walters's failure to do so. Accordingly, defendant cannot make a claim, and OSAD would not be able to successfully argue, that defendant was provided with ineffective assistance of counsel. The court did not err in denying defendant's amended motion to withdraw his guilty plea based on ineffective assistance of counsel.

¶ 32 CONCLUSION

¶ 33 For the foregoing reasons, the motion of OSAD to withdraw as counsel on appeal is granted, and the judgment of the circuit court of Massac County is affirmed.

¶ 34 Motion granted; judgment affirmed.