2012 IL App (4th) 110104-U

NO. 4-11-0104

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
October 30, 2012
Carla Bender
4th District Appellate
Court, IL

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from |
| Plaintiff-Appellee, | ) | Circuit Court of |
| v. | ) | Champaign County |
| ERNEST R. HARVEY, | ) | No. 07CF2125 |
| Defendant-Appellant. | ) | |
| | ) | Honorable |
| | ) | Heidi N. Ladd, |
| | ) | Judge Presiding. |

JUSTICE POPE delivered the judgment of the court.
Justices Cook and Knecht concurred in the judgment.

**ORDER**

¶ 1 *Held*: The trial court did not err in dismissing defendant's postconviction petition where defendant was unable to show he was prejudiced by his counsel's performance.

¶ 2 In October 2008, defendant, Ernest R. Harvey, pleaded guilty to unlawful possession of a controlled substance (cocaine) with intent to deliver (720 ILCS 570/401(a)(2)(A) (West 2006)), a Class X felony. In December 2008, the trial court sentenced him to 12 years' imprisonment. In July 2010, defendant filed a postconviction petition arguing the attorney representing him at sentencing was ineffective for failing to file a direct appeal. Following a January 2011 hearing, the court dismissed defendant's petition. Defendant appeals, and we affirm.

¶ 3 I. BACKGROUND

¶ 4 On December 6, 2007, the State charged defendant with unlawful possession with

intent to deliver 15 grams or more but less than 100 grams of cocaine (720 ILCS 570/401(a)(2)(A) (West 2006)).

¶ 5 During defendant's October 24, 2008, plea hearing, defendant's attorney informed the trial court the parties had reached a plea agreement wherein defendant agreed to plead guilty to unlawful possession of a controlled substance with intent to deliver in exchange for a 12-year sentencing cap. The trial court admonished defendant pursuant to Illinois Supreme Court Rule 402 (eff. July 1, 1997). The court informed defendant he was pleading guilty to a Class X felony and was ineligible for probation. Defendant acknowledged he understood the sentencing range and the State's agreement to recommend a cap of 12 years in prison. The State provided the following factual basis:

> "If the matter proceeded to trial, the State would present evidence and witnesses to show that on the 5th of December of 2007, at approximately 5:35 in the afternoon, officers proceeded to the defendant's [barbershop business] *** [with] three civil warrants *** to serve[] on the defendant for failure to pay child support. When officers arrived they did make contact with the defendant *** and placed him under arrest for the civil warrants. The defendant then asked to speak to an employee about closing the business while he was in custody. Officers allowed defendant to do so, while he was being handcuffed and taken into physical custody. The defendant told the [*sic*] a female *** to grab the keys, and quote, [']the other shit.['] Officers then observed [her] pull out [']the other shit,[']

> which was a plastic baggy [*sic*] containing $429 in United States Currency and 27.2 grams of a white, chunky substance that field-tested positive for the presence of cocaine. When asked about the items, the defendant admitted that he was the middle man in a drug buy, and that he had possession of the goods because he had not yet delivered them to the buyer in the case.
>
> The defendant then asked the officer if the officer could lose some of the cocaine so as to reduce his sentence. The officer declined to do so, and proceeded with the arrest."

Defendant stipulated to the State's factual basis. The court accepted defendant's guilty plea and set the matter for sentencing.

¶ 6 At the conclusion of defendant's December 17, 2008, sentencing hearing, the trial court sentenced him to 12 years' imprisonment. The court then admonished defendant regarding his appeal rights, in part, as follows:

> "Sir, if you do wish to take an appeal, prior to taking an appeal, you must file in this court within thirty days of today's date a written motion asking the court to have the judgment vacated and for leave to withdraw your plea of guilty. In that motion, you must set forth the grounds or reasons for your motion."

¶ 7 On April 1, 2010, defendant filed a *pro se* postconviction petition. On June 17, 2010, the trial court appointed counsel to represent defendant in the postconviction proceedings. On July 18, 2010, defendant's appointed counsel filed an amended postconviction petition. The

petition alleged, *inter alia*, Diane Lenik, the attorney who represented defendant at sentencing, was ineffective for failing to file a motion to withdraw his guilty plea on a timely basis and file a direct appeal. Defendant alleged his wife contacted Lenik in early January 2009 and told her defendant wanted to "appeal" his case. According to defendant's petition, Lenik was "put on notice that Defendant wanted a post-plea motion filed in this case when his wife called Ms. Lenik, but Ms. Lenik failed to file a Motion to Withdraw Guilty Plea in a timely fashion." In response to defendant's wife's phone call, Lenik wrote a letter to defendant. Lenik's letter, dated January 6, 2009, stated the following:

> "I received a phone call from your wife that you want to 'appeal' your case. I'm not sure what you mean by that, but I will tell you what your choices are.
>
> The charge against you was a Class 'X' felony. That means it carries some number of years between 6 and 30. As you know, it does not carry probation. Since you pleaded guilty for what's called a [']negotiated sentence[,'] the only way the appellate court will look at your case is if you ask [the trial court] to withdraw your guilty plea.
>
> If the State didn't agree, you would have to have a real reason to do this–something like being unable to understand the Judge because you were under the influence of drugs. Just being unhappy with your sentence is not enough.
>
> Also the State may agree to give you your plea back so that they can ask for 20[]or more years at a sentencing hearing after a trial.

If you get your plea back, you are forced to go to trial. As you know, the evidence against you was strong and includes your own statements. It is highly unlikely you would win at trial.

You have only 30 days after the sentencing to do anything. If you choose to ask for your plea back and it's granted, you would probably be in much worse shape than you are now. If you ask for your plea back and it's not granted, you could appeal that denial to the Appellate Court, and it would look at whether you had grounds to withdraw your plea.

If you went to trial and lost, you could appeal both sentencing and trial issues–but that would then happen only after you got your plea back. I know that you're unhappy about your situation, but my advice to you would be to do nothing because it could get a lot worse."

¶ 8 During the January 2011 hearing on defendant's postconviction petition, defendant testified he told his trial attorney his defense should be the police took the cocaine from the woman who grabbed his keys out of his pocket but the cocaine did not come from his pocket. Defendant testified Michael Roberts, one of his customers in the shop on the day of the incident, would have testified to what happened during the arrest.

¶ 9 Roberts testified he saw the woman take the keys out of defendant's pocket but did not see her remove anything else. Roberts also testified he observed police taking the drugs from the woman's possession and not from defendant. Roberts also testified "this was a long time ago"

and he "wasn't really paying attention" and "didn't even know what was going on." When Roberts was asked whether from his vantage point he was able to see if the woman pulled anything else from defendant pockets, Roberts responded by stating, "Not from where I was at."

¶ 10 Janie Miller-Jones, the attorney representing defendant up until sentencing, testified defendant did not mention Roberts as a potential witness. Instead, defendant admitted the cocaine was his and told Miller-Jones he wanted to plead guilty. Defendant never mentioned wanting a trial. As a result, she did not discuss trial strategy with defendant or interview police witnesses.

¶ 11 Sandra Carter, defendant's wife, testified she received a phone call from an inmate a few weeks after defendant's sentencing hearing, telling her defendant wanted to appeal and to let his lawyer know. Defendant testified he did not contact Lenik directly because he had a difficult time obtaining writing materials and getting to a phone during the first few weeks he was in prison. As a result, he asked another inmate to call his wife for him. The inmate told Carter to call Lenik and tell her defendant wanted "an appeal." Carter testified she told Lenik defendant "wants you to get in touch with him because he would like to make an appeal."

¶ 12 Lenik testified she understood Carter's communication to mean defendant "wanted to appeal." However, because defendant entered a guilty plea, she knew he would first have to file a motion to withdraw his plea and "nobody ever said anything about withdrawing the guilty plea." As a result, Lenik testified she sent defendant a letter explaining he must first move to withdraw his guilty plea within 30 days of the sentencing date to appeal. Defendant did not contact her regarding the motion to withdraw his plea.

¶ 13 At the conclusion of the hearing, the trial court found the following:

"There is a suggestion [defendant's attorney] should have filed a Motion to Withdraw [defendant's guilty plea.] There was some convoluted testimony from [defendant] about why he couldn't contact her directly. Accepting that on its face[,] it's apparent that he was able to indirectly contact Ms. Lenik through his wife and Ms. Lenik appropriately responded and as efficiently as she could in a timely fashion explaining [defendant] could not challenge the sentence unless he chose to withdraw his guilty plea. There was no response to that letter. We don't know if [defendant] received it or not, but he was in communication with his wife who was in communication with Ms. Lenik and there is no indication that either [defendant] or anyone on his behalf indicated to this Court or to Ms. Lenik that he wished to withdraw his guilty plea.

*** [T]he next question would become even if Ms. Lenik had filed a Motion to Withdraw Guilty Plea was there any basis to support it[,] and I find there was none. It was a clean plea taken pursuant to the requirements of the Supreme Court Rule and if you look at the transcript of the proceedings from that plea it is apparent [defendant] was fully advised as to all of his rights, as to the possible penalties, and as to what the agreement was and what that ramification would hold for him."

The court also found Roberts' testimony, although credible, would not have substantially helped

defendant present a defense had the case gone to trial. Specifically, the court found the following:

> "[E]ven if [Roberts] had been called[,] I find he wouldn't have added one thing or another to this case. He testified as [the assistant state's attorney] has indicated that he really wasn't paying attention, that it was three years ago. I found him to be very credible, a very believable individual who found himself thrust into circumstances that were unusual. He wasn't really paying attention; and in fact when he was asked specifically about seeing the woman *** pulling something from [defendant's] pockets he said he wasn't able to see if she pulled anything from his pocket due to his vantage point[. S]o it was very apparent he had nothing substantive that would have added to the determination as to guilt or innocence if this had gone to a jury trial."

Thereafter, the court denied defendant's postconviction petition.

¶ 14 This appeal followed.

¶ 15 II. ANALYSIS

¶ 16 On appeal, defendant argues he was provided ineffective assistance of counsel where Lenik failed to timely move to withdraw his guilty plea. We disagree.

¶ 17 To establish ineffective assistance of trial counsel, a defendant must prove both (1) the conduct of counsel fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defendant such that a reasonable probability exists the result would

have been different but for the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984). The *Strickland* Court noted when a case is more easily decided on the ground of lack of sufficient prejudice rather than the question of counsel's representation, the court should do so. *Strickland*, 466 U.S. at 697 (where the defendant did not suffer sufficient prejudice, the court need not decide whether counsel's errors were serious enough to constitute less than reasonably effective assistance).

¶ 18 A criminal defendant who has entered a guilty plea does not have an absolute right to withdraw that plea. *People v. Feldman*, 409 Ill. App. 3d 1124, 1127, 948 N.E.2d 1094, 1098 (2011). Instead, "the burden is on the defendant to demonstrate to the trial court 'the necessity of withdrawing the plea.' " *Feldman*, 409 Ill. App. 3d at 1127, 948 N.E.2d at 1098 (quoting *People v. Dougherty*, 394 Ill. App. 3d 134, 140, 915 N.E.2d 442, 447 (2009)). The trial court may permit a defendant to withdraw his or her plea "if it appears that (1) the plea was entered on a misapprehension of the facts or the law, (2) there is doubt as to the guilt of the accused, (3) the accused has a meritorious defense, or (4) the ends of justice will be better served by submitting the case to a jury." *Dougherty*, 394 Ill. App. 3d at 140, 915 N.E.2d at 447. A trial court enjoys discretion in deciding whether to grant a motion to withdraw a guilty plea. *People v. Pullen*, 192 Ill. 2d 36, 39-40, 733 N.E.2d 1235, 1237 (2000). As a result, reversal is warranted on appeal only if the trial court abused its discretion. *Pullen*, 192 Ill. 2d at 40, 733 N.E.2d at 1237.

¶ 19 In this case, defendant agreed to plead guilty to unlawful possession of a controlled substance with intent to deliver in exchange for the State's agreement to a 12-year sentencing cap. The trial court admonished defendant pursuant to Illinois Supreme Court Rule 402 (eff. July 1, 1997). The court informed defendant he was pleading to a Class X felony and was ineligible for

probation. Defendant acknowledged he understood the sentencing range and the fact he would be sentenced to 12 years' imprisonment based on the plea agreement. Defendant also stipulated to the State's factual basis. Thus, defendant did not enter his plea under either a misapprehension of the facts or the law.

¶ 20 Further, defendant argues he should be allowed to withdraw his guilty plea because Roberts' potential trial testimony would provide him with a meritorious defense at trial. However, while the trial court found Roberts' testimony credible, it concluded it would not substantially aid defendant's defense at trial. Following our review of the record, we agree with the court. While Roberts testified he did not observe the police retrieve any drugs from defendant, Roberts also testified he "wasn't really paying attention" and "didn't even know what was going on." Roberts also testified from his vantage point he was really unable to see if the woman removed anything other than keys from defendant's pocket.

¶ 21 Moreover, there is little doubt as to defendant's guilt where the evidence against him was overwhelming. According to the State's factual basis for defendant's plea, police went to defendant's business to arrest him on warrants for failing to pay child support. During the arrest, defendant asked a female employee to close the business for him. Defendant, who was handcuffed at the time, told the employee to grab the keys and "the other shit" from his pocket. Police observed the employee remove a plastic Baggie containing 27.2 grams of a white, chunky substance from defendant's pocket. That substance field-tested positive for the presence of cocaine. That Baggie also contained $429 in cash. Defendant admitted to police he was the middle man in a drug deal and had not yet delivered the drugs to the buyer.

¶ 22 Here, defendant failed to present any objective evidence he was improperly

admonished, had a "meritorious defense," or that "the ends of justice" would otherwise be served by the withdrawal of his plea. Thus, even if a motion to withdraw defendant's plea had been filed, no basis existed for the trial court to grant it. Because defendant has not demonstrated a reasonable probability the court would have granted a motion to withdraw his guilty plea, defendant has failed to show he was prejudiced by his attorney's failure to file such a motion.

¶ 23 III. CONCLUSION

¶ 24 For the foregoing reasons, we affirm the trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 25 Affirmed.