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2016 IL App (3d) 140511-U

Order filed March 1, 2016

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2016

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 14th Judicial Circuit, Whiteside County, Illinois.
Plaintiff-Appellee,)	
v.)	Appeal No. 3-14-0511
CHAD MORSE,)	Circuit No. 11-CF-434
Defendant-Appellant.)	The Honorable John L. Hauptman, Judge, presiding.

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

ORDER

¶ 1 *Held:* In a case involving a defendant who pled guilty to aggravated driving under the influence, the circuit court denied the defendant's motion to withdraw his guilty plea. The appellate court affirmed, holding that the guilty plea waived any non-jurisdictional defects that occurred after the date of the guilty plea, and that the circuit court properly denied the motion to withdraw guilty plea.

¶ 2 The defendant, Chad Morse, pled guilty to aggravated driving under the influence (DUI) (625 ILCS 5/11-501(a)(2) (West 2010)), and was sentenced to 14 years of imprisonment. On appeal, the defendant argues that: (1) attorney Paul Whitcombe rendered ineffective assistance of

counsel by divulging private communications during a conference held pursuant to Supreme Court Rule 402(d) (eff. July 1, 2012); (2) the prosecutor's participation in the Rule 402(d) conference intruded into the defendant's attorney-client relationship, violated the defendant's right to a fair trial, and was "completely offensive to the concept of the effective assistance of counsel"; (3) the circuit court's participation in the Rule 402(d) conference prejudiced the defendant, denied him due process, and rendered his guilty plea involuntary; (4) attorney Theron Burall rendered ineffective assistance of counsel by failing to move for substitution for cause and to move to withdraw the defendant's jury trial waiver; and (5) the circuit court erred when it denied the defendant's motion to withdraw his guilty plea. We affirm.

¶ 3

FACTS

¶ 4

On December 19, 2011, the defendant was charged by indictment with two counts of aggravated DUI (625 ILCS 5/11-501(a)(1), (a)(2), (d)(1)(F) (West 2010)), three counts of reckless homicide (720 ILCS 5/9-3(a) (West 2010)), and two counts of DUI (625 ILCS 5/11-501(a)(1), (2) (West 2010)). The counts alleged, *inter alia*, that the defendant was driving a vehicle while under the influence of alcohol on November 26, 2011, and that he struck and killed a pedestrian.

¶ 5

Attorney William L. Detrick filed an appearance on behalf of the defendant on December 28, 2011, and the case was set for a jury trial. Counsel filed a motion for fitness examination on January 9, 2012, which questioned the defendant's fitness to stand trial. The motion was not noticed up for hearing, and counsel withdrew on January 25, 2012. Attorney Paul Whitcombe filed an appearance on behalf of the defendant on that same date.

¶ 6

On September 21, 2012, the circuit court conducted a conference with the attorneys pursuant to Supreme Court Rule 402 (eff. July 1, 2012). The docket entry stated that the

conference was held "[b]y agreement" and outside the defendant's presence with Whitcombe's consent. The defendant was not present in court on that date.

¶ 7 On October 22, 2012, Whitcombe filed a motion to withdraw as counsel for the defendant, alleging that a material and substantial difference of opinion existed between him and the defendant regarding the direction of the defense. At a hearing on the motion, Whitcombe stated that the defendant did not agree with his recommendations on whether to proceed to trial, how to proceed at trial, and what types of evidence were relevant and could be produced at trial. After hearing arguments, the court found both that the defendant's desire for new counsel was a delay tactic and that a delay of the trial would be inequitable. Accordingly, the court denied the motion.

¶ 8 The defendant waived his right to a jury trial on November 8, 2012, and the case was set for a bench trial to be held in February 2013.

¶ 9 On January 4, 2013, Whitcombe withdrew as counsel for the defendant and attorney Theron Burall entered an appearance on behalf of the defendant.

¶ 10 On March 5, 2013, the defendant entered an open plea of guilty to one count of aggravated DUI in exchange for the State agreeing to drop all other charges. The circuit court accepted the plea after giving admonishments and hearing the State's factual basis, and the case was set for sentencing.

¶ 11 On May 14, 2013, during a hearing, the circuit court noted that while reviewing the pre-sentence investigation report, the court noticed for the first time that the motion for fitness examination had been filed early on in the case. The judge stated that he was disappointed in himself for not noticing the motion earlier, but also acknowledged that the motion was never

noticed up by former defense counsel and otherwise was not pursued. Nevertheless, the court ordered a fitness examination for the defendant and continued the case.

¶ 12 A fitness hearing was held on July 10, 2013. Defense counsel stipulated to the opinion of the examining doctor that the defendant was fit to stand trial. The court found that the defendant was in fact fit to stand trial.

¶ 13 On July 19, 2013, the defendant once again entered an open plea of guilty to aggravated DUI in court. The court accepted the defendant's plea after finding it knowing and voluntary.

¶ 14 On September 11, 2013, the circuit court held a sentencing hearing at the conclusion of which the court sentenced the defendant to 14 years of imprisonment.

¶ 15 On October 11, 2013, attorney Maureen Williams entered an appearance on behalf of the defendant. Through counsel, the defendant filed a motion to withdraw his guilty plea and vacate the judgment. The motion was later supplemented and argued that the defendant's plea was not given knowingly or voluntarily because the Rule 402(d) conference was held without the defendant's permission or his being admonished by the court pursuant to the Rule. The motion also alleged that his due process rights were violated because Whitcombe's motion to withdraw was denied, he was forced to proceed with an attorney in whom he had no confidence, and Whitcombe filed a jury trial waiver. The defendant also filed a motion to reconsider sentence.

¶ 16 At the hearing on the motions, the circuit court acknowledged that the Rule 402(d) conference was held outside of the defendant's presence with Whitcombe's consent. The court also acknowledged its mistake in failing to admonish the defendant before the conference pursuant to the Rule. However, the court found that any errors that occurred with regard to the Rule 402(d) conference were cured by all of the events that took place after that, up to and including the defendant's guilty plea. Accordingly, the court denied the defendant's motion to

withdraw his guilty plea. After hearing arguments on the motion to reconsider sentence, the court also denied that motion.

¶ 17 The defendant appealed.

¶ 18 ANALYSIS

¶ 19 On appeal, the defendant argues that: (1) Whitcombe rendered ineffective assistance of counsel by divulging private communications during the Rule 402(d) conference; (2) the prosecutor's participation in the Rule 402(d) conference intruded into the defendant's attorney-client relationship, violated the defendant's right to a fair trial, and was "completely offensive to the concept of the effective assistance of counsel"; (3) the circuit court's participation in the Rule 402(d) conference prejudiced the defendant, denied him due process, and rendered his guilty plea involuntary; (4) Burall rendered ineffective assistance of counsel by failing to move for substitution for cause and to move to withdraw the defendant's jury trial waiver; and (5) the circuit court erred when it denied the defendant's motion to withdraw his guilty plea.

¶ 20 Of paramount importance to this appeal is the fact that the defendant pled guilty to aggravated DUI on July 19, 2013. "It is well established that a voluntary guilty plea waives all non-jurisdictional errors or irregularities, including constitutional ones." *People v. Townsell*, 209 Ill. 2d 543, 545 (2004).

"[A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty

plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in [*McMann v. Richardson*, 397 U.S. 759 (1970)]." *Tollett v. Henderson*, 411 U.S. 258, 267 (1973).

The standard in *McMann* to which *Tollett* refers is that the advice from counsel must have been "within the range of competence demanded of attorneys in criminal cases." *McMann*, 397 U.S. at 771. As stated by our supreme court:

"If the defendant's pleas were made in reasonable reliance upon the advice or representation of his attorney, which advice or representation demonstrated incompetence, then it can be said that the defendant's pleas were not voluntary; that is, there was not a knowing and intelligent waiver of the fundamental rights which a plea of guilty entails." *People v. Correa*, 108 Ill. 2d 541, 549 (1985).

¶ 21 Because the defendant in this case pled guilty on July 19, 2013, any non-jurisdictional errors that occurred prior to that date have been waived. *Townsell*, 209 Ill. 2d at 545.

¶ 22 Because the defendant can only argue that his guilty plea was involuntary, only his fifth argument can be considered; specifically, that the circuit court erred when it denied the defendant's motion to withdraw his guilty plea. We review a circuit court's decision on a motion to withdraw guilty plea for an abuse of discretion. *People v. Baez*, 241 Ill. 2d 44, 109-10 (2011).

¶ 23 On appeal, the defendant makes no claim that Burall, who was counsel for the defendant at the time of the guilty plea, rendered incompetent advice to the defendant regarding the guilty

plea. Rather, the defendant references other matters that either transpired prior to Burall's representation or do not implicate advice Burall gave to the defendant. The only reference the defendant actually makes to Burall's representation in his argument is that Burall failed to file a motion to substitute the judge for cause and that "[i]nstead, he scheduled a guilty plea." This is insufficient to establish that Burall's advice was incompetent. In addition, given the strength of the evidence against the defendant, we see nothing that suggests Burall's advice to the defendant regarding the guilty plea could have been incompetent. See, e.g., *People v. Witherspoon*, 164 Ill. App. 3d 362, 365 (1987) (stating that "a defense attorney's honest assessment of a case cannot be the basis for holding that a defendant's guilty plea was involuntary"). Accordingly, we hold that the circuit court did not err when it denied the defendant's motion to withdraw his guilty plea.

¶ 24

CONCLUSION

¶ 25

For the foregoing reasons, the judgment of the circuit court of Whiteside County is affirmed.

¶ 26

Affirmed.