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2019 IL App (3d) 180378-U

Order filed July 3, 2019

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2019

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellee,)	
v.)	Appeal No. 3-18-0378
)	Circuit No. 11-CF-1860
WILLIAM K. FREUND,)	
Defendant-Appellant.)	Honorable Edward A. Burmila Jr., Judge, Presiding.

JUSTICE CARTER delivered the judgment of the court.
Justices Lytton and Wright concurred in the judgment.

ORDER

¶ 1 *Held:* Due to the court's incorrect preplea sentence admonishment, we reverse the circuit court's denial of defendant's motion to withdraw the guilty plea, allow defendant to withdraw the plea, and remand the cause for further proceedings.

¶ 2 Defendant, William K. Freund, appeals from the Will County circuit court's denial of his motion to withdraw guilty plea. Defendant argues the court: (1) erred in denying his motion to withdraw guilty plea where the court misinformed him before entering his guilty plea that he

would not be subject to consecutive sentencing, and (2) failed to adequately consider mitigating factors in sentencing and imposed an excessive *de facto* life sentence. We reverse and remand.

¶ 3

I. BACKGROUND

¶ 4

The State charged defendant by indictment with six counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2008)), eight counts of aggravated child pornography (*id.* § 11-20.3(a)(1)), and one count of aggravated criminal sexual abuse (*id.* § 12-16(c)(1)(i)).

¶ 5

On September 19, 2011, defendant appeared before the circuit court for an initial appearance. During the hearing, the court read the charges to defendant and the State said that each charge carried a potential sentence of 6 to 30 years' imprisonment. The State told the court during the bond setting portion of the hearing that any sentences imposed on the "predatory criminal sexual assault of a child [charges], the sentences are consecutive sentences, as you know. So we're looking at a minimum of 36 years, not just six. And they're also to be served at a rate of 85 percent." The court set defendant's bond at \$3 million.

¶ 6

At the October 11, 2011, arraignment hearing, defense counsel moved for a bond reduction. The State argued against a bond reduction noting "the defendant [was] facing six counts. Just the first six counts, Judge, are all predatories. They're all 6 to 30, all 85 percent. They're all to run consecutive to one another." The court denied defendant's motion.

¶ 7

From February 2012 to June 2014, the parties engaged in "lengthy" plea negotiations. On October 14, 2014, defendant entered an open guilty plea to four charges of predatory criminal sexual assault of a child. In exchange for defendant's plea, the State dismissed the remaining 11 counts of the indictment. Before the court accepted defendant's plea, the State told the court that "[e]ach Count could be six to 60" years' imprisonment. While admonishing defendant of the

consequence of the plea, the court said “[e]ach of those [charges] is a mandatory prison sentence of six to 30 years. It could be—is there an extension—six to 60 years. There is no extension beyond the 60?” The State indicated that defendant was not eligible for an extended-term sentence and the court restated that the charges carried “a mandatory prison sentence of from six to 60 years.” Then, the court asked the State if the defendant was eligible for an extended-term or consecutive sentence. The State responded “[n]o,” and the court admonished defendant that “[t]he maximum prison sentence is the 60 years that I mentioned. You could not be made to serve the sentences one after the other by operation of law.” The court found defendant’s plea to be knowing and voluntary. The court accepted defendant’s guilty plea and set the cause for a sentencing hearing.

¶ 8 At the beginning of the January 20, 2015, sentencing hearing, the State asked for a short continuance and noted that there was an error in the admonishments. The State explained that it had previously told the court that defendant was not required to serve consecutive sentences, but the law required that defendant’s sentence be served consecutively. The following colloquy occurred after the State’s disclosure.

“THE COURT: Do you understand that, [defendant]? If that impacted your plea of guilty, you can certainly file a motion to withdraw it.

[DEFENSE COUNSEL]: We understand that, Judge, but it was our intention understanding the statute to operate by way of consecutive nature, and I think I even mentioned at the end of the colloquy that it is consecutive, one to another, and you did admonish the defendant.

THE COURT: All right. Just so the record is clear ***.”

¶ 9 At the conclusion of the February 11, 2015, sentencing hearing, the court said

“Now, the general assembly has not set life in prison as a punishment for this offense. [The State] tells me that the defendant should spend the rest of his life in the Department of Corrections. So I can’t give him a sentence with the intent that he spend the rest of his life in the Department of Corrections. But I can give him a sentence that’s within the range that the general assembly has provided to sentencing courts as the appropriate range of sentences in cases of this type. And for each of the offenses of aggravated criminal sexual assault of a child, the defendant is sentenced to 40 years in the Illinois Department of Corrections. And those sentences are to run concurrent one to the other.

[THE STATE]: Judge, I’m sorry, you said concurrent.

THE COURT: Consecutively, pardon me. By operation of law they are to be run consecutively one to the other. The good time credit is to be assessed at a rate of 85 percent.”

¶ 10 After the sentencing hearing, defense counsel filed a motion to reconsider sentence. The court denied the motion and defendant appealed. We reversed the court’s denial and remanded for new postplea proceedings because defense counsel did not file an Illinois Supreme Court Rule 604(d) (eff. Mar. 8, 2016) certificate with his motion to reconsider sentence. *People v. Freund*, No. 3-15-0147 (2015) (unpublished minute order).

¶ 11 On remand, new defense counsel filed a motion to withdraw guilty plea. The court denied the motion, and defendant filed a notice of appeal. We reversed the court’s denial of the postplea motion in this second appeal because defense counsel filed a noncompliant Rule 604(d) certificate. *People v. Freund*, 2017 IL App (3d) 150846-U. We remanded the cause for new postplea proceedings. *Id.*

¶ 12 On the second remand, defendant filed motions to reconsider sentence and withdraw his guilty plea. In the motion to withdraw guilty plea, defendant argued that the court did not admonish him of the requirement that his sentences be ordered to run consecutively. The motion also alleged that his attorney never told him that he would serve consecutive sentences. The court denied both of defendant’s motions. Defendant appeals.

¶ 13 II. ANALYSIS

¶ 14 A. Motion to Withdraw Guilty Plea

¶ 15 Defendant argues the court erred in denying his motion to withdraw guilty plea because the court did not admonish him of the requirement that his sentences be served consecutively before he entered his plea. After reviewing the record, we find that the court erred in denying defendant’s motion because the court affirmatively informed defendant immediately before the plea that defendant could not be made to serve his sentences “one after the other.”

¶ 16 Defendant does not have an automatic right to withdraw his guilty plea. *People v. Jamison*, 197 Ill. 2d 135, 163 (2001). Instead, the circuit court has discretion to allow or deny defendant’s request to withdraw his guilty plea. *People v. Delvillar*, 235 Ill. 2d 507, 519 (2009). We will not disturb the court’s exercise of discretion unless the court abused its discretion. *Id.* The court should allow defendant to withdraw his guilty plea “ ‘[w]here it appears that the plea of guilty was entered on a misapprehension of the facts or of the law, or in consequence of misrepresentations by counsel or the State’s Attorney or someone else in authority ***.’ ” *People v. Davis*, 145 Ill. 2d 240, 244 (1991) (quoting *People v. Morreale*, 412 Ill. 528, 531-32 (1952)). Defendant bears the burden to establish that “the circumstances existing at the time of the plea, judged by objective standards, justified [his] mistaken impression.” *Id.*

¶ 17 At the beginning of the plea hearing, the State informed the court of the terms of the plea and noted that the parties had made no arrangement for a recommended sentence or sentencing cap. The State advised the court that the four predatory criminal sexual assault of a child charges that defendant was pleading guilty to carried a prison sentence of 6 to 60 years' imprisonment. The State further said that defendant was not eligible for an extended-term or consecutive sentence. Based on the State's comments, the court erroneously admonished defendant that he "could not be made to serve the sentences one after the other by operation of law." However, section 5-8-4(a)(ii) of the Unified Code of Corrections mandated the imposition of consecutive sentences on each of defendant's four charges. 730 ILCS 5/5-8-4(a)(ii) (West 2008). Therefore, we find the combination of the State's misstatement of the law and the court's affirmative admonishment that defendant would not be subject to consecutive sentencing caused defendant to misapprehend the law regarding the sentencing consequences of his guilty plea. See *Davis*, 145 Ill. 2d at 244. Moreover, this misapprehension negated the effect of any prior correct statement of the sentencing consequences because it occurred immediately before defendant entered the plea and was provided by the authority figure in the proceedings—the court. Given this record, the court erred in denying defendant's motion to withdraw his guilty plea.

¶ 18 The State argues that the court did not err when it denied defendant's motion because the record establishes that defendant knew that he would be required to serve consecutive sentences. In support, the State cites to two preplea hearings where it mentioned that defendant would be required to serve consecutive sentences. We find that any notification value conferred by these prior references was nullified by the passage of time and the court's preplea admonishments. The State made its two references nearly two years before defendant entered his guilty plea. In the time that followed, the parties engaged in "lengthy" plea negotiations that culminated in the

dismissal of 11 of the 15 charges. As a result of the negotiations, defendant no longer faced the same sentencing consequences—he would only be sentenced on 4 of the 15 charges in the indictment—as he did when the State generically described the maximum sentence that accompanied all 15 charges. Even if the State’s admonishments carried some residual value, that value was erased by the erroneous admonishment provided by the court. At the time of the admonishment, the court was the authority figure as it possessed a legal duty to accurately inform defendant of the consequences of entering his guilty plea and determine if defendant was entering his plea knowingly and voluntarily. See Ill. S. Ct. R. 402(a) (eff. July 1, 2012). As the authority figure, defendant reasonably relied on the court’s more current admonishments to decide whether to continue with the plea and disregarded any prior sentencing consequences mentioned by the State. After all, the court, and not the State, ultimately determined the length of defendant’s sentences. Therefore, the court’s admonishment nullified the State’s prior references to the consecutive sentencing requirement.

¶ 19 The State also argues that defendant invited the error because defense counsel did not object to it and agreed to proceed to sentencing when the court noted that defendant could file a motion to withdraw the guilty plea. The invited error doctrine prohibits an accused from requesting to proceed in one manner and later argue on appeal that the course of action was in error. *People v. Harvey*, 211 Ill. 2d 368, 385 (2004). The error in the instant case derived from the court’s preplea admonishments which did not reflect the statutorily required sentence consequences attendant to defendant’s guilty plea. The State notified the court of the admonishment error before the sentencing hearing. At that time, defense counsel declined to file a motion to withdraw the guilty plea. Defense counsel’s decision was legally correct because Rule 604(d) requires, to properly preserve his right to appeal, that defendant file a motion to

withdraw the guilty plea after the court imposes sentencing. See *People v. Gabrys*, 2013 IL App (3d) 110912, ¶ 27. Therefore, defense counsel’s decision not to file a presentence motion to withdraw the guilty plea was not an error or basis to apply the invited error doctrine.

¶ 20 Finally, the State argues that the court substantially complied with the Rule 402(a) preplea admonishment requirement where the court admonished defendant of the minimum and maximum term that each charge carried. However, this argument discounts the fact that the court told defendant the maximum sentence he could be made to serve was 60 years’ imprisonment, when the maximum combined sentence, given the consecutive sentencing requirement, was 240 years’ imprisonment. We cannot say that defendant’s plea was entered knowingly when he was told the maximum sentence was 180 years less than the actual maximum total sentence that defendant would face and 100 years less than the sentence that the court actually imposed.

¶ 21 Due to the court’s preplea admonishment error, we find that defendant’s plea was entered based on a misapprehension of the law, and the court erred when it denied defendant’s motion to withdraw the plea. Accordingly, we reverse the court’s denial of defendant’s motion to withdraw the guilty plea, allow defendant to withdraw his guilty plea, and remand the cause for further proceedings.

¶ 22 B. Sentence

¶ 23 Defendant also argues the court did not adequately consider mitigating factors in determining his sentence and imposed an excessive *de facto* life sentence. Our resolution of the first issue has rendered this sentencing issue moot. Accordingly, we take no position on this issue.

¶ 24 III. CONCLUSION

¶ 25 The judgment of the circuit court of Will County is reversed and remanded.

