

No. 1-09-2116

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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|--------------------------------------|---|------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from the |
| |) | Circuit Court of |
| Plaintiff-Appellee, |) | Cook County. |
| |) | |
| v. |) | No. 05 CR 15344 |
| |) | |
| MARCUS SANDERS, |) | The Honorable |
| |) | James M. Obbish, |
| Defendant-Appellant. |) | Judge Presiding. |

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Gallagher and Justice Lavin concurred in the judgment.

ORDER

HELD: Where a sufficient factual basis existed for the entry of defendant's guilty plea, no plain error occurred, and where defendant sought to withdraw his plea based on the ineffective assistance of counsel, the trial court correctly conducted a *Krankel* inquiry to determine if new counsel should be appointed on defendant's claims; the judgment of the trial court was affirmed.

Pursuant to a guilty plea, defendant Marcus Sanders was convicted of one count of predatory criminal sexual assault of a child and was sentenced to 7 1/2 years in prison.

Defendant filed a *pro se* motion to withdraw his plea, which the trial court denied. On appeal,

defendant argues this case should be remanded to allow him to withdraw his guilty plea because the record does not include a factual basis to support the plea. Defendant also contends the trial court erred in ruling on his motion to withdraw his plea without appointing new counsel to represent him in that proceeding. We affirm.

On November 29, 2007, defendant and his counsel appeared before the trial court, and counsel requested a pre-trial conference to discuss a plea pursuant to Supreme Court Rule 402 (eff. July 1, 1997). The court explained to defendant his attorney was asking for a conference at which his criminal background and the facts of the case would be discussed. Defendant indicated he understood. The court held a Rule 402 conference with the prosecutor and defendant's counsel. No record was made of the conference. The court indicated on the record that a "402 conference was held and an offer extended."

The case was continued several times during the next 10 months. On October 3, 2008, defense counsel told the court that defendant wished to plead guilty to one count of predatory criminal sexual assault. The State indicated the victim would be agreeable to defendant's plea.

The court admonished defendant as follows:

"Mr. Sanders, you are charged in Count 1 with committing the offense of predatory criminal sexual assault, that in between the dates of March 1, 2005 and March 31st, 2005, within Cook County, you committed that offense in that you, being 17 years of age or older, intentionally and knowingly committed an act of sexual penetration upon [the victim's name], to wit, contact between Marcus Sanders' mouth and [the victim's] penis. And [the

victim] was under 13 years of age when that act was committed.

Do you understand what you are being charged with in
Count 1 of this indictment?

DEFENDANT: Yes.

THE COURT: To that charge how do you plead, guilty or
not guilty?

DEFENDANT: Guilty."

The court admonished defendant that by pleading guilty, defendant waived his right to a trial on that issue in which the State would have to prove his guilt beyond a reasonable doubt and defendant could call witnesses in his defense. The court informed defendant the sentencing range for the Class X felony was 6 to 30 years in prison and he would serve at least 85 percent of his sentence. The court continued:

"Is there a stipulation that the facts that were given to this Court at the 402 conference, which was held several months ago regarding this case, that if, in fact, those same facts were presented in open court, it would support the charge of predatory criminal sexual assault beyond a reasonable doubt?"

MR. FRYMAN [assistant public defender]: So stipulated that those facts would, in fact, constitute proof beyond a reasonable doubt, Your Honor."

After further questioning of defendant, the court accepted defendant's guilty plea:

"Let the record reflect that I find Mr. Sanders does

understand the nature of the charges pending against him and his rights under the law. I believe he understands the possible penalties which may be imposed as well as the other consequences of a plea of guilty.

I further find that he entered into his plea freely and voluntarily. A factual basis was provided to this Court at the 402 conference, and is stipulated to today by the parties. Accordingly, Mr. Sanders' plea will be accepted."

On appeal, defendant contends the record did not satisfy the requirement in Rule 402(c) of a factual basis to support his plea. He argues the court's reading of the indictment and the stipulation to the facts that were presented at the Rule 402 conference, which was not of record, failed to establish a sufficient factual basis.

Defendant acknowledges he did not raise the lack of a factual basis in his motion to withdraw his plea but contends the lack of an adequate basis for his plea renders the plea void and subject to attack at any time. A judgment is void, rather than merely voidable, only where the court entering the judgment lacked jurisdiction over the parties, over the subject matter, or exceeded its statutory authority to act. *People v. Smith*, No. 1-08-0758, slip op. at 13 (Ill. App. Dec. 23, 2010); see also *People v. Davis*, 156 Ill. 2d 149, 155-56 (1993) (voidable judgment is one entered erroneously by court having jurisdiction).

Even assuming *arguendo* this court was to find the trial judge here did not comply with the requirement of Rule 402, an issue that is addressed below, this court recently held in *Smith* that a violation of Rule 402, a procedural rule, does not divest the trial court of jurisdiction to

enter a conviction based on a defendant's plea; rather, the conviction is voidable, as opposed to void. *Smith*, slip op. at 14; see also *People v. Speed*, 318 Ill. App. 3d 910, 916-17 (2001).

Therefore, defendant's voidness argument is unavailing.

Defendant argues in the alternative that despite his procedural default, this court can review the lack of a factual basis for his plea under the plain error doctrine. Because the first step in plain error review is to determine whether a clear and obvious error occurred (*People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007)), we turn to the merits of defendant's contention.

Rule 402(c) states that the court "shall not enter final judgment on a plea of guilty without first determining that there is a factual basis for the plea." Ill. S. Ct. R. 402(c) (eff. July 1, 1997). The rule is intended to protect those accused of a crime "by ensuring that they have not pleaded guilty by mistake or under a misapprehension, or been coerced or improperly advised to plead to crimes they did not commit." *People v. Bannister*, 378 Ill. App. 3d 19, 35 (2007) (quoting *People ex rel. Daley v. Suria*, 112 Ill. 2d 26, 32 (1986)). The factual basis for a guilty plea generally consists of either an express admission by the accused that he committed the acts alleged in the indictment or a recital of the evidence to the court that supports the allegations in the indictment. *People v. Brazee*, 316 Ill. App. 3d 1230, 1236 (2000).

Rule 402(c) does not require strict compliance; rather, substantial compliance is sufficient. *People v. Barker*, 83 Ill. 2d 319, 327-29 (1980) (noting quantum of proof necessary for factual basis of guilty plea is "less than that necessary to sustain a conviction after a full trial"); *People v. Vinson*, 287 Ill. App. 3d 819, 821 (1997). Rule 402(c) is satisfied if there is a basis anywhere in the record up to the entry of the final judgment from which the judge could reasonably reach the conclusion that the defendant actually committed the acts with the intent, if

any, required to constitute the offense to which he is pleading guilty. *Brazee*, 316 Ill. App. 3d at 1236; *Vinson*, 287 Ill. App. 3d at 821.

Defendant contends the record here contains no factual basis for his plea because he did not admit to the offense and the prosecutor did not refer to the facts underlying the charges against him. He argues the reading of the indictment in court and his counsel's stipulation to the facts presented at the Rule 402 conference were insufficient to establish a factual basis.

The factual basis for a plea may be established off the record. *People v. Doe*, 6 Ill. App. 3d 799, 801 (1972). In *Doe*, the trial court stated it "was satisfied from our [plea discussion] conference that there certainly is a factual basis for the plea of guilty with respect to this defendant." *Doe*, 6 Ill. App. 3d at 800. Rejecting the defendant's contention that the facts supporting the plea must be stated on the record, *Doe* noted the committee comments to Rule 402(c) indicated, as they do currently, that in accepting a guilty plea, "no particular kind of inquiry [by the court] is specified." *Doe*, 6 Ill. App. 3d at 801; see also Ill. S. Ct. R. 402(c), Committee Comments (adopted Oct. 20, 2003). The committee comments to Rule 402(c) state that "the court may satisfy itself by inquiry of the defendant or the attorney for the government, by examination of the pre-sentence report, or by any other means which seem best for the kind of case involved." Ill. S. Ct. R. 402(c), Committee Comments (adopted Oct. 20, 2003); see also *People v. Nyberg*, 64 Ill. 2d 210, 214 (1976) ("means of inquiry utilized by the trial court shall be determined on a case-by-case basis").

An "independent examination by the trial judge of the relation between the law and the acts defendant admits having committed may be made off the record." *Doe*, 6 Ill. App. 3d at 801; see also *People v. Nettles*, 32 Ill. App. 3d 1082, 1085 (1975) (factual basis of plea proper when

court noted and defendant stipulated that court heard such evidence in preceding conferences to form basis for plea); *People v. Robinson*, 28 Ill. App. 3d 757, 762-63 (1975) (substantial compliance with Rule 402(c) found when trial court stated it was "satisfied" as to factual basis for plea after reading grand jury minutes and by conversations in plea conference).

Here, defendant was apprised in open court of the victim's name and the approximate date of the offense. Defense counsel stipulated the facts presented at the Rule 402 conference would support the charge against defendant. It is possible the facts underlying defendant's plea were discussed off the record because the charged offense involved a sexual act against a minor. A sufficient factual basis was presented for defendant's guilty plea. Because without error, there can be no plain error, defendant's contention that this issue met the test for plain error review is rejected.

The cases on which defendant relies to undermine his plea's factual basis are inapposite. In *People v. Williams*, 299 Ill. App. 3d 791, 794 (1998), the attorneys stipulated to the factual basis for the plea, and no other statement was offered. Here, the record reflects the facts on which the plea rested were presented at the Rule 402 conference. In *Vinson*, which defendant also cites, the court was not apprised of the facts surrounding the charged offense; the court simply asked the defendant while taking his plea, "Did you do it?" and the defendant responded in the affirmative. *Vinson*, 287 Ill. App. 3d at 821-22 (noting there was no indication in record that court participated in plea conference). Neither *Williams* nor *Vinson* is comparable to the situation here, where the court indicated the facts were set out at a plea conference.

Defendant's remaining contention on appeal is that the court should have appointed new counsel to represent him after he filed a *pro se* motion to withdraw his plea. In defendant's 14-

page motion, he asserted, *inter alia*, that counsel refused to argue before trial that defendant was charged "under the Illinois Compiled Statute of 1992, a law which does not exist."

The record reflects the following colloquy occurred on December 12, 2008, regarding defendant's motion to withdraw his plea:

"MR. FRYMAN [assistant public defender]: Judge, [defendant] filed a *pro se* motion to withdraw his plea of guilty. I don't know if the Court has got a copy of that in front of it and it's rather lengthy and there are some sort of vague allegations that state in a kind of conclusory manner that I was ineffective; however, there aren't really any specific allegations he included in that and I think the proper course of action would be for the Court to inquire of Mr. Sanders what it is that he's complaining about. If the Court wants to pass it for a moment and review the whole 14 page document to get a grasp perhaps of what Mr. Sanders is complaining about entirely or if the Court wants to just inquire of Mr. Sanders.

Now, I don't know that I can legitimately state at least at this point that there's a conflict sufficient enough to remove me from the case.

THE COURT: Mr. Sanders, tell me what your complaints about your attorney are.

DEFENDANT: Well, the day we were supposed to file a

motion for suppression of the statements, I asked him to file the motion for that - that I had been indicted under the defective law, 1992 ILCS, and that law does not exist to my knowledge and according to my research and he said that he would refuse - he said that he would refuse to file it and he told me that if I wanted the motion filed that I can file it myself. I would have to file it myself.

THE COURT: Anything else on that point? On that point?

DEFENDANT: No.

THE COURT: Any way you can respond to that, Mr. Fryman?

MR. FRYMAN: Yeah. I told him that I refused to file a frivolous motion because I believed that the law against predatory criminal sexual assault did exist and I feel confident in that position. I thought it an ethical obligation not to file such a frivolous motion."

The court did not inquire further of defendant's counsel, and the court continued to question defendant about his motion. Counsel stood by through the exchange between the court and defendant and remained silent until the court stated it was denying defendant's motion to withdraw his guilty plea.

Defendant argues his counsel's representation of him on that motion was a *per se* conflict of interest because counsel was effectively charged with arguing his own incompetence, and he contends this court should remand his case for a new hearing on his motion to withdraw his plea

where he is represented by different counsel.

A court is not required to appoint new counsel in every case where a defendant presents a *pro se* post-trial motion alleging ineffective assistance of counsel. *People v. Krankel*, 102 Ill. 2d 181 (1984); see generally *People v. Jocko*, 239 Ill. 2d 87, 91 (2010). When a defendant makes a post-trial claim of counsel's ineffectiveness, the trial court should first examine the factual basis of the defendant's claim, and if the court determines that the claim lacks merit or pertains only to matters of trial strategy, the court need not appoint new counsel and may deny the defendant's motion. *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003).

Defendant acknowledges *Krankel* but argues its holding does not apply to cases involving motions to withdraw a guilty plea. Contrary to that assertion, this court has approved of the trial court's inquiry into a defendant's *pro se* motion to withdraw his guilty plea. *People v. Allen*, 391 Ill. App. 3d 412, 418 (2009); *People v. Friend*, 341 Ill. App. 3d 139, 143 (2003); *People v. Cabrales*, 325 Ill. App. 3d 1, 5 (2001) (trial court should have conducted preliminary inquiry into defendant's *pro se* motion to withdraw guilty plea to determine if new counsel should be appointed; court erred in proceeding to full hearing on defendant's motion).

In *Allen*, the defendant pled guilty and then filed a *pro se* motion alleging ineffective assistance of counsel, and the trial court inquired into each allegation to determine if new counsel should be appointed. *Allen*, 391 Ill. App. 3d at 414-15. New counsel was not appointed, and the defendant filed a *pro se* motion to withdraw his guilty plea, which was denied. *Allen*, 391 Ill. App. 3d at 416. On appeal, this court affirmed, stating that under *Krankel*, the trial court correctly investigated the defendant's ineffective assistance claims without appointing new counsel. *Allen*, 391 Ill. App. 3d at 419.

Defendant argues *Allen* is inapposite because the defendant's ineffective assistance claims in that case did not involve the motion to withdraw his plea. However, *Allen* explained that an inquiry would be required if the defendant brought claims of ineffective assistance of counsel in his *pro se* motion to withdraw his plea. *Allen*, 391 Ill. App. 3d at 419 (relying on *Cabrales*).

Defendant contends a trial court's inquiry into a defendant's claims of ineffective assistance of counsel, when made in the context of counsel's representation on a defendant's motion to withdraw his plea, threatens a defendant's right to counsel in a plea proceeding under Supreme Court Rule 604(d). Ill. S. Ct. R. 604(d) (eff. July 1, 2006). We disagree that such an inquiry is harmful to a defendant. New counsel can be appointed on a defendant's motion to withdraw his guilty plea if the trial court's inquiry into the defendant's claims determines that step is warranted.

In conclusion, a sufficient factual basis existed for the entry of defendant's plea, and therefore, defendant cannot meet the plain error test on that point. Furthermore, the trial court correctly conducted a preliminary inquiry pursuant to *Krankel* to determine if new counsel should be appointed on defendant's claims of the ineffective assistance of his trial attorney.

Accordingly, the judgment of the trial court is affirmed.

Affirmed.