

No. 2—10—0102
Order filed April 7, 2011

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Kendall County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 07—CF—311
)	
DAVID O. LEMBKE,)	Honorable
)	Thomas E. Mueller,
Defendant-Appellant.)	Judge, Presiding.

PRESIDING JUSTICE JORGENSEN delivered the judgment of the court.
Justices Bowman and Burke concurred in the judgment.

ORDER

Held: (1) The trial court did not abuse its discretion in denying defendant's motion to withdraw his guilty pleas; the parties never made a plea agreement on a 10-year prison sentence, and thus the court did not concur or conditionally concur such that defendant could withdraw his pleas when the court imposed a 20-year sentence; although the trial court did not admonish defendant of mandatory supervised release as to lesser offenses, it admonished him of it as to the greatest offense, such that, because the sentences were concurrent, any error was harmless; (2) the trial court did not abuse its discretion in sentencing defendant to 20 years' imprisonment for meth manufacturing; the court properly discounted defendant's rehabilitative potential, as, although he stated his desire to change and to be a good father, he had not availed himself of past opportunities to do so; although the court made inappropriate remarks about how much time defendant would actually serve and its personal views of the parole system, the sentence was not based on those remarks.

David O. Lembke appeals from the denial of his motion to withdraw his guilty pleas to unlawful participation in methamphetamine manufacturing (720 ILCS 646/15(a)(1) (West 2006)), unlawful possession of methamphetamine (720 ILCS 646/60(a),(b)(1) (West 2006)), and two counts of unlawful delivery of methamphetamine (720 ILCS 646/55(a)(1) (West 2006)). He contends that he should be allowed to withdraw his pleas because (1) the court violated Illinois Supreme Court Rule 402(d)(2) (eff. July 1, 1997) by not abiding by an agreed sentence, and (2) he was not properly admonished about the term of mandatory supervised release (MSR). He also contends that his 20-year extended term sentence was excessive. We affirm.

I. BACKGROUND

In October 2007, Lembke was charged by information with six counts related to production and possession of methamphetamine. On March 13, 2008, a conference was held under Rule 402(d)(2), and a plea offer was discussed, but the details were not put on the record at that time. Also on that date, the defense asked for a five-day continuance. The State said that it would probably keep the plea offer “open for the one week,” but after that, it would be off the table.

On March 18, 2008, the parties appeared, and the court noted that there was a Rule 402 conference the week before. Lembke’s attorney, without providing further explanation, said: “[e]verything has changed since then and I’m asking for a status date so I can explain the changes to [Lembke].”

On April 21, 2008, Lembke entered an open plea to two Class 2 counts of unlawful delivery of methamphetamine and to Class 3 possession of methamphetamine. Lembke stated that no promises had been made in exchange for the plea. During the trial court’s admonitions, the court did not mention the potential for any MSR term.

On June 12, 2008, Lembke entered an open plea to the class 1 offense of unlawful participation in methamphetamine manufacturing, and the State dismissed the remaining charges against him. Lembke stated that he had not been promised anything for the plea. During the court's admonitions, it informed Lembke that any sentence of incarceration would be followed by two years of MSR.

At sentencing, the State presented evidence about the hazards of methamphetamine production and that Lembke had manufactured it in an apartment building, including doing so when his young child was present. The State also noted information in the presentence report showing that Lembke had a long history of addiction and had never undertaken treatment. Lembke had multiple past convictions of drug offenses and, while he was on parole for one of those offenses, he tested positive for marijuana, alcohol, and cocaine. The State asked for at least a 20-year sentence.

In mitigation, Lembke's mother testified that she thought Lembke was finally starting to realize the severity of his problems and that she could see a big change in him. Likewise, Lembke's girlfriend and the mother of his child testified that Lembke was sorry he had a drug problem and that he wanted to get better so that he could be a good father. However, Lembke's girlfriend also testified that Lembke's relationship with their son was not very good, because his drug use prevented him from being home. She said that she had to "find him to make him spend time with his child." When Lembke was at home, he did not do anything other than sleep. Lembke testified that he was ready to get better and that he wanted to be a father to his son. Lembke asked for a 10-year sentence.

The trial court sentenced Lembke to 20 years' incarceration on the class 1 charge of unlawful participation in methamphetamine manufacturing. He was sentenced to concurrent terms of 10 years' incarceration on two of the remaining charges and 5 years on another. He also was ordered

to serve two years' MSR. The court noted Lembke's criminal history, his lack of previous treatment, that he put residents of an apartment building at risk, and that his child was present when he made methamphetamine. The court also observed that Lembke had previously been sentenced to probation on one drug conviction and was released early on another conviction. Referring to the use of drugs while on parole, the court stated: "I think that that illustrates what parole means in the State of Illinois which is a joke." The court also stated: "we're playing with numbers that mean very little in this state. *** When I consider what has happened in the past, I have to consider that 20 probably means four and ten probably means one, given what seems to be happening these days." The court stated that there was a complete lack of any indication that Lembke had taken his problems seriously or tried to stop using drugs. The court also stated that a 20-year sentence was necessary to make a point to Lembke about the seriousness of his activity and to protect the public.

Lembke obtained new counsel and moved to withdraw his pleas and to reconsider the sentence. He argued that, based on the Rule 402 conference, the court had agreed to sentence him to 10 years' incarceration. He further argued that he was not properly admonished of the amount of MSR that he would have to serve. He also argued that the court failed to consider mitigating factors when it sentenced him.

At a hearing on the motions, Lembke's trial counsel, Fred Morelli, testified that, before the Rule 402 conference, the State made a plea offer that would have resulted in a recommendation of either 12 or 14 years' incarceration. He further testified that the Rule 402 conference resulted in a 10-year offer that was initially presented as available for one day. However, Attorney Morelli also recalled that the State said, either at the conference or after it, that the offer would be held open until the following Tuesday. Lembke never accepted the offer for 10 years, because he wanted to discuss

it with his family and, on the following Monday, [the day prior to the Tuesday deadline] the State changed the offer to 14 years. A new Rule 402 conference was never held. Morelli then recommended that Lembke plead guilty to charges to which Morelli felt he did not have a good defense and proceed to trial on the remaining charges. Morelli later recommended the guilty plea to the charge of unlawful participation in methamphetamine manufacturing when the State agreed to dismiss a Class X charge. Morelli discussed the nature of a blind plea with Lembke and told him that, while he “certainly didn’t guarantee it,” his expectation was that the judge would probably give Lembke the 10-year sentence discussed at the Rule 402 conference. Morelli testified that facts came out at sentencing that were not discussed at the Rule 402 conference, but he also stated that he did not expect a 20-year sentence.

The court denied the motions in a written order, stating that the sentence was warranted based on Lembke’s serious criminal history with a short passage of time between offenses. Addressing Lembke’s arguments about mitigating factors, such as his addiction and that he had a child, the court wrote that Lembke also never previously sought treatment and did not spend much time with his child. In regard to the Rule 402 conference, the court stated that it was not a party to any proposed plea agreement, the offer was never timely accepted, and Lembke entered open pleas with no guarantee as to sentence. The court noted that it failed to admonish Lembke about the MSR term on April 21, 2008, but had admonished him on June 12, 2008, that any sentence would result in a two-year MSR term. The court found that, given that the sentences were to run concurrently, any failure to admonish about MSR on April 21, 2008, was harmless. Lembke appeals.

II. ANALYSIS

A. Motion to Withdraw the Pleas

Lembke contends that he should be allowed to withdraw his pleas. He first argues that he pleaded guilty based on an agreement with the court that it would sentence him to 10 years' incarceration as discussed at the Rule 402 conference and that the court should be held to that agreement. We disagree. The record fails to show that an agreement was ever reached and fails to show any concurrence, conditional or otherwise, by the court.

A defendant does not have an absolute right to withdraw a guilty plea and bears the burden of demonstrating to the trial court the necessity of withdrawing the plea. *People v. Allen*, 323 Ill. App. 3d 312, 315 (2001). Leave to withdraw a guilty plea is granted not as a matter of right, but as required to correct a manifest injustice under the facts involved. *People v. Hillenbrand*, 121 Ill. 2d 537, 545 (1988). Leave should be granted 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. *People v. Davis*, 145 Ill. 2d 240, 244 (1991). Absent substantial objective proof that a defendant's mistaken impressions were reasonably justified, a defendant's subjective impressions are insufficient grounds on which to withdraw a guilty plea. *People v. Hale*, 82 Ill. 2d 172, 176 (1980). A trial court's denial of a motion to withdraw a guilty plea will not be disturbed on appeal unless the decision was an abuse of discretion. *Davis*, 145 Ill. 2d at 244.

Supreme Court Rule 402 requires that a guilty plea be accompanied by admonitions, be voluntary, and have a factual basis. At issue here is Rule 402(d)(2), which states the procedures to be followed when a trial judge concurs or conditionally concurs in a plea agreement. It provides:

“(d) Plea Discussions and Agreements. When there is a plea discussion or plea agreement, the following provisions, in addition to the preceding paragraphs of this rule, shall apply:

(2) If a tentative plea agreement has been reached by the parties which contemplates entry of a plea of guilty in the expectation that a specified sentence will be imposed or that other charges before the court will be dismissed, the trial judge may permit, upon request of the parties, the disclosure to him of the tentative agreement and the reasons therefor in advance of the tender of the plea. At the same time he may also receive, with the consent of the defendant, evidence in aggravation or mitigation. The judge may then indicate to the parties whether he will concur in the proposed disposition; and if he has not yet received evidence in aggravation or mitigation, he may indicate that his concurrence is conditional on that evidence being consistent with the representations made to him. If he has indicated his concurrence or conditional concurrence, he shall so state in open court at the time the agreement is stated as required by paragraph (b) of this rule. If the defendant thereupon pleads guilty, but the trial judge later withdraws his concurrence or conditional concurrence, he shall so advise the parties and then call upon the defendant either to affirm or to withdraw his plea of guilty. If the defendant thereupon withdraws his plea, the trial judge shall recuse himself.” Ill. S. Ct. R. 402(d)(2) (eff. July 1, 1997).

When reviewing whether a supreme court rule has been violated, a question of law is presented and the standard of review is *de novo*. *People v. Lozada*, 323 Ill. App. 3d 1015, 1018

(2001). However, Rule 402(d)(2) does not apply to cases in which there is no plea agreement. *People v. Meza*, 376 Ill. App. 3d 787, 790 (2007). “Absent a plea agreement concurred in by the court, a defendant has no right, constitutional or otherwise, to know in advance the specific sentence which will be imposed upon him.” *People v. Lambrechts*, 69 Ill. 2d 544, 556 (1977).

Here, Rule 402(d)(2) is not applicable because Lembke did not accept the offer that was made at the Rule 402 conference. The parties never reached a plea agreement on a 10-year sentence, and in his brief, Lembke admits as much. At best we might infer from the testimony of Attorney Morelli that the state made a ‘one day offer’ that may have been kept open for an additional five days. However, it was just that, an offer. There was no agreement. Until a tentative agreement is reached between the parties and presented to the court, the court is not obliged to express its concurrence or conditional concurrence in the agreement. Thus, the trial judge did not indicate his concurrence or conditional concurrence with any such plea agreement, and his subsequent imposition of a 20-year sentence did not entitle Lembke to withdraw his plea.

Lembke attempts to characterize the Rule 402 conference as creating an agreement between himself and the court. However, plea agreements are between parties, not the judge and the defendant. *Id.* “[I]t is not the trial court’s role to broker a plea agreement.” *People v. Garibay*, 366 Ill. App. 3d 1103, 1108 (2006). “Where the parties themselves have not reached an agreement as to a defendant’s sentence or range of sentence, it is not the trial court’s province to predetermine, unilaterally, the sentence or range of sentence for a defendant who has yet to plead guilty.” *Id.* Here, there was no plea agreement for a specific sentence with the State, and nothing in the record indicates that the court specifically promised Lembke anything. We note that the state did agree to dismiss at least one class X offense and defendant received the benefit of that limited agreement.

However, without a plea agreement with which the trial judge concurred or conditionally concurred, Rule 402(d)(2) does not apply and Lembke cannot prevail on his motion to withdraw his plea.

Lembke also suggests that he pleaded guilty based on misinformation from his attorney. However, he does not contend that his counsel was ineffective, and the record is clear that Morelli told Lembke that he could not guarantee anything in regard to the sentence. Instead, the thrust of Lembke's argument is his disappointment with the sentence that he received. But a defendant cannot legally complain about his guilty plea merely because he was dissatisfied with the length of his sentence. See *People v. Fern*, 240 Ill. App. 3d 1031, 1042 (1993). The mere belief or hope of a defendant that he will get a shorter sentence by pleading guilty does not permit him to withdraw his plea when that expectation is unfulfilled. *Id.*; *People v. Jones*, 135 Ill. App. 3d 1023, 1033 (1985).

Relying on *People v. Whitfield*, 217 Ill. 2d 177 (2005), Lembke next argues that he should be able to withdraw his plea because was not admonished about the MSR term when he pleaded guilty on April 21, 2008.

Supreme Court Rule 402(a)(2) (eff. July 1, 1997) provides that the trial court shall not accept a defendant's plea of guilty of an offense without first admonishing the defendant of the minimum and maximum sentences prescribed by law for that offense. However, "[a] trial court's failure to properly admonish a defendant itself does not automatically establish grounds for reversing the judgment or vacating the plea." *People v. Thompson*, 375 Ill. App. 3d 488, 493 (2007). "Substantial compliance with Rule 402 suffices to establish due process." *Id.* "Moreover, whether an imperfect admonishment requires reversal depends on whether real justice has been denied or whether the inadequate admonishment prejudiced the defendant." *Id.* (citing *People v. Fuller*, 205 Ill. 2d 308, 323 (2002)).

In *Whitfield*, our supreme court noted that “ ‘compliance with Rule 402(a)(2) requires that a defendant be admonished that the mandatory period of [MSR] pertaining to the offense is a part of the sentence that will be imposed.’ ” *Whitfield*, 217 Ill. 2d at 188 (quoting *People v. Wills*, 61 Ill. 2d 105, 109 (1975)). When a defendant is not properly admonished about MSR, “there are two separate, though closely related, constitutional challenges that may be made: (1) that the plea of guilty was not made voluntarily and with full knowledge of the consequences, and (2) that defendant did not receive the benefit of the bargain he made with the State when he pled guilty.” *Id.* at 183-84.

Here, at the guilty plea hearing on June 12, 2008, the court informed Lembke that his Class 1 sentence would include a two-year term of MSR. Although the court failed to admonish him of MSR when he pleaded guilty to the lesser offenses on April 21, 2008, the sentences for those offenses are concurrent and subsumed within the Class 1 sentence. Thus, any error was harmless.

B. The Sentence

Lembke argues that his 20-year sentence was excessive because the trial court failed to consider mitigating factors and because the court sentenced him based on speculation about the amount of time that he would actually serve and personal beliefs about the parole system.

“The trial court is in the best position to fashion a sentence that strikes an appropriate balance between the goals of protecting society and rehabilitating the defendant.” *People v. Risley*, 359 Ill. App. 3d 918, 920 (2005). Thus, we may not disturb a sentence within the applicable range unless the trial court abused its discretion. *People v. Stacey*, 193 Ill. 2d 203, 209-10 (2000). A sentence is an abuse of discretion only if it is at great variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense. *Id.* at 210. We may not substitute our

judgment for that of the trial court merely because we might weigh the pertinent factors differently.
Id. at 209.

In determining an appropriate sentence, relevant considerations include the nature of the crime, the protection of the public, deterrence, and punishment, as well as the defendant's rehabilitative prospects. *People v. Kolzow*, 301 Ill. App. 3d 1, 8 (1998). The weight to be attributed to each factor in aggravation and mitigation depends upon the particular circumstances of the case. *Id.* “The seriousness of the crime is the most important factor in determining an appropriate sentence, not the presence of mitigating factors.” *People v. Quintana*, 332 Ill. App. 3d 96, 109 (2002). A sentencing judge is presumed to have considered all relevant factors unless the record affirmatively shows otherwise. *People v. Hernandez*, 319 Ill. App. 3d 520, 529 (2001).

Here, the court considered, but appropriately discounted, Lembke's mitigating evidence concerning his potential for rehabilitation. Although Lembke stated that he was ready to change and that he wanted to be a father to his child, his history showed that he repeatedly failed to seek treatment and previously showed little concern about his child or about public safety. Indeed, he manufactured methamphetamine in an apartment building with his child present. The court's determination that a 20-year sentence was needed because of the seriousness of the offense and to protect the public was not an abuse of discretion.

Lembke argues that the trial court wrongly sentenced him based on its personal beliefs about the parole system and the amount of time that Lembke would actually spend in prison. But “ ‘[a]n isolated remark made in passing, even though improper, does not necessarily require that defendant be resentenced.’ ” *People v. Reed*, 376 Ill. App. 3d 121, 128 (2007) (quoting *People v. Fort*, 229 Ill.

App. 3d 336, 340 (1992)). To obtain a reversal, the defendant “must show that the trial court relied on the improper fact when imposing sentence.” *Id.*

Here, while it was inappropriate for the trial court to speculate about the amount of time that Lembke might actually serve and to introduce its personal beliefs about the parole system, it is clear that the sentence imposed here was based on Lembke’s criminal history, his previous refusals to seek treatment, and concerns about protecting the public. Indeed, the trial court’s remarks were made in regard to its concerns about Lembke’s past failures to seek treatment and his positive tests for drugs while on parole. Thus, the court’s additional comments do not warrant a new sentencing hearing.

III. CONCLUSION

Lembke is not entitled to withdraw his pleas and his sentence was not excessive. Accordingly, the judgment of the circuit court of Kendall County is affirmed.

Affirmed.