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2011 IL App (3d) 090453-U

Order filed October 6, 2011

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IN THE APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	for the 21st Judicial Circuit,
Plaintiff-Appellee,	)	Kankakee County, Illinois
	)	
v.	)	Appeal No. 05-CF-672
	)	Circuit No. 3-09-0453
	)	
VICTORIA L. MCCUE,	)	Honorable
	)	Kathy Elliott
Defendant-Appellant.	)	Judge, Presiding

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JUSTICE O'BRIEN delivered the judgment of the court.  
Presiding Justice Carter and Justice Schmidt concurred in the judgment.

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**ORDER**

¶ 1 *Held:* When the factual basis entered for a guilty plea makes it clear that a defendant is subject to a mandatory sentencing enhancement, a sentence that does not include the enhancement is void as is the plea.

¶ 2 **FACTS**

¶ 3 Defendant Victoria McCue was charged with two counts of first degree murder for the shooting death of her husband, Brian McCue. 720 ILCS 5/9-1(a)(1), (2) (West 2005). The charges arose from an incident that occurred at the couple's Bradley home in the early morning hours of November 9, 2005. McCue called 911 and said she had shot her husband. Responding to the call,

Bradley police officers found Brian in the living room of the couple's home, dead or dying, from eight gunshot wounds. McCue was arrested at the scene and made several statements to the officers, including that Brian had beaten her in the abdomen prior to the shooting.

¶ 4 McCue's attorneys tendered a psychologist's report in support of a self-defense claim that concluded that McCue suffered from battered spouse syndrome. On May 25, 2007, the trial court stated that a plea agreement had been reached whereby McCue would plead guilty to count I, with an amendment to the indictment redacting language stating, "with a handgun," in exchange for the imposition of a 20-year term of imprisonment and dismissal of count II. The amended indictment alleged that McCue "shot Brian McCue multiple times about the body [redacted], thereby causing his death." Before accepting the plea, the trial court admonished McCue, including concerning the waiver of her right to a jury trial, and the following colloquy also occurred:

“THE COURT: Has anyone promised you anything that you and I have not discussed?

[MCCUE]: No.

THE COURT: Okay. Has anyone threatened you to plead guilty?

[MCCUE]: No.

THE COURT: Okay. Do you have any questions then because I'm going to find that you are knowingly and voluntarily entering into this plea. Do you have any questions?

[MCCUE]: No.

THE COURT: Okay. I am going to at this point going to show

that the defendant is knowingly and voluntarily waiving her rights, she understands the charges and the possible range of penalties.”

¶ 5 The State provided a factual basis, which included McCue’s statement that she and Brian had been arguing in the early morning hours, that the argument turned physical, and that Brian began to hit her about her abdomen. McCue further admitted that her husband “was just saying things to hurt her feelings” and saying “mean things to her and she just lost it.” The State further presented that McCue admitted she did not have the gun during the initial argument, but when her husband went to the living room, “she went, got the gun, walked back into the living room and began firing.” The State offered that eight shots were fired and that the gun had to be reloaded because it only held six rounds. Lastly, the State provided that if the case went to trial, it believed the defense would offer testimony that McCue suffered from spousal abuse. The State concluded, “all things considered and given the location and number of the wounds and the fact of the reload, the State believes we would be able to carry our burden with regard to a First Degree Murder trial.” The defense stipulated to the factual basis and the trial court accepted it. The trial court entered a judgment of conviction and sentenced McCue to 20 years’ imprisonment per the plea agreement.

¶ 6 McCue filed a motion to vacate her guilty plea and thereafter moved to withdraw the motion. She filed an appeal, which this court dismissed for lack of jurisdiction. *People v. McCue*, No. 3-08-0081 (2008) (unpublished order under Supreme Court Rule 23). McCue filed a *pro se* postconviction petition in which she asserted a due process violation based on her claim of innocence and a violation of her right to effective assistance of counsel, arguing that her attorneys were ineffective for failing to investigate her innocence claim. As stated in the petition, McCue told her attorneys that she was innocent but they failed to investigate her claims, that she gave them “a

list of character witnesses that could attest to the disposition of her son [Corey],” and that they did not contact the witnesses. She further alleged that Shields and Smeeton advised her that she had no chance to win a not-guilty verdict at either a bench or jury trial, that a jury trial was “out of the question,” and that she could receive a 65-year sentence if she insisted on proceeding to a bench trial. McCue alleged in her petition that her guilty plea resulted from her attorneys’ unreasonable advice, a lack of communication with them, and her lack of understanding of the law. McCue’s postconviction petition contained her affidavit and the affidavit of an individual named John Paris.

¶ 7 The trial court issued a memorandum of decision in which it dismissed McCue’s petition as frivolous and patently without merit, relying in part on *North Carolina v. Alford*, 400 U.S. 25 (1970). The trial court found that the State presented an “exceptionally strong factual basis” for McCue’s plea, that she knowingly and voluntarily waived her trial rights, and that she acknowledged no one threatened her to plead guilty. The trial court further found that McCue failed to present any new evidence that her plea was not knowing and voluntary. McCue appealed.

¶ 8 In a decision of this court, pursuant to Supreme Court Rule 23, dated June 20, 2011, we affirmed the trial court’s dismissal of the postconviction petition as frivolous and patently without merit. *People v. McCue*, No. 3-09-0453 (2011) (unpublished order under Supreme Court Rule 23). Subsequent to that ruling, the appellant filed a petition for rehearing and motion to supplement appellant’s brief. The basis for appellant’s petition for rehearing was the recent decision of the Illinois Supreme Court in *People v. White*, 2011 IL 109616. We granted the petition for rehearing and for the reasons that follow we vacate the plea and sentence of the defendant and remand.

¶ 9

#### ANALYSIS

¶ 10 On appeal, the issue is whether the defendant’s guilty plea and sentence are void where the

factual basis for the plea of guilty contained reference to the defendant's use of a firearm and the negotiated sentence did not include the relevant mandatory firearm enhancement.

¶ 11 The Unified Code of Corrections sets forth the sentencing range for first degree murder:

"(a) Except as otherwise provided in the statute defining the offense, a sentence of imprisonment for a felony shall be a determinate sentence set by the court under this Section, according to the following limitations:

(1) for first degree murder

(a) a term shall not be less than 20 years and not more than 60 years[.]" 730 ILCS 5/5-8-1 (West 2004).

¶ 12 Section 5-8-1 also contains a provision requiring the imposition of an enhanced sentence where a firearm is used in the offense:

“(d)(iii) if, during the commission of the offense, the person personally discharged a firearm that proximately caused great bodily harm, permanent disability, permanent disfigurement, or death to another person, 25 years or up to a term of natural life shall be added to the term of imprisonment imposed by the court.” 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2004).

¶ 13 In the instant case, the State and the defendant negotiated a plea agreement for a sentence of 20 years which did not include the mandatory sentencing enhancement. Even though the State did amend its indictment to delete reference to the use of a firearm, the recitation of the factual basis for the plea included information that the defendant shot the victim with a gun. Thus, when the trial

court accepted the negotiated plea and imposed the negotiated sentence, there was no doubt that the sentence needed to include the sentencing enhancement as set forth in section 8-5-1(a)(1)(d)(iii) of the Unified Code of Corrections. 730 ILCS 5/5-8-1 (a)(1)(d)(iii)(2004)

¶ 14 While the circuit courts have great discretion in accepting plea agreements that fix sentencing ranges, the circuit court cannot impose a sentence that does not include a sentencing enhancement which has been mandated by the legislature. *White*, 2011 IL 109616, ¶ 20. See also *People v. Torres*, 228 Ill. 2d. 382, 398 (2008) (a defendant "could not have negotiated a lesser sentence given that the 45 year sentence he received was the minimum possible under the sentencing scheme"). The facts of this case are strikingly similar to those in *White* and as such the rationale employed in *White* is applicable in this case to render defendant McCue's plea of guilty and sentence void. *White*, 2011 IL 109616, ¶ 21. The trial court is responsible for enforcing the requirements set forth in the Unified Code of Corrections and for imposing the correct sentence. *People ex rel. Waller v. McKoski*, 195 Ill. 2d 393, 400-01 (2001). Here, since the sentence was not in conformity with the statute and the defendant was thus improperly admonished, both the sentence and the guilty plea are void.

¶ 15 Because the trial court's imposition of the 20-year sentence pursuant to the plea agreement was void for non-compliance with section 5-8-1(a)(1)(d)(iii), we grant the appellant's petition for rehearing and vacate her guilty plea and sentence. The cause is remanded to the trial court with directions to allow defendant to withdraw her guilty plea and proceed to trial, if she chooses.

¶ 16 For the foregoing reasons, the judgment of the circuit court of Kankakee County is reversed and the cause remanded.

¶ 17 Reversed and remanded.