

NOTICE
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2011 IL App (4th) 100732-U

Filed 12/6/11

NO. 4-10-0732

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Woodford County
ROBERT J. DERRICKSON,)	No. 10CF22
Defendant-Appellant.)	
)	Honorable
)	John B. Huschen,
)	Judge Presiding.

PRESIDING JUSTICE TURNER delivered the judgment of the court.
Justices Pope and McCullough concurred in the judgment.

ORDER

- ¶ 1 *Held:* Defendant was not entitled to withdraw his guilty plea since defendant had not shown he was prejudiced by the trial court's failure to admonish him about the minimum prison sentence and minimum extended-term prison sentence as required by Illinois Supreme Court Rule 402.
- ¶ 2 In April 2010, a grand jury indicted defendant, Robert J. Derrickson, with one count of burglary (720 ILCS 5/19-1(a) (West 2010)) and one count of criminal damage to property (720 ILCS 5/21-1(1)(a) (West 2010)). In June 2010, pursuant to a plea agreement, defendant pleaded guilty to the burglary count, and the Woodford County circuit court dismissed the other count at the State's request. Defendant filed two *pro se* postplea motions. At a July 2010 hearing, the court sentenced defendant to 10 years' imprisonment. Defense counsel later filed an amended motion to withdraw defendant's guilty plea. After a September 2010 hearing, the court denied defendant's postplea motions.

¶ 3 Defendant appeals, asserting he must be allowed to withdraw his guilty plea because the trial court failed to inform him that, if he did not receive Treatment Alternatives for Safe Communities (TASC) probation, he would be sentenced to no less than three years in prison. We affirm.

¶ 4 I. BACKGROUND

¶ 5 The grand-jury indictments were based on defendant's actions on March 10, 2010. At the June 9, 2010, plea hearing, the parties indicated that, under their plea agreement, defendant would plead guilty to the burglary count, and the State would request the dismissal of the criminal-damage-to-property count. The plea agreement was open as to sentencing, and defense counsel asked for a TASC examination. In admonishing defendant, the trial court stated the following:

"That--burglary upon conviction is a Class 2 felony. Class 2 felonies are punishable by imprisonment in the Department of Corrections of up to seven years. If I find, however, that you've been convicted of the same or a greater class offense within the last ten years, then you can be sentenced up to 14 years in prison."

After explaining possible fines and mandatory supervised release, the court asked defendant if he understood the maximum penalties, and he replied in the affirmative. The prosecutor then mentioned that, based upon his priors, defendant was required to receive a mandatory prison sentence but the statute for TASC probation seemed to still be available to defendant. The court and the prosecutor then discussed whether defendant could still get TASC probation despite the mandatory prison term. In the discussion, they mentioned residential burglary. On his own,

defendant asked if he was eligible for TASC probation, and the court explained he was eligible but that did not mean he would receive it. Defendant made a few more statements, and the court told him he was not statutorily precluded from receiving TASC probation. After the TASC-probation discussion, the court confirmed defendant knew he was eligible for extended-term sentencing, "which mean[t] 14 years." The court accepted defendant's guilty plea and entered an order, requiring defendant to submit to a TASC examination. The court also dismissed the criminal-damage-to-property count.

¶ 6 On June 22, 2010, defendant filed two *pro se* motions, one to withdraw his guilty plea and one asserting ineffective assistance of counsel. On June 25, 2010, a TASC case manager found a correlation between defendant's current offense and his substance dependency, but due to defendant's past failure to comply with community-based sentencing, defendant was unacceptable for TASC services. On July 9, 2010, defendant received new counsel.

¶ 7 At the July 29, 2010, sentencing hearing, defendant made a statement (1) proclaiming he was innocent, (2) asserting his former counsel's statements pressured him to plead guilty and former counsel would not talk to him after the guilty plea, (3) insisting his prior crimes were all related to his substance abuse, and (4) requesting the trial court give him TASC probation so he could get help. The court considered TASC probation, found it inappropriate for this crime, and sentenced defendant to 10 years' imprisonment.

¶ 8 In August 2010, defense counsel filed an amended motion to withdraw defendant's guilty plea, alleging defendant's plea was not informed and voluntary because the discussion at the plea hearing about his eligibility for TASC probation was confusing since "residential burglary" was mentioned. Defense counsel later filed the certificate required by

Illinois Supreme Court Rule 604(d) (eff. July 1, 2006). On September 16, 2010, the trial court held a hearing on defendant's postplea motions, defendant testified on his own behalf and defendant's former counsel testified on the State's behalf. The court denied the postplea motions, finding defendant received effective assistance of counsel and was aware he was pleading guilty to burglary.

¶ 9 On September 17, 2010, defendant filed a notice of appeal in sufficient compliance with Illinois Supreme Court Rule 606 (eff. Mar. 20, 2009), and thus this court has jurisdiction under Rule 604(d).

¶ 10

II. ANALYSIS

¶ 11 Defendant's sole argument on appeal is he should be allowed to withdraw his guilty plea because his plea was involuntary. Specifically, he asserts the trial court failed to admonish him of the minimum prison term he could face if he did not receive TASC probation as required by Illinois Supreme Court Rule 402(a)(2) (eff. July 1, 1997). Defendant also notes he was not informed of the minimum extended-term prison sentence. The State argues defendant has forfeited his challenge to the court's minimum-sentence admonishment by failing to include it in his postplea motion.

¶ 12 The State is correct that, pursuant to Rule 604(d), defendant's argument is forfeited because he failed to raise it in his motion to withdraw his guilty plea. See *People v. Thompson*, 375 Ill. App. 3d 488, 492, 874 N.E.2d 572, 575-76 (2007). However, our supreme court recognized the failure to admonish a defendant in compliance with Rule 402 may amount to plain error, an exception to the forfeiture rule that is contained in Illinois Supreme Court Rule 615(a) (eff. Jan. 1, 1967). *People v. Fuller*, 205 Ill. 2d 308, 322-23, 793 N.E.2d 526, 537 (2002).

Defendant does argue the plain-error exception is applicable. Before invoking the plain-error exception, we must first determine whether any reversible error occurred. *Fuller*, 205 Ill. 2d at 323, 793 N.E.2d at 537.

¶ 13 Our supreme court adopted Rule 402 to insure compliance with *Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969), which found due process required an affirmative demonstration a guilty plea is voluntary and intelligent before the plea can be accepted. See *People v. Kidd*, 129 Ill. 2d 432, 443, 544 N.E.2d 704, 708 (1989). However, a court's failure to properly admonish a defendant under Rule 402, itself, does not automatically establish grounds for vacating the guilty plea. *Fuller*, 205 Ill. 2d at 323, 793 N.E.2d at 537. "Consequently, the fact that the court improperly admonished defendant as to his minimum sentence should not, in and of itself, provide grounds for reversal of the trial court's decision." *People v. Davis*, 145 Ill. 2d 240, 250, 582 N.E.2d 714, 719 (1991). Substantial compliance with the rule suffices to establish due process. *Fuller*, 205 Ill. 2d at 323, 793 N.E.2d at 537. Thus, "[w]hether reversal is required depends on whether real justice has been denied or whether defendant has been prejudiced by the inadequate admonishment." *Davis*, 145 Ill. 2d at 250, 582 N.E.2d at 719; see also *Fuller*, 205 Ill. 2d at 323, 793 N.E.2d at 537.

¶ 14 Rule 402(a)(2) requires the trial court to inform the defendant of and determine the defendant understands "the minimum and maximum sentence prescribed by law, including, when applicable, the penalty to which the defendant may be subjected because of prior convictions or consecutive sentences[.]" Ill. S. Ct. R. 402(a)(2) (eff. July 1, 1997). In this case, the trial court confirmed defendant was eligible for TASC probation, made clear TASC probation was the only nonprison sentence defendant could receive, and informed defendant of the maximum

prison sentence and extended-term prison sentence he could receive.

¶ 15 The State implicitly concedes defendant was not properly admonished under Rule 402(a)(2) about the minimum prison sentence and the minimum extended-term prison sentence but contends the error is not reversible error because defendant has not shown he suffered prejudice. Defendant did not file a reply brief, responding to the State's argument. We agree with the State defendant has not demonstrated prejudice.

¶ 16 In *Davis*, 145 Ill. 2d at 248, 582 N.E.2d at 718, the trial court informed the defendant of the sentencing range and extended-term range for burglary and also stated the defendant could be sentenced to a term of probation or conditional discharge. However, the defendant was ineligible for TASC probation, probation, and conditional discharge. *Davis*, 145 Ill. 2d at 248, 582 N.E.2d at 718. In finding reversible error, our supreme court noted the record showed no evidence the defendant knew he was ineligible for TASC probation, probation, or conditional discharge. *Davis*, 145 Ill. 2d at 250, 582 N.E.2d at 719. The defendant had asserted, that if he had known he was ineligible for TASC, he would not have pleaded guilty for an open sentence. *Davis*, 145 Ill. 2d at 250, 582 N.E.2d at 719. The defendant explained that, due to his mistaken belief he was eligible for TASC, he did not attempt to negotiate a lesser term of imprisonment and gave up the opportunity to go to trial, where he may have been acquitted. *Davis*, 145 Ill. 2d at 250, 582 N.E.2d at 719. Thus, the *Davis* court found the defendant had suffered prejudice from the improper admonishment. *Davis*, 145 Ill. 2d at 250, 582 N.E.2d at 719.

¶ 17 In this case, defendant acknowledges he knew he would either be sentenced to TASC probation or receive a prison sentence. Defendant was eligible for TASC probation, and

the court considered it in making its sentence determination. Thus, this case is distinguishable from *Davis* because defendant was eligible for TASC and knew any alternative sentence would be imprisonment.

¶ 18 Moreover, unlike *Davis*, defendant does not explain how he was prejudiced by the court's failure to inform him of the minimum prison sentence and the minimum extended-term prison sentence. In his brief defendant only notes the failure to admonish him regarding the minimum prison sentence was "significant" because, if he did not receive TASC probation, "the minimum sentence he could receive was neither time served nor one year in the Illinois Department of Corrections" but was not less than three years. The record shows defendant's motivation for pleading guilty was the possibility of TASC probation. In his statement in the presentence investigation report, defendant requested the court to seriously consider TASC probation and made other statements in support of his request. Also, in his motion to withdraw his guilty plea, defendant stated he pleaded guilty "expect[ing] to receive some favorable consideration by the court for TASC probation." Moreover, the record shows defendant had an extensive criminal history, consisting of 11 felony and 8 misdemeanor convictions. The sentence for his last felony conviction was five years' imprisonment for retail theft. At his sentencing hearing, defendant stated his attorney told him that, if defendant went to trial, he would lose and receive a sentence of 14 years' imprisonment. Thus, the record indicates defendant knew he would not be receiving a minimum sentence for his crime. Defendant does not explain how, and the record contains no evidence, the minimum prison sentences had any impact on defendant's decision to plead guilty to the burglary charge. See *People v. Mendoza*, 342 Ill. App. 3d 195, 202, 795 N.E.2d 316, 322 (2003) (noting one of the reasons prejudice did

not exist was the defendant never alleged he would not have pleaded guilty if he had known he was facing a minimum sentence of six years' imprisonment instead of three).

¶ 19 Moreover, this case is distinguishable from *Kidd*, 129 Ill. 2d at 443, 544 N.E.2d at 709, where the supreme court found reversible error because the trial court never told the defendant before he pleaded guilty that natural life imprisonment was the mandatory minimum sentence. Such an error is clearly prejudicial.

¶ 20 The facts of *People v. Louderback*, 137 Ill. App. 3d 432, 484 N.E.2d 503 (1985), are also different from this case. There, the defendant testified he was confused by the court's statement his attorney could argue " 'for anything less than four years in the penitentiary[,] " and thought the language meant "he could receive a sentence of between one and four years' imprisonment." *Louderback*, 137 Ill. App. 3d at 436, 484 N.E.2d at 505. The trial court also failed to admonish the defendant about a two-year term of mandatory supervised release, and this court concluded the lack of both admonitions constituted reversible error. *Louderback*, 137 Ill. App. 3d at 436, 484 N.E.2d at 505. Here, the court only failed to admonish as to the minimum sentences.

¶ 21 Accordingly, we find defendant is not entitled to withdraw his guilty plea due to the trial court's failure to admonish him about the minimum prison sentence and minimum extended-term prison sentence because defendant has failed to establish prejudice.

¶ 22 III. CONCLUSION

¶ 23 For the reasons stated, we affirm the Woodford County circuit court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 24

Affirmed.