

No. 1-10-2806

**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).

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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. 09 M2 5026
	)	
IGOR POPADYNEC,	)	Honorable
	)	Earl B. Hoffenberg,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE STERBA delivered the judgment of the court.  
Justices FITZGERALD SMITH and PUCINSKI concurred in the judgment.

**ORDER**

¶ 1 *Held:* Denial of motions to vacate guilty plea and for arrest of judgment affirmed where defendant did not demonstrate plea court's failure to substantially comply with Rule 402, involuntariness of his plea, or ineffective assistance of plea counsel.

¶ 2 Defendant Igor Popadynech entered a negotiated plea of guilty to one count of misdemeanor obstruction of a peace officer in exchange for one year of conditional discharge. The circuit court of Cook County subsequently denied defendant's motion to vacate that plea and defendant now appeals from that ruling. He contends that the circuit court abused its discretion in denying his motion to vacate where it failed to substantially admonish him in compliance with

Supreme Court Rule 402 (eff. July 1, 1997). Alternatively, he claims that he was denied effective assistance by plea counsel. For the reasons that follow, we affirm the judgment of the circuit court.

¶ 3

### BACKGROUND

¶ 4 On October 30, 2009, the City of Park Ridge charged defendant with assault and obstructing a peace officer. In the obstructing a peace officer complaint, the City alleged that on October 24, 2009, defendant

"knowingly obstructed the performance of Sgt. Delfosse of an authorized act within his official capacity, being the investigation of said Defendant, knowing Sgt. Delfosse to be a peace officer engaged in the execution of his official duties, in that Defendant knowingly disobeyed several lawful orders given to him by Sgt. Delfosse while trying to investigate a call for Police service."

¶ 5 On July 29, 2010, defendant appeared in court with private counsel on these charges. Counsel told the court that defendant was demanding a jury trial and the court briefly recessed the case. Upon reconvening, counsel told the court that defendant was "not happy" with his advice and that he did "not want my services anymore." The following colloquy ensued:

"THE COURT: You're not getting - - I'm not letting you off with this lawyer. Forget about it. This lawyer has done a good job. He's been on the case. The case is old. So you do one of two things. You either go to a jury trial today or work out a deal. \*\*\* I'll send it up for a jury today. I'm not wasting any more time. I'm not letting the lawyer out, so that's not going to happen today."

THE DEFENDANT: "I thought there would be, like, video evidence."

THE COURT: "I don't care what you thought. I'm telling you what's going on. I'm not going to get involved with the case. That's not my job or my function. My function is to tell you that you have an option based upon what your lawyer is telling you. You can either work out the deal - - that's up to you - - or it's going upstairs to set it for jury. What do you want to do? \*\*\* I'll give you about three more minutes to make up your mind."

¶ 6 After another brief recess, the State informed the court that the parties were moving forward on a plea to the obstructing charge and that it would "SOL" (stricken with leave to reinstate) the assault charge. The court informed defendant that he was charged with obstructing a police officer, a Class A misdemeanor, and that he could "go to jail up to one year, be fined up to \$2500.00." When asked if he understood, defendant replied "yes." When the court asked defendant for his plea, the following colloquy occurred:

"THE COURT: How do you plead?

THE DEFENDANT: Do I say guilty?

THE COURT: Say what you want to say.

THE DEFENDANT: For conditional discharge or whatever?

THE COURT: No. You say guilty or not guilty.

THE DEFENDANT: Guilty.

THE COURT: You understand when you plead guilty, you waive the right to have the State prove you guilty beyond a reasonable doubt. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: You further give up the right to have your lawyer cross-examine or question any witnesses against you. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: You are giving up your right to both a bench and a jury trial.

\*\*\*

When you plead guilty, there is no trial. Do you understand that?

THE DEFENDANT: Yes."

Defendant acknowledged his written waiver of his right to a jury trial, and the court read into the record the stipulation of the parties, to wit:

"THE COURT: Are you stipulating, Counsel, that the testimony would be on the date and time in question - - October 24, 2009 - - defendant knowingly obstructed the performance of Sergeant Delfosse of an authorized act within his official capacity, being the investigation of the defendant, knowing Delfosse to be a police officer engaged in the execution of his duties; and he knowingly disobeyed several lawful orders given to him by the sergeant while trying to investigate a call for police service?

[DEFENSE COUNSEL]: Yes."

The court accepted the stipulation, agreed to the sentence recommended by the State of one year of conditional discharge, and admonished defendant of his appeal rights.

¶ 7 Through different private counsel, defendant subsequently filed a timely motion to vacate his plea, alleging that he had not knowingly or voluntarily entered his guilty plea because the plea court had not substantially admonished him in compliance with Rule 402, that there was an inadequate factual basis for his plea, and that he was denied effective assistance by plea counsel. In support of his motion, defendant attached his own affidavit stating that he was unaware that a trial date had been set, that trial counsel never told him this date, and that "a disagreement

regarding financial issues" arose between them. Defendant also stated that he had requested counsel to secure evidence including phone records, a surveillance videotape from a Walgreen's drug store, and an eyewitness. Pursuant to Supreme Court Rule 604(d) (eff. July 1, 2006), defense counsel filed a certificate setting forth his compliance with the rule.

¶ 8 At the hearing on this motion, counsel argued that the plea court had not admonished defendant as to the voluntariness of his plea. The court responded that

"I'm going to look it over. I hope you guys want to appeal. All of you are going to have to appeal today \*\*\* I'm passing the case. I'll look it over. \*\*\* The motion, I can tell you right now, I'm going to deny it, and that's why we have an appellate court."

Following a recess, the court noted that "if you look at the totality of the circumstances, if you look at the case law, I admonished [him]." After additional argument from defense counsel, the court read the report of proceedings from the plea hearing into the record, then denied the motion. Defendant timely filed this appeal.

¶ 9 ANALYSIS

¶ 10 On appeal, defendant asserts that his challenge should not be reviewed adopting an abuse of discretion standard because the court refused to exercise its discretion. As evidence, he calls our attention to the comments made by the court when he presented his motion such as "I hope you guys want to appeal," "I can tell you right now, I'm going to deny it," and "all of you are going to have to appeal today."

¶ 11 Notwithstanding, we observe that the court also stated on the record that it would review the motion, recessed the proceeding in order to do so, then heard additional argument before announcing its decision. Under these circumstances, we find no reason to depart from the well-established abuse of discretion standard for review of challenges to the denial of a motion to

withdraw a guilty plea. *People v. Baez*, 241 Ill. 2d 44, 109-10 (2011); *People v. Delvillar*, 235 Ill. 2d 507, 519 (2009).

¶ 12 That said, we initially observe that a defendant does not have an automatic right to withdraw his guilty plea, but, rather, must show a manifest injustice under the facts involved. *Delvillar*, 235 Ill. 2d at 520. A reviewing court will not disturb the decision of the plea court unless the plea was entered due to a misapprehension of the facts or of the law, or if there is a doubt as to the guilt of the accused and justice would be better served through a trial. *Id.*

¶ 13 Here, defendant contends that his conviction should be reversed because the court accepted his plea without substantially complying with Supreme Court Rule 402. He specifically contends that the court failed to admonish him of his right to plead not guilty, inform him of the minimum sentence for the offense charged, or inquire as to whether his plea was voluntary before accepting it.

¶ 14 The purpose of Rule 402 admonishments is to ensure that defendant understands his plea, the rights he is waiving, and the consequences of his action. *People v. Dougherty*, 394 Ill. App. 3d 134, 138 (2009). The rule requires substantial, not literal, compliance with its provisions, and substantial compliance has been found where the record shows that defendant's plea was entered understandingly and voluntarily, even if the court failed to admonish defendant as to a specific provision. *Id.* Thus, the failure to properly admonish defendant, standing alone, does not automatically establish grounds for reversing the judgment or vacating the plea. *Delvillar*, 235 Ill. 2d at 520. Rather, a reviewing court focuses on whether there is an affirmative showing that the guilty plea was made voluntarily and intelligently. *Id.*

¶ 15 In asserting that it was not, defendant first claims that the court failed to admonish him of his right to plead not guilty. This omission is confirmed by the plea transcript; however, when

considered in totality, we find that its absence does not provide grounds for questioning the validity of his plea.

¶ 16 The record shows that defendant was represented by counsel throughout the proceedings, and initially sought a jury trial before he decided to accept the plea offer. The court then informed defendant of the nature of the charge, his rights to have the State prove him guilty beyond a reasonable doubt, to have a jury or bench trial, to confront and cross-examine witnesses, and that by pleading guilty he would waive those rights. Defendant acknowledged his understanding of each right and his waiver of them. Under these circumstances, we conclude that the court's remarks were sufficient to convey to defendant that he had the right to plead not guilty (*People v. Davis*, 24 Ill. App. 3d 758, 762 (1974)), and his knowledge of that right is further reflected by the fact that he was represented by counsel throughout the proceedings (*People v. Hale*, 96 Ill. App. 3d 187, 191 (1981)).

¶ 17 Defendant next claims that the court failed to admonish him of the minimum sentence applicable to his situation. We note that Rule 402 was designed to insure properly entered pleas of guilty, not to provide for a recital of all the possible sentencing situations that might arise. *People v. Stewart*, 101 Ill. 2d 470, 486 (1984).

¶ 18 Here, defendant was charged with a Class A misdemeanor. The plea court informed him that he could be jailed for up to one year and fined \$2,500 and that this was the maximum possible sentence. Defendant acknowledged his understanding, and was sentenced to conditional discharge. Although this disposition was available to the court as an alternative to a jail sentence, akin to probation or periodic imprisonment, it is not a minimum sentence within the purview of Rule 402. *People v. Butchek*, 22 Ill. App. 3d 391, 402 (1974). The record further indicates that defendant negotiated his plea and would have been fully apprised of the sentence that would be imposed. This is particularly evident in both defendant's response to the court's

request for his plea, where he asked "For conditional discharge or whatever?," and the court's statement that it was accepting the recommendation of the State as to sentencing. Moreover, since imprisonment was the ultimate penalty available to him, any sentence short of that was a possible lesser sentence; and we are not persuaded that the court's failure to outline all of the available lesser sentences vitiated its substantial compliance with Rule 402 or negatively impacted defendant's otherwise voluntary and knowing entry of a guilty plea. *Stewart*, 101 Ill. 2d at 486-87.

¶ 19 Defendant next claims that the plea court failed to inquire as to whether his plea was voluntary. Although the court failed in this regard, we find that the record clearly demonstrates the voluntary nature of defendant's plea. His colloquy with the court regarding his options and the charges he was facing, the State's recommendation of one year of conditional discharge as a penalty, his response when asked for his plea, the rights he was relinquishing by pleading guilty, and his representation by counsel, demonstrate that he knowingly and voluntarily chose to plead guilty, and the cited omission did not negate the voluntariness of his plea. *Delvillar*, 235 Ill. 2d at 522.

¶ 20 Defendant next contends that the plea court failed to comply with the requirements of Rule 402(c) regarding the factual basis for the plea. This rule requires that, before a plea court enters final judgment on a plea of guilty, it must determine that a factual basis exists for the plea. *People v. Barker*, 83 Ill. 2d 319, 327 (1980). The quantum of proof necessary in order to establish a factual basis for the plea is less than that necessary to sustain a conviction after a full trial. *Id.* "All that is required to appear on the record is a basis 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 the defendant is pleading guilty." *Id.*

¶ 21 The record here shows that to satisfy this requirement, the court read into the record the stipulation of the parties that defendant knowingly obstructed the performance of Sergeant Delfosse of an authorized act within his official capacity knowing him to be a police officer engaged in the execution of his duties. The facts therein established that the sergeant's official act was an investigation of defendant, and that he obstructed it by knowingly disobeying several lawful orders given to him by the sergeant during the investigation. From this, the court could reasonably conclude that defendant actually committed the acts that constituted the offense of obstructing a peace officer.

¶ 22 Defendant cites *People v. Williams*, 299 Ill. App. 3d 791, 794 (1998), for the propositions that a stipulation read by the court does not establish an adequate factual basis for a plea and that the proper procedure is to have the prosecutor state the factual basis and have the court inquire of defense counsel whether he agrees to it. *Williams*, however, states only a "suggested procedure" which the Fourth District finds preferable, but does not set forth a mandate or establish a procedural requirement upon the circuit court with this statement.

¶ 23 As noted, Rule 402 is satisfied where 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. *Barker*, 83 Ill. 2d at 327-28. Here, that basis was provided through the stipulation entered by the parties, as read by the court.

¶ 24 Defendant claims, nonetheless, that the complaint and the stipulation failed to establish an adequate factual basis because neither demonstrated specific acts of his obstruction which constituted the offense. We have already addressed this argument as to the stipulation. As to the complaint, we observe that defendant filed a timely motion to arrest the judgment; therefore, we consider whether the complaint sufficiently stated the necessary elements of the offense so that

the language of the complaint apprised defendant with reasonable certainty of the precise offense with which he was charged. *People v. Brouder*, 168 Ill. App. 3d 938, 941-42 (1988).

¶ 25 To commit the offense of resisting or obstructing a peace officer, defendant "knowingly resists or obstructs the performance by one known to the person to be a peace officer \*\*\* of any authorized act within his official capacity." 720 ILCS 5/31-1 (West 2008). The record shows that the complaint set forth each of the necessary elements of the charged offense and sufficiently listed the acts which led to the obstructing charge, namely that defendant knowingly disobeyed several lawful orders given to him by Sergeant Delfosse. The stipulation reflected these acts and we find defendant's argument without merit.

¶ 26 Defendant, alternatively, contends that his counsel was ineffective because he failed to inform him that the case was set for trial, subpoena a favorable witness, and secure relevant evidence. In a plea setting, a reviewing court applies the same two-part standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Palmer*, 162 Ill. 2d 465, 475 (1994), citing *Hill v. Lockhart*, 474 U.S. 52, 57 (1985). Defendant's failure to make the requisite showing of either deficient performance or prejudice defeats an ineffectiveness claim. *Palmer*, 162 Ill. 2d at 475.

¶ 27 In order to establish prejudice in a plea situation, defendant must show that there is a reasonable probability that, but for the errors of counsel, he would not have pleaded guilty and would have insisted on going to trial. *People v. Gutierrez*, 2011 IL App (1st) 093499, ¶44, citing *People v. Pugh*, 157 Ill. 2d 1, 15 (1993). Whether the alleged error amounts to prejudice largely depends on whether it was likely that defendant would have succeeded at trial. *Id.*, citing *Pugh*, 157 Ill. 2d at 15. A bare allegation that defendant would have pleaded not guilty and insisted on a trial if not for counsel's deficient performance is not enough to establish prejudice. *People v. Hall*, 217 Ill. 2d 324, 336 (2005). Rather, defendant's claim must be accompanied by either a

claim of innocence or the articulation of a plausible defense that could have been raised at trial.

*Id.*

¶ 28 In this case, the record, including defendant's own affidavit which he appended to his motions for new trial and in arrest of judgment, contains no claim of innocence or articulation of a plausible defense that could have been brought at trial. He notes that he had been found not guilty of a related battery charge, but did not provide a nexus between that charge and the present offense.

¶ 29 In addition, defendant cites to evidence that he asked his counsel to secure, including a surveillance video and a witness. Defendant, however, did not discuss the relevancy of the evidence and merely stated that he "hoped" that the witness would testify on his behalf. This is clearly insufficient to establish his claim of ineffective assistance of plea counsel. *Gutierrez*, 2011 IL App (1st) 093499, ¶¶44-45.

¶ 30 Since we are affirming and not remanding this cause, we need not address defendant's last contention that the case should be assigned to a different judge on remand.

¶ 31 Accordingly, we affirm the judgment of the circuit court of Cook County.

¶ 32 Affirmed.