

No. 1-12-0202

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

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 11 C3 30471
)	
TATIANA TSYBOULSKAIA,)	Honorable
)	Ellen B. Mandeltort,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Lampkin and Justice Reyes concurred in the judgment.

ORDER

- ¶ 1 *Held:* Denial of defendant's motion to withdraw her guilty plea affirmed over claims that she was incorrectly admonished as to her sentence, and that the court abused its discretion in denying her motion without an evidentiary hearing.
- ¶ 2 Defendant Tatiana Tsyboulaskaia appeals from an order of the circuit court of Cook County denying her motion to withdraw her guilty plea and vacate judgment pursuant to Illinois Supreme Court Rule 604(d) (eff. Jul. 1, 2006). She contends for the first time that her guilty plea and sentence should be vacated because the plea court incorrectly admonished her that she would only be eligible for the impact incarceration program if she received a minimum sentence of three

years' imprisonment. She also contends that the court abused its discretion in denying her motion to withdraw her guilty plea without conducting an evidentiary hearing.

¶ 3 The record shows, in relevant part, that defendant was charged with retail theft after she was caught stealing clothing valued at under \$300 from a Kohl's store in Arlington Heights, Illinois. At a pretrial hearing on November 7, 2011, the defense requested a Supreme Court Rule 402 conference, and the case was passed. When it was recalled, the following colloquy occurred between the court and defendant:

"THE COURT: And [defendant] is back before me on 11 C3 30471 in custody. We did have a conference in this matter, ma'am. You are charged with one count of retail theft. That is a Class 4 felony, ma'am. It's alleged that on or about June 4, 2011 you committed the offense of retail theft.

At the conference, ma'am, I initially informed your lawyer that if you wish to plead guilty to that charge, ma'am, that I would sentence you to 18 months in the Illinois Department of Corrections. We did have a further conference per your lawyer's request, ma'am, and she indicated that you wished to go to the Illinois Department of Corrections with a recommendation for boot camp; is that correct, ma'am?

THE DEFENDANT: Yes, ma'am.

THE COURT: And do you understand that in order for this Court to sentence you with a boot camp recommendation the sentence in the penitentiary must be three years in the Illinois Department of Corrections. Do you understand that?

THE DEFENDANT: Yes, ma'am.

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THE COURT: So is it your desire, ma'am, to plead guilty to the charge of retail theft for a sentence of three years in the Illinois Department of Corrections followed by one year of mandatory supervised release with a recommendation for the boot camp program? Is that your understanding?

THE DEFENDANT: Yes, ma'am.

THE COURT: And you understand, ma'am, that the boot camp recommendation is just a recommendation. If you go to the Illinois Department of Corrections and they determine for some reason you are either ineligible or for some reason you do not qualify or you do not perform well if you are in that program, that you will be sentenced to three years in the Illinois Department of Corrections automatically. Do you understand that?

THE DEFENDANT: Yes, ma'am.

* * *

THE COURT: Okay, ma'am. I want to make sure you understand if you wish to plead guilty to the charge of retail theft, ma'am, I will sentence you to three years in the Illinois Department of Corrections followed by one year of mandatory supervised release or parole. There will be a boot camp recommendation. You will submit to D.N.A. indexing and pay your mandatory fines and fees. Is that your understanding?

THE DEFENDANT: Yes."

Following this discussion, defendant informed the court that she wished to plead guilty to retail theft, that no one had threatened her or promised her anything in order to make her plead guilty, and that she was doing so of her own free will.

¶ 4 As the factual basis for defendant's plea, the parties stipulated that Jaspal Saini, a loss prevention agent for Kohl's, would testify that about 3:10 p.m. on June 4, 2011, he was working at the Kohl's store at 800 West Dundee Road, in Arlington Heights, when he observed defendant remove several items of clothing from display racks, take them into a dressing room, and exit without the items visibly in her hand. After checking that the hangers for the items were empty, he observed defendant walk past the last point of purchase without making an effort to pay, then leave the store. At that point, he stopped her and recovered the items, which had a retail value of less than \$300, and defendant admitted to him that she had taken the items from the store. The parties further stipulated that a certified copy of defendant's prior conviction for theft in case No. 08 CM 4257 would be entered into evidence at sentencing. The court accepted defendant's guilty plea "as freely and voluntarily made" and entered judgment thereon, then sentenced defendant, as agreed, to three years' imprisonment with a recommendation for boot camp.

¶ 5 On December 6, 2011, defendant, through private counsel, filed a motion to withdraw her guilty plea and vacate judgment pursuant to Rule 604(d). Defendant asserted that she had a valid defense to the charge of retail theft and was innocent, noting that "[t]his is not a scenario where a defendant is looking for a better sentence." She alleged that an individual whom she was with at Kohl's placed the stolen items in her purse without her knowledge, then threatened to hurt her family if she did not plead guilty to the charges. In a supporting affidavit attached to the motion, defendant identified the offender as Juliana Smith.

¶ 6 After argument on January 6, 2012, the plea court denied defendant's motion to withdraw her guilty plea and vacate judgment. In doing so, the court noted, *inter alia*, that the transcript of the plea proceedings showed that defendant denied being threatened or promised anything to make her plead guilty, stated that she was doing so of her own free will, and merely said "I'm Sorry" when given an opportunity to address the court before sentencing. The court found

defendant's apology significant in light of her claim in the motion that "she did not do the crime." The court further stated that it had "clearly explained to the defendant that in order for her to be sentenced or remanded with a recommendation for that boot camp, the sentence in the Illinois Department of Corrections would have to be three years," and defendant "stated to this Court in open court that she understood the proposed disposition."

¶ 7 In this appeal from the denial of her motion, defendant first contends that her guilty plea and sentence should be vacated because she relied on the incorrect sentencing admonishments given to her by the court. Although defendant acknowledges that she failed to raise this issue in her motion to withdraw her guilty plea, as required (Ill. S. Ct. R. 604(d)), she claims that the giving of incorrect admonishments may constitute plain error (*People v. Davis*, 145 Ill. 2d 240 (1991); *People v. McCracken*, 237 Ill. App. 3d 519 (1992)), and urges this court to so find in this case.

¶ 8 The plain error rule is a limited exception to the rule of waiver that allows a reviewing court to consider unpreserved claims of error where a clear or obvious error occurred, and the evidence is closely balanced, or the error was so serious that it affected the fairness of defendant's trial and challenged the integrity of the judicial process. *People v. Naylor*, 229 Ill. 2d 584, 593 (2008). Under both prongs, defendant bears the burden of persuasion; and, if she fails to meet her burden, her procedural default will be honored. *Naylor*, 229 Ill. 2d at 593.

¶ 9 Defendant claims that the plea court admonished her, contrary to statute, that she would only be eligible for the impact incarceration program if she received a minimum sentence of three years' imprisonment. We agree that a three-year minimum sentence is not required for defendant to be eligible for impact incarceration (730 ILCS 5/5-8-1.1 (West 2010)); however, we find no clear indication in the record that the court admonished defendant that there was such a requirement.

¶ 10 The record shows that on November 7, 2011, after a Supreme Court Rule 402 conference was held, the court informed defendant that it had initially made an offer of 18 months' imprisonment in exchange for her plea of guilty; but, at the request of defendant's counsel, a further conference was held during which it was indicated that defendant wanted a sentence that included a recommendation for boot camp. After the court confirmed the correctness of that representation with defendant, the court informed her that "in order for this Court to sentence you with a boot camp recommendation the sentence in the penitentiary must be three years in the Illinois Department of Corrections." Defendant, represented by counsel, acknowledged her understanding of that condition, pleaded guilty, and received a three-year sentence with a recommendation for boot camp.¹

¶ 11 Notwithstanding the ambiguity in the court's statement when viewed in isolation, it is clear when read in the context of the plea proceeding that the court did not incorrectly admonish defendant of a nonexistent provision of the impact incarceration statute, but rather, was setting forth the terms of the new plea agreement that had been reached. The record shows that after an initial offer had been made, the court conducted a further conference at defendant's request in which boot camp would be recommended, per her request, if she agreed to a three-year sentence, rather than the 18 months previously offered. In setting forth the offer to defendant, the court never used the term "eligibility" or referred to the impact incarceration statute, and defendant accepted the terms of the agreement, after acknowledging her understanding and without questioning the longer sentence. In addition, defendant, thereafter, filed a motion to withdraw

¹The State advises that defendant has, in fact, completed the impact incarceration program and was released on parole on June 1, 2012; the Illinois Department of Corrections website, of which we may take notice (*People v. Sanchez*, 404 Ill. App. 3d 15, 17 (2010)), shows that her projected discharge date is June 1, 2013.

her plea and vacate judgment alleging that she was innocent of the charged offense, and raising no issue regarding the admonishments given or the sentence imposed.

¶ 12 Under these circumstances, we find that the only reasonable conclusion to be drawn from the record is that the court's statement was an offer to recommend boot camp for defendant on the condition that she accept a sentence of three years' imprisonment, that defendant understood and accepted it as such, and that the court did not present the three-year sentence "as a mandatory requirement of the law," as she now claims. *People v. Smith*, 406 Ill. App. 3d 879, 885 (2010). Accordingly, we find that defendant has failed to demonstrate a clear or obvious error warranting plain error review, and we thus honor her procedural default of this claim. *Naylor*, 229 Ill. 2d at 593.

¶ 13 Defendant next contends that the plea court failed to comply with the requirements of Rule 604(d) and abused its discretion when it denied her motion to withdraw her guilty plea without an evidentiary hearing, claiming that the court was obligated to conduct such a hearing where she alleged in her motion threats and facts that were outside of the record. The State responds that the court was not required to conduct an evidentiary hearing and, therefore, did not abuse its discretion in denying defendant's motion.

¶ 14 Contrary to defendant's claim, Rule 604(d) imposes no express duty on the court to hold an evidentiary hearing on a motion to withdraw a guilty plea. Rather, the rule merely provides that defendant's motion "shall be heard promptly," and that "[w]hen the motion is based on facts that do not appear of record it shall be supported by affidavit." Ill. S. Ct. R. 604(d).

¶ 15 Notwithstanding, in *People v. Norris*, 46 Ill. App. 3d 536, 539 (1977), this court recognized that because a motion to withdraw a guilty plea may be based on facts outside the record, "an evidentiary hearing must necessarily be contemplated where a defendant, by his supporting affidavits, has alleged sufficient facts to challenge the correctness of the plea

proceedings." This court noted, however, that defendant must plead factual allegations demonstrating the need for such a hearing, as there is no automatic right to withdraw a guilty plea. *Norris*, 46 Ill. App. 3d at 540.

¶ 16 Here, the record shows that defendant alleged in her motion to withdraw that she was innocent of the charge of retail theft and only pleaded guilty because the individual who had placed the stolen items in her purse without her knowledge threatened to hurt her family if she did not do so. The plea court reviewed defendant's assertions in light of the transcript of the plea proceedings and found that they were belied by her previous denial that she had been threatened into pleading guilty and her apology at sentencing. We cannot say that defendant's factual allegations challenged the correctness of the plea proceedings, or demonstrated the need for an evidentiary hearing (*Norris*, 46 Ill. App. 3d at 540), and we thus have no basis for concluding that the court abused its discretion in denying her motion without an evidentiary hearing (*People v. Jamison*, 197 Ill. 2d 135, 163 (2001)).

¶ 17 Defendant, nonetheless, maintains that the court must conduct an evidentiary hearing whenever a motion to withdraw a plea states facts outside the record, citing *People v. Barnes*, 263 Ill. App. 3d 736, 739 (1994). The statement in *Barnes* on which defendant presumably relies, states, "While a defendant has no absolute right to be present at a hearing on a motion to vacate a guilty plea, if the motion alleges facts outside the record or raises issues which may not be resolved without an evidentiary hearing, defendant should be present." *Barnes*, 263 Ill. App. 3d at 739. Contrary to defendant's claim, we do not read this statement in *Barnes* as holding that an evidentiary hearing is required whenever a motion to withdraw a guilty plea states facts outside the record. In *Barnes*, the reviewing court noted that the half-sheet indicated that defendant was not present at the hearing on his motion to withdraw his guilty plea, and left it to the trial court to determine on remand for a Rule 604(d) violation "whether defendant's new rule

604(d) motion alleges facts outside the record or raises issues which may not be resolved without an evidentiary hearing, thereby requiring defendant's presence." *Barnes*, 263 Ill. App. 3d at 739. In the case at bar, defendant was present at the hearing on her motion, the court resolved the issue raised without an evidentiary hearing, and we have found no basis for a remand for that purpose. Accordingly, we find *Barnes* factually inapposite and unpersuasive.

¶ 18 We further examined *People v. Watts*, 55 Ill. App. 3d 30 (1977) and *People v. Hillenbrand*, 121 Ill. 2d 537 (1988), also relied upon by defendant, and find that reliance misplaced. Although defendant cites these cases as examples of where an evidentiary hearing was held by the trial court, neither case stands for the proposition that an evidentiary hearing is automatically required whenever defendant files a motion to withdraw her guilty plea and alleges facts outside the record.

¶ 19 For the reasons stated, we affirm the order of the circuit court of Cook County denying defendant's motion to withdraw her guilty plea and vacate judgment.

¶ 20 Affirmed.