

appeal, defendant asserts the court abused its discretion in denying his amended motion on the basis the court's admonitions improperly "validated [defendant's] unreasonable insistence" that he might not be eligible for Class X sentencing. Because defendant forfeited this argument by conceding in his amended motion that the defendant was properly admonished, we affirm.

¶ 3

I. BACKGROUND

¶ 4 In December 2009, a Sangamon County grand jury indicted defendant on one count of manufacture-delivery of a controlled substance (720 ILCS 570/401(d) (West 2008)). The trial court appointed the public defender to represent defendant. The record reflects that between December 2009 and September 2011, the defendant appeared in court on 32 separate occasions in this case.

¶ 5 During several of those appearances, the State and the trial court indicated defendant was eligible to be sentenced as a Class X offender under section 5-5-3(c)(8) of the Code (730 ILCS 5/5-5-3(c)(8) (West 2008) (text of section eff. until July 1, 2009)) because he had previously been convicted of at least two Class 2 felonies. Defendant insisted the State's version of his criminal history was erroneous because some of the felony convictions attributed to him were committed by third parties (the record is unclear as to which specific convictions defendant believed were falsely attributed to him). The court and State made clear in open court that only two prior Class 2 felony convictions need be proved to render defendant eligible for Class X sentencing.

¶ 6

A. Defendant's Guilty Plea

¶ 7 In September 2011, at the final pretrial conference the day before trial, while the parties were discussing defendant's motion *in limine* to exclude certain incriminating statements

made by him while proceeding *pro se* at an earlier hearing, defendant indicated to his counsel he wished to plead guilty. The following exchange then occurred:

"[DEFENSE COUNSEL]: Judge, I believe [defendant]—Your Honor, excuse me, [defendant] has just informed me that he is interested in pleading open to the charge, and we would set this matter for sentencing hearing. He may elect to contest whether or not he's Class X eligible. That will depend upon the Pre-Sentence Investigation [(PSI)] and whether the State produces the certified copies of the conviction, so we are not pleading to a Class X. We are pleading to the charge, and at the sentencing hearing we can address whether or not he's sentenced as a Class 2 offender or Class X offender.

THE COURT: That's your right to do those, okay, but I have been careful with you, [defendant], because out of your frustration, we have gone a lot of different ways.

Let me talk to you about it so you know what's up. It's your right to take an open plea, [defense counsel] has talked to you about that. If you do that, the Probation Department will talk to you. They will prepare a big report and tell me everything about you. The State will get it. Your attorney will get it. They will argue what an appropriate sentence is. You can make a statement to the court. I'll talk about your priors or I'll be told about your

priors again. Obviously, you've had all of these discussions. You can bring up this issue of the prior convictions to whether or not you should be extended-term eligible. We have gone through that. If anything, the State will get some more verification, if in fact those convictions are used in the PSI, but you can bring that up, but in fact if you are extended-term eligible, I'll sentence you that way, because that's what I'm here to do is to sentence you based upon the range of penalties which you're potentially exposed to.

[DEFENSE COUNSEL]: If you'll pardon me, I don't mean to interrupt. I don't think anybody disagrees that he would be extended-term eligible under the Controlled Substances Act because of a prior drug conviction, so he would be at a minimum seven to 14.

THE COURT: Okay.

[DEFENSE COUNSEL]: It's whether he falls under that mandatory Class X provision that I think we question.

THE COURT: Yeah, that's a good distinction. All right, do you understand that?

THE DEFENDANT: Yes.

THE COURT: I'm trying to be careful, because I'm all ready to get this thing done tomorrow. We can try the case, and it's your right to have a trial, not mine. If you need to tell the Court

now, and if you need time to think about it, whether you want to proceed to trial tomorrow, this plea that was offered by the State or enter into an open plea. Do you need time to think about that?

THE DEFENDANT: I've made my mind up already.

THE COURT: When did you make your mind up?

THE DEFENDANT: I made it up just sitting here today."

The trial court then proceeded to admonish defendant, in pertinent part, as follows:

"THE COURT: All right, so, sir, you're charged again with a Class 2 felony. I talked to you about this before. For appeal, we are talking about three to seven years in the Department of Corrections. You're extended-term eligible, so we are talking about three to 14 years in the Department of Corrections. Also, it's the State's position that you should be sentenced as a Class X offender, which is a potential term of six to 30 years. You understand that's what the State's position is?

THE DEFENDANT: Yes.

THE COURT: All right, and you understand that if the Court is convinced that the State's position is correct, that I would sentence you anywhere from six to 30? You understand that if the State turns out to be correct, your sentence will be anywhere from six to 30 years in the Department of Corrections, non-probationable?

THE DEFENDANT: Well, I had—I had thought they said if I get found guilty, I'm looking at extended term. That's what they kept saying to me. If I get found guilty, not are you pleading guilty. It shouldn't be extended term.

THE COURT: Well, there's the issue. Your attorney says it's three to 14. The State says it is six to 30, and we are going to take that up. It sounds like once your attorney has the PSI and looks it over, and he may bring an argument to the Court that it may only be three to 14.

[DEFENSE COUNSEL]: Can I have a moment?

THE COURT: Yes.

[DEFENSE COUNSEL]: Thank you, Judge.

THE COURT: In the end, I'll have to accept one or the other. It's going to be three to 14 or six to 30. Potentially, it's anywhere from three to 30, and you have to accept that, and you have to go into this plea knowing those are all potentials, and that's what I want you to know.

THE DEFENDANT: All right."

¶ 8 The trial court then gave further admonitions, the State recited the factual basis, and defendant tendered his plea as follows:

"THE COURT: All right, knowing the nature of the charges against you and the minimum and maximum penalties that could

be imposed and knowing there's a disagreement as to what the minimum and maximum penalties are between the Prosecutor and your attorney and knowing your rights that I've explained to you, do you want to give up those? Do you still want give [*sic*] up those rights?

THE DEFENDANT: Yes.

THE COURT: And how do you plead to the charge of Manufacture and Delivery of a Controlled Substance, Class 2 felony?

THE DEFENDANT: I plead guilty."

The court then accepted defendant's guilty plea.

¶ 9

B. Defendant's Sentence

¶ 10

At a November 2011 sentencing hearing, the State presented four certified reports of convictions relating to three prior Class 2 convictions and a Class 1 conviction. The court found defendant eligible for Class X sentencing pursuant to section 5-5-3(c)(8) of the Code (730 ILCS 5/5-5-3(c)(8) (West 2008) (text of section eff. until July 1, 2009)) because defendant had at least two prior Class 2 felony convictions. The court, after noting the applicable sentencing range was 6 to 30 years, sentenced defendant to 15 years' imprisonment.

¶ 11

C. Defendant's First Motion To Withdraw His Guilty Plea

¶ 12

On the day of sentencing, following the hearing, defense counsel filed on behalf of defendant a motion to withdraw his guilty plea. Defendant had prepared the handwritten motion *pro se*. In the motion, defendant essentially stated he wanted to withdraw his plea and go

to trial. Defendant appears to argue that his counsel lied to him by saying he would not be subject to Class X sentencing if he "pled out to the judge for 3 to 14." Along with the motion to withdraw the guilty plea, defense counsel also filed a motion, prepared by defendant *pro se*, seeking substitution of counsel on the grounds that defense counsel had lied to defendant.

¶ 13 In December 2011, the trial court held a hearing on defendant's motions. Defense counsel was present, but due to the nature of the allegations in the motions, declined to argue the motions on behalf of defendant and suggested the court appoint counsel from outside of the public defender's office. The court continued the hearing on defendant's motion to withdraw his guilty plea.

¶ 14 D. Defendant's Amended Motion To Withdraw His Guilty Plea

¶ 15 In January 2012, defendant, through new counsel, Daniel Wright, filed an amended motion to withdraw his guilty plea. In the amended motion, Wright argued defendant's guilty plea was not entered intelligently and with full knowledge of its consequences.

Specifically, the motion states, in part, as follows:

"In the current matter, Defendant's guilty plea was premised upon a fundamental misapprehension of a complicated legal technicality in respect to the sentencing structure applicable to his case. *While the record reflects that Defendant was properly admonished by the Court*, it is clear that the plea was not 'entered intelligently and with full knowledge of its consequences' as required to validate such a plea under Illinois law." (Emphasis added.)

¶ 16 The trial court held a hearing on defendant's amended motion to withdraw his plea. Defendant's direct testimony focused almost entirely on his relationship and communications with his trial counsel leading up to his guilty plea. At no point during the hearing did Wright or defendant argue the trial court gave improper or insufficient admonitions prior to defendant tendering his guilty plea. The court denied defendant's amended motion.

¶ 17 This appeal followed.

¶ 18 II. ANALYSIS

¶ 19 Defendant asserts the court abused its discretion in denying his amended motion to withdraw his guilty plea. Specifically, defendant's argument on appeal is that the court's allegedly improper admonitions "validated [his] unreasonable insistence that he could possibly" be sentenced as anything less than a Class X offender. The court's admonitions form the only basis of defendant's claim of error on appeal. Because defendant stated *in the amended motion* that the court's admonitions were proper, he waived that claim and is precluded from asserting for the first time on appeal that the court abused its discretion in failing to grant his amended motion on that basis.

¶ 20 A. Standard of Review

¶ 21 "The decision to grant or deny a motion to withdraw a guilty plea rests in the sound discretion of the circuit court and, as such, is reviewed for abuse of discretion." *People v. Baez*, 241 Ill. 2d 44, 109-10, 946 N.E.2d 359, 398 (2011).

¶ 22 B. Defendant Forfeited His Argument That the Trial Court Gave Improper Admonitions

¶ 23 Illinois Supreme Court Rule 604(d) (eff. July 1, 2006) provides, in pertinent part,

as follows:

"No appeal from a judgment entered upon a plea of guilty shall be taken unless the defendant, within 30 days of the date on which sentence is imposed, files in the trial court *** a motion to withdraw the plea of guilty and vacate the judgment. *** *Upon appeal any issue not raised by the defendant in the motion to reconsider the sentence or withdraw the plea of guilty and vacate the judgment shall be deemed waived.*" (Emphasis added.)

¶ 24 The record shows the trial court properly instructed defendant regarding the Rule 606(d) requirement that he include all his claims of error in his motion to withdraw his guilty plea. Defendant did not claim in his amended motion (or his original motion, for that matter) that the court's admonitions leading up to the guilty plea were improper. In fact, in his amended motion, defendant explicitly conceded he was properly admonished.

¶ 25 Defendant alleged in his amended motion that he should be allowed to withdraw his plea, even though he was properly admonished, because (1) his counsel lied to him about the applicable sentence and (2) he was simply unable to understand the sentencing structure. On appeal, however, defendant essentially argues the trial court abused its discretion by failing to *disagree* with defendant's concession and, *sua sponte*, determine that its own admonitions were improper because they "validated [defendant's] unreasonable insistence that he could possibly be able to prove that he did not have the requisite convictions to qualify for a Class X sentence." We reject defendant's claim of error.

¶ 26 Neither in his written amended motion to withdraw his plea, nor at any time

during the hearing on that motion, did defendant allege the trial court induced him to plead guilty by misleading him as to the applicable sentence. Moreover, we note the transcripts of the 32 court appearances at which defendant was present reveal that the court, the State, and defense counsel exhaustively explained to defendant that, due to his prior Class 2 felony convictions, he would be subject to mandatory sentencing of between 6 and 30 years' imprisonment as a Class X offender. Defendant claimed throughout the proceedings the State's version of his criminal history was inaccurate, but he was repeatedly told that issue would be resolved at sentencing after he pleaded guilty or was found guilty at trial. At the guilty plea hearing, defendant twice indicated he understood the potential sentence he faced and, *prior* to the allegedly improper admonitions, unambiguously stated he had already made up his mind to plead guilty.

¶ 27 While we conclude defendant forfeited his argument that the court improperly admonished him at the guilty plea hearing, our review of the record reveals a lack of compliance with Illinois Supreme Court Rule 402(a)(2) (eff. July 1, 1997), which requires the following pertaining to admonishment of the defendant regarding the possible penalties he or she is facing:

"The court shall not accept a plea of guilty or a stipulation that the evidence is sufficient to convict without first, by addressing the defendant personally in open court, informing him of and determining that he 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."

¶ 28 In this matter, it was incorrect to defer determination of the possible sentence defendant was facing until the sentencing hearing. As indicated in the rule, the court must determine, based on defendant's prior record, the minimum and maximum sentence defendant faces. During the guilty-plea hearing the court must advise defendant of this information, and only after the court determines defendant understands the possible penalties he is facing should the court accept the plea.

¶ 29 III. CONCLUSION

¶ 30 Because defendant forfeited his claim of error by failing to allege that the court's admonitions leading up to the guilty plea were improper in his amended motion to withdraw his guilty plea, we affirm the trial court's judgment. Because the State successfully defended a portion of the criminal judgment, we grant the State its \$50 statutory assessment against defendant as costs of this appeal. See *People v. Smith*, 133 Ill. App. 3d 613, 620, 479 N.E.2d 328, 333 (1985) (citing *People v. Nicholls*, 71 Ill. 2d 166, 178, 374 N.E.2d 194, 199 (1978)).

¶ 31 Affirmed.