

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).

2013 IL App (4th) 120550-U

NO. 4-12-0550

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED  
August 21, 2013  
Carla Bender  
4<sup>th</sup> District Appellate  
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Vermilion County
MARIO BELL,	)	No. 11CF301
Defendant-Appellant.	)	
	)	Honorable
	)	Nancy S. Fahey,
	)	Judge Presiding.

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JUSTICE APPLETON delivered the judgment of the court.  
Justices Harris and Holder White concurred in the judgment.

**ORDER**

¶ 1 *Held:* Where defendant was improperly admonished at his plea hearing as to the potential maximum term of imprisonment and, upon the subsequent revocation of his probation, the trial court sentenced him to a term greater than that of which he had been admonished, his sentence is reversed and the cause remanded for resentencing.

¶ 2 Defendant, Mario Bell, appeals from the trial court's judgment resentencing him to seven years in prison after his probation was revoked. Initially, defendant pleaded guilty to one count of aggravated battery and was sentenced to probation. Defendant claims his sentence should be reduced to five years, the maximum term the trial court had admonished him he would receive at his plea hearing. We reverse defendant's sentence and remand with directions.

¶ 3 I. BACKGROUND

¶ 4 In November 2011, defendant pleaded guilty to one count of aggravated battery, a Class 3 felony (720 ILCS 5/12-4(b)(8), (e)(1) (West 2010)) in exchange for a sentence of probation

and the State's agreement to dismiss the other pending count of aggravated battery. At the plea hearing, the trial court, the Honorable Claudia S. Anderson presiding, admonished defendant he had been charged with a Class 3 felony punishable by a term of imprisonment between two and five years. The court asked whether defendant was extended-term eligible, to which the prosecutor replied: "Judge, based upon the knowledge I have currently, he would not be. His convictions are sufficiently old." (This was incorrect, as defendant had been convicted in 2004 of a Class 1 felony in Cook County case No. 04-CR-763301.) The court then stated as follows: "It appears not. But if you were, I need to advise you that that could increase three to six. I understand that any convictions you have are beyond ten years ago, so I don't see that extended terms apply." The State recommended a sentence of probation, the term and conditions left to the discretion of the court. After considering the factual basis, the court accepted defendant's plea as entered knowingly and voluntarily. In March 2012, the court sentenced defendant to 24 months' probation.

¶ 5 In April 2012, the State filed a petition to revoke defendant's probation, alleging he had failed to report to his probation officer as required. In May 2012, the trial court, the Honorable Nancy S. Fahey presiding, conducted a hearing on the State's petition to revoke defendant's probation. Defendant informed the court he wished to proceed *pro se*. He admitted the violation and the court admonished him as follows:

"THE COURT: Sir, the underlying offense in this case is aggravated battery, which is a Class 3 felony. Class 3 felonies are punishable between two and five years in the Illinois Department of Corrections, five to ten years possible extended term, up to two and a half years probation, one year mandatory supervised release, which

used to be called parole, and up to a \$25,000 fine. Do you understand the possible penalties for a Class 3 felony?

THE DEFENDANT: Yes, ma'am.

THE COURT: And do you understand that all of those options would be open to the court at sentencing hearing?

THE DEFENDANT: Yes, ma'am."

¶ 6 On June 5, 2012, at the resentencing hearing, defendant remained *pro se*. The State correctly advised the court defendant *was* extended-term eligible and recommended a sentence of seven years in prison. After considering the presentence investigation report, and the statutory factors in aggravation and mitigation, the court resentenced defendant to seven years in prison, due to the "nature and circumstances of the offense, and to the history, character, and condition of the offender." The court admonished defendant as follows:

"Prior to taking an appeal, you must file in the trial court in which—30 days of the date in which sentence is imposed, a written motion asking to have the judgment vacated and for leave to withdraw your plea setting forth the grounds for the motion. If the motion is allowed, the plea, sentence, and judgment will be vacated and a trial date will be set on the charges to which the plea was made."

This appeal followed.

¶ 7

## II. ANALYSIS

¶ 8

Defendant first contends his seven-year sentence should be reduced to a five-year

term due to the trial court's failure to admonish him at the plea hearing that the maximum sentence he could receive would be 10 years in prison, not 5. The court mistakenly admonished defendant "it appear[ed]" he was not extended-term eligible, when actually, he was. Defendant insists his seven-year sentence is void because the court was not authorized to impose a sentence greater than the five-year sentence it warned defendant he could receive.

¶ 9 First, the State contends defendant was required to first file a motion to reconsider his sentence before appealing. Though, the State concedes the trial court failed to admonish defendant of this requirement as it should have done pursuant to Illinois Supreme Court Rule 605(a) (eff. Oct. 1, 2001). The question is whether this court should remand for proper admonishments in accordance with Rule 605(a) or address the merits of defendant's sentencing claim. In this court's discretion and in the interest of judicial economy, we decide to address defendant's claim of error. See *People v. Henderson*, 217 Ill. 2d 449, 468 (2005) (in light of inadequate Rule 605(a) admonishments, the appellate court could either consider the challenge itself or remand for proper admonishments).

¶ 10 Addressing the propriety of defendant's sentence, we must determine whether he is entitled to a reduction of his sentence from seven years to five years, the maximum he was told he would receive before he pleaded guilty. We note section 5-8-2(b) of the Unified Code of Corrections provides:

"If the conviction was by plea, it shall appear on the record that the plea was entered with the defendant's knowledge that a sentence under this Section was a possibility. If it does not so appear on the record, the defendant shall not be subject to such a sentence

unless he is first given an opportunity to withdraw his plea without prejudice." 730 ILCS 5/5-8-2 (West 2010).

¶ 11 This court's decision in *People v. Gregory*, 379 Ill. App. 3d 414 (2008), is instructive on the effect of a trial court's improper admonishments. In *Gregory*, as here, the trial court incorrectly admonished the defendant as to the potential maximum term (14 years as an extended term, 7 years nonextended term) he could receive at resentencing should his probation be revoked. *Gregory*, 379 Ill. App. 3d at 415. At resentencing, the court realized the defendant should have been sentenced as a Class X offender and that probation was not available. The court resentenced defendant to a term of 15 years in prison. *Gregory*, 379 Ill. App. 3d at 415.

¶ 12 The defendant appealed, claiming his 15-year sentence should be reduced to 7 years, as the maximum nonextended term of which he was admonished. This court noted that the appropriate remedy for this situation was a matter of first impression. *Gregory*, 379 Ill. App. 3d at 418. " 'When no direct appeal is taken from an order of probation and the time for appeal has expired, a reviewing court is precluded from reviewing the propriety of that order in an appeal from a subsequent revocation of that probation, unless the underlying judgment of conviction is void.' " *Gregory*, 379 Ill. App. 3d at 418 (quoting *People v. Johnson*, 327 Ill. App. 3d 252, 256 (2002)). We note improper admonishments themselves do not render the defendant's conviction and sentence void. *Gregory*, 379 Ill. App. 3d at 421.

¶ 13 This is where the *Gregory* case and the instant part ways. The sentence of probation imposed upon the defendant's guilty plea in *Gregory* was void, as the offense was not a probationable offense. Here, we do not have a void judgment.

"When only an improper sentencing admonishment is at issue,

withdrawal of the guilty plea is not an available remedy since improper admonishments do not themselves render a defendant's conviction void (*People v. Jones*, 213 Ill. 2d [498,] 509 [2004]) and a reviewing court can only review the propriety of the underlying judgment in an appeal from a probation revocation if it is void (*Johnson*[], 327 Ill. App. 3d at 256). See *People v. Taylor*, 368 Ill. App. 3d 703, 707-08 [] (2006) (addressing an unadmonished extended-term sentence after a probation revocation). Thus, when just the admonishment was improper, the only available remedy to address the error is a sentence in accordance with the improper admonishment." *Gregory*, 379 Ill. App. 3d 421-22.

¶ 14 We find the appropriate remedy under these circumstances, where the trial court mistakenly admonished defendant he would be subject to a maximum term of 5 years in prison when actually defendant could have been subject to a maximum term of 10 years in prison, based his criminal history, is to reverse and remand this case to the trial court for resentencing in accordance with the admonishments defendant received at the plea hearing. See *Taylor*, 368 Ill. App. 3d at 708 (on a revocation of probation when the defendant was sentenced to an extended term without being admonished that an extended term was available at the time he pleaded guilty, "the proper remedy is to vacate the extended-term sentence so that the defendant may be sentenced in accordance with the admonishments that he received before he pleaded guilty"). The court did not inform defendant he was eligible for extended-term sentencing. She merely stated *if* he were, certain penalties would follow. "This type of conditional, tentative admonishment leaves a defendant to speculate whether

an extended-term sentence is indeed possible in his case." *Taylor*, 368 Ill. App. 3d at 708.

Accordingly, we reverse defendant's seven-year sentence and remand for resentencing in accordance with the admonishment he received.

¶ 15

### III. CONCLUSION

¶ 16 For the foregoing reasons, we reverse defendant's sentence and remand with directions for resentencing.

¶ 17 Reversed and remanded with directions.