

plea hearing was held on June 17, 2009. Therein, the State announced that a plea agreement had been reached, but that because the defendant still needed to get an alcohol evaluation, sentencing would have to wait until "another date." Counsel for the defendant agreed, stating, "Yes, we have an agreed recommendation of two years probation, 50 days county jail with time served." Counsel went on to state that because the defendant was obtaining an alcohol evaluation, "we have an agreed sentencing date," which was later determined to be August 17, 2009. The trial judge made several inquiries of the defendant to ensure that the guilty plea was knowing and voluntary, but did not admonish the defendant with regard to the range of sentencing he faced, and did not inform the defendant that an extended-term sentence was a possibility.

¶ 5 Sentencing was subsequently continued and did not occur until November 23, 2009. At a hearing on that date, the trial judge began by noting that it appeared that the defendant had pleaded guilty on June 17, 2009, then asked the parties if an agreement had been reached. The State responded in the affirmative, then stated that "the proposal would be that the defendant would be sentenced to two years probation" and "to a term of fifty days, time served." Counsel for the defendant agreed that those were the terms upon which the parties had agreed. The trial judge then asked the State if the sentencing range would be "one to six instead of one to three." The State responded that it was "one to three," but counsel for the defendant interjected, stating, "I think it would be one to six because [the defendant] has a prior class 4 or higher felony." The trial judge agreed with counsel for the defendant and admonished the defendant that he faced "one to six years in the Illinois Department of Corrections plus a year [of] mandatory supervised release," as well as a fine. He asked the defendant if he understood, and the defendant stated that he did. The trial judge then asked the defendant if, "[k]nowing that," the defendant still wanted "to enter into this negotiated sentence today." The defendant stated that he did. Subsequently, the trial judge accepted the

negotiated sentence and imposed it. He admonished the defendant that prior to "taking an appeal," the defendant would have to file a written motion asking to have the judgment vacated and for leave to withdraw his guilty plea. When questioned, the defendant stated that he understood his appeal rights. The defendant failed to successfully complete his term of probation and was ultimately sentenced to a five-year term of imprisonment. This appeal followed.

¶ 6

ANALYSIS

¶ 7 The sole contention raised in the defendant's supplemental brief on appeal—which at the defendant's request has superceded and replaced his initial brief on appeal—is that the extended-term portion of his sentence must be vacated because, according to the defendant, he was not properly advised that an extended-term sentence was a possibility. In support of his argument, the defendant points to section 5-8-2 of the Unified Code of Corrections (730 ILCS 5/5-8-2(b) (West 2010)), which states that if a conviction is "by plea, it shall appear on the record that the plea was entered with the defendant's knowledge that [an extended-term sentence] was a possibility," and that if "it does not so appear on the record, the defendant shall not be subject to such a sentence unless he is first given the opportunity to withdraw his plea without prejudice." The defendant contends that because he was not notified until his sentencing hearing that he was subject to an extended-term sentence, the trial judge did not comply with section 5-8-2.

¶ 8 We agree with the defendant that it does not appear on the record that the defendant's negotiated guilty plea was entered with his knowledge that an extended-term sentence was a possibility. Indeed, as noted above, at the June 17, 2009, hearing, the trial judge did not admonish the defendant at all with regard to the range of sentencing he faced, and did not inform the defendant that an extended-term sentence was a possibility. This, however, does not end our inquiry. The plain language of section 5-8-2 dictates that in a situation such as

this, where it does not appear on the record that the defendant was aware of the possibility of an extended-term sentence at the time he entered his plea, "the defendant shall not be subject to such a sentence unless he is first given the opportunity to withdraw his plea without prejudice." 730 ILCS 5/5-8-2(b) (West 2010).

¶ 9 In the case at bar, the defendant was given just that opportunity, but declined to act upon it, and thus no error occurred. As explained above, at the November 23, 2009, sentencing hearing, the trial judge admonished the defendant that he faced "one to six years in the Illinois Department of Corrections plus a year [of] mandatory supervised release," as well as a fine. He asked the defendant if he understood, and the defendant stated that he did. The trial judge then asked the defendant if, "[k]nowing that," the defendant still wanted "to enter into this negotiated sentence today." The defendant stated that he did. Accordingly, although the defendant was notified of the possibility of an extended-term sentence in the "one to six years" range, rather than the nonextended range of one to three years, only at the time of sentencing, immediately thereafter the defendant was asked if, armed with that knowledge, he still wanted to proceed. He stated that he did. As we noted in *People v. Cavins*, 288 Ill. App. 3d 173, 181 (1997), for purposes of compliance with section 5-8-2, "it is defendant's burden to withdraw his plea if he so chooses, and the court is required to do nothing other than refrain from preventing him from requesting to withdraw his plea." There is no requirement that the trial court "take some affirmative action to 'give' defendant the opportunity to withdraw the plea." *Id.* To the contrary, when—as in the case at bar—the record demonstrates that the defendant "was correctly advised during his sentencing hearing that he had the right to move to withdraw his guilty plea," the requirement of section 5-8-2 "that a defendant be 'given an opportunity to withdraw his plea without prejudice' " has been met. *Id.* That is because "allowing a defendant to file a motion to withdraw his guilty plea within 30 days after sentencing is sufficient, as a defendant who pleads guilty is not finally 'subject

to such a sentence' until his appeal rights are terminated." *Id.* at 181-82. Accordingly, we conclude that because the defendant could have declined to move forward when he learned of the possibility of an extended-term sentence, and could have instead moved to withdraw his guilty plea, but chose to do neither, he cannot now claim error on the part of the trial court. We therefore reject the sole contention raised in the defendant's supplemental brief and affirm the order of the circuit court.

¶ 10 By separate motion, the defendant asks this court to correct the judgment order by striking the imposition of a \$100 state crime lab fee. The State concedes that the fee is not authorized by statute. We agree and hereby vacate the imposition of the fee. See, *e.g.*, *People v. Beler*, 327 Ill. App. 3d 829, 837 (2002) (fee not authorized by statute is void and must be set aside).

¶ 11 CONCLUSION

¶ 12 For the foregoing reasons, we affirm the order of the circuit court of Crawford County, but vacate the \$100 state crime lab fee imposed upon the defendant.

¶ 13 Order affirmed; \$100 state crime lab fee vacated.