

No. 1-12-0092

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 CR 1899
)	
ROBERT STEEL,)	Honorable
)	Maura Slattery-Boyle,
Defendant-Appellant.)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Gordon and Justice Taylor concurred in the judgment.

O R D E R

¶ 1 *Held:* Where defendant requested plea conference, court did not improperly initiate plea conference; trial court is not prohibited from participating in a plea conference but only from initiating one. One of defendant's fees on his underlying conviction was erroneously assessed and, as it is void, may be corrected on appeal from violation of probation proceeding.

¶ 2 Pursuant to a negotiated guilty plea, defendant Robert Steel was convicted of delivery of a controlled substance (less than one gram of heroin) and sentenced to 18 months' probation with fines and fees. Upon a later finding that defendant violated the terms of his probation, the court

revoked probation and sentenced him to five years' imprisonment. Defendant contends on appeal that his guilty plea for his underlying conviction is void because the court initiated plea negotiations contrary to Supreme Court Rule 402 (eff. July 1, 2012). Defendant also contends that one of his fees was erroneously assessed and may be corrected now because it is void.

¶ 3 Defendant was charged by indictment with delivery of a controlled substance for allegedly delivering less than one gram of heroin on or about January 15, 2011.

¶ 4 On May 3, 2011, defense counsel requested a plea conference pursuant to Rule 402. The court informed defendant that the conference would include defense counsel, the prosecutor, and the court, that the court would be told facts that it would otherwise not hear until trial, that the State would present the facts surrounding the charge and defendant's criminal background, that defense counsel would present any mitigating circumstances, that the court would recommend a sentence for a guilty plea, that defendant would be free to accept or reject the court's recommendation, that rejection would mean the case would proceed to trial, and that defendant could not seek a substitution of judge based on the plea conference. Defendant expressed his understanding of each of these admonishments and personally agreed to a plea conference. The plea conference was then held off the record.

¶ 5 After the plea conference, the court stated that it recommended a sentence of 18 months' probation if defendant pled guilty, and defendant personally accepted the recommendation. The court admonished him of the charge against him and the applicable sentencing range, and of his right to a jury trial or a bench trial where he could examine witnesses and present evidence. Defendant waived his rights to a bench and jury trial and to a presentencing investigation (PSI). The court ascertained from defendant that his plea was voluntary and not coerced. The State

recited the factual basis for the plea: on the date alleged, defendant sold a named police officer, in exchange for \$20, two bags of a white powder, one of which later tested positive for heroin. The court found that defendant's plea was voluntary and knowingly made, spread of record that he had two prior felony convictions, and accepted the plea. The court sentenced him to 18 months' probation, on conditions including that he comply with the reporting and treatment requirements of his probation assessment and that he complete drug and alcohol evaluation and treatment, and \$1655 in fines and fees including a \$20 probable cause hearing fee. The court admonished him of his appeal rights and warned him that he would be sentenced to five years in prison if he violated his probation.

¶ 6 In July 2011, at the State's request, the court transferred defendant's probation to intensive drug probation, with conditions including drug and alcohol testing.

¶ 7 In August 2011, the State filed a petition to revoke defendant's probation, alleging that he (1) tested positive for marijuana, cocaine, and opiates on July 29, and admitted on August 4 to cocaine and alcohol use and on August 8 to heroin use, and (2) failed on August 1 to enter "detox" at Loretto Hospital. Defendant's probation officer recommended 120 days' jail. On September 2, 2011, the court ordered defendant's remand to jail for drug treatment evaluation. The State supplemented its petition in September, adding allegations that defendant had a blood-alcohol concentration of .04 on August 4 and tested positive for cocaine on August 16.

¶ 8 On September 19, 2011, following evidence and argument, the court found that defendant violated his probation by his admitted drug use and failure to go to Loretto Hospital as directed by his probation officer. Defendant's motion to reconsider, as amended, was denied on December 12, 2011; he raised various claims regarding the revocation proceedings but none

regarding the underlying plea and conviction. Also on December 12, following a PSI and argument in aggravation and mitigation, the court terminated defendant's probation and sentenced him to five years' imprisonment. Defendant's motion to reconsider his sentence was denied, and this appeal timely followed.

¶ 9 On appeal, defendant contends that that his guilty plea is void because the court initiated plea negotiations in violation of Supreme Court Rule 402.

¶ 10 Generally, on appeal from a revocation of probation where the underlying conviction was upon a guilty plea, this court has no jurisdiction to consider challenges to the guilty plea or resulting sentence because such challenges should have been raised in a timely post-plea motion and appeal. *In re J.T.*, 221 Ill. 2d 338, 346-47 (2006). However, when a court exceeds its statutory authority to act, the resulting order is void, and a void judgment may be challenged at any time in any court with jurisdiction. *In re Danielle J.*, 2013 IL 110810, ¶ 29; *People v. Gutierrez*, 2012 IL 111590, ¶ 14; *People v. Chambers*, 2013 IL App (1st) 100575, ¶ 31.

¶ 11 Supreme Court Rule 402 governs guilty pleas, and at the time of defendant's plea in May 2011, paragraph (d) governing plea discussions provided:

"(1) The trial judge shall not initiate plea discussions.

(2) If a tentative plea agreement has been reached by the parties which contemplates entry of a plea of guilty in the expectation that a specified sentence will be imposed or that other charges before the court will be dismissed, the trial judge may permit, upon request of the parties, the disclosure to him of the tentative

agreement and the reasons therefor in advance of the tender of the plea. At the same time he may also receive, with the consent of the defendant, evidence in aggravation or mitigation. The judge may then indicate to the parties whether he will concur in the proposed disposition; and if he has not yet received evidence in aggravation or mitigation, he may indicate that his concurrence is conditional on that evidence being consistent with the representations made to him. If he has indicated his concurrence or conditional concurrence, he shall so state in open court at the time the agreement is stated as required by paragraph (b) of this rule. If the defendant thereupon pleads guilty, but the trial judge later withdraws his concurrence or conditional concurrence, he shall so advise the parties and then call upon the defendant either to affirm or to withdraw his plea of guilty. If the defendant thereupon withdraws his plea, the trial judge shall recuse himself.

(3) If the parties have not sought or the trial judge has declined to give his concurrence or conditional concurrence to a plea agreement, he shall inform the defendant in open court at the time the agreement is stated as required by paragraph (b) of this rule that the court is not bound by the plea agreement, and that if the defendant persists in his plea the disposition may be different from

that contemplated by the plea agreement." Ill. S. Ct. R. 402(d)
(eff. July 1, 1997).

¶ 12 This court has found that, while Rule 402(a) expressly requires the trial court make certain admonishments "by addressing the defendant personally in open court," the error in doing so by television rather than in person was of constitutional dimension but also was procedural so that the error rendered the resulting convictions voidable rather than void. *People v. Speed*, 318 Ill. App. 3d 910 (2001). Following *Speed*, this court has also found "that a violation of Rule 402 based on the court's allegedly improper involvement in the plea agreement did not oust the court's jurisdiction or render the judgment void." *People v. Smith*, 406 Ill. App. 3d 879, 887 (2010). To show that a court's participation in plea negotiations rendered a guilty plea involuntary, a defendant must show that the court participated in the negotiation process to the extent that improper influence was exerted upon the defendant to plead guilty, or the defendant reasonably believed he was no longer able to receive an impartial trial so that he must plead guilty and accept the court's sentence. *Smith*, 406 Ill. App. 3d at 888. Moreover, an involuntary plea is not thereby void. *People v. Hubbard*, 2012 IL App (2d) 101158; *Smith*, 406 Ill. App. 3d at 888. See also *People v. Mingo*, 30 Ill. App. 3d 285 (1975)(where court merely stated what its position in plea proceedings would be, after the defendant initiated the negotiations, court did not improperly initiate the negotiations).

¶ 13 Here, the court did not initiate the plea conference as Rule 402(d)(1) prohibits. Defendant requested the plea conference: his counsel asked the court for the conference, and defendant himself concurred in counsel's decision after being admonished that the court would make a sentencing recommendation based on facts it would hear in the conference but otherwise

would not hear until trial. As defense counsel initiated the conference, either there was a tentative plea agreement or plea offer from the State that defendant was presenting to the court for its concurrence, in which case the instant contention would be utterly disingenuous,¹ or there was not and defendant was seeking the court's sentencing recommendation so that he invited the error alleged. See *Smith*, 406 Ill. App. 3d at 886-87. However, defendant contends that the court "has no authority to extend an offer of an agreed sentence to a defendant," and if he is correct, the voidness would (among other effects) render the invited nature of the error moot.

¶ 14 We conclude that defendant is not correct. His citation to Rule 402 as the basis for this contention is unsupported; no language in the Rule expressly prohibits a court from *participating* in a plea conference or discussion as the court did here by recommending a sentence. Our supreme court presumably knows the difference between initiation and participation and chose to use the former term in crucial paragraph (d)(1). In this regard, defendant correctly notes that the purpose of Rule 402(d) "is to avoid coercive guilty pleas and to assist the trial court in maintaining a neutral stance," (*Smith*, 406 Ill. App. 3d at 888) and also raises the specter that "the court could effectively deprive the State of its authority to negotiate with the defendant."

However, that purpose is sufficiently served, and that specter dispelled, by preventing the court from commencing a plea conference or discussion so that it cannot make a recommendation unless a party seeks one. The court no more sets its neutrality aside by making a party-sought sentencing recommendation than it does when it rules on a contested motion, and it no more coerces a plea by making its recommendation than by concurring in a State plea offer. Thus, we

¹ The State notes that, at a bond hearing about a month before the plea conference and hearing, the State mentioned that it would "take an opportunity to look at [defendant's criminal history] and make him an offer." However, there is no indication on the record that the State carried through this intention and actually made a plea offer.

reject defendant's express argument to apply *Speed* narrowly and implicit argument not to follow *Smith's* clear holding.

¶ 15 Lastly, while paragraphs (d)(2) and (3) address how the court should address a tentative plea agreement, nothing therein expressly prohibits the court making its own recommendation; these paragraphs notably commence with "If a tentative plea agreement has been reached by the parties." In *People v. Meza*, 376 Ill. App. 3d 787 (2007), we held that, where a court made a sentencing offer after a plea conference that it later declined to follow in sentencing the defendant on his guilty plea, the Rule 402(d)(2) requirement that a defendant be allowed to withdraw his plea if the court withdraws its concurrence to a tentative plea agreement was inapplicable because the court did not concur (or conditionally concur) to a non-existent plea agreement. While we disagree with the result in *Meza* ("In contrast, the promise that defendant would receive a 32-year sentence if he pled guilty was unequivocal." *Smith*, 406 Ill. App. 3d at 889-90), we agree to the extent that a court that makes a sentencing offer is acting neither directly pursuant to nor directly contrary to Rule 402(d)(2).

¶ 16 For the aforementioned reasons, we conclude that the court did not act outside its authority by recommending a sentence at a plea conference it did not initiate, so that the recommendation and resulting plea and sentence of probation are not void.

¶ 17 Defendant also contends that his \$20 probable cause hearing fee (55 ILCS 5/4-2002.1(a) (West 2010)) was erroneously assessed because he had no probable cause hearing but was charged by indictment. In response, the State agrees that there was no probable cause hearing but argues that we cannot now, on appeal from the revocation of probation and resentencing, consider a challenge to a fee assessed on his underlying conviction. Defendant replies that we

can vacate the fee because it is void and we have jurisdiction. We agree with defendant. The fee is not authorized by the above-cited statute where a defendant does not have a probable cause hearing, and a sentence -- including a fee -- contrary to statutory requirements is void and may be corrected by this court whenever we have jurisdiction. *People v. Marshall*, 242 Ill. 2d 285, 302 (2011); *People v. Smith*, 236 Ill. 2d 162 (2010). We shall therefore do so.

¶ 18 Accordingly, pursuant to Supreme Court Rule 615(b)(2) (eff. Aug. 27, 1999), the \$20 probable cause hearing fee is vacated. The judgment of the circuit court is otherwise affirmed.

¶ 19 Affirmed in part; vacated in part.