

No. 1-12-1030

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. 08 CR 10442
)	
MARTIN LYONS,)	The Honorable
)	Nicholas R. Ford,
Defendant-Appellant.)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Simon and Justice Pierce concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant waived claim that trial court violated Rule 402; counsel strictly complied with Rule 604(d) certification requirement; judgment affirmed.

¶ 2 Martin Lyons, the defendant, entered a negotiated plea of guilty to first degree murder and aggravated kidnaping and was sentenced to respective, consecutive terms of 32 and 10 years' imprisonment. On appeal, he contends that his plea must be vacated because the circuit court

failed to inform him that his sentences would run consecutively in violation of Supreme Court Rule 402 (eff. July 1, 1997). He also contends that the denial of his motion to vacate his guilty plea must be vacated because his counsel failed to strictly comply with Supreme Court Rule 604(d) (eff. Feb. 6, 2013).

¶ 3 The record shows that defendant and his codefendant, Nico Lewis¹, were charged by indictment with 11 counts of first degree murder, 8 counts of attempted aggravated criminal sexual assault, and one count each of aggravated kidnaping, vehicular hijacking, robbery, possession of a stolen motor vehicle, burglary, and concealment of a homicidal death. These acts took place in May 2008, and involved a single victim, 21-year-old Tenika Hinton.

¶ 4 On June 22, 2010, defendant, through private counsel, requested a Rule 402 conference. Thereafter, defense counsel indicated on the record that he had conveyed the court's offer of 32 years' imprisonment for first degree murder, 8 years' imprisonment for aggravated kidnaping, and the dismissal of the remainder of the counts to defendant, who then indicated his understanding of these terms, but informed the court that he was rejecting the offer.

¶ 5 Defense counsel subsequently filed a motion to suppress statements, and following a hearing on that motion, on February 23, 2011, defendant informed the court that he wished to plead guilty and accept the former offer. Defendant then withdrew his plea of not guilty, and the court admonished him, in relevant part, that he would be sentenced to 32 years' imprisonment for

¹ Codefendant, who is not a party to this appeal, entered a negotiated plea of guilty to first degree murder and aggravated kidnaping and was sentenced to consecutive, respective terms of 36 and 10 years' imprisonment. This court affirmed that judgment on direct appeal. *People v. Lewis*, 2013 IL App (1st) 120088-U.

first degree murder at 100%, and 10 years for aggravated kidnaping at 85%, followed by a period of 3 years mandatory supervised release (MSR). When the court asked defendant if he wanted to accept that offer and enter a plea of guilty, he responded, "[y]es."

¶ 6 The court then advised defendant that the murder charge was a Class X offense with a sentencing range of 20 to 60 years' imprisonment at 100%, that aggravated kidnaping had a sentencing range of 6 to 30 years' imprisonment, and that both sentences would be followed by a three-year period of MSR. Defendant indicated that he understood these sentencing provisions.

¶ 7 The record shows that the parties stipulated to the factual bases for the plea, which the court found sufficient to prove defendant's guilt of first degree murder and aggravated kidnaping beyond a reasonable doubt. The court then accepted defendant's guilty pleas, entered a conviction on the two elected offenses, and sentenced defendant to a term of 32 years' imprisonment for first degree murder and 10 years for aggravated kidnaping. The mittimus reflected that the sentences were to run consecutively.

¶ 8 On March 22, 2011, defendant, through the same counsel, filed a motion to withdraw his guilty pleas, alleging that he believed he was intimidated by threats of receiving the maximum sentence if he did not plead guilty, that he did not fully understand the court system or the extent of his guilty plea, that he has a defense worthy of consideration by a jury, and that he feels the ends of justice will be better served by submitting his case to a jury. Before any action was taken on this motion, defendant filed a *pro se* motion to withdraw the guilty plea on May 2, 2011, alleging that his lawyer misled him and told him he was not going to have to serve all the time given to him, that he was also told that he was going to receive good time credit if he "copped out," but has since learned at the prison law library that he has to serve all the time he was given. He further alleged that counsel provided inadequate representation, and that he (defendant) was

not mentally competent to enter a guilty plea. In support of his motion, defendant attached his own affidavit in which he stated that he did not know that the sentences were consecutive, and was told they would run concurrently. He thus requested that his sentences run concurrently, and if not, that the matter proceed to trial.

¶ 9 Defense counsel was subsequently allowed to withdraw and defendant was appointed counsel, who adopted private counsel's motion to withdraw the guilty plea. On March 21, 2012, counsel filed a Rule 604(d) certificate in which he stated that he had consulted with defendant in person and on numerous occasions to ascertain his contentions of error in his guilty plea and sentence, that he examined the trial court file and the report of the of the guilty plea and sentencing proceeding, and, after reviewing the above, he "adopted the initial motion to withdraw" filed by private counsel.

¶ 10 At the proceeding on the motion to withdraw the guilty plea, counsel argued, in relevant part, that the crux of this motion was that defendant did not fully understand the court system or the extent of his guilty plea in that he believed he was receiving concurrent, and not consecutive sentences. Counsel maintained that defendant was unaware that his sentences were to run consecutively until he went to prison. The State responded that defendant failed to present this argument in his motion to withdraw the guilty plea or in the Rule 604(d) certificate, and on the face of the petition, defendant did not meet his burden.

¶ 11 Defendant testified that after the Rule 402 conference, his attorney told him that he would receive a 32-year sentence at 100% and a 10-year sentence at 85%, and when he asked him if it was to run concurrently or consecutively, he told him that he was going to look into it, but he never came back and explained how the sentences would run. Defendant testified that at the time he entered the guilty plea and was sentenced, he did not know that the sentences would run

consecutively to each other, and that there would be a maximum sentence of 32 years' imprisonment for all the offenses. He maintained that he did not learn that the sentences would run consecutively until he went to prison.

¶ 12 Defendant's private plea attorney testified that prior to the Rule 402 conference, he advised defendant that the sentencing range for first degree murder was 20 to 60 years and 6 to 30 years for aggravated kidnaping, with the sentences running consecutively. Following the Rule 402 conference, counsel told defendant that he would receive 32 years' imprisonment for the murder offense and 10 years' imprisonment for the aggravated kidnaping, and that the sentences would run consecutively. Counsel explained to defendant what "consecutive" meant, *i.e.*, that the time for the two offenses did not run together, or simultaneously. At that point, defendant rejected the offer, and decided to plead not guilty. On February 23, 2011, however, defendant asked if the court would reinstate the original offer. Counsel again explained to defendant that the sentences would run consecutively, and never told him that the sentences would run concurrently. He also denied advising defendant that he would look into whether the sentences could run concurrently because the law mandated consecutive sentences, and defendant never told him that he believed he was receiving concurrent sentences.

¶ 13 Appointed counsel then argued his motion noting that he did not adopt defendant's *pro se* affidavit, but that it discusses the consecutive versus concurrent sentencing issue which was "modified" by private counsel in his motion to withdraw the guilty plea, that he did adopt. Counsel further argued that defendant testified to what he perceived happened, and that the transcript indicates separate sentences, but is unclear as to whether they run consecutively.

¶ 14 The court denied the motion to withdraw the guilty plea, finding that it knew for a fact that defendant was under no misconception as to the sentences he would receive, and was told

that the sentences would run consecutively by his private counsel again and again. The court concluded that defendant knew exactly what he was doing when he was sentenced.

¶ 15 On appeal, defendant first contends that his guilty plea must be vacated because the trial court violated Rule 402, by failing to inform him that his sentences would run consecutively, rendering his plea unknowing and involuntary.

¶ 16 We initially observe that defendant did not expressly raise this issue in his motion to withdraw the guilty plea. Supreme Court Rule 604(d) provides, in relevant part, that no appeal from a judgment entered upon a plea of guilty shall be taken unless 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, and that upon appeal, *any issue not raised by defendant in the motion to withdraw the guilty plea and vacate the judgment shall be waived.* (Emphasis added.) Ill. S. Ct. R. 604(d) (eff. Feb. 6, 2013). Rule 604(d) further provides that the motion shall be in *writing* and state the grounds therefor.

¶ 17 Here, defendant initially filed a motion to withdraw his guilty pleas through private counsel. He subsequently filed a *pro se* motion to withdraw the guilty plea and attached an affidavit, in which he maintained that he was not advised that the sentences would run consecutively. Private counsel then withdrew, and defendant's appointed counsel adopted the motion to withdraw the guilty plea filed by private counsel, but not the *pro se* motion and affidavit. Although counsel argued the consecutive sentence issue at the hearing on the motion to withdraw the guilty plea, and examined defendant and private counsel's motions, the issue was never presented in the written motion adopted by appointed counsel. As a consequence, defendant failed to comply with the requirements of Rule 604(d), and the issue is waived. Ill. S. Ct. R. 604(d); *People v. Bien*, 277 Ill. App. 3d 744, 751 (1996).

¶ 18 Defendant acknowledges that waiver, but claims that the issue may be reviewed under the plain error doctrine. Under the plain error exception to the waiver rule, the reviewing court may consider unpreserved error where the evidence is close, regardless of the seriousness of the error, or the error is serious, regardless of the closeness of the evidence. *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005). The burden of persuasion remains with defendant under both prongs to the plain error doctrine, and he must first show that a clear or obvious error occurred. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). If defendant fails to meet his burden, the procedural default will be honored. *Hillier*, 237 Ill. 2d at 547.

¶ 19 Illinois Supreme Court Rule 402 (eff. July 1, 1997) provides that prior to accepting a guilty plea, the court must admonish defendant, in relevant part, of the minimum and maximum sentence prescribed by law, including, when applicable, the penalty to which defendant may be subjected because of prior convictions or consecutive sentences. The transcript of defendant's guilty plea here does not show that the court admonished defendant on the record that his sentences would run consecutively. This omission constitutes error, and we thus consider whether either of the two prongs of the plain error doctrine have been satisfied. *People v. Sargent*, 239 Ill. 2d 166, 188-90 (2010).

¶ 20 In this case, defendant does not argue that the evidence was closely balanced nor why the error was so severe that it must be remedied to preserve the integrity of the judicial process. *People v. McDade*, 345 Ill. App. 3d 912, 914 (2004). Rather, defendant merely claims that his due process rights were violated and analogizes his case to *People v. Hayes*, 336 Ill. App. 3d 145, 153 (2002), and *People v. Davis*, 145 Ill. 2d 240, 250 (1991).

¶ 21 The purpose of the Rule 402 admonishments is to ensure that defendant understands his plea, the rights he is waiving, and the consequences of his actions. *People v. Sharifpour*, 402 Ill.

App. 3d 100, 114 (2010). Substantial, rather than literal compliance is required. (*Sharifpour*, 402 Ill. App. 3d at 114), and the failure to properly admonish a defendant, alone, does not automatically establish grounds for reversing the judgment or vacating the plea. *Davis*, 145 Ill. 2d at 250. Illinois courts have found substantial compliance with Rule 402 where the record indicates that defendant entered his plea voluntarily and understandingly even where the court failed to admonish defendant as to a specific provision. *People v. Daugherty*, 394 Ill. App. 3d 134, 139 (2009). In determining whether defendant's plea was voluntary the reviewing court may consider the entire record (*Daugherty*, 394 Ill. App. 3d at 139), and whether reversal is required for an imperfect admonishment depends on whether real justice has been denied or whether defendant has been prejudiced thereby. *People v. Torres*, 228 Ill. 2d 382, 399 (2008).

¶ 22 With the aforementioned rules in mind, defendant's claim fails. The record shows that five months passed between the initial plea offer and defendant's acceptance thereof. During that time, as evidenced by plea counsel's testimony, defendant was advised that the terms would run consecutively to one another, and, after he explained to defendant the meaning of that term, defendant rejected the offer. The record also shows, however, that defendant reconsidered that decision after his motion to suppress hearing, and asked if the court would reinstate the original offer. Plea counsel testified that he once again explained the meaning of consecutive terms to defendant, and never suggested that his sentences would be concurrent because, contrary to defendant's assertion, consecutive sentences were mandated by law. The court agreed that defendant was under no misconception as to the sentences he would receive, that counsel repeatedly informed him that the sentences would run consecutively, and that defendant knew exactly what he was doing when he was sentenced. Under these circumstances, it is clear that defendant was neither denied real justice or prejudiced by the court's failure to state on the record

that the sentences imposed as a result of the negotiated plea were to run consecutively.

¶ 23 In reaching that determination, we find *Davis*, and *Hayes*, cited by defendant, factually distinguishable because in those cases, defendant was advised of one thing and subjected to another at sentencing. *Torres*, 228 Ill. 2d at 399. In *Davis*, 145 Ill. 2d at 243, 248, defendant was told that he was eligible for probation when he was not and was sentenced to a 10-year term. In *Hayes*, 336 Ill. App. 3d at 150, defendant entered an open plea and was not admonished that the sentence imposed in the plea case would be served consecutively to a 17-year term imposed in a separate case. Here, no erroneous advice was given during defendant's admonishment.

¶ 24 Defendant, relying on *People v. Akers*, 137 Ill. App. 3d 922, 926-27 (1985), further claims that he is not chargeable with matters *dehors* his own record, and thus, the failure of the court to inform him on the record that he was subject to consecutive sentences renders his plea involuntary. As noted above, the supreme court has held that the failure to properly admonish, alone, does not automatically establish grounds for reversing the judgment or vacating the plea (*Davis*, 145 Ill. 2d at 250), and whether reversal is required for an imperfect admonishment depends on whether real justice has been denied or whether defendant has been prejudiced by it. *Torres*, 228 Ill. 2d at 399, citing *Davis*, 145 Ill. 2d at 250. Considering the posture of the case and the entire record, we find that defendant has not established plain error based on the omission from the court's admonishment. To do so in this case, would interject a *pro forma* or *per se* rule and overlook the entire circumstances revealed in this record showing that defendant entered his plea knowingly and voluntarily. Accordingly, we find that defendant has not established plain error, and therefore, we honor his forfeiture of the issue.

¶ 25 Defendant next contends that this court must vacate the denial of his motion to withdraw his guilty plea because his appointed counsel failed to certify that he had made amendments to

the motion necessary for an adequate presentation of any defects in his guilty plea proceedings. He thus claims that counsel failed to strictly comply with the Rule 604(d) certificate requirement.

¶ 26 Rule 604(d) provides, in relevant part, that counsel shall file a certificate with the circuit court stating that he has consulted with defendant either by mail or in person to ascertain his contentions of error in the entry of the guilty plea or sentence, examined the trial court file and report of proceedings of the guilty plea and has made any amendments to the motion necessary for adequate presentation of any defects in those proceedings. Ill. S. Ct. R. 604(d). The purpose of this rule is to ensure that before a criminal appeal can be taken from a guilty plea, the trial court that accepted the plea and imposed the sentence be given the opportunity to hear the allegations of improprieties that took place outside the official proceeding and *dehors* the record, but nevertheless were unwittingly given sanction in the courtroom. *People v. Tousignant*, 2014 IL 115329, ¶14; *People v. Wilk*, 124 Ill. 2d 93, 104 (1988). Strict compliance with Rule 604(d) is required (*People v. Foster*, 171 Ill. 2d 469, 474 (1996)), and our review of counsel's compliance with the rule is *de novo*. *People v. Grice*, 371 Ill. App. 3d 813, 815 (2007).

¶ 27 Here, counsel filed a Rule 604(d) certificate in which he stated that he had consulted with defendant in person and on numerous occasions to ascertain his contentions of error in his guilty plea and sentencing proceeding, examined the trial court file and the report of the guilty plea and sentencing proceeding, and, after doing so, he "adopted the initial motion to withdraw" filed by private counsel. In doing so, counsel expressly satisfied the first two duties under the rule, and by adopting the original motion filed by private counsel after defendant had filed a *pro se* motion and counsel withdrew, appointed counsel indicated that he did not believe any amendments were necessary, thereby satisfying the third duty.

¶ 28 Defendant disagrees, and as part of his argument cites counsel's failure to include the

court's Rule 402 omission. He maintains that if counsel had done so, the motion would have been granted. Counsel is not required to recite the language of the rule verbatim in the certificate (*People v. Mineau*, 2012 IL App (1st) 110666, ¶16), but must provide some evidence that he performed the duties required under the rule. *People v. Wyatt*, 305 Ill. App. 3d 291, 297 (1999). Counsel did so here, and we find defendant's claim otherwise one of form over substance.

¶ 29 In reaching that conclusion, we have examined *People v. Willis*, 313 Ill. App. 3d 553, 555 (2000), and *People v. Dismuke*, 355 Ill. App. 3d 606, 607-08 (2005), which defendant cites in support of his argument, but find that his reliance on those cases is misplaced. In *Willis*, counsel filed a Rule 604(d) certificate in which he crossed out the language that he made amendments necessary for adequate preservation of defects in the proceedings. *Willis*, 313 Ill. App. 3d at 555. In *Dismuke*, 355 Ill. App. 3d at 607-08, counsel solely certified that he consulted with defendant, examined the court file, and reviewed the report of proceedings. These cases are clearly factually distinguishable from the case at bar where counsel certified that he consulted with defendant to ascertain his contentions of error at the guilty plea proceeding, examined the trial court file and the report of the guilty plea proceeding, and, after reviewing the above, he adopted the original motion to withdraw the guilty plea filed by defendant's prior counsel.

¶ 30 Defendant also contends without argument or citation to supporting authority that the court failed to admonish him that he had the right to persist in his not guilty plea. Merely listing an issue is not argument and does not satisfy the requirements of Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013), but, rather, results in waiver of the issue for review. *People v. Phillips*, 215 Ill. 2d 554, 565 (2005).

¶ 31 In light of the foregoing, we affirm the judgment of the circuit court of Cook County.

¶ 32 Affirmed.