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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of Lake County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 08-CF-2174
	)	
JOHN W. RILEY,	)	Honorable
	)	John T. Phillips,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE HUTCHINSON delivered the judgment of the court.  
Justices Zenoff and Birkett concurred in the judgment.

**ORDER**

¶ 1 *Held:* (1) Defendant showed no plain error in his sentence: because defendant did not plead guilty, the trial court was permitted to impose, without having admonished him to this effect, a sentence greater than the one that the State by agreement had recommended; (2) defendant forfeited an argument by failing to raise it in his motion to reconsider his sentence, and his forfeiture stood in light of his failure to argue plain error.

¶ 2 In this appeal, defendant, John W. Riley, challenges his sentence of 27½ years' imprisonment for home invasion (720 ILCS 5/12-11(a)(3) (West 2008)). Defendant had originally been sentenced to a 23-year prison term, but we vacated that sentence in an earlier appeal (*People v. Riley*, 2012 IL App (2d) 110054-U (*Riley I*)). Defendant contends that the trial

court erred in increasing his sentence on remand. Because we conclude that defendant has forfeited his arguments on appeal and shown no plain error, we affirm.

¶ 3 Defendant's conviction of home invasion was entered following a stipulated bench trial. Defendant was also convicted of aggravated kidnaping (720 ILCS 5/10-2(a)(6) (West 2008)). Both offenses arose from the same incident. The parties had previously agreed that, if defendant were found guilty based on the stipulated evidence, they would recommend that he receive a 23-year term for each offense. The trial court sentenced defendant in accordance with the recommendation. However, in *Riley I*, this court vacated the aggravated-kidnaping conviction, finding that the stipulated evidence did not establish one of the elements of that offense. We also concluded that the trial court had erred in imposing sentence on defendant without ordering the preparation of a presentence investigation report and that it was necessary for the trial court to resentence defendant.

¶ 4 On remand, a presentence investigation report was prepared and witnesses testified on defendant's behalf. The State recommended, as it had previously, that defendant be sentenced to a 23-year prison term. In contrast, defendant asked the trial court to consider a sentence "in the neighborhood of ten years." After considering, *inter alia*, defendant's criminal history and his behavior while incarcerated following his conviction in this case, the trial court sentenced defendant to a 27½-year prison term. Defendant moved for reconsideration, contending that "the sentence imposed is excessive given the applicable factors in mitigation as well as Defendant's history, and family situation, and other factors suggesting that defendant is amenable to rehabilitation." The trial court denied the motion, and this appeal followed.

¶ 5 Defendant first argues that, because the trial court did not advise him that the parties' agreed sentencing recommendation was not binding on the court, the court was not at liberty to

depart from the recommendation by imposing a longer sentence. Defendant acknowledges that he did not raise this issue in his motion to reconsider his sentence. “ ‘Normally, any sentencing issues not raised in a motion to reconsider the sentence are forfeited.’ ” *People v. Yaworski*, 2011 IL App (2d) 090785, ¶ 5 (quoting *In re Angelique E.*, 389 Ill. App. 3d 430, 432 (2009)). However, defendant urges us to consider the issue pursuant to the plain-error rule, which permits review of an otherwise forfeited issue where the evidence in a case is so closely balanced that the outcome might have resulted from the error and not the evidence (*People v. Herron*, 215 Ill. 2d 167, 178 (2005)) or where the error is so serious that the defendant was denied a substantial right and thus a fair hearing (*id.* at 179).

¶ 6 Our supreme court has explained that “[t]he first step of plain-error review is determining whether any error occurred.” *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). As explained below, no error occurred here.

¶ 7 In support of his argument that the trial court was bound by the agreed sentencing recommendation, defendant relies on *People v. Baldrige*, 19 Ill. 2d 616 (1960), *People v. Lambrechts*, 69 Ill. 2d 544 (1977), and *People v. Whitfield*, 217 Ill. 2d 177 (2005). We first consider *Baldrige* and *Lambrechts*.

¶ 8 In *Baldrige*, the defendant pleaded guilty to the offense of willfully, maliciously, and feloniously setting fire to a public building. *Baldrige*, 19 Ill. 2d at 618, 620. In exchange for the defendant’s plea, the State agreed to recommend a sentence of two to four years’ imprisonment. Before accepting the defendant’s plea, the trial court advised the defendant that the court was not obligated to follow the State’s recommendation. After the court accepted the defendant’s plea and sentenced him to the penitentiary for a term of four to eight years, the defendant appealed. He argued that “the court’s acceptance of the plea of guilty denied [him]

due process of law under the circumstance that he was in part influenced to make it by the agreement of the State's Attorney to recommend a sentence of two to four years." *Id.* at 621.

The *Baldrige* court rejected the argument, reasoning as follows:

"While it was held in *McKeag v. People*, 7 Ill. 2d 586 [(1956)], that the failure of a prosecutor to make an agreed recommendation operated to deprive an accused of substantial rights, the record in this case shows that the State's Attorney carried out his agreement and did in fact recommend to the court the lighter sentence. Clearly, the fact that the recommendation was not followed is no basis for a claim of deprivation of rights [citations] and when it is considered that the court, prior to the time the plea of guilty was entered and accepted, expressly advised defendant it would not necessarily be bound by such recommendation, it can hardly be said that defendant was the victim of misrepresentation, misleading inducement or improper conduct. What does appear, rather, is that defendant, with full understanding and the advice of his counsel, took a calculated risk that the punishment meted out by the court might be less severe than he would receive upon a trial before a jury." (Emphasis added.) *Id.* at 621-22.

¶ 9 Notably, because the defendant had been admonished that the agreed sentencing recommendation was not binding, the *Baldrige* court had no occasion to decide whether due process required such an admonishment. Furthermore, the *Baldrige* court had no occasion to consider what admonition (if any) was necessary when a defendant does not plead guilty but rather agrees to be tried by the court on stipulated evidence. *Lambrechts* sheds some additional light on these questions. In *Lambrechts*, the court stated:

"Absent a plea agreement concurred in by the court, a defendant has no right, constitutional or otherwise, to know in advance the specific sentence which will be

imposed upon him. [Citation.] Nor is there any obligation upon a judge to follow the recommendations embodied *in a plea agreement* in which he has not concurred [citations], although, if he does not concur, he must inform the defendant in open court at the time the terms of the agreement are stated that the agreement is not binding on the judge and that the disposition of the case may be different from that proposed in the plea agreement. [Citation.] The purpose of that admonition is to eliminate the possibility that the defendant might infer from the judge's awareness of the agreement that the judge has concurred therein." (Emphases added.) *Lambrechts*, 69 Ill. 2d at 556-57.

¶ 10 *Lambrechts* makes it clear that when the trial court does not concur in a *plea agreement*, the trial court must inform the defendant—before accepting his or her plea—that the court is not bound by any agreed sentencing recommendation. The obligation to inform the defendant arises under Illinois Supreme Court Rule 402(d) (eff. July 1, 1997), the salient provisions of which are, by their terms, applicable only where the parties have entered into a plea agreement. Rule 402(d) (eff. July 1, 2012) provides, in pertinent part:

“When there is a plea discussion or plea agreement, the following provisions \*\*\* shall apply:

\* \* \*

(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 or her of the tentative agreement and the reasons therefor in advance of the tender of the plea. At the same time the trial judge may also receive, with the consent of the defendant, evidence in aggravation or

mitigation. The judge may then indicate to the parties whether he or she will concur in the proposed disposition; and if the judge has not yet received evidence in aggravation or mitigation, he or she may indicate that his or her concurrence is conditional on that evidence being consistent with the representations made. If the judge has indicated his or her concurrence or conditional concurrence, the judge 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 or her concurrence or conditional concurrence, the judge shall so advise the parties and then call upon the defendant either to affirm or to withdraw his or her plea of guilty. If the defendant thereupon withdraws his or her plea, the trial judge shall recuse himself or herself.

(3) If the parties have not sought or the trial judge has declined to give his or her concurrence or conditional concurrence to a plea agreement, the judge 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 or her plea the disposition may be different from that contemplated by the plea agreement.”

¶ 11 In the case before us, there was no plea agreement. The agreement in this case was a *Starks* agreement, *i.e.*, an agreement between the parties pertaining to some aspect of the case other than the defendant’s plea. See *People v. Starks*, 106 Ill. 2d 441 (1985) (State was bound by agreement to dismiss charge if defendant passed polygraph test). Defendant did not plead guilty; he was convicted following a stipulated bench trial conducted pursuant to an agreement that, if he were found guilty, both parties would recommend that he be sentenced to a 23-year prison term. Defendant argues that, by agreeing to a stipulated bench trial, he waived “important

constitutional rights,” namely “his right to a trial by jury, his right to confront his accusers, and his right to present a defense.” However, a guilty plea entails more than a waiver of those particular rights. A guilty plea is “a knowing admission of guilt of the criminal acts charged and all the material facts alleged in the charging instrument.” *People v. Rhoades*, 323 Ill. App. 3d 644, 651 (2001). “A guilty plea ends the controversy and removes the prosecution’s burden of proof, as it supplies both the evidence and the verdict.” *Id.* (citing *Boykin v. Alabama*, 395 U.S. 238, 242 n.4 (1969)).

¶ 12 Here, the parties’ stipulation supplied the evidence only; in performance of its function as trier of fact, the trial court found defendant guilty based on the evidence. Defendant stipulated neither that he was guilty of any crime, nor that there was sufficient evidence to sustain a conviction. Had defendant pleaded guilty, thereby “remov[ing] the prosecution’s burden of proof” (*id.*), he would not have been heard to argue, in *Riley I*, that the evidence was insufficient to sustain the aggravated-kidnapping conviction. Not only did defendant raise that argument in the earlier appeal, he did so successfully.

¶ 13 Because defendant did not plead guilty, Rule 402(d)(3) simply does not apply. Rather, the controlling principle, garnered from *Lambrechts*, is that “defendant ha[d] no right, constitutional or otherwise, to know in advance the specific sentence which [would] be imposed upon him.” *Lambrechts*, 69 Ill. 2d at 556. The importance of the constitutional rights that defendant waived by entering the stipulation is not in doubt. However, a waiver of those rights does not require “the full protections that attend the entry of a guilty plea.” *Adams v. Peterson*, 968 F.2d 835, 839 (9th Cir. 1992).

¶ 14 Defendant also contends that the principles announced in *Whitfield* dictate that he be sentenced in accordance with the parties’ agreed sentencing recommendation. In *Whitfield*, the

defendant pleaded guilty, pursuant to an agreement with the State, to charges of first-degree murder and armed robbery. At the guilty-plea hearing, the prosecutor recited that under the plea agreement the defendant would receive concurrent sentences of “25 years [Illinois Department of Corrections]” for first-degree murder and “ ‘six years [Illinois Department of Corrections]’ ” for armed robbery. *Whitfield*, 217 Ill. 2d at 179. Neither the prosecutor nor the trial court advised the defendant that his prison term would be followed by a three-year term of mandatory supervised release (MSR). The defendant argued that the addition of the MSR term to his sentence deprived him of the benefit of his bargain with the State. Our supreme court held that “ ‘when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such a promise must be fulfilled.’ ” *Id.* at 189 (quoting *Santobello v. New York*, 404 U.S. 257, 262 (1971)). Although the prosecutor in *Whitfield* had not affirmatively promised the defendant that he would not serve a term of MSR, the defendant successfully argued that absent an admonishment the MSR term was not part of his plea agreement, as evinced by the record, that his sentence would consist only of the prison term. *Id.* at 186.

¶ 15 *Whitfield* is inapposite for two reasons. First, in *Whitfield*, the notion that the defendant’s bargain with the State spared him from an MSR term was based on Illinois Supreme Court Rule 402(b) (eff. July 1, 1997), which provides that “[i]f the tendered plea is the result of a plea agreement, the agreement shall be stated in open court.” Because there was no plea agreement in this case, this provision does not apply. Secondly, here the parties’ agreement to proceed to a stipulated bench trial—as that agreement was stated in open court—did *not* provide that defendant would *receive* a specific sentence; the agreement merely provided that the parties

would *recommend* a specific sentence. The State honored its part of the bargain by making the promised recommendation.

¶ 16 Defendant next argues that, even if the trial court was not bound by the parties' agreed sentencing recommendation, the court erred in increasing his sentence after the original sentence was set aside in *Riley I*. Defendant relies on *North Carolina v. Pearce*, 395 U.S. 711 (1969), and section 5-5-4(a) of the Unified Code of Corrections (730 ILCS 5/5-5-4(a) (West 2012)), which forbid a court from imposing a sentence longer than one that has been set aside, unless a longer sentence is warranted by conduct on the part of the defendant that occurred after the original sentencing proceeding.

¶ 17 Defendant forfeited review of the issue by failing to raise it in his motion to reconsider his sentence. As noted, defendant simply argued that his sentence was excessive "given the applicable factors in mitigation as well as Defendant's history and family situation, and other factors suggesting that defendant is amenable to rehabilitation." He did not mention *Pearce* and section 5-5-4(a) or differentiate conduct that occurred after the original sentencing proceeding from conduct that occurred beforehand. Moreover, although the State has pointed out the forfeiture, defendant has not argued in his appellate briefs that the issue is reviewable under the plain-error rule. "If a defendant fails to make a plain-error argument, we generally honor his procedural default [citation], because a defendant who fails to argue for plain-error review when he has forfeited review of an issue 'obviously cannot meet his burden of persuasion' that one of the two prongs of the plain-error rule is satisfied [citation]." *People v. Leach*, 2012 IL 111534, ¶ 61. Accordingly, we will not consider whether defendant's sentence ran afoul of *Pearce* and section 5-5-4(a).

¶ 18 For the foregoing reasons, we affirm the judgment of the circuit court of Lake County.

¶ 19 Affirmed.