

**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).

2014 IL App (4th) 130083-U

NO. 4-13-0083

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

**FILED**  
May 15, 2014  
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.	)	Macoupin County
CODY R. McGUIRE,	)	No. 11CF65
Defendant-Appellant.	)	
	)	Honorable
	)	Patrick J. Londrigan,
	)	Judge Presiding

JUSTICE STEIGMANN delivered the judgment of the court.  
Justices Pope and Knecht concur in the judgment.

**ORDER**

¶ 1 *Held:* The appellate court reversed the trial court's denial of the defendant's motion to withdraw his guilty pleas. The court's imposition of void sentences pursuant to a plea agreement rendered the defendant's entire plea agreement void and entitled the defendant to withdraw his guilty pleas.

¶ 2 In August 2012, defendant, Cody R. McGuire, entered negotiated guilty pleas to first degree murder (720 ILCS 5/9-1(a)(1) (West 2010)) and aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2010)). Pursuant to the plea agreement, the trial court sentenced defendant to 33 years in prison for first degree murder and 20 years in prison for aggravated battery with a firearm, with both sentences to run concurrently. Defendant filed a motion to withdraw his guilty pleas, arguing that he was deprived of the benefit of his bargain with the State because his sentences were void. The court denied that motion.

¶ 3 Defendant appeals, arguing that (1) the trial court erred by denying his motion to withdraw his guilty pleas because his sentences were void, (2) his conviction for aggravated battery with a firearm must be vacated pursuant to the one-act-one-crime doctrine, and (3) the court erred in its imposition of various fines. The State concedes that because defendant's sentences are void, the court erred by denying his motion to withdraw his guilty pleas. We accept the State concession, reverse, and remand with directions.

¶ 4 II. BACKGROUND

¶ 5 In April 2011, the State charged defendant with first degree murder, alleging, in pertinent part, that defendant "shot Willie Jason Walton in the face and chest, thereby causing the death of Willie Jason Walton." The State also charged defendant with aggravated battery with a firearm, alleging, in pertinent part, that defendant "shot Willie Jason Walton in the head with a .38 caliber revolver." Also in April 2011, the trial court appointed the public defender, Jono Verticchio, to represent defendant.

¶ 6 On August 20, 2012, defendant pleaded guilty to both counts. In exchange for defendant's guilty pleas, the State agreed to recommend to the trial court a (1) 33-year prison term for first degree murder and (2) 20-year prison term for aggravated battery with a firearm, with both sentences to run concurrently. The State asserted in the factual basis that "defendant used a .38 caliber revolver to pistol whip Willie Jason Walton in the head and then used that said weapon to shoot Willie Jason Walton in the face and chest[,] causing the death of Willie Jason Walton." The trial court accepted the factual basis, entered judgment of conviction on both counts, and sentenced defendant in accordance with the terms of the plea agreement.

¶ 7 In September 2012, defendant mailed to the trial court a *pro se* motion to withdraw his guilty pleas (defendant's motion included a handwritten certificate of service stating that

he mailed his motion on September 18, 2012; the motion was file-stamped by the court on September 21, 2012). In his motion, defendant sought to withdraw his guilty pleas based upon various aspects of Verticchio's performance that he alleged constituted ineffective assistance of counsel. The court appointed Verticchio to represent defendant and scheduled a hearing on the *pro se* motion.

¶ 8 On September 24, 2012, Verticchio filed an amended motion to withdraw guilty plea on behalf of defendant, which also alleged ineffective assistance of Verticchio. On September 27, 2012, Verticchio filed a motion to withdraw as counsel. The trial court granted Verticchio's motion to withdraw and appointed a private attorney, John Delaney, to represent defendant.

¶ 9 In December 2012, Delaney filed an amended motion to withdraw guilty plea, alleging, in pertinent part, that defendant was denied the benefit of his bargain with the State because his negotiated sentence of 33 years for first degree murder was void for failing to include the mandatory 25-year firearm enhancement of section 5-8-1(d)(iii) of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5-8-1(d)(iii) (West 2010)). The State filed a response to defendant's amended motion, arguing that defendant was not deprived of the benefit of the bargain because the trial court did not actually apply the mandatory 25-year firearm enhancement to defendant's sentence.

¶ 10 In January 2013, following the hearing, the trial court denied defendant's amended motion to withdraw guilty plea, concluding that under *Strickland v. Washington*, 466 U.S. 668 (1984), defense counsel's erroneous "advice" regarding the negotiated sentence did not render defendant's guilty plea involuntary.

¶ 11 This appeal followed.

¶ 12

## II. ANALYSIS

¶ 13

### A. The Trial Court's Mischaracterization of Defendant's Motion

¶ 14

Initially, we note that the trial court inexplicably characterized defendant's motion to withdraw his guilty plea as a "postconviction petition" under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2012)).

¶ 15

Defendant labeled his pleading as "Motion To Withdraw Plea," and he mailed it within 30 days of sentencing. See Ill. S. Ct. R. 604(d) (eff. July 1, 2006) ("No appeal shall be taken upon a negotiated plea of guilty challenging the sentence as excessive unless the defendant, within 30 days of the imposition of sentence, files a motion to withdraw the plea of guilty and vacate the judgment."); see also *People v. Pagel*, 197 Ill. App. 3d 305, 308, 553 N.E.2d 1110, 1112 (1990) (a *pro se* motion to withdraw guilty plea is timely if mailed within the 30-day window). Verticchio's amended motion was labeled, "Motion To Withdraw Plea of Guilty and Vacate Judgment." Delaney's amended motion was labeled, "Amended Motion To Withdraw Guilty Plea and Vacate Sentence." The State filed a response to the pleading, which it labeled, "State's Response to Defendant's Motion To Withdraw Guilty Plea and Vacate Sentence." The trial court's own docket referred to the pleading as a "Motion To Withdraw Guilty Plea." Everything about defendant's motion was consistent with a motion to withdraw guilty plea.

¶ 16

At the hearing on the motion, however, the trial court characterized the motion as a petition for postconviction relief, apparently because it was file-stamped 31 days after the date of sentencing. The following exchange occurred between the court and Delaney:

"THE COURT: \*\*\* The court interprets that as a postconviction hearing petition under [section 122-1 of the Act].  
Would that be correct, [defense counsel]?"

[DELANEY]: Your Honor, I believe it is still a Motion to Withdraw his guilty pleas as it was timely filed by himself, *pro se*, and by his first attorney, [the public defender].

THE COURT: No one argues whether it was timely filed in response by the State. I am just making sure you filed under 725 ILCS 5/122, is that correct?

[DELANEY]: Yes, Your Honor."

¶ 17 Throughout the remainder of the hearing (which consisted of little more than a brief argument by Delaney), the parties and the trial court referred to defendant's pleading interchangeably as both a motion to withdraw guilty and a postconviction petition. In announcing its ruling at the conclusion of the hearing, the court stated, "This is a postconviction proceeding and under the Act the petition does not enjoy an entitlement to an evidentiary hearing." The court then proceeded through its *Strickland* analysis and concluded as follows: "Accordingly, the court grants the motion to dismiss and the petition for postconviction relief is hereby dismissed." (The court apparently construed the "State's Response to Defendant's Motion To Withdraw Guilty Plea and Vacate Sentence" as a second-stage motion to dismiss the postconviction petition pursuant to section 122-5 of the Act.) The court's characterization of the pleading as a postconviction petition was erroneous.

¶ 18 Defendant filed a timely motion to withdraw guilty plea, not a postconviction petition. This is not a trivial distinction. When the trial court dismisses a postconviction petition, the Act (1) bars the defendant from filing a successive postconviction petition unless he obtains leave of the court (725 ILCS 5/122-1(f) (West 2014)) and (2) results in the waiver of any claims not raised in the original petition (725 ILCS 5/122-3 (West 2014)). Had the outcome of this case

been different—that is to say, had defendant not appealed the court's judgment or had we not reversed the court's judgment on appeal—the court's erroneous mischaracterization of defendant's motion to withdraw guilty plea could have prejudiced defendant in the future, had he chosen to file a true postconviction petition. Although the supreme court has held that a trial court may recharacterize a *pro se* pleading as a petition for postconviction relief (see *People v. Shellstrom*, 216 Ill. 2d 45, 833 N.E.2d 863 (2005); *People v. Swamynathan*, 236 Ill. 2d 103, 923 N.E.2d 276 (2010); *People v. Stoffel*, 239 Ill. 2d 314, 941 N.E.2d 147 (2010)), those cases are irrelevant when a motion to withdraw guilty plea is *timely filed* as a motion to withdraw guilty plea under Supreme Court Rule 604(d). The court's discretion to recharacterize a pleading as a postconviction petition does not extend to timely filed motions under Rule 604(d).

¶ 19 In any event, because the trial court (1) appointed counsel to make any necessary amendments to the motion, and (2) held a hearing on the motion, the proceedings in this case were more akin to proceedings on a motion to withdraw guilty plea than postconviction proceedings. Accordingly, we treat this case as an appeal from the court's denial of defendant's motion to withdraw guilty plea instead of an appeal from the court's dismissal of defendant's postconviction petition under the Act.

¶ 20 B. Defendant's Negotiated Guilty Plea

¶ 21 For a first degree murder conviction, section 5-4.5-20 of the Unified Code requires the trial court to impose a sentence of no less than 20 and no more than 60 years in prison. 730 ILCS 5/5-4.5-20(a) (West 2010). Further, section 5-8-1(a)(1)(d)(iii) of the Unified Code requires the court to impose a mandatory 25-year firearm enhancement "if, during the commission of the offense, the person personally discharged a firearm that proximately caused \*\*\* death to another person." 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2010). Finally, section 5-8-4(d)(1) of

the Unified Code requires the court to impose consecutive sentences if "[o]ne of the offenses for which the defendant was convicted was first degree murder." 730 ILCS 5/5-8-4(d)(1) (West 2010).

¶ 22 "A court does not have authority to impose a sentence that does not conform with statutory guidelines [Citations] and a court exceeds its authority when it orders a lesser or greater sentence than that which the statute mandates[.] [Citations.] In such a case, the defendant's sentence is illegal and void." *People v. White*, 2011 IL 109616, ¶ 20, 953 N.E.2d 398. "Even when a defendant, prosecutor, and court agree on a sentence, the court cannot give the sentence effect if it is not authorized by law." *White*, 2011 IL 109616, ¶ 23, 953 N.E.2d 398 (quoting *United States v. Greatwalker*, 285 F.3d 727, 730 (8th Cir. 2002)).

¶ 23 In this case, the trial court imposed concurrent sentences of 33 years in prison for first degree murder and 20 years in prison for aggravated battery with a firearm. The court imposed these sentences despite the State's representation in the charging information and the factual basis that defendant committed the first degree murder by personally discharging a firearm that caused the death of the victim. When "[t]he version of facts agreed to by the State and presented by it in the factual basis to the court establishe[s] that a firearm was used in the commission of the offense[,] \*\*\* the mandatory sentence enhancement [is] triggered." *White*, 2011 IL 109616, ¶ 27, 953 N.E.2d 398.

¶ 24 Defendant's sentences are void because the trial court failed to (1) impose the mandatory 25-year firearm enhancement and (2) order that defendant's sentence for aggravated battery with a firearm be served consecutive to his sentence for first degree murder. The State concedes that defendant's sentences are void. Because defendant entered into the negotiated plea agreement based upon the promise of a sentence that cannot legally be imposed, his "entire plea

agreement is void as well." *White*, 2011 IL 109616, ¶ 21, 953 N.E.2d 398. Accordingly, the court erred by denying defendant's motion to withdraw his guilty plea. Because we so conclude, we do not reach the merits of defendant's remaining claims.

¶ 25

### III. CONCLUSION

¶ 26 For the reasons stated, we reverse the trial court's judgment and remand with directions to allow defendant to withdraw his guilty pleas for first degree murder and aggravated battery with a firearm.

¶ 27 Reversed and remanded with directions.