

NOTICE

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2015 IL App (4th) 131016-U

NO. 4-13-1016

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

September 18, 2015
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Sangamon County
JEREMY V. BECK,)	No. 10CF474
Defendant-Appellant.)	
)	Honorable
)	Peter C. Cavanagh,
)	Judge Presiding.

PRESIDING JUSTICE POPE delivered the judgment of the court.
Justices Knecht and Harris concurred in the judgment.

ORDER

¶ 1 *Held:* We grant appointed counsel's motion to withdraw pursuant to *Anders v. California*, 386 U.S. 738 (1967), and affirm the trial court's judgment where no meritorious issues could be raised on appeal.

¶ 2 This case comes to us on the motion of the office of the State Appellate Defender (OSAD) to withdraw as counsel on appeal pursuant to *Anders v. California*, 386 U.S. 738 (1967), asserting no meritorious issues can be raised in this case. After carefully reviewing the record, we grant OSAD's motion to withdraw.

¶ 3 I. BACKGROUND

¶ 4 In May 2012, after being admonished pursuant to Illinois Supreme Court Rule 402 (eff. July 1, 1997), defendant, Jeremy V. Beck, entered into an open guilty plea to aggravated battery with a firearm (720 ILCS 5/12-4.2 (West 2010)). In August 2012, the trial court sentenced defendant to a term of 12 years in prison followed by 3 years' mandatory

supervised release (MSR). Defendant filed a motion to reconsider his sentence, which the trial court denied. Defendant appealed.

¶ 5 In November 2012, this court remanded to the trial court, ordering as follows:

"Defendant-appellant's motion for summary remand is hereby allowed. The cause is remanded to the circuit court for the filing of a Supreme Court Rule 604(d) certificate, the opportunity to file a new post-plea motion, if counsel concludes that a new motion is necessary, a hearing on the motion, a new judgment, and strict compliance with requirements of Rule 604(d)." *People v. Beck*, No. 4-12-0794 (Nov. 9, 2012) (unpublished order under Supreme Court Rule 23).

¶ 6 At a hearing on December 6, 2012, defense counsel advised the trial court he had written defendant seeking any thoughts he may have regarding an amended motion to reconsider but had not received a response. On December 31, 2012, defense counsel filed an amended motion to reconsider the sentence in which he incorporated the allegations of the initial motion to reconsider the sentence and added allegations under a subheading titled "Amendments for Reconsideration of Sentence as requested by the Defendant Pursuant to Written Consultation."

Defense counsel filed a Rule 604(d) certificate, stating as follows:

"[C]ounsel *** hereby states that he has complied with Supreme Court Rule 604(d) and that he has consulted with the defendant personally after sentencing as to his motion for reduction of sentence and after sentencing by consulting with the [d]efendant by mail and has ascertained the [d]efendant's contentions of error

in the sentence and sentencing hearing, has examined the court file and transcripts of the report of proceedings of the sentencing hearing, and has made any amendments to the motion for reduction of sentence necessary for the adequate presentation of any defect in the proceedings."

¶ 7 At the February 2013 hearing on the amended motion to reconsider, defense counsel reiterated the allegations of error in the initial motion to reconsider and noted additional allegations "the [d]efendant *** requested *** be placed before the [c]ourt." The trial court denied defendant's amended motion.

¶ 8 In May 2013, this court again remanded the case. Defense counsel's Rule 604(d) certificate was deficient on its face because it failed to mention whether counsel had examined the report of proceedings of the plea of guilty and whether counsel had consulted with defendant to ascertain defendant's contentions of error in the entry of the plea of guilty. Therefore, this court could not ascertain whether counsel in fact had consulted with defendant about the guilty plea. We reversed the trial court's judgment regarding Rule 604(d) compliance and remanded for "(1) appointment of counsel (if unrepresented), (2) the filing of new postplea motions (if defendant so desires), (3) a new hearing on defendant's postplea motions, and (4) strict compliance with the Rule 604(d) requirements." *People v. Beck*, 2013 IL App (4th) 130101-U, ¶ 19.

¶ 9 In October 2013, defense counsel filed an amended Rule 604(d) certificate, stating as follows:

"1. Counsel has consulted with the [d]efendant immediately following the plea of guilty and sentence by mail on

occasion to ascertain defendant's contentions of error in the sentence or the entry of the plea of guilty.

2. Counsel has examined the trial court file.

3. Counsel has examined the report of proceedings of the plea of guilty and sentencing.

4. Counsel has made any amendments to the [m]otion necessary for the adequate presentation of any defects in these proceedings.

5. Again, counsel has ascertained the [d]efendant's contention of error in the plea and the [d]efendant does not wish to contest any error in the plea of guilty or withdraw his plea of guilty. The [d]efendant wishes only to proceed on the error in sentencing and the contentions of error in the sentence are the subject of the [m]otion for [r]econsideration."

¶ 10 At the November 2013 hearing on the amended motion to reconsider, defense counsel again argued the allegations of the initial motion to reconsider and further noted, "defendant has also raised [the following] arguments himself, which I have, as counsel, included in the argument." These allegations included the following: (1) the trial court did not give any consideration to the testimony of defendant's family and friends or his statement in allocution; (2) he never should have been assigned the particular prosecutor who did not give him a fair alternative to the plea agreement and made a "prejudicial judgment" at the sentencing hearing; (3) he demonstrated rehabilitation since his incarceration; and (4) the MSR imposed violated his constitutional right against double jeopardy. The trial court denied the motion.

¶ 11 This appeal followed.

¶ 12 In February 2015, OSAD moved to withdraw as counsel, contending no meritorious issues could be raised on appeal. The record shows service of the motion on defendant. On its own motion, this court granted defendant leave to file additional points and authorities by April 2, 2015. Defendant has filed none. After carefully examining the record, we grant OSAD's motion to withdraw.

¶ 13 II. ANALYSIS

¶ 14 OSAD contends the record shows no meritorious argument can be raised on appeal. Specifically, OSAD concludes (1) the certificate filed by defense counsel complied with Illinois Supreme Court Rule 604(d) (eff. July 1, 2006); (2)(a) the trial court substantially complied with Illinois Supreme Court Rule 402 (eff. July 1, 1997), and (b) defendant's plea was made voluntarily; (3) the 12-year prison sentence was not excessive; (4) the trial court gave sufficient weight to the factors in mitigation; (5) no error resulted from the prosecutor; and (6) MSR is constitutional.

¶ 15 A. Defense Counsel's Rule 604(d) Certificate

¶ 16 OSAD maintains defense counsel's amended certificate strictly complied with the requirements of Illinois Supreme Court Rule 604(d) (eff. July 1, 2006) and, therefore, no colorable argument can be made the certificate was not in compliance. We agree.

¶ 17 As noted, this is the third time this case is before us. The first time, we remanded because defense counsel failed to file a Rule 604(d) certificate. The second time, we remanded for strict compliance with the rule.

¶ 18 Rule 604(d) states, in relevant part:

"The defendant's attorney shall file with the trial court a certificate

stating that the attorney has consulted with the defendant either by mail or in person to ascertain defendant's contentions of error in the sentence *or* the entry of the plea of guilty, has examined the trial court file and report of proceedings of the plea of guilty, and has made any amendments to the motion necessary for adequate presentation of any defects in those proceedings." (Emphasis added.)

¶ 19 Here, the first paragraph of counsel's amended certificate stated, "Counsel has consulted with the [d]efendant immediately following the plea of guilty and sentence by mail on occasion to ascertain defendant's contentions of error in the sentence *or* the entry of the plea of guilty." (Emphasis added.) By using the word "or," defense counsel did not clearly state he had consulted with defendant to ascertain his contentions of error in both the sentence and the guilty plea as required by *People v. Tousignant*, 2014 IL 115329, ¶ 20, 5 N.E.3d 176. However, the following additional paragraph in counsel's certificate cured the defect in the first paragraph and showed counsel performed the duties required under the rule:

"Again, counsel has ascertained the [d]efendant's contention of error in the plea and the [d]efendant does not wish to contest any error in the plea of guilty or withdraw his plea of guilty. The [d]efendant wishes only to proceed on the error in sentencing and the contentions of error in the sentence are the subject of the [m]otion for [r]econsideration."

¶ 20 Moreover, defendant is not entitled to a third remand. In *People v. Shirley*, 181 Ill. 2d 359, 692 N.E.2d 1189 (1998), the supreme court addressed the application of the Rule

604(d) certificate requirement in the context of a second postjudgment proceeding after an initial remand based on trial counsel's initial failure to comply strictly with the certificate requirement. The court rejected the premise the rule of strict compliance "must be applied so mechanically as to require Illinois courts to grant multiple remands and new hearings following the initial remand hearing." *Id.* at 369, 692 N.E.2d at 1194. Instead, if the defendant has received a full and fair opportunity to raise his claims of error in the entry of the plea or the sentence, or both, another remand is not required, absent a good reason to do so. *Id.* Thus, the court rejected the defendant's request for a second remand on the sole basis his trial counsel had filed the certificate late. The court examined the record and concluded, because there would be no point in providing the defendant with yet a third opportunity to argue his sentences were excessive (the trial court having rejected that contention twice already), another remand would be "an empty and wasteful formality." *Id.* at 370, 692 N.E.2d at 1195.

¶ 21 Here, defendant twice received a full and fair opportunity to raise his claims of error in the entry of the plea or sentence. Counsel certified he had reviewed the trial court file, the report of proceedings of the guilty plea, and the report of proceedings of the sentencing hearing. According to defense counsel's certificate, defendant chose not to raise any issues regarding the plea but instead chose to challenge his sentence. Counsel filed three motions to reconsider the sentence, the second and third of which contained additional allegations included at defendant's request. Based on a review of the record, we conclude defendant has received a full and fair opportunity to raise his claims of error and there is no reason to remand again.

¶ 22 Therefore, we agree with OSAD no colorable argument can be made regarding counsel's Rule 604(d) certificate.

¶ 23 B. The Plea Proceedings

¶ 24 OSAD next maintains, although defendant chose not to challenge the appropriateness or voluntariness of his guilty plea and, therefore, any potential issues in the plea proceedings were waived, no colorable argument can be made defendant was not properly admonished during the guilty plea hearing or his plea was not made voluntarily. We agree.

¶ 25 Illinois Supreme Court Rule 402(a) (eff. July 1, 2012) requires defendants to be advised of the (1) rights they are relinquishing by pleading guilty and (2) consequences of pleading guilty. The purpose of the admonishments is to guarantee a defendant understands his plea or stipulation, the rights he is waiving, and the consequences of pleading guilty. Rule 402(a) states:

"In hearings on pleas of guilty, or in any case in which the defense offers to stipulate that the evidence is sufficient to convict, there must be substantial compliance with the following:

(a) Admonitions to Defendant. The court shall not accept a plea of guilty or a stipulation that the evidence is sufficient to convict without first, by addressing the defendant personally in open court, informing him of and determining that he understands the following:

(1) the nature of the charge;

(2) the minimum and maximum sentence prescribed by law, including, when applicable, the penalty to which the defendant may be subjected because of prior convictions or consecutive sentences;

(3) that the defendant has the right to plead not guilty, or to

persist in that plea if it has already been made, or to plead guilty;
and

(4) that if he pleads guilty there will not be a trial of any kind, so that by pleading guilty he waives the right to a trial by jury and the right to be confronted with the witnesses against him; or that by stipulating the evidence is sufficient to convict, he waives the right to a trial by jury and the right to be confronted with any witnesses against him who have not testified." Illinois Supreme Court Rule 402(a) (eff. July 1, 1997).

¶ 26 In the case *sub judice*, a jury was in place when defense counsel advised the trial court defendant wanted to enter into an open plea. The court wanted to assure itself of defendant's desire to plead guilty before releasing the jury. The court admonished defendant (1) he was charged with aggravated battery with a firearm; (2) the charge was a Class X felony, which was nonprobationable and carried a sentencing range of 6 to 30 years in prison to be served at 85% and followed by 3 years of MSR; (3) he had a right to a jury trial and, in fact, a jury had been empaneled to hear his case; (4) he had a right to a bench trial; (5) he was presumed innocent until proved guilty beyond a reasonable doubt; (6) he could testify on his own behalf, subpoena witnesses, and confront and cross-examine the State's witnesses; and (7) if he pleaded guilty, he would be admitting his guilt and giving up his right to a trial of any kind. Defendant indicated he understood these admonitions.

¶ 27 Illinois Supreme Court Rule 402(b) (eff. July 1, 2012) states:

"The court shall not accept a plea of guilty without first determining that the plea is voluntary. If the tendered plea is the

result of a plea agreement, the agreement shall be stated in open court. The court, by questioning the defendant personally in open court, shall confirm the terms of the plea agreement, or that there is no agreement, and shall determine whether any force or threats or any promises, apart from a plea agreement, were used to obtain the plea."

¶ 28 In this case, a jury had already been empaneled. Consequently, the trial court took extra steps to make sure defendant wanted to plead guilty. The court determined defendant understood (1) the nature of an open plea, *i.e.*, there was no agreement regarding the sentence to be imposed; (2) the nature of a sentencing hearing; (3) he would not be sentenced immediately; (4) any previous plea offers were no longer available; (5) the case was ready to proceed to trial; and (6) he had an absolute right to proceed to trial. The court further determined defendant (1) could read, write, and understand English; (2) had never been in a mental institution or under the care of a psychiatrist; (3) was not under the care of a doctor or taking any medications; and (4) had not been bullied, threatened, or otherwise coerced into pleading guilty. Further, defendant repeatedly assured the court he wanted to enter into an open plea rather than proceed with the jury trial.

¶ 29 Illinois Supreme Court Rule 402(c) (eff. July 1, 2012) requires the trial court to find there is a factual basis for a guilty plea before entering a final judgment on a plea of guilty.

¶ 30 Here, the parties stipulated to the following factual basis: "[O]n July 10th, 2010, an individual, who would be identified as the [d]efendant *** arrived outside of the apartment building at 1546 East Cornell, Springfield, Sangamon County, Illinois. He was also identified as the person who pulled a handgun, fired that handgun. Shots were fired, struck a victim, Curtis

Washington, twice in the abdomen, once in the back, went through his arm. He would be identified by Curtis Washington, and Kelia Beck[,] and Lakeshia Washington."

¶ 31 We agree with OSAD no colorable argument can be made the plea proceedings were inadequate or defendant did not enter his plea voluntarily.

¶ 32 C. The 12-Year Sentence

¶ 33 Defendant mainly argues his sentence to a 12-year term of imprisonment for shooting someone was so excessive it violated the eighth amendment prohibition against cruel and unusual punishment. U.S. Const., amend. VIII. However, OSAD maintains no colorable argument can be made the trial court abused its discretion when sentencing defendant. We agree.

¶ 34 A trial court has broad discretionary powers in determining an appropriate sentence for a defendant. *People v. Jones*, 168 Ill. 2d 367, 373, 659 N.E.2d 1306, 1308 (1995). This is because the trial court is better able to assess the credibility of witnesses and to weigh evidence presented during the sentencing hearing. *Id.* (citing *People v. Younger*, 112 Ill. 2d 422, 427, 494 N.E.2d 145, 147 (1986)). "The trial court must base its sentencing determination on the particular circumstances of each case, considering such factors as the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age." *People v. Fern*, 189 Ill. 2d 48, 53, 723 N.E.2d 207, 209 (1999) (citing *People v. Streit*, 142 Ill. 2d 13, 19, 566 N.E.2d 1351, 1353 (1991); *People v. Perruquet*, 68 Ill. 2d 149, 154, 368 N.E.2d 882, 884 (1977)).

¶ 35 Where the sentence imposed by the trial court falls within the statutory range permissible for the offense, a reviewing court will disturb the sentence only if the trial court abused its discretion. *Jones*, 168 Ill. 2d at 373-74, 659 N.E.2d at 1308. An abuse of discretion

exists where the sentence imposed is "greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense." *Fern*, 189 Ill. 2d at 54, 723 N.E.2d at 210. The spirit and purpose of the law are upheld when the sentence imposed reflects the seriousness of the offense and gives adequate consideration to the defendant's rehabilitative potential. *People v. Murphy*, 72 Ill. 2d 421, 439, 381 N.E.2d 677, 686 (1978).

¶ 36 Here, defendant pleaded guilty to aggravated battery with a firearm, a Class X felony (720 ILCS 5/12-4.2(b) (West 2010)), which is nonprobationable and has a sentencing range of 6 to 30 years in prison. 730 ILCS 5/5-4.5-25(a) (West 2010). Therefore, the 12-year sentence was at the lower end of the potential range the court could have imposed.

¶ 37 Defendant admitted he shot Curtis Washington in the abdomen, back, and arm with a handgun. The presentence investigation report (PSI) showed defendant was 24 years old at the time of sentencing. He had nine misdemeanor convictions, five prior felony convictions, and two prior terms of imprisonment. Among those convictions was a prior aggravated battery. He had previously failed at probation, having committed other crimes while on probation. Further, at the time defendant committed the instant offense, he had only recently completed a term of MSR and, as a felon, could not legally possess a firearm.

¶ 38 Prior to sentencing, the trial court indicated it had reviewed and considered the following: (1) the PSI; (2) the trial court file, which included letters from family and friends on defendant's behalf; (3) defendant's statement in allocution; and (4) the factors in aggravation and mitigation. The court also noted there "were special circumstances involving close family members [*sic*] and [d]efendant perceived this person to be in danger." However, the court also recognized the "serious nature of the offense" and "a minimum sentence would belie the serious nature of this offense." The court stated, "The [d]efendant[,] for a short period of time[,] has

created quite a body of work [and defendant had] quite a criminal history for a person [his] age."

The court further noted defendant's failures on probation.

¶ 39 Considering the seriousness of the offense, defendant's illegal possession and use of a handgun, and defendant's extensive criminal history, the 12-year sentence cannot be viewed as excessive, nor in violation of the eighth amendment prohibition against cruel and unusual punishment. Therefore, we agree with OSAD no colorable argument can be made the trial court abused its discretion at sentencing.

¶ 40 D. The Trial Court's Sentencing Considerations

¶ 41 OSAD acknowledges the argument defendant made in his postsentencing motion to the effect the trial court failed to give sufficient weight to (1) his rehabilitative capacity, (2) the testimony in mitigation, (3) the letters from family and friends on defendant's behalf, and (4) his statement in allocution. However, OSAD maintains the court gave sufficient weight to defendant's rehabilitative potential and the factors in mitigation. We agree.

¶ 42 When a defendant pleads guilty, the trial court must admonish him regarding the minimum and maximum sentence prescribed by law, including the applicable MSR term. Illinois Supreme Court Rule 402(a)(2) (eff. July 1, 1997); *People v. Whitfield*, 217 Ill. 2d 177, 195, 840 N.E.2d 658, 669 (2005). Here, the record shows defendant entered an open plea of guilty. At the plea hearing, after the trial court admonished defendant his case was nonprobationable and carried a potential prison sentence of 6 to 30 years, the court advised defendant, "with regard to any prison stay, you understand that at the end of that prison stay you would be made to serve a term of three years [of MSR], right?" Defendant asserted he understood the court's admonishment. Therefore, the court met the requirements of Rule 402(a)(2) before accepting defendant's plea.

¶ 43 Article I, section 11, of the Illinois Constitution provides, "All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const.1970, art. I, § 11. However, rehabilitative potential is not entitled to greater weight than the seriousness of the offense. *People v. Coleman*, 166 Ill. 2d 247, 261, 652 N.E.2d 322, 329 (1995). Moreover, the existence of mitigating factors does not require the court to reduce a sentence from the maximum allowed. *People v. Payne*, 294 Ill. App. 3d 254, 260, 689 N.E.2d 631, 635 (1998).

¶ 44 In the case *sub judice*, the trial court heard the evidence presented in mitigation by way of witness testimony, letters written on defendant's behalf, and defendant's statement in allocution where he (1) accepted responsibility for his actions, (2) discussed the State constitutional requirement that sentences be determined by considering the seriousness of the offense and the individual's rehabilitative potential, and (3) argued he should get the minimum sentence since the injuries sustained by Washington were not life-threatening. When mitigating factors are presented to the court, a presumption exists it considered them. *Id.* Here, the court stated it had considered all appropriate factors in mitigation and aggravation. Further, the court noted it had considered the PSI. A trial court that examines a PSI is presumed to have considered the defendant's potential for rehabilitation. *People v. Babiarz*, 271 Ill. App. 3d 153, 164, 648 N.E.2d 137, 146 (1995).

¶ 45 Nothing in the record suggests the trial court failed to consider any appropriate mitigating factor or defendant's rehabilitative potential. Notably, defendant's sentence is at the lower end of the 6- to 30-year sentencing range. Consequently, we agree with OSAD no colorable argument can be made the trial court did not afford the mitigating factors sufficient weight.

¶ 46

E. The Prosecutor Assigned to This Case

¶ 47

OSAD acknowledges defendant's contention in his motions to reconsider his sentence that the prosecutor created error in this case but maintains no colorable argument can be made the prosecutor caused any error in the proceedings. We agree.

¶ 48

At the third hearing on the motion to reconsider the sentence, defense counsel stated:

"[D]efendant alleges, that he never should have been assigned to the particular prosecutor. The prosecutor did not give him a fair alternative to the plea agreement and defendant claims that the prosecutor made a prejudicial judgment at sentencing. Prosecutor stated that the motions in the sentencing hearing were not relevant but that the defendant thought they were."

¶ 49

Regarding defendant's first allegation, like OSAD, we could find no authority to support the notion criminal defendants have a right to choose the prosecuting attorneys who will be assigned to their cases.

¶ 50

Regarding defendant's second contention, a defendant has no constitutional right to be offered the opportunity to plea bargain. *People v. Palmer*, 162 Ill. 2d 465, 476-77, 643 N.E.2d 797, 802 (1994); *People v. Crenshaw*, 2012 IL App (4th) 110202, ¶ 13, 974 N.E.2d 1002.

¶ 51

Regarding defendant's third allegation, defendant did not explain what the prosecutor did or said that constituted a "prejudicial judgment at sentencing." Like OSAD, our review of the sentencing hearing revealed nothing to support the allegation. Therefore, we agree with OSAD no colorable argument can be made the prosecutor caused any error in this case.

¶ 52

F. MSR is Constitutional

¶ 53 Last, OSAD acknowledges defendant's allegation in his amended motion to reconsider his sentence that MSR is unconstitutional because it violates double-jeopardy principles. OSAD maintains no colorable argument can be made MSR violates double-jeopardy principles. We agree.

¶ 54 In his amended motion to reconsider his sentence, defendant argued MSR is unconstitutional because it violates double-jeopardy principles where defendant's actual custody will exceed his 12-year sentence because 12 years served at 85% plus 3 years of MSR will equal 13 years in custody. Defendant cited no authority for this argument. OSAD could find no authority to support the argument MSR violates double jeopardy when the number of years one remains in custody, including imprisonment and MSR, exceeds the term of imprisonment. As OSAD points out, such an argument supposes MSR is not part of the court's ultimate sentence, but rather imposition of MSR constitutes a separate and distinct punishment for a single crime. In *People v. Lee*, 2012 IL App (4th) 110403, ¶ 32, 979 N.E.2d 992, this court held such an argument has no merit:

"Since *People ex rel. Scott v. Israel*, 66 Ill. 2d 190, 194, 361 N.E.2d 1108, 1109 (1977), it has been axiomatic that a 'sentence to a mandatory parole is part of the original sentence by operation of law.' MSR is a mandatory part of a criminal sentence. 730 ILCS 5/5-8-1(d) (West 1998). Defendant's contentions an MSR violation may result in a second term of imprisonment were rejected in *Israel*. There, the supreme court stated this is not a second sentence and what causes a defendant's recommitment to prison is the defendant's violation of his parole conditions. *Israel*,

66 Ill. 2d at 194, 361 N.E.2d at 1109. Defendant's prison term and MSR are a part of the same sentence, not two different sentences."

Here, defendant cannot argue he was sentenced or imprisoned twice for the same crime.

Therefore, no violation of the double-jeopardy clause occurred.

¶ 55

III. CONCLUSION

¶ 56

For the reasons stated, we grant OSAD's motion to withdraw and affirm the trial court's judgment.

¶ 57

Affirmed.