

NOTICE  
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2015 IL App (5th) 130460-U

NO. 5-13-0460

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	St. Clair County.
	)	
v.	)	No. 05-CF-73
	)	
CURTIS J. RICHARD,	)	Honorable
	)	John Baricevic,
Defendant-Appellant.	)	Judge, presiding.

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JUSTICE STEWART delivered the judgment of the court.  
Justice Goldenhersh concurred in the judgment.  
Justice Welch dissented.

**ORDER**

¶ 1 *Held:* The circuit court's failure to correctly admonish the defendant regarding the minimum sentence constitutes plain error.

¶ 2 The defendant, Curtis J. Richard, appeals the denial of his motion to withdraw his guilty plea. He argues that his plea was not knowing and voluntary because the circuit court incorrectly admonished him regarding the minimum sentence he faced. We reverse.

¶ 3 **BACKGROUND**

¶ 4 On February 4, 2005, the defendant was indicted for the first-degree murder of

Ronald Curtis. The State subsequently filed notice of its intent to seek an enhanced sentence of natural life imprisonment based on the fact that the offense had been committed during the course of an armed robbery.

¶ 5 On July 13, 2006, the defendant entered a negotiated plea of guilty to first-degree murder. In exchange for the defendant's guilty plea, the State agreed to forego seeking a natural life sentence and to request a sentence in the range of 20 to 55 years' imprisonment. The sentence cap was five years below the maximum possible sentence. In admonishing the defendant pursuant to Illinois Supreme Court Rule 402(a) (eff. July 1, 1997), the trial court stated: "I could sentence you to a period of time in the Illinois Department of Corrections for from 20 to 60 years." According to the factual basis for the plea, the victim, Ronald Curtis, had been shot twice in the chest with a .38-caliber handgun, and the defendant had given a videotaped statement to police wherein he admitted shooting Curtis and taking his wallet. There were no witnesses to the shooting; however, two witnesses would testify to seeing someone matching the defendant's description close to the victim immediately following the shooting. The court accepted the defendant's guilty plea, ordered a presentence investigation, and set the cause for sentencing.

¶ 6 A sentencing hearing was held on September 8, 2006. The State requested a sentence of 55 years' imprisonment. Plea counsel argued for a sentence in the "low end" of the sentencing range. The court sentenced the defendant to 55 years' imprisonment, finding that such a sentence was necessary for the protection of the public and to deter others.

¶ 7 On October 5, 2006, the defendant filed a motion to withdraw his guilty plea alleging that his plea was involuntary and that the trial court was biased against him and had predetermined the sentence. At the hearing on the motion, the defendant focused his argument on whether the court abused its discretion in sentencing him to 55 years' incarceration. The trial court denied the motion to withdraw the guilty plea and "any oral motion to reduce sentence." The defendant appealed, and this court vacated the order denying the motion to withdraw the plea and remanded the cause to the trial court because counsel failed to file a certificate of compliance with Illinois Supreme Court Rule 604(d) (eff. July 1, 2006). *People v. Richard*, No. 5-07-0004 (2008) (unpublished order under Supreme Court Rule 23).

¶ 8 On remand, the defendant filed an amended motion to withdraw his guilty plea, which he subsequently amended twice. In his third amended motion to withdraw his guilty plea, the defendant argued that his guilty plea was involuntary because he had not been properly admonished by the trial court of his rights upon entering the guilty plea and the plea was made under "ignorance, misapprehension and misunderstanding" by the defendant of the law, facts, plea and its consequences, and the legality of the sentence imposed. He further argued that he had been denied the effective assistance of plea counsel.

¶ 9 At the hearing on the defendant's third amended motion to withdraw his guilty plea, the defendant testified that plea counsel told him that the sentencing range pursuant to the plea agreement was 20 to 55 years and that he accepted the agreement because counsel assured him that he would receive a sentence in the low end of the range given

the absence of violence in his criminal history. He stated that he believed the low end would be 20 to 30 years' imprisonment.

¶ 10 Plea counsel testified that the defendant's videotaped confession was a crucial piece of evidence against him. After viewing this piece of evidence with the defendant and his mother, plea negotiations were discussed. Plea counsel testified that he never promised the defendant a specific sentence. He discussed the sentencing range with the defendant and told him that he felt a sentence of 55 years' imprisonment would be unlikely. He stated that he told the defendant that 40 years' imprisonment was a realistic range but that he hoped the sentence would be between 20 and 30 years' incarceration.

¶ 11 The court denied the motion to withdraw the guilty plea. This court again vacated the trial court's order denying the defendant's motion to withdraw his guilty plea and remanded the cause to the trial court because counsel's certificate of compliance with Rule 604(d) was defective. *People v. Richard*, 2012 IL App (5th) 100302.

¶ 12 On remand, the defendant filed a fourth amended motion to withdraw his guilty plea that included a complaint that the plea "was made under ignorance, misapprehension and misunderstanding by the [defendant] of the law, facts, the Plea and its consequences, and the legality of the sentence actually imposed." At the hearing thereon, the defendant elected to stand on the transcript of the hearing on the third amended motion and not provide any further evidence or argument. The trial court denied his fourth amended motion to withdraw his guilty plea, and this appeal followed.

¶ 13 ANALYSIS

¶ 14 The defendant argues that his guilty plea was not knowing and voluntary because

the trial court admonished him that the sentencing range was between 20 and 60 years' imprisonment when in fact the minimum sentence he could receive was 45 years because of the mandatory 25-year add-on required by section 5-8-1(a)(1)(d)(iii) of the Unified Code of Corrections, which provides that 25 years shall be added to any sentence imposed where the defendant personally discharges a firearm during the commission of an offense. 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2004).

¶ 15 When the defendant filed a motion to withdraw his guilty plea based upon the fact that he was under a misapprehension of the law, he did not raise the issue that the trial court admonished him incorrectly as to his possible minimum sentence. Rule 604(d) provides that "any issue not raised by the defendant in the motion to reconsider the sentence or withdraw the plea of guilty and vacate the judgment shall be deemed waived" on appeal. Ill. S. Ct. R. 604(d) (eff. Feb. 6, 2013). Supreme Court Rule 402(a)(2) provides that the court shall not accept a guilty plea without first informing the defendant of and determining that he understands the minimum and maximum sentence prescribed by law. If a lower court fails to give the admonishments required by Rule 402, that failure can amount to plain error, an exception to the waiver rule. *People v. Davis*, 145 Ill. 2d 240, 250 (1991).

¶ 16 "[T]he plain-error doctrine allows a reviewing court to consider unpreserved error when (1) a clear or obvious error occurs and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurs and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the

judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). The circuit court erred in admonishing the defendant that the minimum sentence he could receive was 20 years' imprisonment. The issue is whether this error is so serious that it affected the fairness of the judicial process.

¶ 17 Due process of law requires that a defendant's guilty plea be voluntary and knowing, and if it is not, it has been obtained in violation of due process and, therefore, is void. *People v. Williams*, 188 Ill. 2d 365, 370 (1999). An improper admonishment alone does not automatically establish grounds for reversing the judgment or vacating the plea. *Davis*, 145 Ill. 2d at 250. "Whether reversal is required depends on whether real justice has been denied or whether defendant has been prejudiced by the inadequate admonishment." *Id.*

¶ 18 The State argues that *People v. Torres*, 228 Ill. 2d 382 (2008), controls. In *Torres*, the defendant filed a postconviction petition alleging that he did not understand the consequences of his blind plea, that his attorney left the courtroom following the sentencing hearing without speaking to him, and that he did not know he had the right to appeal and to have the court reconsider his sentence. *Id.* at 390-91. He also filed a motion to withdraw his guilty plea and to vacate his sentence. *Id.* The trial court dismissed his postconviction petition as frivolous and patently without merit and denied his motion to withdraw the guilty plea as untimely. *Id.* The defendant appealed, and the appellate court found that he stated the gist of a constitutional claim of ineffective assistance of counsel. *Id.* at 392. The supreme court addressed whether the "defendant's postconviction petition claim—that his attorneys were ineffective for failing to consult

with him about an appeal—should have been summarily dismissed by the trial court based on the facts presented." *Id.* at 393.

¶ 19 For the first time before the supreme court, the defendant argued that he had a nonfrivolous ground for appeal because the trial court incorrectly admonished him about the possible minimum sentence, and his trial attorney should have known that he was incorrectly admonished. *Id.* at 398. The trial court admonished the defendant that the sentencing range was 20 to 60 years' imprisonment when the statutory minimum available in his case was actually 45 years' imprisonment because he discharged a firearm that caused the death of another, requiring the addition of 25 years to the sentence. *Id.* The court noted that to the extent that the defendant attempted to raise the admonishment issue as an independent claim apart from the duty-to-consult issue, it was forfeited because the admonishment issue was not raised in the defendant's postconviction petition, nor was it raised in the appellate court. *Id.* at 399. The court examined the issue only in the context of whether counsel had a duty to consult with the defendant about an appeal because the incorrect admonishment amounted to a nonfrivolous ground for an appeal that a rational defendant would have wanted to raise under the circumstances. *Id.* The defendant argued that the trial court should have added 25 years to the sentencing range, making his sentence 70 years' imprisonment, and because the court should have added 25 years, it should have admonished him that it would add 25 years to the 20- to 60-year sentencing range. *Id.* at 401. The court found that there was no merit to this argument as the trial court did not add or even consider the 25 years that the defendant complained about. *Id.* The defendant was sentenced to 45 years' imprisonment, which the court

found was well within the 20 to 60 years' sentencing range the court admonished him about. *Id.* at 399-400. The court found that the issue was frivolous and without merit. *Id.* at 399.

¶ 20 *Torres* is distinguishable. It involved a postconviction petition alleging ineffective assistance of counsel and was analyzed in that context. In the instant case, the issue is not ineffective assistance of counsel but whether the defendant's guilty plea was knowing and voluntary where the trial court incorrectly admonished him as to the minimum sentence he could receive.

¶ 21 Numerous court decisions have held that a misapprehension by the defendant as to sentencing alternatives may render a guilty plea involuntary if the defendant was unaware of the possible punishment. *Davis*, 145 Ill. 2d at 249. In *Davis*, the defendant was charged with residential burglary and burglary. *Id.* at 243. The defendant was advised that he was eligible for the Treatment Alternatives to Street Crimes (TASC) program. *Id.* at 245. He pleaded guilty to burglary, and the other charge was dismissed. *Id.* at 243. There was no agreement as to the sentence to be imposed. *Id.* The court admonished the defendant that the possible sentence could range from probation to an extended-term sentence. *Id.* at 247. At the defendant's request, the court ordered an evaluation of his qualifications for the TASC program. *Id.* at 243. After the plea hearing and three days before sentencing, the defendant learned he was not eligible for the TASC program due to his criminal record. *Id.* at 245. The defendant was sentenced to 10 years' imprisonment, and he filed a motion to withdraw his guilty plea, which was denied. *Id.* at 243.



¶ 22 Both parties acknowledged that the purpose of the plea agreement was to enable the defendant to seek treatment in a TASC program without foreclosing the State from being able to seek an extended-term prison sentence. *Id.* at 245. Instead of focusing solely on the defendant's understanding at the time of the plea, the supreme court based its decision substantially on the fact that the trial court incorrectly admonished the defendant. *Id.* at 247. Due to his criminal record, the defendant was not eligible for probation or a TASC program, and the trial court never explained to the defendant that he faced a mandatory prison sentence. *Id.* at 248. The supreme court found that it was likely that the defendant never fully understood the range of penalties he was subject to at the time of the plea. *Id.* While the defendant did not raise the improper admonishment in his motion to withdraw his guilty plea, the court found that because of the gravity of the error, and in the interests of justice, the issue was not waived. *Id.* at 251. The court held that the defendant's misapprehension as to his eligibility for the TASC program coupled with the fact that the trial court gave incorrect admonishments, which led the defendant to believe he would be eligible for a sentence other than incarceration, amounted to plain error on the part of the trial court. *Id.*

¶ 23 In *People v. Tripp*, the defendant pleaded guilty to two counts of theft and four counts of murder in the deaths of two different victims. *People v. Tripp*, 248 Ill. App. 3d 706, 707 (1993). At the plea hearing, the court was informed that, in exchange for the defendant's guilty plea, the State had agreed to waive the death penalty. *Id.* at 708. The trial court admonished the defendant that he could be sentenced to a determinate term of 20 to 40 years' imprisonment or an extended term of 40 to 80 years' imprisonment and

that the maximum possible sentence was natural life imprisonment. *Id.* The court accepted the defendant's plea. *Id.* The defendant appeared at the sentencing hearing prepared to present evidence in aggravation and mitigation. *Id.* at 709. At some point between the plea hearing and the sentencing hearing, the trial court discovered that the statute provided a mandatory term of natural life imprisonment, and the defendant was sentenced accordingly. *Id.* He filed a postconviction petition alleging that his pleas were involuntarily entered because he was never properly admonished that the minimum sentence for multiple murders was mandatory life imprisonment. *Id.* at 707. At the evidentiary hearing, the defendant testified that he would not have pleaded guilty had he known the minimum mandatory term was natural life imprisonment. *Id.* at 710. He admitted that the court had advised him that the maximum possible penalty was natural life imprisonment, but he did not learn until the sentencing hearing that it was also the minimum sentence. *Id.* The defendant's postconviction petition was denied, and he appealed. *Id.* at 707-08.

¶ 24 The defendant argued that the court's improper admonishment severely prejudiced him because he would not have pleaded guilty had he known that he would spend the rest of his life in the penitentiary. *Id.* at 713. He further asserted that the court's failure to advise him of the minimum sentence prescribed by law rendered his plea involuntary. *Id.* The State argued that, notwithstanding the erroneous admonishment, the trial court substantially complied with the rule because the defendant received the benefit of the plea bargain he made with the State. *Id.* It argued that, because the defendant was told that the maximum possible sentence was natural life imprisonment, he could not claim

unfairness or surprise by the imposition of that sentence. *Id.*

¶ 25 The appellate court noted that it was not a "benefit of the bargain" case. *Id.* at 714. Instead, it was an improper-admonishment case in which the defendant alleged error on the part of the court and counsel for their failure to advise him of the minimum penalty that must be imposed when he pleaded guilty. *Id.* "The purpose of the requirement to advise defendant of the maximum and minimum penalty which can be imposed is to ensure that defendant makes a voluntary and intelligent decision by understanding all the possible consequences of his decision." *Id.* at 715. The court held that when a defendant had been advised that the minimum sentence he may receive is less than what it actually is, he cannot be deemed to have made an intelligent decision because the range of possible penalties is greater than he believed. *Id.*

¶ 26 In the instant case, the defendant received an erroneous admonishment. The trial court admonished him that he faced a possible sentence of from 20 to 60 years' imprisonment when in fact the mandatory minimum sentence for first-degree murder through the personal discharge of a firearm is 45 years. 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2004). The defendant testified that he accepted the plea agreement because his attorney told him he would get the low end of the sentence range, meaning between 20 and 30 years' imprisonment. At the sentencing hearing, defense counsel requested a sentence of 20 years' imprisonment. Because the trial court never explained that the mandatory minimum prison sentence the defendant faced was 45 years' imprisonment, it was likely that he never fully understood the range of penalties he was subject to at the time of his plea. The defendant's misapprehension as to his eligibility for a sentence as

low as 20 years' imprisonment coupled with the fact that the trial court gave an erroneous admonishment led the defendant to believe he would be eligible for a sentence of less than 45 years' imprisonment. Because the defendant was advised that the minimum sentence he could receive was less than what it actually was, he could not have understood all the possible consequences of his decision, and his plea was not a voluntary and intelligent decision. The trial court's improper admonishment constituted plain error because it was an error so serious that it affected the fairness of the judicial process.

¶ 27 In light of the foregoing, the defendant's murder conviction cannot stand. We reverse the order of the circuit court of St. Clair County denying the defendant's motion to withdraw his guilty plea; we vacate the defendant's murder conviction and remand this cause to the circuit court with directions that the defendant be allowed to plead anew.

¶ 28 Reversed; murder conviction vacated and cause remanded with directions.

¶ 29 JUSTICE WELCH, dissenting.

¶ 30 I respectfully dissent from the decision of my distinguished colleagues.

¶ 31 The defendant pled guilty in 2006 and, over the next eight years, filed numerous motions to withdraw his guilty plea and has been before this court twice. Despite these many opportunities, he never before alleged that his plea was not knowing and voluntary because the circuit court failed to admonish him that he faced a minimum sentence of 45 years' imprisonment, a claim he raises now for the first time in the present appeal. The defendant argues, and the majority concludes, that the circuit court's incorrect

admonishment regarding the minimum sentence constitutes plain error. I disagree.

¶ 32 The plain error rule is a limited exception which allows the reviewing court to consider unpreserved claims of error where a clear or obvious error has occurred, and (1) the evidence is so closely balanced that review is necessary to preclude the argument that an innocent person has been convicted, or (2) the alleged error is so egregious that it affected the fundamental fairness of the proceeding and remedying the error is necessary to preserve the integrity of the judicial process. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007) (citing *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005)). It "is not 'a general saving clause preserving for review all errors affecting substantial rights whether or not they have been brought to the attention of the trial court.' " *Herron*, 215 Ill. 2d at 177 (quoting *People v. Precup*, 73 Ill. 2d 7, 16 (1978)).

¶ 33 The defendant pled guilty in exchange for the State's promise to forego seeking a natural life sentence and to seek a sentence of no more than 55 years' imprisonment. The parties and the court proceeded at the sentencing hearing on the understanding that the sentencing range was between 20 and 55 years. The court sentenced the defendant to 55 years based on his criminal history, as well as the need to deter others and protect the public. In exchange for a sentence that was only 10 years above the statutory minimum, the defendant avoided a sentence of natural life. Had the circuit court admonished the defendant that the minimum sentence was 45 years, it is unlikely that he would have rejected the plea agreement and gone to trial where (1) plea counsel had already told him that a sentence in the 40-year range was likely if he pled guilty, (2) an acquittal was unlikely given the damning nature of his confession, (3) a conviction would have exposed

him to a sentence of natural life, and (4) even if he did not receive a life sentence, his criminal history made a sentence of less than 55 years unlikely. Under these circumstances, I cannot conclude that the circuit court's incorrect admonition is so egregious an error that it affected the fundamental fairness of the proceeding, and that allowing the defendant to withdraw his plea is necessary to preserve the integrity of the judicial process. For this reason, I dissent.