

NOTICE  
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2015 IL App (5th) 140064-U

NO. 5-14-0064

IN THE

APPELLATE COURT OF ILLINOIS

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).

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	St. Clair County.
	)	
v.	)	No. 11-CF-584
	)	
ROBERT CHAVEZ,	)	Honorable
	)	John Baricevic,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE STEWART delivered the judgment of the court.  
Justices Welch and Moore concurred in the judgment.

**ORDER**

¶ 1 *Held:* Where no meritorious argument can be made in support of the defendant's appeal, the Office of State Appellate Defender's motion to withdraw as counsel is granted, and the judgment of the circuit court is affirmed.

¶ 2 The defendant, Robert Chavez, appeals the circuit court's denial of his motion to reconsider his sentence. The Office of State Appellate Defender (OSAD) has been appointed to represent him. OSAD has filed a motion with an attached memorandum pursuant to *Anders v. California*, 386 U.S. 738 (1967), alleging that there is no merit to the appeal and requesting leave to withdraw as counsel. See *McCoy v. Court of Appeals*, 486 U.S. 429 (1988). The defendant was given proper notice and time to file briefs,

objections, or any other documents supporting his appeal. He has not filed a response. We have considered OSAD's motion to withdraw and the attached memorandum. We have examined the entire record on appeal and find no error or potential grounds for appeal. For the following reasons, we now grant the OSAD's motion to withdraw as counsel, and we affirm the judgment of the circuit court of St. Clair County.

¶ 3

### BACKGROUND

¶ 4 On October 14, 2011, the defendant pled guilty to violating an order of protection in contravention of section 12-30(a)(1) of the Criminal Code of 1961 (720 ILCS 5/12-30(a)(1) (West 2010)). Because the defendant had a prior conviction for violating an order of protection, the charge was a Class 4 felony.

¶ 5 The State and the defendant entered into a plea agreement wherein the defendant agreed to plead guilty to count I, as well as counts II and III from another case, case number 11-CF-759, in exchange for the State's dismissal of count II in the instant cause, and count I in case number 11-CF-759. The parties did not agree on an appropriate sentence.

¶ 6 At the guilty plea hearing, the assistant State's attorney described the nature of the charges and gave a detailed statement of facts for each charge. When the court asked defense counsel whether he concurred with the factual basis as recited by the State, counsel stated that he stipulated to the fact that the defendant had made phone calls and sent text messages to the victim on April 26, 2011, and May 2, 2011, but with respect to the other facts alleged by the State, counsel declined to stipulate. The court did not inform the defendant of the nature of the charges, as required by Illinois Supreme Court

Rule 402(a)(1) (eff. July 1, 1997), but did otherwise admonish the defendant according to Rule 402(a)(2) through (a)(4). Throughout the plea hearing, the defendant acknowledged that he understood the court's admonishments. The court informed the defendant that he could be subject to an extended-term sentence of up to six years in prison and four years of mandatory supervised release. The defendant pled guilty.

¶ 7 At the sentencing hearing, the victim testified that the defendant had harassed and stalked her, terrorized her, sent threatening text messages and made threatening phone calls to her, and made her fear for her life. The State also admitted into evidence court records from case number 92-CF-1314, in which the defendant had been convicted of felony criminal damage to property. The victim in that case, Loretta Bunyard, testified that the defendant started stalking her daughter, broke into peoples' homes in an effort to intimidate Bunyard and her daughter, and deliberately ran his vehicle into Bunyard's vehicle while Bunyard's daughter was driving it. While the defendant was charged with felony criminal damage to property, he was not charged with stalking Bunyard's daughter.

¶ 8 The defendant presented two witnesses who testified that he had created and maintained an Alcoholics Anonymous (AA) group in the St. Clair County jail while incarcerated. The defendant's AA sponsor testified as to the defendant's alcohol dependence. The defendant's sister testified that the defendant had supportive family members who would give him a place to stay should he be released.

¶ 9 The defendant made a statement of allocution, wherein he admitted that he had engaged in the conduct with which he had been charged, that he took responsibility for

that conduct, and that he was sorry for it. The court sentenced the defendant to five years in prison on each count, to run concurrently, and four years of mandatory supervised release.

¶ 10 Following the sentencing hearing, the defendant filed a motion to reduce or modify his sentence, arguing that the court did not consider the defendant's history, factors in mitigation, and sentencing alternatives when it sentenced him. He also filed a motion to withdraw his guilty plea, asserting that he did not understand the court's admonishments when he pled guilty.

¶ 11 The court held a hearing on both motions on March 19, 2012. The defendant voluntarily withdrew his motion to withdraw his guilty plea, but proceeded on the motion to reduce or modify his sentence. Defense counsel argued that the defendant's sentence should be reduced from five years to three years in prison because the five-year sentence was not in keeping with the defendant's past history of criminality, occupational or personal habits, mental history, family situation, economic status or education, and other mitigating factors. The court denied the motion.

¶ 12 At no time did defense counsel file a certificate pursuant to Illinois Supreme Court Rule 604(d) (eff. July 1, 2006). The defendant filed a notice of appeal. The defendant's appellate counsel filed a motion for summary remand in that appeal, arguing that trial counsel did not comply with the requirements of Rule 604(d). The State confessed error, this court granted the motion, and remanded the case for the filing of a Rule 604(d) certificate, the filing of any new motions the defendant wanted to file, and a new hearing on those motions. See *People v. Chavez*, 2013 IL App (5th) 120183-U.

¶ 13 On remand, the defendant's new defense counsel filed the required Rule 604(d) certificate. The defendant did not file a new motion to reduce or reconsider his sentence, but on January 16, 2014, the circuit court held a hearing on the original motion.

¶ 14 At that hearing, defense counsel argued that the testimony of Bunyard was improperly considered and was irrelevant because it had happened 20 years prior. Counsel also argued that prior to this case, the defendant had gone 10 years without committing a felony in St. Clair County, and that the court did not consider the defendant's rehabilitative potential. The State responded that Bunyard's testimony was relevant because it showed that the defendant had committed similar acts in the past, and that he had committed offenses outside of St. Clair County during the 10-year period.

¶ 15 The defendant gave a statement that his prior defense counsel had told him that a five-year sentence "was just not going to happen," and that he would probably be sentenced to two or three years. The court denied the motion to reconsider or reduce sentence. From that order, the defendant appeals.

¶ 16 ANALYSIS

¶ 17 In its motion to withdraw as counsel on appeal, OSAD listed five possible issues that could be presented on appeal, but contends that those issues are without merit. We review those issues below.

¶ 18 The first issue OSAD identified is whether the court's failure to give the defendant the Rule 402(a)(1) admonishment regarding the nature of the charge was reversible error where the State stated the nature of the charge and provided a detailed factual basis that further describe the nature of the charge.

¶ 19 Although admonishments need not be perfect, the circuit court must substantially comply with Rule 402(a). *People v. Burns*, 405 Ill. App. 3d 40, 43 (2010). "So long as the court's admonishments were sufficient to impart to a defendant the essence or substance of the [supreme court] rule," setting forth admonishments given to defendant at time of sentencing in cases in which judgment is entered upon negotiated plea of guilty, "the court has substantially complied with the rule." *People v. Dominguez*, 2012 IL 111336,

¶ 22. Substantial compliance with Rule 402 can be found even when the State, rather than the court, recites the nature of the charges. See *People v. Pritchett*, 23 Ill. App. 3d 1084, 1086 (1974).

¶ 20 Here, at the guilty plea hearing, the State recited the nature of the charges and gave a lengthy factual background. Even though the court did not tell the defendant the nature of the charges, the record shows that the defendant was told about the charges by the State. The court complied with all of the other admonishments in Rule 402, and thus, we find that the court substantially complied with Rule 402.

¶ 21 The second issue OSAD identified is whether original defense counsel's prediction as to the length of the defendant's sentence constituted ineffective assistance of counsel. Counsel is ineffective if his or her representation falls below an objective standard of reasonableness and the substandard representation prejudiced the defendant such that the result in the trial court would have been different but for counsel's errors. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *People v. Albanese*, 104 Ill. 2d 504, 525-26 (1984).

¶ 22 To prevail under *Strickland*, a defendant must demonstrate that counsel's performance was deficient and that the deficient performance so prejudiced the defendant that he was denied a fair trial. *People v. Cordell*, 223 Ill. 2d 380, 385 (2006). Counsel's honest assessment of a possible sentence does not suggest deficient performance such that counsel's assistance was ineffective. *People v. Wilson*, 295 Ill. App. 3d 228, 237 (1998).

¶ 23 At the second hearing on his motion to reconsider his sentence, the defendant asserted that his plea counsel told the defendant that a five-year sentence "was just not going to happen." This information was inaccurate, but the defendant fails to assert, and the record fails to show, that counsel misinformed the defendant about the sentencing range. Counsel made a prediction that turned out to be incorrect. Counsel did not advise the defendant improperly. The circuit court clearly explained the sentencing range to the defendant and the defendant indicated that he understood the possible sentence. Five years was within the sentencing range.

¶ 24 The next issue OSAD identified was whether defense counsel's failure to stipulate to the factual basis recited by the State with respect to the specific charge at issue in the case at bar provides a basis for vacating the guilty plea. In other words, the issue is whether the circuit court erred in finding an adequate factual basis for the plea.

¶ 25 In determining a factual basis, the circuit court may look anywhere in the record and may consider police reports, confessions, statements of witnesses, or information contained in the presentence investigation report. *People v. Allen*, 323 Ill. App. 3d 312, 317 (2001). In addition, when a defendant voluntarily withdraws his motion to withdraw

his guilty plea, any error committed in accepting the stipulated factual basis is waived. *People v. Williams*, 299 Ill. App. 3d 791, 795-96 (1998). Here, the defendant admitted that he committed the acts with which he was charged, the same acts that the State recited when giving the factual basis.

¶ 26 The next potential issue that OSAD identified is whether the State's presentation of evidence at the sentencing hearing of bad acts by the defendant which occurred 20 years prior, arising out of a case for which the defendant had already served his sentence, was improper, thereby requiring reversal and reconsideration of his sentence.

¶ 27 Outstanding indictments, other criminal conduct that did not result in prosecution or conviction, and even conduct that has resulted in an acquittal of a defendant can be considered at sentencing as long as the information is accurate and reliable. *People v. Deleon*, 227 Ill. 2d 322, 340 (2008). Evidence of a history of prior delinquencies or criminal activity can be considered when determining aggravating factors in sentencing. 730 ILCS 5/5-5-3.2 (West 2012).

¶ 28 Here, the defendant had previously committed similar acts. That information was relevant when the court was determining an appropriate sentence. The defendant had the ability to cross-examine Bunyard at sentencing. Defense counsel did cross-examine Bunyard, but the defendant did not counter any of Bunyard's testimony or deny any of her claims. The information Bunyard provided was relevant as an aggravating factor to show that the defendant had a history of prior delinquency and criminal activity similar to the instant case.

¶ 29 The final potential issue that OSAD identified is whether the sentence imposed on the defendant was disproportionate to the nature of the offense or otherwise not in keeping with the constitutional or statutory guidelines for sentencing.

¶ 30 The circuit court has considerable discretion when imposing a sentence and such decisions will not be overturned unless there has been an abuse of discretion. *People v. Wilson*, 143 Ill. 2d 236, 250-51 (1991). Indeed, the circuit court is in the best position to determine an appropriate sentence. *People v. Fern*, 189 Ill. 2d 48, 53 (1999). As the circuit court is in the best position to determine an appropriate sentence, a reviewing court may not substitute its own judgment for that of the circuit court. *Id.* Further, "[e]ven where there is evidence in mitigation, the court is not obligated to impose the minimum sentence." *People v. Sims*, 403 Ill. App. 3d 9, 24 (2010) (citing *People v. Madura*, 257 Ill. App. 3d 735, 740-41 (1994)). When a sentence falls within the statutory sentencing range, the circuit court has not abused its discretion unless the sentence is manifestly disproportionate to the nature of the offense. *People v. Hauschild*, 226 Ill. 2d 63, 90 (2007).

¶ 31 Here, the court sentenced the defendant to five years in prison, which was within the statutory range and was not the maximum possible sentence. The sentencing court was in the best position to weigh the mitigating and aggravating factors, and the sentence was not at a great variance from the law. The defendant had a criminal record that included seven prior felony convictions. Therefore, the court did not abuse its discretion when it sentenced the defendant to five years in prison.

¶ 32

CONCLUSION

¶ 33 For the foregoing reasons, the motion of OSAD to withdraw as counsel on appeal is granted, and the judgment of the circuit court of St. Clair County is affirmed.

¶ 34 Motion granted; judgment affirmed.