THIRD DIVISION
March 9, 2016

No. 1-13-3153

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 08 CR 1600
	)	
CHAD HARDY,	)	Honorable
	)	Kay M. Hanlon,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Justices Fitzgerald Smith and Lavin concurred in the judgment.

O R D E R

¶ 1 *Held*: Denial of post-plea motion affirmed. Defendant was not prejudiced regarding his open plea by the court's failure to admonish him of the full range of mandatory supervised release. Post-plea counsel did not fail to certify taking all steps required by Supreme Court Rule 604(d) before filing a post-plea motion.

¶ 2 Pursuant to a 2009 guilty plea, defendant Chad Hardy was convicted of three counts of predatory criminal sexual assault and sentenced to consecutive 10-year prison terms. Defendant's *pro se* post-plea motion was denied but we remanded for further post-plea proceedings. *People v.*

Hardy, No. 1-10-0549 (2012)(unpublished order under Supreme Court Rule 23).[1] Defendant now appeals from the circuit court's 2013 denial of his post-remand counsel-filed post-plea motion. On appeal, he contends that we should remand (1) to allow him to withdraw his plea because the court erroneously admonished him in the 2009 plea hearing that he faced three years of mandatory supervised release (MSR) when the applicable term of MSR is from three years to life, and (2) for further post-plea proceedings because post-plea counsel did not certify that he consulted with defendant to ascertain his claims regarding both the sentence and guilty plea. For the reasons stated below, we affirm.

¶ 3 Defendant was charged with multiple counts of predatory criminal sexual assault, criminal sexual assault, and aggravated criminal sexual abuse allegedly committed from September 1 through December 19, 2007, against his daughter K.H. when she was less than 13 years old. The State alleged three distinct acts of sexual assault and one of sexual abuse.

¶ 4 The case proceeded, with defendant represented by counsel, through discovery and pre-trial motions including unsuccessful motions to suppress statements and other evidence. Defendant filed *pro se* motions to dismiss the indictment including a speedy-trial claim; defense counsel presented the motions and the State responded on the merits, arguing that defendant made no speedy-trial demand and the State relied on counsel's representations that continuances were by agreement. The court denied the motions in September 2009 and defendant filed a *pro se* interlocutory appeal in October, which we dismissed. *People v. Hardy*, No. 1-09-2760 (Oct. 15, 2009). In the interim, a plea conference was held on September 30 – defense counsel

[1] In 2012, while that appeal was pending, defendant filed and the court *sua sponte* dismissed a *pro se* petition for relief from a void judgment; we affirmed. *People v. Hardy*, No. 1-12-1372 (2013)(unpublished order under Supreme Court Rule 23).

requested a conference and, after the court's admonishments, defendant personally agreed to the conference – and continued to October 8. Following the conference, counsel stated on the record that "I have communicated to [defendant] the results of the [plea] conference" and defendant wanted time to consult with his family; the case was continued to October 19.

¶ 5 On October 19, 2009, the State nol-prossed all counts except for three counts of predatory criminal sexual assault alleging three distinct acts of sexual assault, Counts Two, Four, and Six. Counsel stated that it was defendant's intention to "enter a plea that he understands is without an agreement with the Court to Counts Two, Four, and Six" and that counsel had explained to defendant the court's conference recommendation of 30 years' imprisonment but defendant did not accept it "and understands the consequences of entering a blind plea is that [the court] would have a statutory range in this case now of a minimum of 18 and a maximum of 90 years in" prison. Defendant agreed that he "wish[ed] to enter a plea of guilty." The court recited the three charges and defendant affirmed that he understood them. The court told defendant that he faced for each charge a prison term of 6 to 30 years, which must be served consecutively for a total of 18 to 90 years on the three charges, and a fine of up to $25,000. "In addition, any sentence that is ordered by the court would be followed by a three-year period of" MSR. Defendant affirmed that he understood the sentencing range and wanted to plead guilty. The court explained to defendant his right to a trial where he could present and examine witnesses and other evidence, his right to a jury trial, and that he was giving up these rights with a guilty plea; defendant affirmed that he understood and had no questions. The State recited the factual basis for the plea, describing K.H.'s potential testimony and defendant's inculpatory post-arrest statement, and defense counsel

stipulated thereto. The court found that defendant was knowingly and voluntarily waiving his rights and that there was a factual basis for his plea.

¶ 6 The case proceeded immediately to sentencing, where the parties adopted a pre-trial investigation report for sentencing and presented witnesses and arguments in aggravation and mitigation. Defendant addressed the court, apologizing for his actions and the harm they caused, claiming that counsel had presented him a State offer to plead to "Count Three of the indictment for 10 years at 85 [percent], which all parties agreed to," describing in detail various mitigating factors in his life, and asking the court to be lenient with "a sentence of 18 [years] at 85" percent. The court noted mitigating factors but also the "despicable" nature of the offenses and sentenced defendant to three consecutive 10-year prison terms with fines and fees, without stating his MSR term. The court admonished defendant of his appeal rights, and counsel immediately filed a motion to reconsider the sentence, arguing that defendant's prison sentence was excessive; the court denied the motion.

¶ 7 Defense counsel filed on October 21 a notice of appeal from the October 19 judgment. Defendant filed *pro se* documents in November 2009[2] including a motion to withdraw his guilty plea and a notice of appeal. He argued that his motion to dismiss on speedy-trial grounds was erroneously denied and that he was not admonished in a plea conference regarding "the possible sentencing of the charge and the initial plea offer from the [S]tate was not presented in open court" for the record, nor was the court's "concurrence or rejection of such offer." He also claimed that the State made an offer in September 2009 of a plea to a single count of predatory

[2] The *pro se* documents were mailed on November 4 and stamped "filed" in the circuit court on November 13.

criminal sexual assault with a prison sentence of "10 years at 85%" and that he accepted the offer on September 30 "and was led to believe" he was finalizing that agreement. Another plea conference was held on October 8 but he was again "not admonished in open court and nothing was put on the record." Instead, counsel entered into a "blind" guilty plea to three counts so that defendant "feels duped and conspired against."

¶ 8 The State responded to the motion to withdraw plea, arguing that defendant stated in the plea hearing that he understood his rights, had no questions for the court, and was not being forced or threatened to plead guilty, and that defendant personally addressed the court during sentencing. The State argued that defendant offered no evidence to support his feeling of being duped beyond the feeling itself, including that he did not allege erroneous advice from counsel.

¶ 9 The court heard the motion to withdraw plea on January 29, 2010. Defendant, acting *pro se,* claimed that he had unsuccessfully requested transcripts of the proceedings and argued that he was not adequately prepared for the hearing. Following brief arguments, the court denied defendant's motion to withdraw his plea.

¶ 10 On appeal, we held that there was no certificate or other indication on the record that counsel consulted with defendant regarding any post-plea claims before defendant filed his *pro se* post-plea motion. *Hardy,* No. 1-10-0549, ¶ 19. We also noted that the court in the post-plea hearing did not attempt to ascertain from defendant whether he wanted counsel appointed. *Id.,* ¶ 23. Rejecting State arguments that these constituted harmless errors, we remanded for further post-plea proceedings. *Id.,* ¶¶ 25-26. (We also vacated certain fines and fees. *Id.,* ¶¶ 28-38.)

¶ 11 On remand, the court was presided over by a different judge than at the guilty plea hearing and *pro se* plea-withdrawal proceedings. In August 2012, post-plea counsel was

appointed and withdrew the *pro se* motion to vacate the plea. In November 2012, counsel filed a motion to vacate the plea. The motion claimed that, on September 30, 2009, trial counsel asked for a plea conference in anticipation of receiving a 10-year sentence as agreed between the State and trial counsel, but the court did not agree to this disposition and recommended 30 years' imprisonment on three counts. The motion argued that trial counsel was ineffective for (1) suggesting a "blind" plea knowing that defendant had rejected the court's recommendation of 30 years in prison, and (2) failing to allow defendant to review all discovery including an exculpatory police report, as defendant would not have pled guilty had he been aware of the report. The motion noted defendant's belief that trial counsel "fell short in his duties *** to discuss defense strategies and possible defenses" and argued the belief is supported by the absence of notes in trial counsel's case file on strategy, investigations, or interviews with defendant, his family, or witnesses.

¶ 12 Also in November 2012, post-plea counsel filed a certificate attesting that he "consulted with [d]efendant to ascertain his contentions of error in the sentence and/or in the plea of guilty," "examined the trial court file and report of proceedings of the sentencing and/or the plea of guilty," and "made any amendments to [d]efendant's motion that were necessary for adequate presentation of any defects in the proceedings." *See* Ill. S. Ct. R. 604(d) (eff. Dec. 3, 2015).

¶ 13 The State responded to the motion to vacate the plea, claiming that trial counsel had been provided all discovery materials, including a police laboratory report indicating a DNA profile other than defendant's on K.H.'s vaginal swab, and reviewed all discovery with defendant before the plea hearing. The State argued that counsel's honest assessment of a defendant's case in light of the State's case cannot be the basis for finding a plea involuntary, and that a defendant who

does not maintain his innocence is generally not allowed to withdraw his guilty plea while defendant had admitted his offenses.

¶ 14 On August 7, 2013, the circuit court held a hearing on the motion to withdraw the plea. Defendant testified regarding his representation by trial counsel Dean Morask, including that Morask met him only twice before plea negotiations and four or five times altogether, and never reviewed discovery or discussed trial strategy with him. Morask relayed a State offer of "10 years at 85%" but told him after the September 30 plea conference that the court rejected the offer and recommended 30 years. Defendant rejected the recommendation but Morask advised him to enter a blind plea and throw himself on the mercy of the court. On cross-examination, defendant admitted that the court at the plea hearing admonished him of the charges and sentencing he faced, the rights he was waiving, and that he had been made no promises or threats to induce his plea, that as a college graduate he understood the admonishments, and that he had not been threatened or made any promises. He also admitted that Morask filed and presented motions to suppress and that he had discussed the evidence on those motions with Morask.

¶ 15 Dean Morask testified that he reviewed the discovery documents with defendant in detail during meetings but would not let him keep copies. Defendant told Morask that he did not want a trial and that he "did it" so Morask felt he could not call him as a trial witness. The State made an offer of 10 years to a single count of predatory criminal sexual assault, and defendant accepted it. Morask advised defendant to seek a plea conference so he would know before a plea hearing if the court approved the offer; defendant agreed. The State and Morask presented on aggravation and mitigation at the conference and the court did not approve the agreement but instead recommended 30 years' imprisonment. Between the October 8 and 19 court dates, Morask met

with defendant and explained that he could go to trial, accept the recommended sentence, or enter a blind plea allowing him to raise an excessive-sentence claim on appeal. Defendant did not want a trial but was concerned about the length of the sentence because the court said in the plea conference that it would consider a sentence closer to the maximum if the evidence was as aggravating as the State alleged. Morask told defendant that a blind plea was subject to the full sentencing range but would allow an excessive-sentence claim on appeal; defendant understood and agreed. After the open plea and sentencing, Morask filed a post-sentencing motion to preserve an excessive-sentence claim. On cross-examination, Morask stated that he took notes in this case, albeit not "of everything I did." He testified to making various particular investigatory efforts but not making notes thereof. Morask had a conversation with post-plea counsel in August 2012 but did not recall telling him that his case file may be incomplete because he "may have gotten rid of some stuff." Morask testified that "I never keep the entirety of a file in any case" and that post-plea counsel subpoenaed his file about two years after the plea.

¶ 16 The parties stipulated that post-plea counsel would testify to an August 2012 conversation with Morask wherein Morask admitted that his case file may not be complete and said that he "may have thrown away stuff."

¶ 17 Following arguments by the parties, the court denied the motion. The court found that Morask reviewed discovery with defendant in detail while not providing him copies, defendant did not want to go to trial and admitted the offenses, and Morask recommended a blind plea to preserve an excessive-sentence claim. The court found it reasonable for counsel to present the State's offer in a plea conference and found the plea-hearing admonishments to be thorough.

¶ 18 Post-plea counsel filed a motion to reconsider, noting defendant's testimony that Morask never reviewed the discovery with him and advised him to enter a blind plea despite his rejection of the court's recommendation. Counsel also argued that Morask admitted to not making or keeping notes or issuing subpoenas in this case. Post-plea counsel argued that Morask had admitted that he may have discarded some of the contents of the case file to "cover his ass." On October 7, 2013, the court denied reconsideration, finding that the motion was not presenting new evidence and that Morask credibly testified to not recalling making the "cover his ass" remark. This appeal followed.

¶ 19 On appeal, defendant contends that we should remand (1) to allow him to withdraw his plea because the court erroneously admonished him in the plea hearing that he faced three years of MSR when he could have been sentenced to MSR for life, and (2) for further post-plea proceedings because post-plea counsel did not certify that he consulted with defendant to ascertain his claims of error "in *both* the sentence *and* the guilty plea." (Emphasis in original.)

¶ 20 We shall first dispose of the latter contention. Defendant acknowledges in his brief that, at the time of post-plea counsel's certificate, Supreme Court Rule 604(d) required in relevant part that counsel file "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." (Emphasis added.) Ill. S. Ct. R. 604(d) (eff. Dec. 11, 2014). It was not until a 2015 amendment of Rule 604(d) that "and" was substituted for the emphasized "or." Here, post-plea counsel certified in relevant part that he "consulted with [d]efendant to ascertain his contentions of error in the sentence and/or in the plea of guilty." While defendant puts great weight on the "or" in the certificate, it also includes an "and" so that it is reasonably read as

counsel's certification that he consulted with defendant to ascertain his claims of error in the sentence *and* guilty plea. In sum, we find no ambiguity in post-plea counsel's certificate of compliance with Rule 604(d).

¶ 21 This leaves us with defendant's primary contention: that he should be allowed to withdraw his plea because the circuit court erroneously admonished him in the plea hearing that he faced three years of MSR when he could have been sentenced to MSR for life. Defendant admits that he did not raise this claim in the post-plea motion or circuit court proceedings thereon but argues that we should consider it as plain error under the fundamental fairness prong or as ineffective assistance of post-plea counsel. (Defendant argues in his reply brief that he did not forfeit the contention as it is encompassed by his claim to feeling "duped and conspired against." However, we do not deem the MSR contention raised by such language, which moreover was in the initial *pro se* motion that post-plea counsel withdrew in favor of his counsel-filed motion.) The State in response admits that the admonishment regarding MSR was erroneous but argues that defendant was not prejudiced thereby.

¶ 22 Supreme Court Rule 402 (eff. July 1, 2012) governs guilty pleas and provides in relevant part that:

> "there must be substantial compliance with the following: *** 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 or her of and determining that he or she understands the following: *** (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."

Section 5-8-1(d)(4) of the Code of Corrections (730 ILCS 5/5-8-1(d)(4) (West 2012)) provides that the MSR term for predatory criminal sexual assault "shall range from a minimum of 3 years to a maximum of the natural life of the defendant." Under this provision, the court does not impose a determinate MSR term within said range but sentences a defendant to an indeterminate MSR term of between three years and natural life as determined by the Prisoner Review Board. *People v. Rinehart*, 2012 IL 111719, ¶¶ 23-30. Where a defendant enters a non-negotiated or open guilty plea, the failure to admonish him of the applicable MSR term does not run afoul of his constitutional rights if his sentence including MSR is less than the maximum sentence of which he was admonished. *People v. Whitfield*, 217 Ill. 2d 177, 193-94 (2005). A "negotiated plea of guilty is one in which the prosecution has bound itself to recommend a specific sentence, or a specific range of sentence, or where the prosecution has made concessions relating to the sentence to be imposed and not merely to the charge or charges then pending." Ill. S. Ct. R. 604(d) (eff. Dec. 3, 2015), R. 605(b), (c) (eff. Oct. 1, 2001).

¶ 23 In *People v. Pace*, 2015 IL App (1st) 110415, ¶ 30, a defendant entered an open or blind plea to first degree murder and two counts of aggravated battery with a firearm and received consecutive prison terms of 60, 20, and 20 years. On appeal, he claimed in part that his guilty plea was not knowing and voluntary because he had not been admonished about the possibility of consecutive sentencing. *Id.*, ¶ 47. We acknowledged that the court failed to so admonish the defendant and thus did not substantially comply with Rule 402's requirement to admonish a defendant about to plead guilty regarding his possible sentence. *Id.*, ¶ 59. However, after analyzing various cases on the issue of prejudice from improper Rule 402 admonishments, we found three separate reasons why the *Pace* defendant could not demonstrate prejudice from the

improper admonishment. *Id.*, ¶¶ 61-70. "First, defendant did not claim anywhere in his motion to vacate or appellate brief that that he would not have pled guilty had he received a proper admonishment. This is fatal to defendant's argument." *Id.*, ¶ 70. Second, the defendant was correctly admonished that his maximum possible sentence was life imprisonment and thus did not receive a sentence exceeding the sentence he was told he could receive. *Id.*, ¶ 71. "Third, defendant entered into a blind plea. Defendant was admonished that there was no agreement between him and the State or court regarding the sentence he would receive. Thus, defendant had no reasonable expectations regarding the sentence he would receive. Therefore, he cannot argue that his expectations were thwarted or that he would have negotiated a more favorable plea had he received a proper admonishment." *Id.*, ¶ 72.

¶ 24 The *Pace* defendant failed to raise another claim of erroneous Rule 402 sentence admonishments in his motion to withdraw his plea but contended that we should consider the claim as plain error and ineffective assistance of counsel. *Id.*, ¶ 73. We rejected his claim that the failure to properly admonish a defendant pursuant to Rule 402 affects substantial rights and thus constitutes the second prong of plain error concerning substantial or structural error; structural error applies to a narrow set of systemic errors eroding the integrity of the judicial process such as "complete denial of counsel, trial before a biased judge, racial discrimination in the selection of a grand jury, denial of the right of self-representation at trial, denial of a public trial, and where the trial court propounds a defective reasonable doubt instruction." *Id.*, ¶¶ 75-76. We rejected the ineffective assistance argument because defendant could not show prejudice from the Rule 402 admonishment if it was faulty – he had been admonished that he faced life imprisonment so that no sentence could exceed his admonished maximum sentence, and he

failed to allege that he would not have pled guilty had he been properly admonished – and thus could not show that counsel prejudiced him by not challenging the admonishment in the post-plea motion. *Id.*, ¶¶ 78-79.

¶ 25 Here, defendant argues that his sentence including 30 years' prison and a still-possible lifetime MSR term is greater than his admonished maximum 90 years' imprisonment. Defendant entered an open plea; while the trial court had recommended three consecutive ten-year prison terms, defendant rejected that recommendation and the court admonished defendant clearly that he faced up to 90 years' imprisonment on the three charges before the court. *Whitfield* poses the threshold question in an open-plea case such as this one of whether defendant's actual prison sentence of 30 years and actual MSR term exceeds his admonished sentencing range of 90 years' imprisonment and three years' MSR. However, defendant's MSR term is indeterminate, and we take judicial notice of the electronic records of the Department of Corrections that defendant's MSR term is "to be determined." *Cordrey v. Prisoner Review Bd.*, 2014 IL 117155, ¶ 12 n.3. We do not know the decisive fact of defendant's actual MSR term: he may state a claim under *Whitfield* if it exceeds 57 years[3] but cannot if it does not. We therefore conclude that the instant contention is speculative and undeterminable at this point. We will not grant relief on such a speculative claim where defendant does not yet have a claim and there is a distinct possibility that he will have no claim. See, e.g., *People v. Patterson*, 2014 IL 115102, ¶ 81 ("Satisfying the prejudice prong [of ineffective assistance] necessitates a showing of actual prejudice, not simply speculation that defendant may have been prejudiced.")

[3] The difference between defendant's actual and maximum prison terms is 60 years, and he was admonished that he faced three years' MSR.

¶ 26 Defendant having failed to show – indeed, being unable at this point to show – that his sentence including MSR exceeds his admonished maximum sentence, we note that the other two reasons we stated in *Pace* for finding no prejudice from the erroneous admonishments there also apply here. Defendant did not raise the MSR claim in his motion to withdraw his plea or the circuit court proceedings thereon, and he does not contend in his briefs herein that he would not have pled guilty had he been aware of the full MSR term. More importantly, defendant entered into a blind or open plea and thus had no sentencing expectations to be thwarted and certainly no lost opportunity to negotiate a more favorable plea. We see no reason not to follow *Pace* and similarly hold that defendant fails to show prejudice from the trial court's erroneous MSR admonishment, and thereby also fails to prove that he was prejudiced when post-plea counsel did not challenge the MSR admonishment in his post-plea motion. We also follow *Pace* insofar as defendant contends that his MSR claim should be considered under the second prong of plain error because, as the *Pace* defendant contended unsuccessfully, his substantial rights were affected by the erroneous admonishment. In sum, were defendant's MSR claim not speculative, we would conclude that defendant forfeited it and has failed to show that he overcame forfeiture.

¶ 27 Accordingly, the judgment of the circuit court is affirmed.

¶ 28 Affirmed.