

No. 1-12-0806

**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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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	Nos. 08 CR 22181
	)	09 CR 3001
	)	
TARIUS WASHINGTON,	)	Honorable
	)	Lawrence Flood,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE TAYLOR delivered the judgment of the court.  
Presiding Justice Gordon and Justice McBride concurred in the judgment.

**O R D E R**

¶ 1 **Held:** Postplea counsel was ineffective for filing a procedurally inappropriate motion to reconsider sentence; a new sentencing hearing is required where the trial court failed to make a finding of defendant's criminal history at the time the sentence was imposed. Reversed and remanded for a new motion to withdraw defendant's guilty plea if desired and a new sentencing hearing if required.

¶ 2 Pursuant to a negotiated guilty plea, defendant Tarius Washington was found guilty of aggravated criminal sexual abuse pursuant to section 12-16(b) of the Criminal Code of 1961

(Code) (720 ILCS 5/12-16(b) (West 2008)), and aggravated criminal sexual assault pursuant to section 12-14(a)(1) of the Code (720 ILCS 5/12-14(a)(1) (West 2010)) and sentenced to consecutive terms of 3 years and 20 years in prison. On appeal, defendant argues that: (1) his postplea counsel was ineffective for failing to include in his motion to reconsider sentence an argument that the trial court erred when it stated that defendant's sentencing range was 6 to 60 years; (2) postplea counsel was ineffective for failing to amend the postplea petition to allege that defendant's guilty plea was involuntary due to the trial court's improper Supreme Court Rule 402 (eff. July 1, 2012) admonishments; and (3) the trial court imposed a sentence without considering a presentence investigation (PSI) report or making a finding on the record regarding defendant's history. We reverse and remand with directions.

¶ 3 Defendant was charged under indictment No. 08 CR 22181 with eight counts of home invasion, two counts of aggravated criminal sexual abuse, and one count of unlawful restraint. He was also charged under indictment No. 09 CR 3001 with 18 counts of aggravated criminal sexual assault, three counts of criminal sexual abuse, eight counts of aggravated kidnapping, one count of kidnapping, armed robbery, unlawful restraint, and aggravated unlawful restraint. According to the State's factual basis for the plea, on March 10, 2007, about 5:35 a.m., the victim in the assault case, K.B., was standing at 5804 West Chicago Avenue talking on her cell phone. Defendant walked behind K.B. and grabbed her, placed a sharp object to K.B's throat and told her that he would kill her if she screamed. Defendant then forced her into an alley at 5807 West Rice, and sexually assaulted her. After the attack, defendant fled and K.B. immediately called the police. She later identified defendant in a lineup as the offender.

¶ 4 On October 24, 2008 at about 11:45 p.m., 14-year-old victim, L.M., was asleep in her bedroom at 647 North Waller. She awoke to find defendant on top of her and choking her neck.

The victim's brother, Justin Morris heard the gagging sounds coming from the victim's bedroom. He entered the room, and turned on the light and saw defendant on top of his sister, choking her. Upon seeing Morris, defendant fled the apartment. Both L.M. and her brother identified defendant as the offender.

¶ 5 During plea proceedings, defendant pled guilty to aggravated criminal sexual abuse and aggravated criminal sexual assault. The court admonished defendant and asked if he understood that when he pled guilty he would be giving up his right to a bench or jury trial, and defendant stated that he understood. The court also told defendant that "the range of sentence for a Class X felony is from six to 60 years." The State then offered the factual basis for the plea and defense counsel stipulated to the facts. The trial court found that defendant entered his plea freely and voluntarily, accepted the factual basis, and sentenced defendant to the agreed upon sentence of consecutive terms of three years in prison for the abuse conviction and 20 years in prison for the assault conviction.

¶ 6 Following the court's acceptance of the plea agreement, defendant sent the court a letter requesting to withdraw his guilty plea. Defendant maintained that trial counsel led him to believe that he would receive 60 years to life in prison if he did not take the State's 20-year plea deal. He also stated that at the guilty plea hearing, he acknowledged understanding his rights because defense counsel had told him not to ask any questions in front of the judge. Defendant stated that his lack of education led him to believe that pleading guilty was the right thing to do. He also stated that he thought he was pleading guilty to home invasion, not aggravated criminal sexual assault. After not receiving a response from the court, defendant sent another letter attaching his first letter and restating his request to withdraw his guilty plea on the aggravated

criminal sexual assault case. The court appointed new counsel to represent defendant on his motion to withdraw his guilty plea.

¶ 7 Defendant's postplea counsel filed a motion to withdraw defendant's guilty plea and a separate, supplemental motion to reconsider defendant's sentence, both accompanied by defendant's sworn affidavit. In the affidavit, defendant averred that his plea counsel led him to believe that he would have to serve only 12 years. He averred that, due to his lack of education, he did not know that 85% of his 20-year sentence was 17 years. If defendant would have known he would not have pled guilty. In the supplemental motion to reconsider the sentence, counsel noted that the trial court mistakenly informed defendant at the guilty plea hearing that the maximum term for the Class X offense was 60 years, when in fact defendant was not eligible for the extended term. Defendant's postplea counsel informed the court that case law and procedure required him to argue the motion to withdraw the guilty plea first. If the court denied the motion, then he would argue the motion to reconsider sentence.

¶ 8 During the hearing on the motion to withdraw the guilty plea, the court focused on whether defense counsel was ineffective for misleading defendant into thinking he would have to serve only 12 years. Defendant's plea counsel, Kathleen Yurchak, testified that she never told defendant that he would have to serve only 12 years of his 20-year sentence. She simply did the math with defendant for each sentence separately, added them together, and subtracted his pre-sentence credit to inform him of the time he would have to serve in prison. The court subsequently denied defendant's motion to withdraw his guilty plea, finding that there was no evidence which indicated that Yurchak misled defendant. Specifically, the court noted:

"You know, taking into consideration the fact that he indicates that he had not graduated from high school and was not good in math, I understand that, but by the same

token, I don't have any case law that requires an attorney—that an attorney would be ineffective because she didn't explain—she told the defendant what the parameters were, the plea agreement, how that would affect him with his time that he already served and I believe that was sufficient."

¶ 9 During the hearing on the motion to reconsider, defendant argued that 20 years was "too long for this defendant \*\*\* who had somewhat of a disadvantaged family and educational background and who only had primarily a juvenile delinquency history with the system before these cases." The court denied the motion to reconsider. The court acknowledged its mistake in telling defendant that he was eligible for a maximum term of 60 years in prison, even though he was not eligible for an extended term. However, the court stated that the 20-year sentence was part of the plea agreement and that the court simply went along with the plea agreement. The court further noted that the 20-year sentence was reasonable.

¶ 10 On appeal, defendant first contends that his postplea counsel was ineffective for failing to amend defendant's motion to withdraw his guilty plea to include the argument that the trial court incorrectly informed him that he was eligible for an extended-term maximum of 60 years, thereby rendering his guilty plea involuntary. Defendant argues that he would not have pled guilty if informed of the correct maximum penalty of 30 years. Defendant further argues postplea counsel erred by raising the issue in a procedurally inappropriate motion. Defendant alternately contends that the trial court's error amounted to plain error.

¶ 11 Claims of ineffective assistance of trial and appellate counsel are decided applying the test set forth in *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984)). In order to succeed on a claim of ineffective assistance of counsel, the defendant must show "that counsel's performance fell below an objective standard of reasonableness," and "that there is a reasonable probability

that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *People v. Manning*, 241 Ill. 2d 319, 326 (2011) (citing *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984)). To prevail, the defendant must satisfy both prongs of the *Strickland* test. *People v. Brown*, 236 Ill. 2d 175, 185 (2010). Where the facts relevant to an ineffective assistance of counsel claim are not disputed, our review is *de novo*. *People v. Bew*, 228 Ill.2d 122, 127 (2008); *People v. Tolefree*, 2011 IL App (1st) 100689, ¶ 25.

¶ 12 Defendant asserts both a plain-error violation and an ineffective assistance of counsel violation. Under either theory, a preliminary question is whether the trial court erred when it admonished defendant that he was facing 6 to 60 years if convicted of aggravated criminal sexual assault.

¶ 13 First, we find that the trial court erred by misstating the potential penalties defendant faced. Defendant pled guilty to aggravated criminal sexual assault, a Class X felony; therefore, defendant's sentencing range was 6 to 30 years pursuant to section 12-14(a)(1) of the Code (720 ILCS 5/12-14(a)(1) (West 2010)). The trial court however admonished defendant and stated that his sentencing range was 6 to 60 years, the range as stated with an extended term. There was no basis for imposing an extended term sentence. None of the factors which would allow an extended term sentence were present in this case, (see 720 ILCS 5/12-14(d)(1) (West 2010)), and although the trial court subsequently found the sentence itself to be "reasonable," the trial court conceded its mistake in stating the sentencing range. The State does not argue that an extended term would have been proper in this case. Rather, the State attempts to justify the trial court's sentencing range by recalculating defendant's potential sentence based on varying combinations of the offenses defendant was charged with instead of the single offense to which he pled guilty. Supreme Court Rule 402 (eff. July 1, 2012) requires only that defendant be admonished of the

minimum and maximum sentence for the crime to which he is pleading guilty not that he be advised of all possible permutations of sentences for crimes the State has or will dismiss or nol-pross. However, based on the crime to which defendant pled guilty, there is no combination of penalties which results in a range of 6 to 60 years. Some courts have found no prejudice where the trial court understates the penalty but sentences defendant within the range of the incorrect admonishment. *People v. Hoyer*, 100 Ill. App. 3d 418, 420 (1981); *People v. Rhodes*, 289 Ill. App. 3d 292, 298 (1997); *People v. Mendoza*, 342 Ill. App. 3d 195, 202 (2003). However, the parties do not cite and we have not found any cases that have applied such an analysis when the trial court *overstates* the potential penalties. Thus, we find that the court did in fact err during defendant's admonishment.

¶ 14 Returning to the question of ineffective assistance of counsel, we find that postplea counsel compounded the error by raising it in a procedurally inappropriate motion to reconsider sentence. Defendant faced 34 separate charges, including 18 counts of aggravated criminal sexual assault, and the State nol-prossed all but the aggravated criminal sexual abuse and aggravated criminal sexual assault charges. In exchange for pleading guilty to the two charges, the parties agreed to specific sentences totaling 23 years. Thus, defendant's plea was fully negotiated. Resultantly, defendant cannot challenge his sentence by filing a motion to reconsider; he may only move to withdraw his plea. See *People v. Dunn*, 342 Ill. App. 3d 872, 881 (2003). Case law overwhelmingly supports the rule that defendant may not challenge his sentence only following a fully negotiated plea. See *People v. Richard*, 2012 IL App (5th) 100302 ¶ 25 (holding that challenging the sentence only without moving to withdraw the guilty plea is contrary to the language of Supreme Court Rule 604(d)(eff. July 1, 2012)); see *People v. Evans*, 174 Ill. 2d 320, 327-29 (1996) (holding that challenging the sentence only without

moving to withdraw the guilty plea violates the contract principles underlying a negotiated plea). However, postplea counsel erroneously contended that defendant could move to reduce his sentence if he first moved unsuccessfully to withdraw the guilty plea. Therefore, we find that postplea counsel's performance fell below an objectively reasonable level of assistance in violation of the first prong of *Strickland*. *Strickland*, 466 U.S. at 688, 694 (1984)).

¶ 15 We also find that the outcome of the hearing on defendant's motion to withdraw his guilty plea likely would have been different if postplea counsel had properly raised the issue of improper Rule 402 admonishments. First, we note that the trial court conceded that it incorrectly admonished defendant. This concession, however, was made in the course of postplea counsel's improper motion to reduce defendant's sentence. We believe it is likely that if the trial court had been questioned regarding its compliance with Rule 402 during the motion to withdraw defendant's guilty plea, as competent counsel would have done, the trial court would have granted defendant's motion and conducted new plea proceedings. It is possible that defendant may elect not to withdraw his guilty plea, in light of the number of charges the State nol-prossed and the potentially lengthier sentence he was facing. However, the ultimate decision as to whether to accept a guilty plea was defendant's alone to make (see *People v. Guzman*, 2014 IL App (3d) 090464, ¶ 30) and we believe that defendant should be afforded the opportunity to make such a decision after being properly admonished.

¶ 16 Therefore, we conclude that defendant was denied the effective assistance of postplea counsel. Accordingly, we remand this cause for further proceedings, where defendant may, if he still desires to do so, move to withdraw his guilty plea. Because we have afforded defendant relief on his ineffective assistance of counsel claim, it is unnecessary for us to go on and determine defendant's alternative claim that the error rises to the level of plain error.

¶ 17 Finally, we note that defendant contends he is entitled to a new sentencing hearing because the trial court sentenced him without the benefit of a written pre-sentence investigation (PSI) report or any on-the-record finding of his criminal history in violation of section 5-3-1 of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5-3-1 (West 2006)). We find that the trial court failed to comply with the mandates of 5-3-1, but presume that the trial court will do so if required to conduct a new sentencing hearing on remand.

¶ 18 For the foregoing reasons, we reverse the judgment of the Circuit court of Cook County and remand for the filing of a new motion to withdraw defendant's guilty plea (if defendant so desires), and a new sentencing hearing in compliance with section 5-3-1 if required.

¶ 19 Reversed; remanded with directions.