NOTICE
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2014 IL App (5th) 120466-U

NO. 5-12-0466

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).

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Williamson County.
	)	
v.	)	No. 10-CF-504
	)	
JOSEPH S. THOMAS,	)	Honorable
	)	John Speroni,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE SCHWARM delivered the judgment of the court.
Justices Spomer and Stewart concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court's extended-term sentence, imposed after revocation of probation, was reduced to nonextended term because the record did not demonstrate that, when he pled guilty, the defendant knew that extended-term sentencing was a possibility.

¶ 2 After the circuit court sentenced him to a six-year extended term of imprisonment, the defendant, Joseph S. Thomas, filed a motion to reconsider, challenging the excessiveness of his sentence. The circuit court denied the motion. On appeal, the defendant argues that the circuit court improperly imposed the extended-term sentence in violation of section 5-8-2(b) of the Unified Code of Corrections (the Code) (730 ILCS

5/5-8-2(b) (West 2010)). For the reasons set forth below, we agree and vacate the extended-term portion of the defendant's sentence.

¶ 3 BACKGROUND

¶ 4 On December 6, 2010, the defendant was charged by information with domestic battery (720 ILCS 5/12-3.2(a)(2) (West 2010)) and violation of an order of protection (720 ILCS 5/12-30 (West 2010)). In February 2011, pursuant to negotiations with the State, the defendant pled guilty to unlawfully violating an order of protection (720 ILCS 5/12-30 (West 2010)), in exchange for the State's dismissal of the remaining charge (720 ILCS 5/12-3.2(a)(2) (West 2010)). At the guilty plea hearing, the following colloquy ensued:

> "THE COURT: Okay. Possible penalties on a Class IV felony, you could be sentenced to the Department of Corrections for one year or up to three years. If extended term applies, for three years or as long as six years. You could be fined up to $25,000. Is this offense where the Mandatory Supervisory Release has been increased to four years?
>
> [Assistant State's Attorney]: I don't believe so, your Honor.
>
> THE COURT: It's just domestic?
>
> [Assistant State's Attorney]: I think it's just a domestic.
>
> THE COURT: There is a one-year term of Mandatory Supervisory Release, or you could be placed on probation.
>
> [Assistant State's Attorney]: I apologize. It is an extended term.
>
> THE COURT: For four years?

[Assistant State's Attorney]: For four years, yes.

THE COURT: I am sorry. The term of Mandatory Supervisory Release is not one year. It's four years. Okay. What Mandatory Supervisory Release is, that is a term if you were sentenced to prison you would have to serve that time of Mandatory Supervisory Release after you were out of prison. Similar to what used to be known as parole, okay? Do you have any questions about that?

THE DEFENDANT: Only one year. It goes up to four years.

THE COURT: It's four years Mandatory Supervisory Release. That's right, sir.

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Or you could be placed on probation or conditional discharge for up to 30 months. Do you have any questions about the nature of the charge or possible penalties?

THE DEFENDANT: No, sir."

The circuit court thereafter heard the factual basis for the plea. Pursuant to the State's recommendation, the circuit court sentenced the defendant to 30 months' probation.

¶ 5 On March 1, 2012, the State filed a petition to revoke the defendant's probation on the basis that he committed the offense of disorderly conduct for effecting a false bomb threat (720 ILCS 5/26-1(a)(3) (West 2012)). On May 1, 2012, after hearing evidence, the circuit court revoked the defendant's probation. At resentencing on July 5, 2012, the circuit court imposed the maximum extended-term sentence of six years' imprisonment,

based on the defendant's prior criminal history, with one-year mandatory supervised release and with 188 days' credit for time served.

¶ 6 On July 18, 2012, the defendant filed a motion to reconsider sentence, arguing that his sentence was excessive. After a hearing on October 1, 2012, the circuit court denied the defendant's motion to reconsider his sentence. On October 10, 2012, the defendant filed a timely notice of appeal.

¶ 7 ANALYSIS

¶ 8 Citing *People v. Taylor*, 368 Ill. App. 3d 703 (2006), the defendant argues that the circuit court's admonishments regarding the possibility of extended-term sentencing were inadequate at the time of his guilty plea, and consequently, when the defendant was later sentenced to an extended-term sentence following the revocation of his probation, the court's imposition of that sentence was improper. The defendant requests that his sentence be reduced to the maximum three-year nonextended term sentence for the Class 4 felony of which he was convicted. The State counters that the defendant has forfeited this challenge for failing to raise it within 30 days after his plea or to include it in his postrevocation motion to reconsider.

¶ 9 Generally, sentencing issues must be raised in a postsentencing motion in order to preserve them for appellate review. 730 ILCS 5/5-4.5-50(d) (West 2010); *People v. Heider*, 231 Ill. 2d 1, 15 (2008). We note that the defendant in this case filed a motion to reconsider his extended-term sentence, arguing that the sentence was excessive. Notwithstanding his motion to reconsider, however, our supreme court has held that a sentence which does not conform to a statutory requirement is void, and a void order may

be attacked at any time or in any court, either directly or collaterally. *People v. Thompson*, 209 Ill. 2d 19, 24-25 (2004). "Furthermore, because an improper increase in sentence is a matter affecting a defendant's substantial rights, the instant claim is reviewable as plain error." *People v. McBride*, 395 Ill. App. 3d 204, 208 (2009); see also *People v. Whitfield*, 217 Ill. 2d 177, 201-02 (2005). Accordingly, the defendant may contest his extended-term sentence in this appeal. See *Thompson*, 209 Ill. 2d at 28.

¶ 10 The State also contends that the court in *Taylor* ignored the language of section 5-8-2(b) of the Code and improperly fashioned an extrajudicial remedy. The State argues that we should therefore reject *Taylor*, and by extension our prior decision in *McBride*, as wrongly decided. We decline to do so.

¶ 11 Section 5-8-2(b) of the Code states as follows:

> "If the conviction was by plea, it shall appear on the record that the plea was entered with the defendant's knowledge that [an extended-term sentence] was a possibility. If it does not so appear on the record, the defendant shall not be subject to such a sentence unless he is first given an opportunity to withdraw his plea without prejudice." 730 ILCS 5/5-8-2(b) (West 2010).

¶ 12 In *Taylor*, pursuant to this section of the Code, the appellate court found that the defendant's extended-term sentence, imposed upon revocation of the defendant's probation, was improper because the trial court had failed to adequately admonish him on the possibility of an extended-term sentence prior to accepting his negotiated guilty plea. *Taylor*, 368 Ill. App. 3d at 708; *People v. Eisenberg*, 109 Ill. App. 3d 98, 100 (1982); see also *McBride*, 395 Ill. App. 3d at 209 (following reasoning in *Taylor*). In *Taylor*, prior to

accepting the defendant's guilty plea, the trial court had stated, " '*If* extended term applies, it's 2 to 10 years.' " *Taylor*, 368 Ill. App. 3d at 708. The appellate court held that "[t]his type of conditional, tentative admonishment leaves a defendant to speculate whether an extended-term sentence is indeed possible in his case." *Id.* Accordingly, the appellate court concluded that the record did not establish that section 5-8-2(b) of the Code had been satisfied. *Id.*

¶ 13 The court in *Taylor* recognized that section 5-8-2(b)'s remedy, to move to withdraw a guilty plea, is unavailable where the trial court does not initially sentence the defendant to an extended term, but does so only after the revocation of probation. See *Taylor*, 368 Ill. App. 3d at 708. The court in *Taylor* therefore concluded that upon revocation of probation, when the record does not demonstrate that the defendant knew when he entered his plea that extended-term sentencing was possible, the proper remedy is to vacate the extended-term sentence so that the defendant may be sentenced in accordance with the admonishments that he received before he pled guilty. *Id.* We note that this reasoning is consistent with our supreme court's holding that where a circuit court lacks the statutory authority to impose an extended-term sentence, the extended-term portion of that sentence is void. *Thompson*, 209 Ill. 2d at 24-25.

¶ 14 As in *Taylor*, in the present case, the circuit court's statement regarding "[i]f extended term applies," was a conditional, tentative admonishment that left the defendant to speculate whether an extended-term sentence was possible in his case. The record does not demonstrate that, when he pled guilty, the defendant knew that extended-term sentencing was a possibility. Upon revocation of the defendant's probation, the circuit

court could impose only another sentence that was available at the time of initial sentencing. See *People v. Witte*, 317 Ill. App. 3d 959, 963 (2000); 730 ILCS 5/5-6-4(e) (West 2010). Because the record does not demonstrate that the defendant knew at the time of his guilty plea that he was eligible to receive an extended-term sentence, the defendant was not subject to the extended term at the subsequent revocation hearing.

¶ 15 The circuit court here sentenced the defendant to the maximum extended term. Given the circuit court's apparent intent to sentence the defendant to the maximum term, we hereby vacate the defendant's extended-term sentence but modify the defendant's sentence to the maximum possible nonextended term. See 730 ILCS 5/5-4.5-45 (West 2010); see also *Taylor*, 368 Ill. App. 3d at 709 (because record established that the trial court intended to impose the maximum available sentence for each conviction, the circuit court reduced the defendant's sentences to the maximum nonextended terms). Accordingly, pursuant to Supreme Court Rule 615(b)(4), we reduce the defendant's sentence to the maximum, nonextended three-year term of imprisonment.

¶ 16 CONCLUSION

¶ 17 For the reasons stated, we vacate the extended-term portion of the defendant's sentence and reduce his sentence to the maximum nonextended term of three years' imprisonment.

¶ 18 Vacated in part; affirmed as modified.