NO. 4-10-0459 Order Filed 3/7/11

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JOSE A. PACHECO, Defendant-Appellant.	)	Appeal from Circuit Court of Douglas County No. 06CF104 Honorable Chris E. Freese, Judge Presiding.

JUSTICE MYERSCOUGH delivered the judgment of the court.
Justice Pope concurred in the judgment.
Justice Appleton dissented.

ORDER

Held: (1) A sufficient factual basis for defendant's guilty plea existed even where the trial court did not ask defense counsel whether counsel agreed that the prosecutor had a witness who, if called, would testify substantially as indicated.

(2) Court has no power to shorten the period of mandatory supervised release provided by statutory law. Because the trial court sentenced defendant to a term of mandatory supervised release that was less than the statutory minimum, the sentence is void, and the court must resentence defendant.

Defendant, Jose A. Pacheco, appeals from the denial of his amended motion to withdraw his guilty plea. Because the trial court sentenced defendant to a term of mandatory supervised release below the statutory minimum, defendant must be resentenced. Therefore, we vacate defendant's sentence and

remand for resentencing.

I. BACKGROUND

Defendant was charged by information with two counts. Count I charged defendant with aggravated criminal sexual assault (720 ILCS 5/12-14(a)(1) (West 2006)), and count II charged him with criminal sexual assault (720 ILCS 5/12-13(a)(1) (West 2006)). On December 7, 2006, he pleaded not guilty to both counts.

In a hearing on October 11, 2007, defendant told the trial court he wished to withdraw his not-guilty plea to count II and enter an open plea of guilty to that count. After admonishing defendant--informing him, among other things, that the imprisonment range was 4 to 15 years and that his sentence would include two years of mandatory supervised release--the court asked the State for the factual basis. The State responded:

> "If called to testify, C.P., age 15, would state that between September 1, 2006[,] through September 30, 2006, she was residing in Tuscola, Douglas County.
>
> She would identify the Defendant as being someone within her family. She would state that while in her bedroom, Defendant would enter the bedroom, hold her arms and

legs down, making it difficult for her to move, and while doing so, Defendant would place his fingers in her vagina."

The court found a factual basis for the plea. The court accepted the guilty plea and entered judgment on count II. The State dismissed the remaining count of the information, count I.

On December 11, 2007, the trial court sentenced defendant to 15 years' imprisonment for count II, together with fines. Both the docket entry and the sentencing judgment indicate that the period of mandatory supervised release will be two years.

On January 10, 2008, defendant moved to withdraw his guilty plea and for reconsideration of his sentence. He amended his motion on May 5, 2010, to allege that the trial court erred in accepting the factual basis without asking defense counsel whether she agreed that the prosecutor had witnesses who, if called, would so testify. On May 20, 2010, in a supplement to the amended motion, defendant argued that the court had admonished him incorrectly by telling him he would serve only two years of mandatory supervised release. In reality, under section 5-8-1(d)(4) of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5-8-1(d)(4) (West 2006)), "the term of mandatory supervised release [would] range from a minimum of 3 years to a maximum of the natural life of the defendant." Defendant asserted he actually received a life term of mandatory supervised

release. A document printed from the web site of the Illinois Department of Corrections (DOC) and attached to the supplement indicated defendant had to remain on "parole" for "life."

In a hearing on June 15, 2010, the trial court denied defendant's amended motion to withdraw his guilty plea and for reconsideration of his sentence. The court found that Supreme Court Rule 402(c) did not require that defense counsel be asked whether counsel agreed that the prosecutor had witnesses who, if called, would testify as indicated in the factual basis. The court further found, on the mandatory-supervised-release issue, that notwithstanding section 5-8-1(d)(4) of the Unified Code (730 ILCS 5/5-8-1(d)(4) (West 2006)), the court had sentenced defendant to two years of mandatory supervised release. That was what the sentencing judgment said, and "[t]he court direct[ed] [DOC] to honor that order."

This appeal followed.

II. ANALYSIS

On appeal, defendant argues the trial court erred by denying his motion to withdraw his guilty plea because the court (1) erred in the handling of the factual basis and (2) improperly admonished defendant that he would only serve two years of mandatory supervised release when the range of supervised release was from three years to natural life.

A. Trial Court Complied With Supreme Court Rule 402(c)

Defendant argues the trial court erred in handling the factual basis because the court did not ask defense counsel whether counsel agreed the prosecutor had witnesses who, if called, would testify substantially as indicated.

When a defendant challenges the sufficiency of the factual basis, we review for an abuse of discretion the trial court's determination that a sufficient factual basis existed. *In re C.K.G.*, 292 Ill. App. 3d 370, 376-77, 685 N.E.2d 1032, 1036 (1997). Whether the court complied with Rule 402(c), however, is reviewed *de novo*. *People v. Benford*, 345 Ill. App. 3d 751, 751-52, 803 N.E.2d 1072, 1073 (2004).

Supreme Court Rule 402(c) (eff. July 1, 1997) provides that "[t]he court shall not enter final judgment on a plea of guilty without first determining that there is a factual basis for the plea." The factual basis can be established by the prosecutor's summary of the testimony and evidence which would have been presented at trial or the defendant's own admission that he committed the acts alleged in the indictment. *People v. Calva*, 256 Ill. App. 3d 865, 872, 628 N.E.2d 856, 862 (1993) (also holding that a trial court can accept a guilty plea, with a factual basis, even if the defendant maintains his innocence). In fact, "[a]ll that is required to appear on the record is a basis from which the judge could reasonably reach the conclusion that the defendant actually committed the acts with the intent

(if any) required to constitute the offense to which the defendant is pleading guilty." *People v. Barker*, 83 Ill. 2d 319, 327-28, 415 N.E.2d 404, 408 (1980).

Defendant argues, citing *People v. Williams*, 299 Ill. App. 3d 791, 701 N.E.2d 1186 (1998), and *C.K.G.*, 292 Ill. App. 3d 370, 685 N.E.2d 1032, that the trial court was required to ask defense counsel whether counsel agreed that the prosecutor had a witness who, if called, would testify substantially as indicated. Defendant asserts that because the court did not do so, he is entitled to withdraw his guilty plea.

Both *Williams* and *C.K.G.* are distinguishable. In *Williams*, this court found the trial court erred by accepting a stipulation to serve as the only showing for the factual basis for the defendant's guilty plea but found the issue forfeited by the defendant's failure to raise it before the trial court. *Williams*, 299 Ill. App. 3d at 794-95, 701 N.E.2d at 1188 (when asked for a factual basis, defense counsel indicated that he stipulated there was a factual basis, and nothing further was stated about a factual basis). In *dicta*, this court stated that, after the prosecutor's recitation of the evidence the State would present if the case went to trial, the trial court "should" ask defense counsel whether he or she agreed that the State had witnesses who, if called, would testify substantially as indicated. *Williams*, 299 Ill. App. 3d at 794, 701 N.E.2d at 1188

(referring to this procedure as a "suggested procedure"). While this court continues to affirm that such a procedure should be followed, we did not hold then and do not hold now that the failure to do so violates Rule 402(c).

The other case cited by defendant, *C.K.G.*, 292 Ill. App. 3d 370, 685 N.E.2d 1032, is also distinguishable. In *C.K.G.*, the trial court asked the respondent personally whether he agreed with the prosecutor's representations regarding the factual basis. *C.K.G.*, 292 Ill. App. 3d at 373, 685 N.E.2d at 1034. This court held that questioning the respondent personally was not required by Rule 402(c). *C.K.G.*, 292 Ill. App. 3d at 378, 685 N.E.2d at 1037. This court further noted that the Rule 402 requirements constituted a floor, not a ceiling, and that a trial court may ask additional questions, but should "do so only by the use of an *informed* discretion." (Emphasis in original.) *C.K.G.*, 292 Ill. App. 3d at 377, 685 N.E.2d at 1037. It was in the context of the trial court having decided to personally question the respondent that this court noted, in *dicta*, that all the court needed to do to ensure that the respondent was given an opportunity to address the factual-basis issue was to ask defense counsel whether he or she agreed that the prosecutor had witnesses who, if called, would testify substantially as indicated. *C.K.G.*, 292 Ill. App. 3d at 378, 685 N.E.2d at 1037. This court did not hold that such questioning was required by Rule 402(c).

In this case, the prosecutor articulated a factual basis from which the trial court could reasonably conclude that defendant actually committed the offense to which he pleaded guilty. The court fully complied with Supreme Court Rule 402(c). Therefore, defendant was not entitled to withdraw his guilty plea on the basis that the court failed to ask defense counsel whether counsel agreed the prosecutor had a witness who, if called, would testify substantially as indicated.

B. Trial Court Improperly Admonished Defendant Regarding Mandatory Supervised Release

Defendant also argues his plea must be vacated because the trial court improperly admonished defendant that he would have to serve a mandatory-supervised-release term of two years when, in fact, he was subject to a term of mandatory supervised release from three years to life. Defendant asserts DOC imposed a term of lifetime mandatory supervised release.

We disagree with defendant that DOC had the authority to impose a term of lifetime mandatory supervised release. Section 5-8-1(d)(4) of the Unified Code, which governs the imposition of terms of mandatory supervised release, provides, in relevant part, as follows:

> "(d) Except where a term of natural life is imposed, every sentence shall include as though written therein a term in addition to the term of imprisonment. *** Subject to

earlier termination under Section 3-3-8, the parole or mandatory supervised release term shall be as follows:

* * *

(4) for defendants who commit the offense of *** criminal sexual assault ***, the term of mandatory supervised release shall range from a minimum of 3 years to a maximum of the natural life of the defendant." 730 ILCS 5/5-8-1(d)(4) (West 2006).

The Second District and this court have disagreed on the proper interpretation of section 5-8-1(d)(4). The Second District, in *People v. Schneider*, 403 Ill. App. 3d 301, 308, 933 N.E.2d 384, 391 (2010), held that section 5-8-1(d)(4) of the Unified Code requires the trial court set an indeterminate term of mandatory supervised release, and the Department of Corrections determines how long the defendant remains on mandatory supervised release after three years. This court rejected the reasoning of *Schneider* in *People v. Rinehart*, No. 4-09-0283, slip op. at 17 (Ill. App. December 17, 2010), ___ Ill. App. 3d ___, __, ___ N.E.2d ___, ___.

In *Rinehart*, this court held the legislature intended

the trial court have the authority to impose a term of mandatory supervised release between three years and natural life. *Rinehart*, slip op. at 16, ___ Ill. App. 3d at ___, ___ N.E.2d at ___. The *Rinehart* court held:

> "The trial court, and not DOC, is in the best position to assess and weigh the factors relevant to determine whether a defendant should serve three years' MSR, natural life, or a term in between." *Rinehart*, slip op. at 16, ___ Ill. App. 3d at ___, ___ N.E.2d at ___.

The ambiguity in section 5-8-1(d)(4) of the Unified Code arises, in part, from the language that the term of mandatory supervised release is included "as though written therein" while section 5-8-1(d)(4) refers to a term of mandatory supervised release that ranges from a minimum of three years to a maximum of natural life. See 730 ILCS 5/5-8-1(d)(4) (West 2006). The "as though written therein" language was contained in the statute when the legislature amended the statute to include section 5-8-1(d)(4). See 730 ILCS 5/5-8-1(d)(4) (West 2006).

This court reaffirms *Rinehart* and holds that the trial court was required to impose a mandatory-supervised-release term between three years and natural life. In this case, the court imposed a mandatory-supervised-release term of two years. A

court has no power to shorten the period of mandatory supervised release stipulated by statutory law. *People v. Whitfield*, 217 Ill. 2d 177, 200-01, 840 N.E.2d 658, 672 (2005). Because the two-year term of mandatory supervised release was below the statutory minimum, the sentence is void. See *People v. Arna*, 168 Ill. 2d 107, 113, 658 N.E.2d 445, 448 (1995) ("A sentence which does not conform to a statutory requirement is void").

Defendant requests, on appeal, that he be permitted to withdraw his guilty plea because he was not admonished that he could receive a term of mandatory supervised release of three years to life. That request is premature. Because the trial court should have sentenced defendant to a term of mandatory supervised release somewhere between three years and life, we remand for the court to make that determination. If the court imposes lifetime mandatory supervised release, defendant's guilty plea would not be a knowing plea because he would have received a sentence greater than that to which he was admonished. See, *e.g.*, *People v. Fish*, 316 Ill. App. 3d 795, 800, 737 N.E.2d 694, 698 (2000) (the defendant's plea was not knowing where he was not admonished of mandatory supervised release, restitution, fines, fees, and costs and his sentence was two years longer and $40,000 more costly than what he was told he could receive). "In order for a guilty plea to withstand appellate *** review, the record must reflect the defendant's plea was entered as a knowing,

intelligent act, done with sufficient awareness of the relevant circumstances and likely consequences." *People v. Didley*, 213 Ill. App. 3d 910, 915, 572 N.E.2d 423, 426 (1991), citing *Brady v. United States*, 397 U.S. 742, 749 (1970). If however, the trial court fashions a sentence that fits within the sentencing range defendant was told he could receive--for example, 14 years' imprisonment followed by 3 years of mandatory supervised release--then no error will have occurred. See *People v. Coultas*, 75 Ill. App. 3d 137, 140, 394 N.E.2d 26, 28 (1979) (no constitutional error occurred because the actual sentence that the defendant received, three years plus mandatory supervised release, was less than the maximum five-year sentence that the court admonished him he could receive).

III. CONCLUSION

For the foregoing reasons, we vacate defendant's sentence and remand this case for resentencing. We otherwise affirm the judgment.

Affirmed in part, vacated in part, and cause remanded with directions.

JUSTICE APPLETON, dissenting:

I respectfully dissent from the majority's decision in this case, and, in doing so, I disagree with the position of this court expressed in *Rinehart*, No. 4-09-0283, ___ Ill. App. 3d ___. While both Justices Myerscough and Pope agree that defendant was incorrectly admonished concerning the possible term of MSR, they believe the error in the sentence imposed may somehow be corrected by the trial court. I find the error to be unremediable by resentencing.

The error here occurred both by incorrectly admonishing defendant he was subject to a two-year term of MSR and by failing to admonish him that he was subject to the potential of MSR for the rest of his life. The majority apparently believes the error is remediable by somehow adjusting the sentence to trade one extra year of MSR for one year of imprisonment.

Unfortunately, the solution is not so neatly achieved. Not the trial court, but a sex-offender evaluator approved by the Sex Offender Management Board determines at what point, within the range of three years to life, the defendant shall be discharged from MSR. 730 ILCS 5/3-14-2.5(d), 5-8-1(d)(4) (West 2008). The trial court erred by failing to admonish defendant that MSR would be for at least three years and possibly for the rest of his life, and I would vacate both defendant's plea and sentence and remand for either trial or a plea with proper

admonishments.