2012 IL App (4th) 110007-U

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NOS. 4-11-0007, 4-11-0008 cons.

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JAIME CORNEJO, Defendant-Appellant.	)	Appeal from Circuit Court of McLean County Nos. 09CF658 09CF710 Honorable Charles G. Reynard, Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justice Appleton concurred in the judgment.
Justice Pope specially concurred.

ORDER

¶ 1 *Held*: The appellate court (1) concluded the trial court (a) failed to admonish defendant in case No. 09-CF-710 on the applicability of consecutive sentences, so defendant must be allowed to withdraw his plea and plead anew, but defendant suffered no prejudice by the trial court's complained of admonishment in case No. 09-CF-658; and (b) erred by sentencing defendant in No. 09-CF-658 to extended-term sentences for certain domestic battery (subsequent offense) and unlawful restraint counts but properly sentenced him to an extended-term on the unrelated intimidation and residential burglary; and (2) reversed and remanded in No. 09-CF-710 to permit defendant to withdraw his plea and plead anew; and (3) modified various sentences in No. 09-CF-658 to the maximum nonextended term and remanded with directions to strike the written sentencing judgment's provision that the counts in No. 09-CF-658 are ordered "consecutive to" No. 09-CF-710 and issue an amended sentencing judgment so reflecting.

¶ 2 In April 2010, in McLean County case No. 09-CF-710, defendant, Jaime Cornejo, entered an open guilty plea to harassment of a witness committed July 16 to 29, 2009. In May

2010, in McLean County case No. 09-CF-658, defendant entered a partially negotiated guilty plea (negotiated as to charges) to intimidation (count VIII) committed on or about July 1 to 16, 2009; domestic battery (subsequent offense) (count XI) committed July 4, 2009; domestic battery (subsequent offense) (count IX) and aggravated battery (count X) committed July 13 to 14, 2009; and residential burglary (count IV), unlawful restraint (count V), and two counts of domestic battery (subsequent offense) (counts VI and VII) committed July 16, 2009. In July 2010, the trial court sentenced defendant in No. 09-CF-658 to the following concurrent, extended-term prison sentences: residential burglary (count IV), 28 years; unlawful restraint (count V), five years; domestic battery (subsequent offense) (count VI), five years; domestic battery (subsequent offense) (count VII), five years; intimidation (count VIII), seven years; domestic battery (subsequent offense) (count IX), five years; aggravated battery (count X), seven years; and domestic battery (subsequent offense) (count XI), five years. In case No. 09-CF-710, the court sentenced defendant to an extended 14-year prison term to run consecutively to the sentences imposed in No. 09-CF-658.

¶ 3 In this consolidated appeal, defendant argues the trial court (1) failed to adequately admonish him his sentences in McLean County case Nos. 09-CF-658 and 09-CF-710 were mandatorily consecutive in compliance with Illinois Supreme Court Rule 402(a)(2) (eff. July 1, 1997) so he should be permitted to withdraw both guilty pleas; and (2) improperly sentenced him to extended-term sentences for (a) unlawful restraint, (b) domestic battery (subsequent offense), and (c) intimidation. We agree the court (1) failed to admonish defendant in case No. 09-CF-710 in compliance with Rule 402(a), and (2) erred by sentencing defendant to extended-term sentences for two domestic battery (subsequent offense) counts and an unlawful

restraint count in No. 09-CF-658. In No. 09-CF-710, our case No. 4-11-0008, we reverse and remand with directions. In No. 09-CF-658, our case No. 4-11-0007, we affirm as modified and remand with directions.

¶ 4 I. BACKGROUND

¶ 5 In July 2009 in No. 09-CF-658, our case No. 4-11-0007, the State charged defendant with the following offenses, all against his then-girlfriend, M.E.: (1) for conduct occurring from July 1 to 16, 2009, intimidation, a Class 3 felony (720 ILCS 5/12-6(a)(1) (West 2008) (count VIII); (2) for conduct occurring on July 4, 2009, domestic battery (subsequent offense), a Class 4 felony (720 ILCS 5/12-3.2(a)(2) (West 2008)) (count XI); (3) for conduct occurring on or about July 13 to 14, 2009, domestic battery (subsequent offense), a Class 4 felony ((720 ILCS 5/12-3.2(a)(2) (West 2008)) (count IX), and aggravated battery, a Class 3 felony (720 ILCS 5/12-4(b)(8) (West 2008)) (count X); and (4) for conduct occurring on July 16, 2009, criminal sexual assault, a Class 1 felony (720 ILCS 5/12-13(a)(1) (West 2008)) (count I); criminal sexual assault, a Class 1 felony (720 ILCS 5/12-13(a)(1) (West 2008)) (count II); criminal sexual abuse, a Class 4 felony (720 ILCS 5/12-15(a)(1) (West 2008)) (count III); residential burglary, a Class 1 felony (720 ILCS 5/19-3(a) (West 2008)) (count IV); unlawful restraint, a Class 4 felony (720 ILCS 5/10-3 (West 2008)) (count V); and domestic battery (subsequent offense), a Class 4 felony (720 ILCS 5/12-3.2(a)(2) (West 2008)) (counts VI and VII).

¶ 6 In August 2009, the grand jury indicted defendant on all 11 counts.

¶ 7 In August 2009, in case No. 09-CF-710, our case No. 4-11-0008, the State charged defendant with harassment of a witness, a Class 2 felony (720 ILCS 5/32-4a(a)(2) (West

2008)) occurring from July 16 to 29, 2009, and involving a witness, M.E., from case No. 09-CF-658.

¶ 8 On July 16, 2009, police arrested defendant in case No. 09-CF-658. He was unable to post bond and held on a parole hold at the McLean County jail before being remanded to the Department of Corrections in August 2009. The record shows the conduct in case No. 09-CF-710 occurred while defendant was in pretrial detention for the charges in case No. 09-CF-658. The conduct in both cases occurred while defendant was on parole for a 2003 felony conviction.

¶ 9 In April 2010, on the day set for bench trial in case No. 09-CF-710, defendant entered an open guilty plea to harassment of a witness. The trial court advised defendant he was subject to a 3 to 14-year extended-term prison sentence, nonprobationable, followed by two years' mandatory supervised release. Defendant stated he understood. The court found defendant knew the possible penalties and knowingly and voluntarily waived his trial rights. Immediately prior to conducting the plea hearing in No. 09-CF-710, the court continued No. 09-CF-658 on defendant's motion.

¶ 10 In May 2010, in case No. 09-CF-658, defendant pleaded guilty to residential burglary (count IV), unlawful restraint (count V), four counts of domestic battery (subsequent offense) (counts VI, VII, IX, and XI), intimidation (count VIII), and aggravated battery (count X). Defendant agreed to a minimum sentence of 20 years. In exchange, the State agreed to dismiss two criminal sexual assault counts (counts I and II) and one criminal sexual abuse count (count III). The trial court admonished defendant on his extended-term eligibility on the following charges: residential burglary, intimidation, and aggravated battery. The court further advised

defendant of the four-year mandatory supervised release period on the domestic batteries. The State suggested to the court the sentence on case No. 09-CF-658 was mandatorily consecutive to any sentence imposed on case No. 09-CF-710, because defendant was in pretrial custody when the conduct in case No. 09-CF-710 occurred. Defense counsel stated he would need to research whether the sentence was mandatorily consecutive. Relevant to this appeal, the court then admonished defendant as follows:

> "THE COURT: Based upon the issue that your attorney and the [assistant] [S]tate's [A]ttorney have referred to, I also need to advise you of the *possibility that the sentence that's imposed in this case would be consecutive to the sentence that's to be imposed in the other case* on July 1st, meaning that one sentence is served first, and then the other sentence is served, as opposed to the sentences being served at the same time.
>
> Do you understand that it is a possible consequence, a possible penalty associated with pleading guilty in this case?
>
> THE DEFENDANT: Yes. " (Emphasis added.)

¶ 11 The trial court then admonished defendant as to the sentence ranges for each count. After stating the possible prison sentence, the court asked defendant if he had any questions as to the penalties. Defendant responded in the negative. The court found defendant understood the charges, possible penalties, and trial rights, and he voluntarily waived his rights.

¶ 12 On July 1, 2010, first in No. 09-CF-658, the trial court orally sentenced defendant to extended terms on all counts: 28 years for residential burglary (count IV), 5 years for unlawful

restraint (count V), 5 years for domestic battery (subsequent offense) (counts VI, VII, IX, and XI), 7 years for intimidation (count VIII), and 7 years for aggravated battery (count X) with the sentences to run concurrently. In No. 09-CF-710, the court sentenced defendant on one count of harassment of a witness to an extended 14-year prison term to run consecutively to the sentences imposed in No. 09-CF-658.

¶ 13 In July 2010, defendant filed a motion to withdraw guilty plea and a motion to reconsider sentence in both Nos. 09-CF-658 and 09-CF-710, arguing (1) his plea was unknowing and involuntary and (2) his sentence was excessive. Later, the trial court denied defendant's motions in both cases. These appeals, consolidated on defendant's motion, followed.

¶ 14 II. ANALYSIS

¶ 15 Defendant argues the trial court (1) failed to adequately admonish him his sentences in case Nos. 09-CF-658 and 09-CF-710 were mandatorily consecutive in compliance with Supreme Court Rule 402(a) and (2) improperly sentenced him to extended-term sentences for (a) unlawful restraint (b) domestic battery (subsequent offense) and (c) intimidation.

¶ 16 A. Defendant's Claim the Trial Court Failed To Adequately Admonish Him His Sentences were Mandatorily Consecutive

¶ 17 Defendant argues the trial court failed to adequately admonish him his sentences in Nos. 09-CF-658 and 09-CF-710 were mandatorily consecutive in compliance with Supreme Court Rule 402(a), and he should be permitted to withdraw his guilty plea and plead anew. We agree the court failed to admonish defendant in case No. 09-CF-710 in compliance with Rule 402(a) but conclude defendant suffered no prejudice by the trial court's complained of admonishment in case No. 09-CF-658.

¶ 18 The trial court has discretion to grant or deny a motion to withdraw a guilty plea and the decision is reviewed for an abuse of discretion. *People v. Delvillar*, 235 Ill. 2d 507, 519, 922 N.E.2d 330, 338 (2009). Absent a factual dispute, the legal issue of what admonishments the trial court is required to give a defendant is reviewed *de novo*. *People v. DePaolo*, 317 Ill. App. 3d 301, 310, 739 N.E.2d 1027, 1034 (2000). A defendant does not have an automatic right to withdraw a plea of guilty. The defendant must show a manifest injustice under the facts involved. *Delvillar*, 235 Ill. 2d at 520, 922 N.E.2d at 338. Failure to properly admonish a defendant, standing alone, does not automatically establish grounds for vacating the plea. *People v. Fuller*, 205 Ill. 2d 308, 323, 793 N.E.2d 526, 537 (2002). Whether reversal is required for an imperfect admonishment depends on whether "real justice" has been denied or whether the defendant has been prejudiced by the inadequate admonishment. *Fuller*, 205 Ill. 2d at 323, 793 N.E.2d at 537 (citing *People v. Davis*, 145 Ill. 2d 240, 250, 582 N.E.2d 714, 719 (1991)). A trial court's admonitions pursuant to Rule 402(a) will be judged based upon what the court said at that proceeding. *People v. Bassette*, 391 Ill. App. 3d 453, 458, 908 N.E.2d 1062, 1066 (2009).

¶ 19 Supreme Court Rule 402(a), in pertinent part, states:

> "(a) Admonitions to Defendant. 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 of and determining that he understands the following:
>
> (1) the nature of the charge;
>
> (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[.]" Ill. S. Ct. 402(a) (eff. July 1, 1997).

Substantial compliance with Rule 402(a) is sufficient to establish due process. *People v. Whitfield*, 217 Ill. 2d 177, 195, 840 N.E.2d 658, 669 (2005). However, informing a defendant of the *possibility* of consecutive sentences when consecutive sentences are in fact mandatory has been held an inadequate admonishment under Rule 402(a). *People v. Dorethy*, 331 Ill. App. 3d 504, 507, 771 N.E.2d 609, 611 (2002) (3rd Dist.). *Dorethy* held under such circumstances, the defendant should be allowed to withdraw his guilty plea and plead anew. *Id*.

¶ 20 Defendant argues section 5-8-4(h) of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5-8-4(h) (West 2008)), which we construe as section 5-8-4(d)(8) of the Unified Code (730 ILCS 5/5-8-4(d)(8) (West 2008) (eff. July 1, 2009)), applies to make his sentence in case No. 09-CF-710 mandatorily consecutive with case No. 09-CF-658 because he was in pretrial detention during the period in question. Section 5-8-4(d)(8) of the Unified Code states, in part:

> "*If a person* [(1)] *charged with a felony* [(2)] *commits a separate felony while* on pretrial release or *in pretrial detention in a county jail facility* or county detention facility, *then the sentences imposed upon conviction* of these felonies *shall be served consecutively regardless of the order in which the judgments of conviction are entered*." (Emphases added.) 730 ILCS 5/5-8-

4(d)(8) (West 2008) (eff. July 1, 2009).

Defendant argues the trial court should have admonished him at both plea hearings the sentences imposed would be mandatorily consecutive under section 5-8-4(d)(8) of the Unified Code.

¶ 21 Defendant argues his case is controlled by *People v. Davison*, 378 Ill. App. 3d 1010, 883 N.E.2d 648 (2008), *reversed on other grounds*, 233 Ill. 2d 30, 906 N.E.2d 545 (2009). In *Davison*, this court, in *dicta*, stated, "[i]nforming a defendant merely of the *possibility* of consecutive sentences when they are mandatory is an inadequate admonishment under Rule 402(a) and 'the defendant should be allowed to withdraw his guilty plea and plead anew.' " *Davison*, 378 Ill. App. 3d at 1019, 883 N.E.2d at 655 (quoting *Dorethy*, 331 Ill. App. 3d at 507, 771 N.E.2d at 611). In *Davison*, the defendant, unlike here, pleaded guilty in two separate cases the same day. Given this timing, we find *Davison* inapposite.

¶ 22 The State argues under *People v. Blankley*, 319 Ill. App. 3d 996, 1002, 747 N.E.2d 16, 21 (2001), where a defendant has a pending case, with no conviction or sentence, a trial court would not know whether a consecutive sentence was even possible at the first plea hearing. In *Blankley*, the defendant entered his guilty plea in the first degree murder charge in Bond County approximately two months before he was convicted on drug-related charges in Macoupin County. The *Blankley* court found when the defendant entered his guilty plea in Bond County the trial court had no basis for admonishing him as to the possibility of consecutive sentences, because whether he would be convicted in Macoupin County, and subject to a mandatory consecutive sentence, was speculative. *Blankley*, 319 Ill. App. 3d at 1007-8, 747 N.E.2d at 25. Unlike *Blankley*, defendant here had both charges pending in McLean County and not in separate counties.

¶ 23 We agree with the State. Where two cases are pending with no conviction or sentence and only one is at hearing, a trial court ordinarily would not know whether a consecutive sentence was possible, let alone mandatory, in the first case in which a defendant pleaded guilty. However, these are not the circumstances presented.

¶ 24 Focusing on the point in time of the April 2010 plea hearing in case No. 09-CF-710, defendant had not been convicted in No. 09-CF-658. However, the factual basis for the plea suggested the applicability of the mandatory consecutive sentencing provision: (1) the State charged defendant with multiple felonies against M.E. in No. 09-CF-658; and (2) while in the McLean County jail between July 16 and July 29, 2009, defendant made about 35 calls to M.E., who was going to be a witness in the criminal case against him in No. 09-CF-658, during the course of which he asked her to drop the charges, change her story to the police department, and take letters to the State's Attorney's office asking that charges be dropped. Thus, the trial court was required to admonish defendant if he pleaded guilty in case No. 09-CF-710, a mandatory consecutive sentence would attach if he was also convicted in No. 09-CF-658. When defendant pleaded in case No. 09-CF-710, the court failed to inform him of the mandatory consecutive nature of the sentence if he was convicted and sentenced first in case No. 09-CF-658. We conclude defendant was prejudiced by being sentenced to a mandatory consecutive sentence in No. 09-CF-710 when he was never admonished on the applicability of consecutive sentencing under section 5-8-4(d)(8) of the Unified Code.

¶ 25 However, at the May 2010 plea hearing in No. 09-CF-658, defendant was similarly subject to the section 5-8-4(d)(8) mandatory consecutive sentencing requirement because of his prior guilty plea in case No. 09-CF-710. We need not decide whether, as

defendant argues, the trial court's use of the word "possibility" when admonishing defendant about consecutive sentences was improper as the distinction between "possibility" and "mandatory" may have influenced defendant's decision to forego his trial rights and plead guilty because he was not prejudiced by the court's sentence.

¶ 26 In No. 09-CF-658, we conclude defendant was not prejudiced by the complained of admonishment because the sentences imposed in No. 09-CF-658 were not ordered to run consecutively to the sentence in No. 09-CF-710. Rather, in pronouncing sentence, the court ordered the sentence in No. 09-CF-710 consecutive to the sentences imposed in No. 09-CF-658.

¶ 27 In No. 09-CF-710, we conclude the trial court failed to admonish defendant in substantial compliance with Rule 402(a), and we reverse and remand with directions to allow defendant to withdraw his plea and plead anew.

¶ 28 We note, however, the trial court's written sentencing order differs from its oral pronouncement, as it shows the court imposed a consecutive sentence in No. 09-CF-658 as well as No. 09-CF-710. See *People v. Roberson*, 401 Ill. App. 3d 758, 774, 927 N.E.2d 1277, 1291 (2010) ("When the oral pronouncement of the court and the written order conflict, the oral pronouncement of the court controls."). In No. 09-CF-658, we remand for issuance of an amended sentencing judgment so the sentence in No. 09-CF-658 conforms to the court's oral pronouncement, *i.e.*, striking the written sentencing judgment's provision that the counts in No. 09-CF-658 are ordered "consecutive to" No. 09-CF-710.

¶ 29 B. Defendant's Claim the Trial Court Improperly Sentenced Him to Extended-Term Sentences in Case No. 09-CF-658

¶ 30 Defendant next contends the trial court improperly sentenced him to extended-

term sentences in case No. 09-CF-658 for (a) unlawful restraint, (b) two counts of domestic battery (subsequent offense) occurring on July 16, 2009, and (c) intimidation. Here, the most serious class offense for which defendant was convicted in No. 09-CF-658 was residential burglary, a Class 1 felony, occurring on July 16, 2009. The record reveals defendant's criminal objective on July 16, 2009 was to persuade M.E. to continue their relationship by assaulting her. The State concedes the extended-term sentences for unlawful restraint (count V) and two counts of domestic battery (subsequent offense) (counts VI and VII) should be vacated because they were committed during the same course of conduct on July 16. The State argues the seven year extended-term sentence for intimidation is proper because the conduct occurred from July 1 to 16, 2009. We agree with the State.

¶ 31 The question of whether the trial judge imposed an improper sentence is reviewed *de novo*. *People v. Thompson*, 209 Ill. 2d 19, 22, 805 N.E.2d 1200, 1202 (2004). Section 5-8-2(a) of the Unified Code authorizes the trial court to impose an extended-term sentence only on the offense within the most serious class of which the offender is convicted. 730 ILCS 5/5-8-2(a) (West 2008); *People v. Peacock*, 359 Ill. App. 3d 326, 337, 833 N.E.2d 396, 405 (2005). The supreme court construed section 5-8-2(a) to allow a single exception to this rule where a trial court may impose extended-term sentences on separately charged, differing class offenses arising from unrelated courses of conduct. *People v. Bell*, 196 Ill. 2d 343, 351, 751 N.E.2d 1143, 1147 (2001). Courts must consider whether a substantial change in the nature of the defendant's criminal objective warrants finding unrelated courses of conduct. *Bell*, 196 Ill. 2d at 354, 751 N.E.2d at 1149. An extended-term sentence imposed in violation of the Unified Code is void. *Thompson*, 209 Ill. 2d at 27, 805 N.E.2d at 1204-05.

¶ 32 The intimidation charged in count VIII occurred from July 1 to 16, 2009, and the trial court found such conduct was unrelated to the July 16 residential burglary. The record shows defendant intimidated M.E. over this period to prevent her from ending their relationship and his criminal objective of intimidation changed when he committed residential burglary to assault her. Because the intimidation conduct was unrelated to the residential burglary the trial court properly sentenced defendant to an extended-term sentence for intimidation as conduct unrelated to the residential burglary. See *People v. Hummel*, 352 Ill. App. 3d 269, 271-73, 815 N.E.2d 1172, 1174-76 (2004) (finding the defendant's criminal objective in committing battery against person obstructing his egress was unrelated to committing burglary).

¶ 33 The unlawful restraint and domestic battery (subsequent offense) charges were committed during the same course of conduct on July 16, 2009. Accordingly, we modify defendant's sentence to the maximum nonextended prison terms for those offenses: three years for unlawful restraint (count V), and three years on each count of domestic battery (subsequent offense) (counts VI and VII). Finally, although not raised by the parties, the record shows the trial court failed to admonish defendant on his extended-term eligibility on count IX, domestic battery (subsequent offense), occurring on July 13 to 14, 2009; or on count XI, domestic battery (subsequent offense) occurring on July 4, 2009. We therefore reduce his sentences on those counts to the maximum nonextended term, three years.

¶ 34 We remand for issuance of an amended sentencing judgment (Ill. S. Ct. R. 615(b) (eff. Aug. 27, 1999)) so reflecting.

¶ 35 III. CONCLUSION

¶ 36 In No. 09-CF-658, we affirm the trial court's judgment as modified and remand

for issuance of an amended sentencing judgment striking the reference in the written sentencing judgment that the sentence imposed in No. 09-CF-658 is consecutive to the sentence imposed in No. 09-CF-710 and reducing the extended term sentences to the maximum nonextended term sentences as follows: three years for unlawful restraint (count V), and three years on each count of domestic battery (subsequent offense) (counts VI and VII). In No. 09-CF-710, we reverse and remand with directions to allow defendant to withdraw his plea and plead anew.

¶ 37 No. 4-11-0007: Affirmed as modified and cause remanded with directions.

¶ 38 No. 4-11-0008: Reversed and remanded with directions.

¶ 39 JUSTICE POPE, specially concurring:

¶ 40 The trial court imposed a consecutive sentence in case No. 09-CF-710 but failed to admonish defendant at the time of his plea that a consecutive sentence was even a possibility, much less mandatory, if a conviction was entered in case No. 09-CF-658. I agree with the majority defendant must be allowed the opportunity to withdraw his plea. However, I would leave our finding at that. Instead, the majority holds the trial judge should have known to admonish defendant of the mandatory consecutive sentences when the plea was taken in case No. 09-CF-710 because the two cases were both in the same county. In my opinion, at the time of the first plea, the trial judge had no way of knowing whether a second conviction would occur.

¶ 41 At the time of the second plea, the trial judge was required to advise defendant that any sentence in case No. 09-CF-658 would be consecutive to the sentence in case No. 09-CF-710. If the trial court had so advised defendant and then made the sentence in case No. 09-CF-658 consecutive to the sentence imposed in case No. 09-CF-710, I believe we would uphold that sentence despite the fact no consecutive sentencing admonishment was given at the time of the plea in case No. 09-CF-710. However, the trial court impermissibly imposed the consecutive sentence in case No. 09-CF-710, rather than in case No. 09-CF-658.

¶ 42 Additionally, because defense counsel at the time of the plea in case No. 09-CF-658 said he was not sure if any sentence in that case would have to be served consecutively to the sentence in case No. 09-CF-710, the trial judge told defendant consecutive sentencing was a "possibility." The trial judge should have refrained from taking the plea until the lawyers researched the issue so he could have properly admonished defendant about the mandatory nature of consecutive sentences.