

NOTICE
This Order was filed under
Supreme Court Rule 23 and is
not precedent except in the
limited circumstances allowed
under Rule 23(e)(1).

2023 IL App (4th) 220677-U
NO. 4-22-0677
IN THE APPELLATE COURT
OF ILLINOIS

FILED
June 1, 2023
Carla Bender
4th District Appellate
Court, IL

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
Plaintiff-Appellee,)	Circuit Court of
v.)	Logan County
BRIAN K. WILLIAMS,)	No. 17CF126
Defendant-Appellant.)	
)	Honorable
)	William G. Workman,
)	Judge Presiding.

JUSTICE LANNERD delivered the judgment of the court.
Justices Turner and Knecht concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court reversed and remanded to allow defendant to withdraw his guilty plea and plead anew, concluding the trial court failed to substantially comply with Illinois Supreme Court Rule 402(d)(3) (eff. July 1, 2012).

¶ 2 Defendant, Brian K. Williams, appeals his convictions for two counts of predatory criminal sexual assault of a child, Class X felonies (720 ILCS 5/11-1.40(b)(1) (West 2018)). In November 2018, defendant pleaded guilty to the charges pursuant to a partially negotiated plea agreement. In exchange for defendant's plea, the State agreed to (1) cap its sentencing recommendation to a total of 33 years in prison and (2) dismiss count III, which alleged aggravated criminal sexual assault (*id.* § 5-8-4(d)(2)). After accepting defendant's plea, the trial court sentenced him to consecutive sentences of 60 years in prison on counts I and II, for a total of 120 years in prison.

¶ 3 Defendant appeals on three grounds. First, defendant contends the trial court failed to substantially comply with Illinois Supreme Court Rule 402(d)(3) (eff. July 1, 2012), and therefore, he should be permitted to withdraw his guilty plea. Second, defendant argues the court erred when it denied his motion to withdraw his guilty plea because defendant misunderstood the consequences of pleading guilty, received ineffective assistance of counsel, and did not enter his plea knowingly and voluntarily. Finally, defendant asserts he should be allowed to challenge his sentence as excessive under the proportionate penalties clause of the Illinois Constitution (Ill. Const. 1970, art. 1, § 11).

¶ 4 Because the trial court failed to substantially comply with Rule 402(d)(3), we reverse the court's judgment and remand to allow defendant to withdraw his guilty plea. We additionally direct the court to assign this case to a different judge and appoint new counsel to represent defendant. Because we find this issue dispositive, we do not address defendant's remaining arguments on appeal.

¶ 5 I. BACKGROUND

¶ 6 In August 2017, the State charged defendant by information with two counts of predatory criminal sexual assault of a child (720 ILCS 5/11-1.40(b)(1)) (counts I and II) and one count of aggravated criminal sexual assault (count III) (*id.* § 5-8-4(d)(2)). Count I alleged that between January 1, 2012, and June 21, 2017, defendant committed an act of sexual conduct with D.E., who was under 13 years of age, in that he touched the vagina of D.E. with his hands for the purpose of sexual gratification or arousal. Count II alleged that between January 1, 2012, and June 21, 2017, defendant committed an act of sexual penetration with D.E., who was under 13 years of age, in that he placed his penis in the vagina of D.E. Count III alleged defendant was a

family member of D.E. and committed an act of sexual penetration with D.E., who was under 18 years of age, in that he placed his penis in the vagina of D.E.

¶ 7 A. Plea Hearing and Sentencing

¶ 8 In November 2018, the parties informed the trial court they had reached a partially negotiated plea agreement. Under its terms, defendant agreed to plead guilty to counts I and II in exchange for the State's dismissal of count III and a recommendation that defendant be sentenced to no more than 33 years in prison. Defendant stated this was his understanding of the terms of his agreement with the State. In addition, defendant agreed he signed the document memorializing the terms and discussed the plea with his attorney and family members.

¶ 9 The trial court explained to defendant the nature of the charges to which he was pleading guilty and that under the applicable sentencing provisions, he was to be sentenced "to a term of imprisonment of not less than 6 years and not more than 60 years" on each count. Further, his sentences for each count were required to be served consecutively.

¶ 10 The trial court advised defendant that by pleading guilty, he would be giving up the right to (1) a jury or bench trial, (2) confront and cross-examine the State's witnesses, and (3) present witnesses and evidence on his own behalf. Defendant denied he was threatened or forced to plead guilty. Moreover, defendant denied that anyone had made promises to him, other than those in the plea agreement, to induce him to plead guilty. The following exchange occurred upon the court's admonishments regarding further consequences of his plea:

"THE COURT: As a consequence of this conviction after a plea, the sentence for any future conviction may be increased, and there may be a higher possibility for the imposition of a consecutive sentence.

As a consequence of this conviction after a plea, there may be a registration requirement that would restrict where you may work, live, or be present.

As a consequence of this conviction, there may be an impact upon your ability to retain or obtain housing in the public or private market, to retain or obtain employment, or to retain or obtain a firearm, an occupational license, or a driver's license. Do you have any questions about any of those?

THE DEFENDANT: So it can go more than the cap?

THE COURT: Pardon?

THE DEFENDANT: It can go more than the cap?

THE COURT: I will be explaining that to you here in a little bit.

THE DEFENDANT: Okay. I misunderstood you, sir.

THE COURT: That's all right. We will discuss that in a few moments, all right?"

¶ 11 Immediately afterward, the trial court asked defendant how he pleaded to each of the charges, and defendant responded, "Guilty," to both counts I and II, respectively. The State recited its factual basis, and defendant's counsel agreed the State "would have witnesses that would testify as indicated." The court found defendant's plea was knowing and voluntary and the State's factual basis supported the guilty plea. The court ordered a presentence investigation and for the case to be set for sentencing.

¶ 12 After accepting defendant's plea, the trial court addressed defendant as follows:
"Now, another comment that you made, I want to make sure that you fully understand that the plea agreement, the partially negotiated plea agreement, is that the State is going to cap its recommendation of the sentence. The Court is not

bound by that. I want you to recall that. The sentencing range in this case theoretically goes from 6 years to 120 years. That is the sentencing range on these two cases combined because one is mandatory consecutive to the other. Well, actually, I should rephrase that because the minimum sentence on each case is 6 years, but since they have to be consecutive, the minimum sentence would be 12 years up to 120 years. That is the sentencing range.”

The court concluded the plea hearing, and a sentencing hearing was set for January 2019.

¶ 13 At the beginning of the sentencing hearing, defense counsel informed the trial court that during the presentence investigation, defendant expressed he was actually innocent of the charges as they were alleged by the State in the information. Defense counsel stated:

“[Defendant] discussed this issue with me today, and I advised him that the proper vehicle to contest this in my opinion would be to be sentenced, file a petition to vacate the sentence and plea of guilty to alleged involuntary plea confusion, etcetera, and he can’t bring it up now until he is sentenced.”

Counsel later stated, “If [defendant] is going to attack the sentence and plea and timeline, we have to do a post-conviction.”

¶ 14 After communicating this issue, the parties proceeded to sentencing. The parties presented evidence in aggravation and mitigation, defendant’s statement in allocution, and sentencing recommendations. The court sentenced defendant to 60 years in prison on each count, for a total of 120 years. The court advised defendant that if he wished to appeal his conviction and sentence, he must, within 30 days, file “a written motion asking to have the trial court reconsider the sentence or to have the judgment vacated and for leave to withdraw your plea of guilty setting forth your grounds for that motion.”

¶ 15

B. Post-Sentencing Proceedings and Initial Appeal

¶ 16

In February 2019, defendant filed a motion to withdraw his guilty plea and vacate the judgment combined with a motion to reconsider his sentences. The State filed a response, arguing under Illinois Supreme Court Rule 604(d) (eff. Jul. 1, 2017), defendant was required to file separate motions to withdraw his guilty plea and to reconsider his sentences. Defendant's counsel filed two amended motions to withdraw the guilty plea, an amended motion to challenge defendant's sentence as excessive, and a certificate pursuant to Rule 604(d).

¶ 17

In July 2019, the trial court conducted a hearing on defendant's postsentencing motions. The court informed defendant's counsel that defendant could not proceed on both a motion to withdraw the guilty plea and a motion to reconsider defendant's sentences. Defendant's counsel proceeded only on the motion to reconsider defendant's sentences, and the court denied the motion.

¶ 18

Defendant filed a timely notice of appeal, and this court allowed the parties' joint motion for summary remand for compliance with Rule 604(d) and the opportunity for defendant to file a new postplea motion. See *People v. Williams*, No. 4-19-0511 (2020) (unpublished summary order under Supreme Court Rule 23(c)).

¶ 19

C. Proceedings on Remand

¶ 20

On remand, defendant's counsel filed a third motion to withdraw defendant's guilty plea and to vacate the sentence. In the motion and attached memorandum of law, defendant argued (1) his sentence should be vacated because he was not given the benefit of his bargain with the State; (2) the trial court failed to comply with Rule 402(d)(3), such that defendant did not understand he could withdraw his plea; (3) his plea was not knowing and voluntary because the court's admonishments were deficient and it did not answer defendant's

questions clearly; (4) he did not understand the charges against him; (5) his guilty plea was entered under a misapprehension of the law and the facts; and (6) his sentence was excessive and unconstitutional.

¶ 21 At a July 2022 hearing, the trial court denied defendant's motion to withdraw his guilty plea. In a written order, the court emphasized its belief defendant had been fully admonished under Rule 402. It further found defendant's sentence was not excessive or disproportionate. According to the court, "[a]t the time of the plea[,] the Court made it clear to the Defendant that [it] was not bound by the State's recommendation and fully advised the Defendant of the sentencing range."

¶ 22 This appeal followed.

¶ 23 II. ANALYSIS

¶ 24 Defendant presents three arguments on appeal. First, defendant asserts his plea should be vacated and the cause remanded for him to plead anew because the trial court failed to substantially comply with Rule 402(d)(3). Second, defendant argues the court erred when it denied his motion to withdraw his guilty plea because his plea was not knowingly and voluntarily made. Finally, defendant contends he should be allowed to challenge his sentence as excessive because his 120-year sentence effectively converted his partially negotiated plea into an open plea for purposes of Rule 604(d).

¶ 25 The State responds that the trial court substantially complied with Rule 402(d)(3), defendant's plea was knowingly and voluntarily entered, and defendant is precluded from challenging his sentence under Rule 604(d).

¶ 26 Because we conclude the trial court failed to substantially comply with Rule 402(d)(3), the court's judgment is reversed and the cause is remanded to allow defendant to

withdraw his guilty plea. For the reasons that follow, we direct the court to assign this case to a different judge and appoint new counsel to represent defendant on remand.

¶ 27

A. Rule 402 Admonishments

¶ 28

Pursuant to Rule 402, every criminal defendant who enters a plea of guilty has a due process right to be properly and fully admonished. *People v. Whitfield*, 217 Ill. 2d 177, 188, 840 N.E.2d 658, 666 (2005). “The purpose of Rule 402 admonishments is to ensure that a defendant understands his plea, the rights he has waived by pleading guilty and the consequences of his action.” *People v. Dougherty*, 394 Ill. App. 3d 134, 138, 915 N.E.2d 442, 446 (2009). Rule 402(d) states, in part, as follows:

“When there is a plea discussion or plea agreement, the following provisions *** shall apply:

* * *

(3) If the parties have not sought or the trial judge has declined to give his or her concurrence or conditional concurrence to a plea agreement, the judge shall inform the defendant in open court at the time the agreement is stated as required by paragraph (b) of this rule that the court is not bound by the plea agreement, and that if the defendant persists in his or her plea the disposition may be different from that contemplated by the plea agreement.” Ill. S. Ct. R. 402(d) (eff. July 1, 2012).

According to the Committee Comments, the purpose of Rule 402(d)(3) is to “remove any possibility of an inference by the defendant that the judge’s awareness of the agreement indicates concurrence in it.” Ill. S. Ct. R. 402, Committee Comments (rev. May 1997).

¶ 29 Generally, the trial court's compliance with Rule 402 must be "substantial." *Dougherty*, 394 Ill. App. 3d at 138. "If an ordinary person in the circumstances of the accused would understand them as conveying the information required by the rule, the essentials have been complied with." *People v. Sutherland*, 128 Ill. App. 3d 415, 419, 470 N.E.2d 1210, 1214 (1984). Whether the trial court complied with Rule 402 is a question of law reviewed *de novo*. *People v. Chavez*, 2013 IL App (4th) 120259, ¶ 14, 998 N.E.2d 143. Additionally, the trial court's "[f]ailure to properly admonish a defendant does not automatically establish grounds for reversing judgment or vacating a guilty plea." *Dougherty*, 394 Ill. App. 3d at 139. Instead, "[w]hether reversal is required depends on whether real justice had been denied or whether defendant has been prejudiced by the inadequate admonishments." *Id.*

¶ 30 In *People v. Collins*, 100 Ill. App. 3d 611, 426 N.E.2d 1274 (1981), this court considered whether the trial court complied with Rule 402(d)(3) when it accepted the defendant's plea of guilty to theft by deception. There, the defendant entered into an agreement with the State where, in exchange for her plea of guilty, the State agreed to dismiss an additional charge and recommend defendant be given a three-year prison sentence. *Id.* at 611-12. The trial court admonished the defendant that it had not concurred conditionally or otherwise in the plea agreement and that it was not bound to follow it. *Id.* at 612. At the sentencing hearing, the court announced it did not concur with the prosecutor's recommendation and sentenced the defendant to five years in prison. *Id.* The defendant immediately asked to withdraw her plea, and the court denied the defendant's request because it "had told her the plea agreement was not binding on it." *Id.*

¶ 31 On appeal, this court determined the trial court erred when it failed to ask the defendant whether she wished to persist in her plea of guilty after admonishing her that it was not bound by the agreement. *Id.* at 613. The court explained:

“Rule 402(d)(3) governs the situation where, as here, the court has either declined to commit himself to follow the agreement or has not been consulted. Under these circumstances, when the plea agreement is presented, the court is required to inform the defendant that the court is not bound by the agreement and that ‘if the defendant persists in his plea the disposition may be different from that contemplated by the plea agreement.’ *** The rule clearly requires the court to make both explanations and to *expressly* give the defendant an opportunity to persist in or withdraw the plea.” (Emphasis added.) *Id.*

The *Collins* court reversed and remanded for the defendant to plead anew, holding “the necessity of properly following the procedure [under Rule 402(d)(3)] to be so important that the failure to follow it *** was plain error.” *Id.* at 614; see also *People v. Sanders*, 99 Ill. 2d 262, 273, 457 N.E.2d 1241, 1246 (1979) (explaining issues waived by the defendant on appeal may be reviewed for plain error “where the error alleged is so substantial as to reflect on the fairness or impartiality” of the proceedings).

¶ 32 B. This Case

¶ 33 Here, the trial court failed to substantially comply with Rule 402(d)(3). Because defendant was prejudiced by the court’s inadequate admonishments, we reverse and remand with directions.

¶ 34 First, the trial court failed to inform defendant, *at the time the agreement was stated* (see Ill. S. Ct. R. 402(d)(3) (eff. Jul. 1, 2012)), that it was not bound by defendant’s

agreement with the State. Instead, the trial court explained it was not bound by the State's sentencing recommendation *after* it had already accepted defendant's guilty plea and set the matter for sentencing. Defendant specifically asked the court *before* pleading guilty whether his sentence could exceed the cap recommended by the State and stated he "misunderstood." The court responded it would answer that question "in a little bit[.]" thereby expressing its intention to wait until *after* accepting defendant's guilty plea to address his concern as to the prospect of being sentenced to a period exceeding the cap. Although the State claims defendant likely asked this question because he was aware he could receive a sentence that exceeded the cap, the record just as easily supports defendant's assertion on appeal that he was confused about the effect of the sentencing cap contained in the agreement. Defendant's inquiry may also have been prompted by the court's admonishment that "[a]s a consequence of this conviction after a plea, the sentence for any future conviction may be increased." Regardless, the court failed to correct defendant's misunderstanding at the time it was communicated to the court.

¶ 35 Second, and most significantly, the trial court neglected to inform defendant that if he persisted in the guilty plea, he could receive a sentence different than contemplated by the agreement. See Ill. S. Ct. R. 402(d)(3) (eff. Jul. 1, 2012). Although the court, after explaining it was not bound by the sentencing cap, reiterated the possible sentencing range (*i.e.*, 6 to 60 years in prison on each count), this was insufficient to apprise defendant that he had the right *not* to persist in the guilty plea. Compounded by the fact the court had already accepted his plea and set the matter for sentencing, an ordinary person under the circumstances would not understand he could still withdraw the plea. This understanding was essential for the court to have substantially complied with Rule 402(d)(3). See *Collins*, 100 Ill. App. 3d at 613 ("The rule clearly requires the court to make both explanations and to *expressly* give the defendant an opportunity to persist in

or withdraw the plea.” (Emphasis added.)). Like the trial court in *Collins*, the court’s failure here to *expressly* give defendant an opportunity to withdraw his plea rendered its admonishment insufficient. Because this court has determined that the necessity of this procedure is so important that its omission undermines the fairness of the proceedings, the court failed to substantially comply with Rule 402(d)(3). See *id.* at 615.

¶ 36 Finally, the trial court’s failure to substantially comply with Rule 402(d)(3) resulted in prejudice to defendant. Defendant asserts that had the court informed him he could withdraw his guilty plea following the statement that the court was not bound by the State’s sentencing recommendation, he would have withdrawn his plea and proceeded to trial. Here, defendant entered his plea of guilty under the impression he would receive a total of 33 years in prison. He was not informed the court could sentence him to more than 33 years until after the plea had been accepted, when the court *then* stated he could still be sentenced to a maximum of 120 years. We conclude it would have been rational for defendant to withdraw the plea and elect to proceed to trial after learning the court was not bound to follow the State’s recommendation and did not state an intention to do so. Under these circumstances, defendant has established prejudice resulting from the improper admonishments.

¶ 37 Because we conclude this error alone is dispositive in this case, we need not address defendant’s remaining arguments. See *People v. Langford*, 195 Ill. App. 3d 366, 369, 552 N.E.2d 274, 277 (1990) (declining to review remaining issues on appeal after concluding defendant should have been allowed to withdraw his guilty plea).

¶ 38 C. Appointment of New Counsel and Judge Reassignment

¶ 39 Defendant requests that this court, upon remand, both (1) appoint new counsel and (2) direct the circuit court to assign this case to a different judge.

¶ 40

1. *Appointment of New Counsel*

¶ 41 Defendant argues new counsel should be appointed to represent him on remand because counsel's deficient performance during the plea proceedings and sentencing prejudiced him. We agree.

¶ 42 A defendant alleging he was denied effective assistance of counsel during the proceedings prior to his guilty plea must show that counsel's performance was deficient and that, but for counsel's unprofessional errors, he would not have pleaded guilty. *People v. Johnson*, 2018 IL App (3d) 150679, ¶ 25, 100 N.E.3d 588. "Where, as here, a claim of ineffective assistance of plea counsel involves a claim that [the defendant] relied on his counsel's erroneous advice about a consequence of his plea, the defendant must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." (Internal quotation marks omitted.) *Id.* ¶ 26. Additionally, as stated above, Rule 402(d)(3) provides that where the court has not expressed its concurrence in the terms of the plea agreement, the defendant must be given the opportunity to withdraw his plea. See Ill. S. Ct. R. 402(d)(3) (eff. Jul. 1, 2012); *Collins*, 100 Ill. App. 3d at 613.

¶ 43 Here, defense counsel erroneously advised defendant prior to sentencing that he could not withdraw his plea until after he had been sentenced. The record shows defendant wished to withdraw his plea prior to sentencing, as evidenced by the discussions at the beginning of the sentencing hearing. But for counsel's erroneous advice, defendant would have been entitled to withdraw his plea under Rule 402(d)(3) because the trial court had not concurred or conditionally concurred in the terms of the plea agreement. A decision to withdraw the plea would have been rational because defendant learned at the plea hearing that the court was not required to follow the State's sentencing recommendation and that defendant actually faced 120

years in prison. Accordingly, on remand, we direct the appointment of new counsel to represent defendant.

¶ 44

2. Reassignment to a New Judge

¶ 45

Defendant argues this court should direct the circuit court to reassign this case to a new judge on remand because he was denied a fair hearing in this case. We disagree defendant was denied a fair hearing but conclude the interests of the parties and the administration of justice would be served by reassigning the case to a new judge.

¶ 46

“In order to show bias or prejudice on the part of the trial court toward one of the parties, *** the record must show that there was active personal animosity, hostility, ill will or distrust toward the defendant and, absent such a showing, a court will not conclude that there was actual prejudice which prevented or interfered with a fair hearing.” *People v. Johnson*, 199 Ill. App. 3d 798, 806, 557 N.E.2d 565, 570 (1990). “Moreover, the alleged bias or prejudice of a trial judge to be disqualifying must be shown to have stemmed from an extra-judicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case.” *People v. Massarella*, 80 Ill. App. 3d 552, 556, 400 N.E.2d 436, 447 (1979).

¶ 47

Here, defendant has not shown the trial court harbored “active personal animosity, hostility, ill will or distrust” toward defendant or that it relied on matters outside the record in fashioning defendant’s sentence. The record shows the court’s findings at sentencing were supported by the evidence presented and related to the statutory sentencing factors. There is no indication the court relied on any extrajudicial source in making its determinations.

¶ 48

However, Illinois Supreme Court Rule 366(a)(5) (eff. Feb. 1, 1994) permits this court, in its discretion, to reassign a case to a different judge upon remand. See *People v.*

Montanez, 2016 IL App (1st) 133726, ¶ 44, 55 N.E.3d 692. In the exercise of our discretion under Rule 366(a)(5), we find that the interests of the parties and the administration of justice would be most efficiently served by assigning the case to a different judge on remand.

¶ 49

III. CONCLUSION

¶ 50 For the reasons stated, we reverse the judgment of the trial court and remand to allow defendant to withdraw his guilty plea and plead anew. On remand, we direct the court to both reassign the case to a different judge and appoint new counsel to represent defendant.

¶ 51 Reversed and remanded with directions.