2020 IL App (2d) 180597-U
No. 2-18-0597
Order filed November 4, 2020

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellee,	)	
v.	)	No. 17-CF-1544
ALFRED ESCOBAR,	)	Honorable Liam C. Brennan,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Presiding Justice Birkett and Justice McLaren concurred in the judgment.

ORDER

¶ 1 *Held*: Having filed a motion to reconsider his sentence but not a motion to withdraw his guilty plea and to vacate the judgment, defendant was limited on appeal to challenging his sentence. Defendant's first argument on appeal was an improper challenge to his plea. With respect to defendant's second argument, the appellate court held that the trial court did not abuse its discretion when sentencing defendant and did not consider an improper factor.

¶ 2 Defendant, Alfred Escobar, pleaded guilty to three counts of criminal sexual assault (720 ILCS 5/11-1.20(a)(3) (West 2016)) in exchange for the State's agreement to dismiss 15 other charges. There was no agreement as to sentencing. The trial court sentenced defendant to a

cumulative total of 18 years in prison. Defendant filed a motion to reconsider his sentence, which the court denied. He now appeals, and we affirm.

¶ 3 I. BACKGROUND

¶ 4 On August 24, 2017, defendant was charged by indictment with 18 counts of criminal sexual assault stemming from conduct that occurred between May 1 and August 1, 2017. The alleged victim was defendant's nephew, T.E., who was 14 or 15 years old at the time of the offenses. Over the next months, the parties completed discovery and engaged in plea negotiations.

¶ 5 On January 25, 2018, defense counsel requested a continuance to February 22 to review discovery with defendant, noting that defendant had "expressed some confusion about his charges." Defendant asked to speak, and the court engaged in the following colloquy with him:

"THE DEFENDANT: Your Honor, may I speak?

THE COURT: It's better that you speak to [defense counsel].

THE DEFENDANT: Okay.

THE COURT: And then if after — Well, just tell me without the details what it regards.

THE DEFENDANT: I'd like a different Public Defender, please.

THE COURT: All right. Let me explain to you how this works.

THE DEFENDANT: Yes.

THE COURT: So you qualified for the appointment of a Public Defender but not the Public Defender of your choice.

THE DEFENDANT. No. I know.

THE COURT: Hold on. And the Public Defender's Office assigns a particular Public Defender to a particular case and I'm not involved in that process. What I can tell

you is that [defense counsel] is the single most experienced and qualified Public Defender in the entire office and that you're fortunate to have him. I want you to continue speaking with him; and if there's problems that are legally relevant, we can address them on the next date. Thank you.

[DEFENSE COUNSEL]: Thank you, Your Honor.

THE DEFENDANT: Okay."

¶ 6 On February 22, 2018, the prosecutor told the court that the parties had reached a partial plea agreement, whereby defendant would plead guilty to counts I, III, and IV, and the State would dismiss all other counts. There was no agreement as to sentencing on these three counts, so defendant would face a cumulative sentence of between 12 and 45 years in prison. Both defense counsel and the court questioned defendant extensively on the record to ensure that he understood the agreement and that he wished to plead guilty under those terms. During these discussions, defendant expressed no dissatisfaction with his counsel. To the contrary, he indicated that he had discussed the plea agreement with his counsel three or four times in person and "perhaps a dozen or more times" on the phone. Defendant acknowledged that he had reviewed all of the discovery, that he felt that his counsel spent enough time explaining to him his possible defenses, and that he did not need any more time to discuss the plea with his counsel.

¶ 7 As the factual basis for the plea, the prosecutor represented that T.E. would testify that he resided with defendant, who was his uncle, from May 1 to August 1, 2017. T.E. would testify that, during that period, he and defendant engaged in sexual acts. This included defendant placing his penis in T.E.'s anus, defendant placing his penis in T.E.'s mouth, and defendant putting his mouth on T.E.'s penis. The prosecutor represented that an investigator would testify that defendant admitted that he engaged in sex acts with his nephew but said that this was consensual. Defense

counsel agreed that this was "the sum and substance" of the State's evidence. After hearing this, the trial court confirmed with defendant one last time that he wished to proceed with the plea agreement. The court accepted the plea and set the matter for sentencing.

¶ 8 The court held a sentencing hearing on June 8, 2018. According to the presentence investigation report, among the medications that defendant was prescribed was Triumeq. In their briefs on appeal, both parties indicate that Triumeq is a drug that is prescribed to treat the human immunodeficiency virus (HIV).

¶ 9 Investigator Carmen Easton of the Du Page County Children's Advocacy Center was the only witness who testified at the hearing. She detailed the information that was relayed to her by T.E., defendant, and T.E.'s father. Of significance to this appeal, Easton testified that T.E. told her that defendant forced him to engage in various sex acts more than 10 but less than 20 times. This included T.E. receiving anal sex from defendant while defendant did not use a condom. Defendant initially denied to Easton that he engaged in any sex acts with T.E. Defendant ultimately admitted to Easton that he engaged in sex acts with T.E. without the use of condoms. Defendant claimed, however, that T.E. initiated the sexual activity and took advantage of defendant while he was going through a "weak period." According to Easton, during her interview with defendant, she was "made aware" that defendant was HIV-positive. Easton testified that T.E. was not aware that defendant was HIV-positive. T.E. had to be tested for HIV. T.E. tested negative for the virus, but he had to take a retest as a follow-up six months later.

¶ 10 The defense introduced into evidence a packet of "mitigation materials" that consisted primarily of letters from defendant's family and friends and evidence that he participated in faith-based programs while incarcerated. Defendant gave a lengthy statement in allocution, during

which he said the following about his medical condition: "I don't ejaculate, all right? I have no testicle. Now, I don't have a — ADS syndrome [*sic*]. I don't have that. I couldn't.

¶ 11 The only mention of defendant's HIV status during the parties' arguments regarding sentencing was when the prosecutor said the following:

> "The facts are clear that this Defendant is the established liar and [T.E.] is telling the truth: When [T.E.] says he was forced to perform these sexual acts, *** how the Defendant refused to wear a condom.
>
> That, of course, added another level of disgusting, self-involved cruelty by this Defendant. He knowingly exposed a 14-year-old boy to HIV. He risked this boy's young life to satisfy his sexual desires. Thanks to this Defendant, [T.E.] at the ripe age of 15 had to undergo HIV testing. A scary thought for a consenting adult; very well a traumatized and confused teenager."

The State requested a prison sentence of 22 years. Defendant requested 12 years.

¶ 12 The court sentenced defendant to a total of 18 years in prison (8 years on count I, 5 years on count III, and 5 years on count IV, to be served consecutively). The court explained:

> "The Court has considered the factors in aggravation and mitigation, statutory and nonstatutory, the arguments of counsel, and the statement of the Defendant. It's the considered judgment of this Court that a minimum sentence is not appropriate, especially in light of the danger that the Defendant put [T.E.] in as it relates to the possibility that he might contract the HIV virus in the course of this conduct. Clearly, there were easy steps to be taken to try to avoid that; and I understand and will accept that that, in fact, did not happen. But it certainly is a danger that the Defendant subjected [T.E.] to that precludes, in this Court's opinion, a minimum sentence."

¶ 13 On June 14, 2018, defendant filed a motion to reconsider his sentence. For the most part, it was a form motion with generic allegations of error that were not tailored to defendant's case. For example, defendant asserted, without further elaboration, that "[t]he Court erred by considering improper aggravation presented by the State." At the hearing on this motion, defense counsel stood on the motion without presenting further argument. The court denied the motion, and defendant timely appealed.

¶ 14 II. ANALYSIS

¶ 15 A. Pre-Plea Claim of Ineffective Assistance of Counsel

¶ 16 Defendant first contends that, when he requested new counsel on January 25, 2018, the court should have inquired into the nature of defendant's problems with his counsel. Defendant acknowledges that "a trial court is not required to hold a traditional *Krankel* inquiry prior to trial." See *People v. Krankel*, 102 Ill. 2d 181 (1984). Nevertheless, he maintains that the court failed to comply with the procedures that apply to pretrial claims of ineffective assistance. See *People v. Washington*, 2012 IL App (2d) 101287, ¶ 22 (the trial court must review pretrial allegations of ineffective assistance and then perform a *Krankel* analysis; whether that analysis must occur before trial or after trial depends on whether the allegations require a showing of prejudice).

¶ 17 The State contends that defendant's statement in open court that he would "like a different Public Defender" did not meet the low bar to raise a claim of ineffective assistance. The State thus submits that the trial court was under no obligation to conduct any further inquiry.

¶ 18 We need not decide whether defendant's assertion that he would like a different attorney triggered the trial court's duty to conduct a further inquiry, as both parties overlook the procedural impediment to our review of this claim. The cases cited by the parties that involved pretrial allegations of ineffective assistance of counsel—*People v. Jocko*, 239 Ill. 2d 87 (2010), *People v.*

Morgan, 2017 IL App (2d) 150463, and *Washington*—each involved defendants who subsequently opted for trials and were found guilty. Here, by contrast, defendant pleaded guilty.

¶ 19 "It is well established that a voluntary guilty plea waives all non-jurisdictional errors or irregularities, including constitutional ones." *People v. Townsell*, 209 Ill. 2d 543, 545 (2004). To that end, Supreme Court Rule 604(d) (eff. July 1, 2017) provides, in relevant portion:

> "No appeal from a judgment entered upon a plea of guilty shall be taken unless the defendant, within 30 days of the date on which sentence is imposed, files in the trial court a motion to reconsider the sentence, if only the sentence is being challenged, or, if the plea is being challenged, a motion to withdraw the plea of guilty and vacate the judgment."

Although defendant moved to reconsider his sentence, he never moved to withdraw his plea of guilty and to vacate the judgment. Accordingly, on appeal, he may challenge his sentence but not his plea. See *People v. Lumzy*, 191 Ill. 2d 182, 187 (2000) (where the State agreed to drop certain charges against the defendant in exchange for his guilty plea but there was no agreement regarding sentencing, the defendant's motion to reconsider his sentence preserved his right to challenge the sentence on appeal without having to move to withdraw the plea).

¶ 20 The question thus arises whether defendant's argument on appeal challenges his plea. We determine that it does. We note that defendant does not claim that his *Krankel* argument is a challenge to his sentence. Moreover, it appears that defendant has carefully crafted his argument and prayer for relief to avoid directly stating that he is challenging his plea. He argues that the trial court failed to conduct a proper inquiry into the allegations that he raised prior to pleading guilty. He requests a "remand[ ] for further proceedings pursuant to *Krankel*." Specifically, he asserts that, "[i]f the trial court determines that [his] allegations shows [*sic*] possible neglect by

trial counsel, new counsel should be appointed to assist him at a hearing on trial counsel's ineffectiveness."

¶ 21 To what end, though, would *Krankel* proceedings relating to pre-plea allegations of ineffective assistance be necessary if defendant does not intend to challenge his plea by arguing that it was involuntary? See *People v. Newell*, 41 Ill. 2d 329, 331 (1968) (where a defendant pleaded guilty, he could not "complain of any denial of constitutional rights unless there [was] some substance to his claim, implied in [his postconviction] petition, that his guilty plea was involuntary"). Here, the defense was engaged in plea negotiations with the State when defendant requested new counsel on January 25, 2018. As he had not yet been sentenced, any dissatisfaction with his attorney at that time obviously did not specifically relate to any sentencing issue. When we consider how defendant's *Krankel* argument plays out to its logical conclusion, it is apparent that he is effectively challenging his plea, not his sentence. Defendant did not file a motion to withdraw his plea and to vacate the judgment, so he may not challenge the plea on direct appeal.

¶ 22 We understand that the State forfeited any argument along these lines by failing to raise the issue in its brief. *People v. Sophanavong*, 2020 IL 124337, ¶ 21. Forfeiture, however, is "a limitation on the parties and not the court." *Sophanavong*, 2020 IL 124337, ¶ 21. Our supreme court has described Rule 604(d) as a " 'condition precedent for an appeal from a defendant's plea of guilty.' " *People ex rel. Alvarez v. Skryd*, 241 Ill. 2d 34, 40 (2011) (quoting *People v. Wilk*, 124 Ill. 2d 93, 105 (1988)). The rule is not a mere suggestion, but rather has "the force of law" and must be "obeyed and enforced as written." *Skryd*, 241 Ill. 2d at 39. Accordingly, we decline to allow defendant to challenge his plea on direct appeal without complying with the requirements of Rule 604(d).

¶ 23 B. Sentencing

¶ 24 Defendant also argues that the court erred in assessing more than the minimum sentence where (1) there was insufficient evidence that he was capable of transmitting HIV and (2) there was no showing that he caused or threatened serious harm. Defendant submits that he preserved this issue for review. Alternatively, he maintains that he is entitled to relief under both prongs of the plain-error doctrine.

¶ 25 The first aspect of defendant's argument challenges the trial court's factual conclusions from the evidence that was presented. As to that issue, we apply the abuse-of-discretion standard. See *People v. Bailey*, 409 Ill. App. 3d 574, 590-92 (2011) (applying the abuse-of-discretion standard where the defendant challenged the sufficiency of the evidence that was presented at her sentencing hearing). A trial court abuses its discretion where its ruling is " 'arbitrary, fanciful, unreasonable or where no reasonable person would take the view adopted by the trial court.' " *Bailey*, 409 Ill. App. 3d at 591 (quoting *People v. Johnson*, 347 Ill. App. 3d 570, 574 (2004)). The second aspect of defendant's argument is that the trial court considered an improper aggravating factor. We review that part of defendant's argument *de novo*. *People v. Abdelhadi*, 2012 IL App (2d) 111053, ¶ 8.

¶ 26 The State does not specifically address whether defendant preserved his arguments. For the following reasons, we hold that the trial court committed no error. Thus, the result would be the same irrespective of whether defendant preserved his arguments or instead must rely on the plain-error doctrine. See *Abdelhadi*, 2012 IL App (2d) 111053, ¶ 7 (the first step in the plain-error analysis is to decide whether an error occurred).

¶ 27 1. *Defendant's Capability of Transmitting HIV*

¶ 28 Defendant does not seem to dispute that he is HIV-positive and that he engaged in various sex acts with T.E. without using a condom. Defendant nevertheless contends that there was

insufficient evidence supporting that he was capable of transmitting HIV. His argument proceeds as follows. He points to the following portion of his statement in allocution: "I don't ejaculate, all right? I have no testicle. Now, I don't have a — ADS syndrome [*sic*]. I don't have that. I couldn't." According to defendant, "[i]t is possible that [he] was telling the court that he was physically unable to transfer the virus through semen." Defendant then faults the trial court for failing to question him in response to these ambiguous comments to determine whether he was able to transmit HIV. To that end, defendant notes that the Centers for Disease Control's (CDC) website indicates that some HIV-positive individuals—specifically, those who have an undetectable viral load due to being on antiretroviral medications—have " 'effectively no risk of transmitting HIV.' " See https://www.cdc.gov/hiv/basics/transmission.html (last visited October 22, 2020). Given that defendant was taking Triumeq, he proposes that it was possible that he was unable to transmit HIV. Thus, he reasons that the trial court "should have required some medical evidence to support the assertion that T.E. was in 'danger[ ]' as a result of the defendant's supposed HIV status, rather than assuming such a risk existed." Defendant therefore asserts that the court's belief that defendant could have transmitted HIV to T.E. was "unsubstantiated."

¶ 29 We hold that there was a sufficient basis for the court to conclude that defendant put T.E. in danger by creating a risk of transmitting HIV. The evidence showed that defendant was HIV-positive and that he engaged in anal sex with T.E. without a condom. Unprotected sexual activity of this nature is widely understood as a common method of transmitting HIV. In fact, it is a class 2 felony for a person who knows that he is infected with HIV to intentionally engage in insertive anal intercourse without a condom, even if no transmission of the virus results, unless the person's partner "knew that the infected person was infected with HIV, knew that the action could result in infection with HIV, and consented to the action with that knowledge." 720 ILCS 5/12-5.01(a)(1),

(b), (c), (d), (e) (West 2018). Neither party introduced evidence at defendant's sentencing hearing regarding either the general risks of an HIV-positive person transmitting the virus through unprotected anal sex or defendant's particularized risk of doing so. Based on the evidence that was presented, however, it was reasonable for the court to conclude that defendant's actions created at least some risk of transmitting the virus to T.E. that could have been mitigated by using condoms.

¶ 30 In presenting his argument on appeal, defendant introduces new medical concepts and evidence into the record by referencing several websites, although he does not specifically request that we take judicial notice of the material. The State does the same thing in responding to defendant's argument. Even if we could take judicial notice of medical evidence of this nature, the problem is that this information was never brought to the trial court's attention. The parties thus improperly attempt to create a new factual record on appeal. See *Cook County Board of Review v. Property Tax Appeal Board*, 339 Ill. App. 3d 529, 542 (2002) ("A court will not take judicial notice of critical evidentiary material not presented in the court below or of evidence that may be significant in the proper determination of the issues between the parties."). Implicit in defendant's argument is the assumption that it was the State's burden to prove a negative: that he *did not* have an undetectable viral load when he assaulted T.E. on multiple occasions. Defendant, however, does not develop an argument as to why the State had such a burden, apart from noting that defendant made vague remarks during his statement in allocution about not ejaculating, having no testicle, and not having AIDS.[1] We are mindful that "[t]he State is not subject to the same

[1] We note that T.E. told Easton that defendant ejaculated. Nobody ever alleged that defendant has AIDS.

burden of proof at a sentencing hearing as it is during the guilt phase of a trial." *Bailey*, 409 Ill. App. 3d at 592. "[O]ur supreme court has not articulated a specific burden of proof at sentencing and instead maintains that 'relevance and reliability are the important factors in the consideration of evidence at sentencing.' " *Bailey*, 409 Ill. App. 3d at 592 (quoting *People v. Jackson*, 149 Ill. 2d 540, 549 (1992)). There was a sufficient basis in the record to support the trial court's conclusion that defendant's conduct created a risk of transmitting HIV that could have been mitigated by using a condom. Accordingly, we determine that the trial court did not abuse its discretion.

¶ 31 B. *Improper Sentencing Factor*

¶ 32 Defendant also maintains that the potential for HIV transmission is not a threat of harm for purposes of section 5-5-3.2(a)(1) of the Unified Code of Corrections (730 ILCS 5/5-5-3.2(a)(1) (West 2018)). In support of his position, he relies on our supreme court's decision in *People v. Giraud*, 2012 IL 113116. Defendant thus argues that the trial court relied on an improper sentencing factor. Given that the trial court specifically indicated that it was imposing a higher sentence due to this factor, defendant requests that we vacate his sentence and remand for resentencing.

¶ 33 The State responds that *Giraud* is distinguishable because it addressed the statutory elements required to sustain a charge of aggravated criminal sexual assault, not the aggravating factors that may be considered at sentencing on a charge of criminal sexual assault.

¶ 34 *Giraud* construed section 12-14(a)(3) of the Criminal Code of 1961, which provided: "The accused commits aggravated criminal sexual assault if he or she commits criminal sexual assault and any of the following aggravating circumstances existed during *** the commission of the offense: *** (3) the accused acted in such a manner as to threaten or endanger the life of the victim

or any other person." 720 ILCS 5/12-14(a)(3) (West 2006). A jury convicted the defendant of this offense because the defendant, knowing that he was HIV-positive, had forcible intercourse with his teenage daughter without wearing a condom. *Giraud*, 2012 IL 113116, ¶ 1. The daughter did not contract HIV. *Giraud*, 2012 IL 113116, ¶ 2. The appellate court reduced the defendant's conviction to criminal sexual assault (720 ILCS 5/12-13 (West 2006)), reasoning that he did not threaten or endanger his daughter's life during the assault. *Giraud*, 2012 IL 113116, ¶ 1.

¶ 35 Our supreme court affirmed the appellate court. In doing so, the court focused heavily on the statutory phrase "during *** the commission of the offense." The court explained that the defendant did not " 'act[ ] in such a manner as to threaten' " his daughter during the commission of the offense, given that "a threat, by its very nature, must be communicated to the object of the threat." *Giraud*, 2012 IL 113116, ¶ 14. The court concluded that "[a] risk of future harm is not a threat of harm" (*Giraud*, 2012 IL 113116, ¶ 15), explaining:

> "A sexual assault creates many risks for the victim: the risk of being infected with a sexually transmitted disease, the risk of an unwanted pregnancy, the risk of posttraumatic stress. These and other consequences of the crime are among the reasons that sexual assault is a serious felony. These risks, however, are not threats because they are not communicated by the assailant to the victim during the commission of the offense. Thus, in the present case, the victim was not threatened by the defendant." *Giraud*, 2012 IL 113116, ¶ 16.

¶ 36 The court also rejected the State's argument that the defendant " 'acted in such a manner as to *** endanger' " his daughter's life when he exposed her to HIV. *Giraud*, 2012 IL 113116, ¶ 17. In doing so, the court reiterated that the statute's plain language required "actual endangerment of the victim or another person during the commission of the offense." *Giraud*,

2012 IL 113116, ¶ 22. The court noted that, if an HIV-positive individual sexually assaults a victim and the victim contracts the virus, the defendant could be charged with aggravated criminal sexual assault pursuant to a different portion of the statute for causing " 'bodily harm *** to the victim.' " (720 ILCS 5/12-14(a)(2) (West 2006)). *Giraud*, 2012 IL 113116, ¶¶ 31, 33. If the victim does not contract HIV, however, the defendant could be charged with both criminal sexual assault and criminal transmission of HIV, facing consecutive sentencing. *Giraud*, 2012 IL 113116, ¶¶ 33-34.

¶ 37 For these reasons, the court in *Giraud* held that, "as a matter of law, mere exposure of the victim to HIV during the commission of the offense" does not threaten or endanger the victim's life for purposes of elevating the offense of criminal sexual assault to aggravated criminal sexual assault. *Giraud*, 2012 IL 113116, ¶ 39.

¶ 38 Defendant's reliance on *Giraud* is misplaced. Section 5-5-3.2(a)(1) of the Unified Code of Corrections provides that one aggravating factor to consider at sentencing is whether "the defendant's conduct caused or threatened serious harm." 730 ILCS 5/5-5-3.2(a)(1) (West 2018). Unlike the statute that the court considered in *Giraud*, there is no language indicating that the serious harm that results or was threatened must exist during the commission of the offense. Moreover, a defendant need not communicate any threat to the victim; his conduct need only threaten serious harm.

¶ 39 At a minimum, it was appropriate for the trial court to consider the effect on T.E. of having to take multiple HIV tests to ensure that he had not contracted the virus. See *People v. Nevitt*, 228 Ill. App. 3d 888, 892 (1992) ("The psychological harm inflicted on a young victim of a sexual crime has been held to be a proper consideration.") That seems to be what the prosecutor had in mind when she mentioned HIV in her argument regarding sentencing. Given that this was the only

mention of HIV during the parties' arguments at sentencing, it seems likely that the trial court shared the prosecutor's concern about the psychological impact on T.E. of having been sexually assaulted and then worrying about his exposure to HIV. We find nothing improper about this. Because defendant has failed to demonstrate that the trial court considered an improper factor at sentencing (see *Abdelhadi*, 2012 IL App (2d) 111053, ¶ 9 ("The defendant bears the burden of establishing that a sentence was based on improper considerations.")), we reject this argument.

¶ 40 III. CONCLUSION

¶ 41 For the reasons stated, we affirm the judgment of the circuit court of Du Page County.

¶ 42 Affirmed.