2020 IL App (2d) 190235-U
No. 2-19-0235
Order filed November 4, 2020

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. CEDRIC N. WINSTON, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Stephenson County. No. 14-CF-55 Honorable Michael Paul Bald, Judge, Presiding.

JUSTICE BRIDGES delivered the judgment of the court.
Justices McLaren and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in denying defendant's motion to correct the mittimus. Also, defendant's trial counsel was not ineffective for withdrawing his motion to reconsider defendant's sentence for second-degree murder. Therefore, we affirm.

¶ 2 Pursuant to a plea agreement with the State, defendant, Cedric N. Winston, pleaded guilty to various charges, some which dated from 2012 and the rest which dated from 2014. The length of all of the sentences was negotiated except for that of second-degree murder, for which the trial court sentenced defendant to 17 years' imprisonment, with all sentences to run concurrently. On appeal, defendant argues that for his conviction of second-degree murder, he should receive credit

for time spent in prison beginning from his 2012 arrest, even though he was not charged with murder until 2014. He also argues that defense counsel was ineffective for withdrawing his motion to reconsider defendant's second-degree murder sentence, based on the mistaken belief that defendant would first have to move to withdraw his guilty plea. We affirm.

¶ 3 I. BACKGROUND

¶ 4 According to the factual basis presented by the State, on September 23, 2012, defendant argued with LaShawn Thurman at a house party. Defendant and at least three other people later exchanged gunfire outside. Thurman saw defendant shooting at him, and a bullet grazed Thurman's thigh. The police gathered .40-caliber, .45-caliber, and 9-millimeter shell casings from the scene. Bystander Victoria Strong was shot in the leg in the crossfire from either a .38-caliber bullet or a 9-millimeter bullet, and she died from her injury on September 29, 2012. On September 30, 2012, Natasha Ellis, the mother of defendant's child, received an accidental voicemail message from defendant containing a recorded conversation between him and his father. In the recording, defendant stated that the person he wanted to kill was lucky to only get grazed in the thigh. Defendant stated that he got rid of the bullet casings and hid the guns, and they discussed sticking to a story. Defendant's father would testify to having this conversation. Ellis would also testify that shortly after the shooting, defendant told her that he chased Thurman and shot at him.

¶ 5 On October 20, 2012, the police responded to a domestic complaint involving defendant and Ellis. Ellis told the police that defendant had given her a red bag containing guns and that she stored the bag in her apartment. The police obtained a warrant and found four guns in a bag, namely three semi-automatic pistols and a 9-millimeter "semi-automatic/fully automatic rifle." Defendant's latent fingerprints were found on four gun magazines. Based on this discovery,

defendant was charged in case number 12-CF-299 with four counts of possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2012)).

¶ 6 On November 28, 2012, the police executed a search warrant on defendant's residence and found a holster for a .32 or .38-caliber firearm, two "speedloaders," and .38-caliber rounds. As a result of this search, defendant was charged in case number 12-CF-311 with possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2012)). On the same date, the police arrested defendant at his workplace and found cocaine on his person, for which he was charged with possession of a controlled substance (720 ILCS 570/402(c) (West 2012)) in case number 12-CF-310. Defendant remained in custody from November 28, 2012, on.

¶ 7 Much later, on March 4, 2014, defendant was charged by indictment in case number 14-CF-55 with first-degree murder (720 ILCS 5/9-1(a)(3) (West 2012)), attempted first-degree murder (720 ILCS 5/8-4(a) (West 2012)), aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2012)), and unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2012)) for the incident on September 23, 2012.

¶ 8 On June 19, 2015, following an Illinois Supreme Court Rule 402 (eff. July 1, 2012) conference, the State amended the charge of first-degree murder to second-degree murder (720 ILCS 5/9-2 (West 2012)). Defendant waived a preliminary hearing on the second-degree murder charge, though the trial court admonished defendant of the possible penalties. The parties then proceeded to recite their agreement regarding the charges for all four underlying cases. The parties agreed to fully negotiated pleas of three years' imprisonment in case number 12-CF-310; three years' imprisonment in case number 12-CF-311; and, for case number 12-CF-299, five years' imprisonment for the first three counts and six years' imprisonment for the fourth count. In case number 14-CF-55, the parties agreed that the charge of first-degree murder would be amended to

second-degree murder, that defendant would plead guilty, and that the trial court would determine his sentence. They agreed to fully-negotiated pleas of six years' imprisonment each for attempted murder and for aggravated discharge, and five years' imprisonment for possession of a weapon by a felon. The parties agreed that all of the sentences would run concurrently.

¶ 9 A sentencing hearing took place on September 3, 2015, and the trial court entered the agreed-upon sentences. For the plea to second-degree murder, the trial court sentenced defendant to 17 years' imprisonment, concurrent with the other sentences.

¶ 10 Defendant filed a motion to reconsider the 17-year sentence on October 1, 2015.

¶ 11 Subsequently, on June 30, 2016, defendant filed a motion to correct the mittimus. He noted that the mittimus in 14-CF-55 credited him for time served dating back to March 4, 2014, when he was charged with murder. However, he argued that he should be credited for time served since November 28, 2012, when he was first taken into custody, as reflected in the presentence report.

¶ 12 A hearing on the motion took place on July 7, 2016. Defense counsel argued that at the time of sentencing, there was no notice that defendant would not receive credit for time served since his arrest, thereby violating defendant's due process rights. He argued that although defendant was not charged with murder until March 2014, he was "theoretically in custody" for that charge in November 2012, as shown by the fact that the police questioning at the time focused on the shooting rather than the guns he was charged with possessing. Defense counsel argued that defendant was further entitled to the credit under section 5-4.5-100 of the Unified Code of Corrections (730 ILCS 5/5-4.5-100 (West 2016)) and *People v. Hernandez*, 345 Ill. App. 3d 163 (2004).

¶ 13 The State responded that the date listed on the presentence investigation report was not controlling, nor was there any agreement that defendant would get extra custody credit beginning

in November 2012. The State argued that there was no factual connection between the crimes that defendant was initially arrested for and the charge of second-degree murder. The State pointed out that defendant was getting credit for the time spent in custody since November 2012 for case numbers 12-CF-310, 12-CF-311, and 12-CF-299. The State asserted that the statute did not pertain to individuals in custody for unrelated offenses and that *Hernandez* was distinguishable.

¶ 14 The trial court denied defendant's motions on August 18, 2016. It stated that *Hernandez* was inapposite because that case involved the same underlying charge for both periods of time that the defendant was in custody. In contrast, here defendant was first charged with murder on March 4, 2014, and there were no previous charges related to that prosecution. Another case that the parties had mentioned, *People v. Kane*, 136 Ill. App. 3d 1030 (1985), was distinguishable because it involved a petition to revoke probation.[1] The trial court further ruled that the 17-year sentence was appropriate.

¶ 15 Defendant appealed, and on April 27, 2018, this court granted his unopposed motion for a summary remand. *People v. Winston*, No. 2-16-0728. We remanded the cause for the filing of a valid Illinois Supreme Court Rule 604(d) (eff. July 1, 2017) certificate; the opportunity to file a new motion to withdraw the guilty plea and/or reconsider the sentence; and a new motion hearing. *Id.*

¶ 16 Defendant filed an amended motion to reconsider the sentence and/or correct the mittimus on January 2, 2019. A hearing on the motion took place on March 13, 2019. At the beginning of the hearing, defense counsel stated that he was no longer requesting that the trial court reconsider

[1] At a hearing on August 18, 2016, the trial court stated that under *Kane*, a defendant is not entitled to credit for time he spent in custody on an unrelated offense.

the 17-year sentence because pursuant to *People v. Johnson*, 2019 IL 122956, defendant would first have to file a motion to withdraw his guilty plea. Defense counsel stated:

> "I have spoke [*sic*] to Mr. Winston regarding that case and regarding his position, and Mr. Winston has indicated to me that he does not have any objection or any problem with the 17-year sentence that he was given for the second-degree murder, so he would not be requesting to withdraw his guilty plea because he's not—he's not contesting or arguing that the 17 years was—was not proper.
>
> Is that correct, Mr. Winston?"

Defendant replied, "That's correct."

¶ 17 Regarding the mittimus, defense counsel argued that because defendant was arrested in 2012 and questioned about the murder, it was disingenuous to say that he was not entitled to credit beginning the day he was arrested. Defense counsel further argued that there was no additional evidence discovered from November 28, 2012, until March 4, 2014, when defendant was charged with murder. The prosecutor disagreed, stating that the autopsy was not conducted until January 24, 2013, which showed that the investigation was continuing. He also argued that although the police may have questioned defendant in November 2012 about the murder, he was in custody on charges for unrelated crimes. Further, to the best of the prosecutor's recollection, the guns found at that time did not match the shell casings found at the scene of the shooting. The trial court denied defendant's motion to correct the mittimus, stating that it would stand on its earlier ruling.

¶ 18 Defendant timely appealed.

¶ 19 II. ANALYSIS

¶ 20 A. Credit for Time Spent in Custody

¶ 21 Defendant points out that he received a substantially longer sentence for second-degree murder than for his other convictions and that all the sentences are to run concurrently, such that the second-degree murder sentence ultimately controls the total amount of time he will be imprisoned. Defendant argues that because his credit for time spent in custody was applied to only his shorter concurrent sentences, he was denied meaningful credit to his term of imprisonment as contemplated by section 5-4.5-100(c). Section 5-4.5-100(c) provides:

> "An offender arrested on one charge and prosecuted on another charge for conduct that occurred prior to his or her arrest shall be given credit on the determinate sentence or maximum term and the minimum term of imprisonment for time spent in custody under the former charge not credited against another sentence." 730 ILCS 5/5-4.5-100(c) (West 2012).

Defendant argues that if his time spent in custody under the "former charge" is credited only against a shorter concurrent sentence, he will effectively receive no credit for the time he spent in custody from November 28, 2012, until March 4, 2014.

¶ 22 Defendant highlights that although the plain meaning of statutory language will be given effect when it is clear and unambiguous, a reviewing court is not always bound by the literal interpretation of a statute *(People v. Whitney,* 188 Ill. 2d 91, 97 (2007)), such as where applying the plain language would create an absurd or unjust result (*People v. Hanna,* 207 Ill. 2d 486, 498 (2003)). Additionally, if a statute is ambiguous, a court may consider extrinsic aids of construction to discern the legislature's intent (*People v. Horsman*, 406 Ill. App. 3d 984, 987 (2011)), and under the rule of lenity, an ambiguity in a criminal statute must be construed to favor the accused (*People v. Maldonado,* 402 Ill. App. 3d 1068, 1074 (2010)).

¶ 23 Defendant argues that for the credit to be applied in such a manner that precludes any benefit to his term of imprisonment defeats section 5-4.5-100's purpose, which is "to prevent the State from depriving a defendant of credit for jail time through a technical evasion." *Hernandez*, 345 Ill. App. 3d 163, 169 (2004). Defendant argues that the limiting language "not credited against another sentence" is meant to prevent a double crediting of time to the unfair advantage of a defendant (*People v. Latona*, 184 Ill. 2d 260, 271 (1998)), but for him to receive the single credit of time as contemplated by the legislature, the word "sentence" must be understood in the context of concurrent sentences to mean "term of imprisonment," because otherwise his earlier custody credit becomes a nullity. Defendant argues that this also creates an unjust and absurd result because pre-trial detention disproportionately affects the poor.

¶ 24 Defendant continues that the trial court erred in relying on *Kane*, in which a prior version of the statute was at issue.[2] In *Kane*, the court stated that the "purpose of subsection (c) is to insure credit for all confinement since arrest in the circumstance where 'the original charge is dropped in favor of a new charge which results in conviction and imprisonment.' " *Kane*, 136 Ill. App. 3d at 1035 (quoting Ill. Ann. Stat. ch. 38, par. 1005-8-7, Council Commentary, at 224 (Smith-Hurd 1982)). It further stated that "subsection (c) was added to protect the right secured to a defendant under subsection (b), and that it did so by preventing the State from depriving a defendant of credit for jail time through technical evasion." *Id.* at 1036. The court stated that subsection (b) required granting credit only for time spent in custody as a result of the offense for which the sentence was imposed, such that the defendant was not entitled to credit for the time which she spent in custody on the unrelated offense. *Id.* Defendant argues that the *Kane* court erred in its interpretation of the

[2] The statute's language has remained substantially the same.

statute, as subsection (c) does not modify subsection (b), and the court's reading impermissibly adds conditions onto subsection (c) that are not otherwise present. Defendant argues that subsection (c)'s plain language requires only that the later charge be for "conduct that occurred prior to his or her arrest" on the initial charges.

¶ 25 Defendant argues that this case is similar to *Hernandez*. The defendant there was charged with aggravated criminal sexual abuse and was granted bail. *Hernandez*, 345 Ill. App. 3d at 165. The defendant failed to appear in court, so the trial court revoked his bond and issued a bench warrant which noted the original violation of aggravated criminal sexual abuse. He was arrested on April 14, 2001. *Id.* Four months later, on August 14, 2001, the State dismissed the aggravated criminal sexual abuse charge and charged defendant with violating his bail bond. *Id.* The defendant was subsequently found guilty, but at his sentencing, the trial court ruled that he could receive credit for time served only from the time he was charged with violating his bail bond, and not from the time he was arrested on the bench warrant. *Id.* at 166.

¶ 26 On appeal, this court stated that the bench warrant did not formally charge the defendant with a crime but rather was a procedural tool to effect his return to face prosecution on the sexual abuse charge. *Id.* at 170. We stated that "[b]ecause the defendant was arrested for the charge of aggravated criminal sexual abuse but later prosecuted on the bail bond violation, which occurred prior to the April 2001 arrest, section 5-8-7(c) of the Corrections Code applie[d], and [the] defendant should have received the additional credit." *Id.* We stated that the State had manipulated his liberty by allowing him to remain in custody for about four months without bail before it charged him with violating his bail bond, and then the trial court denied him credit for all of the time served, which was "contrary to our legislature's intent to afford a defendant sentence credit for all time served in confinement." *Id.* at 170-71. We noted that if the State had formally charged

defendant with violating his bail bond when the arrest warrant was effected on April 14, 2001, it would have been undisputed that he would have been entitled to credit for the time spent in custody. *Id.*; see also *People v. Roberson*, 212 Ill. 2d 430, 439 (2004) (citing *Hernandez* with approval and stating that under section 5-8-7(b) (730 ILCS 5/5-8-7(b) (West 2000)) once a defendant is arrested for an offense, the defendant is " 'in custody' " for that offense even before being formally charged).

¶ 27 Defendant points to the prosecutor's statement that defendant "was a suspect pretty quickly after the commission of the crime" in 2012 and that "the police's interest in him as a suspect [in the murder] may have heightened their scrutiny of him which may have resulted in their discovering these other crimes." Defendant argues that our reasoning in *Hernandez* applies, as there is nothing in the record to show why the State waited until March 4, 2014, to indict him for the September 2012 shooting. He acknowledges that the State indicated that the autopsy did not take place until January 2013, but he argues that the State never said that anything substantive came from the autopsy. Defendant argues that even accounting for that date, he was not indicted until over one year later.

¶ 28 Defendant maintains that to adopt the trial court's reasoning would mean that the total length of time any defendant may serve on concurrent sentences will turn on the potentially arbitrary date on which the State chooses to indict on any given charge, which may be delayed in situations where the State is in no particular rush to charge because a defendant is confined in pre-trial detention awaiting other charges. Defendant contends that whether this is intentional or inadvertent, it is precisely the type of technical manipulation that the legislature was concerned might occur when it enacted subsection (c). Defendant argues that it is particularly concerning in this case because he was never put on notice that his concurrent plea would result in a meaningless

credit for the 461 days he spent in jail awaiting trial. Defendant asserts that crediting him for this time against the total term of his imprisonment would give him the meaningful single application of credit for time spent in jail as contemplated by the legislature.

¶ 29 The State argues that there is nothing in the record to suggest, much less support, defendant's claim that it manipulated the investigation in this matter to delay charging defendant with the instant offenses, as this court found had been done in *Hernandez*. The State points to the prosecutor's statements about the autopsy date and the shell casings. The State argues that *Hernandez* is additionally distinguishable because the defendant there was later arrested pursuant to the original charge, whereas here defendant was in jail pursuant to his arrest for three separate offenses that were unrelated to the subsequent charges. According to the State, under *Kane* a defendant is entitled to receive credit for time spent in custody only as a result of the offense for which the sentence is imposed, but defendant argues merely that *Kane* was wrongly decided without citing authority. The State maintains that defendant received credit for his time served from November 28, 2012, in cases 12-CF-211, 12-CF-310, and 12-CF-311. It argues that if the second-degree murder conviction were to be vacated, defendant would receive a practical as well as a legal benefit from the time served in those cases. The State argues that the trial court was correct in ruling that defendant was not entitled to credit for time served in case number 14-CF-55 until he was charged with the relevant offenses on March 4, 2014.

¶ 30 Defendant's arguments turn largely on the interpretation of 5-4.5-100(c). When interpreting a statute, our primary objective is to ascertain the legislative intent, which is best indicated by the plain and ordinary meaning of the statute's language. *People v. Miles*, 2020 IL App (1st) 180736, ¶ 9. In determining the plain meaning, we consider the statute in its entirety, keeping in mind the subject it addresses and the legislature's purpose in enacting it. *Id.* We may

not read into the statute exceptions, limitations, or conditions that conflict with the express legislative intent. *Id.*

¶ 31 Looking at the plain language of section 5-4.5-100(c), it is true that defendant fits within the category an "offender arrested on one charge and prosecuted on another charge for conduct that occurred prior to his or her arrest." 730 ILCS 5/5-4.5-100(c) (West 2012). However, the credit is "for time spent in custody under the former charge *not credited against another sentence*." (Emphasis added.) *Id.* As the State points out, the credit for the time that defendant spent in custody beginning on November 28, 2012, has been applied against his sentences in cases 12-CF-211, 12-CF-310, and 12-CF-311, so section 5-4.5-100(c) does not pertain to defendant's situation. See also *Robinson*, 172 Ill. 2d at 460 ("The phrase restricting in-custody credit to time not credited against another sentence *** indicates a legislative awareness of such a limiting condition.").

¶ 32 Rather, section 5-4.5-100(b) applies to defendant's charge of second-degree murder. It states that the defendant "shall be given credit *** for the number of days spent in custody as a result of the offense for which the sentence was imposed." 730 ILCS 5/5-4.5-100(b) (West 2014). Defendant was charged with first-degree murder (later amended to second-degree murder) on March 4, 2014, so that was the day he began spending time in custody for the second-degree murder offense. See also *People v. Koen*, 2014 IL App (1st) 113082, ¶ 57 (the defendant was not entitled to credit for time imprisoned for other crimes that were separate and distinct).

¶ 33 *Hernandez* is distinguishable and does not compel a different result because there the defendant's "arrest [and imprisonment] related back to the original charge of aggravated criminal sexual abuse." *Hernandez*, 345 Ill. App. 3d at 170. Here, in contrast, the 2014 charges were independent of the 2012 charges. For the same reason, this is not a situation where the State could have been said to have been manipulating defendant's liberty. This is especially true considering

that the victim's autopsy was not performed until after defendant was arrested in 2012, and considering the prosecutor's representation that the guns found in 2012 did not match the shell casings found at the scene of the shooting.

¶ 34 *Kane* further supports our analysis, as, citing council commentary, it stated that the "purpose of subsection (c) is to insure credit for all confinement since arrest in the circumstance where 'the original charge is dropped in favor of a new charge which results in conviction and imprisonment.' " *Kane*, 136 Ill. App. 3d at 1035 (quoting Ill. Ann. Stat., ch. 38, par. 1005–8–7, Council Commentary, at 224 (Smith-Hurd 1982)). Our supreme court has agreed with *Kane*'s reasoning. See *Robinson*, 172 Ill. 2d at 460 (the legislature adopted subsection (c) to prevent the State from intentionally denying a defendant credit for time spent in jail by dropping the initial charge and recharging the defendant with another crime). None of the original charges were dropped in favor of new charges in the instant case, so subsection (c) does not apply. *Cf. People v. Warren*, 2016 IL App (4th) 120721-B, ¶ 174 (subsection (c) did not apply because the defendant's initial charges were not dropped in favor of subsequent charges). Also, this principle lends support to *Kane*'s statement that "subsection (c) was added to protect the right secured to a defendant under subsection (b), and that it did so by preventing the State from depriving a defendant of credit for jail time through technical evasion," as well as its statement that the defendant was not entitled to credit for time which he spent in custody on an unrelated offense. *Id.* at 1036; see also *People v. Ashley*, 2020 IL 123989, ¶ 36 ("A reviewing court must view the statute as a whole, construing words and phrases in light of other relevant statutory provisions and not in isolation."); *People v. Woznick*, 209 Ill. App. 3d 1061, 1062 ("The defendant is not entitled to credit for time served in custody on an unrelated charge."); *People v. Leggans*, 140 Ill. App. 3d 268, 271 (1986) (applying

the same principle). Accordingly, the trial court did not err in denying defendant's motion to correct the mittimus.

¶ 35 B. Ineffective Assistance of Counsel

¶ 36 Defendant next argues that defense counsel rendered ineffective assistance by withdrawing his motion to reconsider the 17-year sentence for second-degree murder, based on a misunderstanding of *People v. Johnson*, 2019 IL 122956. For a claim of ineffective assistance of counsel, a defendant must satisfy the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Hodges*, 234 Ill. 2d 1, 17 (2009). The defendant must first establish that, despite the strong presumption that trial counsel acted competently and that the challenged action was the product of sound trial strategy, counsel's representation fell below an objective standard of reasonableness under prevailing professional norms such that he or she was not functioning as the counsel guaranteed by the sixth amendment. *People v. Manning*, 227 Ill. 2d 403, 416 (2008). Second, the defendant must establish prejudice. *People v. Valdez*, 2016 IL 119860, ¶ 14. In most situations this is done by showing a reasonable probability that the proceeding would have resulted differently absent counsel's errors. *Id.* A failure to establish either prong of the *Strickland* test precludes a finding of ineffectiveness. *People v. Peterson*, 2017 IL 120331, ¶ 79.

¶ 37 In *Johnson*, the defendant entered into a negotiated guilty plea in which he agreed to plead guilty to two counts of unlawful delivery of a controlled substance within 1000 feet of a church, which had a sentencing range of 4 to 15 years. *Johnson*, 2019 IL 122956, ¶ 4. In return, the State agreed to dismiss the seven remaining charges and recommended a sentencing cap of 13 years' imprisonment on each of the two counts. *Id.* The trial court imposed concurrent terms of 11 years' imprisonment. *Id.* The defendant filed a motion to reduce the sentence, and upon being told that he would first have to file a motion to withdraw his guilty plea, he did so. *Id.* ¶¶ 12-13. In the initial

appeal, the cause was sent back for the filing of a Rule 604(d) certificate, and the trial court again denied the defendant's motion to withdraw his plea. *Id.* ¶¶ 15-16.

¶ 38 The defendant again appealed and argued for the first time that he was not required to withdraw his guilty plea because the trial court improperly relied on two statutory aggravating factors. *Id.* ¶ 16. The appellate court agreed (*id.* ¶ 18) but the supreme court held that the appellate court was incorrect (*id.* ¶ 58). It pointed out that, pursuant to Rule 604(d), a defendant must move to withdraw his guilty plea before challenging a negotiated guilty plea, and pleas where the parties have negotiated a sentencing cap. *Id.* ¶¶ 27-28. The supreme court stated that "where the plea agreement between a defendant and the State concerns both the charging and sentencing aspects of the defendant's case, the defendant must move to withdraw the plea." *Id.* ¶ 31. It continued that " 'if a plea agreement limits or forecloses the State from arguing for a sentence from the full range of penalties available under law, in order to challenge his sentence, a defendant must first move to withdraw his plea in the trial court.' " *Id.* (quoting *People v. Diaz*, 192 Ill. 2d 211, 225 (2000)). The supreme court concluded that a defendant who enters a negotiated guilty plea may not challenge his sentence on the basis that the trial court relied on improper statutory sentencing factors, as it was the equivalent to challenging the sentence as excessive. *Id.* ¶ 57.

¶ 39 Defendant argues that *Johnson* is distinguishable because there and in the cases cited therein, the pleas were entered in exchange for an agreement to both dismiss certain charges and to recommend a specific lesser sentence on the charge to which the defendant ultimately plead guilty. According to defendant, the concern was that if the plea agreement prevented the State from arguing for the full range of penalties available, the plea must be withdrawn and the parties returned to the status quo before the sentence could be challenged. Defendant contends that here, there was no such agreement and the State made no concessions as to second-degree murder, which

was clearly shown by the parties' references to that plea on the record as "open" and "blind." Defendant argues that the State had the ability to argue the maximum sentence at the sentencing hearing, so none of the contractual principles implicated by the State's concession on the sentencing cap in *Johnson* were present here, such that his counsel's decision to withdraw the motion to reconsider was objectively unreasonable.

¶ 40 The State argues that defendant is estopped from raising this claim because he specifically agreed to his attorney's actions and affirmed that he was not contesting that the 17-year sentence was improper. See *In re Detention of Swope*, 213 Ill. 2d 210, 217 (2014) (a party cannot complain of error which he induced the court to make or to which he consented). The State further argues that despite the language used during the plea negotiations referring to the second-degree murder plea as "open," it was actually a partially negotiated plea, as shown by the fact that the agreement to charge defendant with second-degree murder was intrinsically tied to the fully negotiated plea in each of the other nine charges. Thus, the new charge amounted to a concession by the State that limited it from arguing for a sentence from the full range of penalties available under the law for first-degree murder. According to the State, defendant received a sentencing benefit from the agreement, and allowing him to unilaterally modify his agreement while holding the State to its end of the bargain would violate contract principles. See *Johnson*, 2019 IL 122956, ¶ 46. The State maintains that defense counsel correctly determined that defendant's only recourse under Rule 604(d) was to seek to withdraw the plea, which defendant did not wish to do, such that counsel correctly proceeded with only the portion of the post-plea motion to amend the mittimus.

¶ 41 Defendant responds that his oral acquiescence to defense counsel's actions was a result of his attorney's objectively unreasonable advice regarding *Johnson* and his mistaken belief that defendant would have to withdraw his guilty plea in order to challenge his sentence, such that there

was no invited error. Defendant further argues that the State dropping the first-degree murder charge in exchange for a guilty plea to second-degree murder did not make the agreement a partially negotiated plea, as the parties did not agree to the length of the sentence. Rather, when a defendant pleads guilty solely in return for the dismissal of charges, the parties each receive what they bargained for. Defendant cites *People v. Gooch*, 2014 IL App (5th) 120161. There, the defendant pleaded guilty to one charge in exchange for the dismissal of two others. *Id.* ¶ 5. He challenged the sentence imposed as excessive, and the trial court denied his motion. *Id.* On appeal, the State argued that defendant would have to move to withdraw his guilty plea before contesting his sentence because he entered a partially negotiated guilty plea rather than an open plea. *Id.* The appellate court disagreed, stating that "when a defendant pleads guilty in return for a dismissal of charges, the State and defendant each receive what they agreed to, that being a guilty plea in exchange for a dismissal of charges." *Id.* ¶ 25.

¶ 42 We agree with defendant that he is not estopped from raising his ineffective assistance of counsel argument, because defendant's statement that the 17-year sentence for second-degree murder was appropriate was premised on defense counsel's representation that defendant would have to withdraw his guilty plea in order to challenge it. However, we conclude that defense counsel did not render ineffective assistance by withdrawing the request to reconsider that sentence. Rule 604(d) provides, in relevant part:

> "No appeal shall be taken upon a negotiated plea of guilty challenging the sentence as excessive unless the defendant, within 30 days of the imposition of sentence, files a motion to withdraw the plea of guilty and vacate the judgment. *For purposes of this rule, a negotiated plea of guilty is one in which the prosecution has bound itself to recommend a specific sentence, or a specific range of sentence, or where the prosecution has made*

concessions relating to the sentence to be imposed and not merely to the charge or charges then pending." (Emphasis added.) Ill. S. Ct. R. 604(d) (eff. July 1, 2017).

¶ 43 Defendant argues that he was not required to withdraw his guilty plea because his sentence was not negotiated, in that he entered an open guilty plea to second-degree murder and that the State was able to argue for the full range of penalties for that charge. Defendant's argument would be correct if the parties had simply agreed that the State would amend the charge of first-degree murder to second-degree murder and that defendant would plead guilty, without agreement as to defendant's sentence. See *People v. Lumzy*, 191 Ill. 2d 182, 187 (2000); *Gooch*, 2014 IL App (5th) 120161, ¶ 25. However, that is not what occurred. Rather, the parties entered into an agreement that pertained to all charges under all case numbers, including specific sentences for every charge except for second-degree murder. This case therefore falls within the category of a plea agreement that "concerns both the charging and sentencing aspects of the defendant's case," such that a "defendant must move to withdraw the plea" in order to challenge it. *Johnson*, 2019 IL 122956, ¶ 31. In other words, "the prosecution has made concessions relating to the sentence to be imposed and not merely to the charge or charges then pending." Ill. S. Ct. R. 604(d) (eff. July 1, 2017); see also *Johnson*, 2019 IL 122956, ¶¶ 31-32.

¶ 44 Additionally, there was a sentencing concession by the State specifically related to the second-degree murder charge, as the parties agreed that all sentences would run concurrently. In *People v. Diaz*, 192 Ill. 2d 211, 223 (2000), the defendant agreed to plead guilty to 4 charges, and the State agreed to dismiss the remaining 13 charges. The State further "not only agreed that extended-term sentences would not be imposed, but also agreed that it would not seek consecutive sentences." *Id.* The supreme court stated that it was clear that the State made sentencing concessions in entering the plea agreement and that the defendant obtained a sentencing benefit

from the agreement. *Id.* at 224. It stated that it would be contrary to contract principles to allow the defendant to unilaterally modify his portion of the agreement while holding the State to its end of the bargain, such that the defendant was required to file a motion to withdraw his guilty plea in the trial court before challenging his sentence on appeal. *Id.* In *People v. DeRosa*, 396 Ill. App. 3d 769, 771, 775 (2009), the appellate court specifically held that the State's agreement, which consisted of withdrawing two charges and agreeing that the two remaining charges would be served concurrently, was a sentencing concession making Rule 604(d) applicable.

¶ 45 Similar to *Diaz* and *DeRosa*, here the State also made sentencing concessions by agreeing to concurrent sentences (in addition to the aforementioned sentencing concessions of amending the first-degree murder charge and recommending specific sentences for each remaining charge), thereby "limit[ing] or forclos[ing] the State from arguing for a sentence from the full range of penalties available under the law" (*Diaz,* 192 Ill. 2d at 225) and requiring that defendant move to withdraw his guilty plea in order to change his sentence. As the record reveals that defendant did not wish to withdraw his guilty plea, defense counsel did not provide ineffective assistance by withdrawing the request to reconsider the sentence for second-degree murder.

¶ 46 III. CONCLUSION

¶ 47 For the reasons stated, we affirm the judgment of the Stephenson County circuit court.

¶ 48 Affirmed.