

NOTICE
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2020 IL App (5th) 170160-U

NO. 5-17-0160

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Clinton County.
)	
v.)	No. 16-CF-68
)	
TERRY CRISTEL,)	Honorable
)	Stanley M. Brandmeyer,
Defendant-Appellant.)	Judge, presiding.

JUSTICE CATES delivered the judgment of the court.
Presiding Justice Welch and Justice Wharton concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court failed to substantially comply with Illinois Supreme Court Rule 402 in that the trial court did not ascertain whether the defendant’s plea of guilty was voluntary, and the trial court’s failure to substantially comply with Rule 402 prejudiced the defendant.

¶ 2 Defendant Terry Cristel pled guilty, pursuant to a plea agreement, to one count of attempt (burglary) (720 ILCS 5/8-4(a), 19-1(a) (West 2016)). In accordance with the plea agreement, the trial court sentenced the defendant to 42 months in the Illinois Department of Corrections (IDOC). The defendant subsequently filed a *pro se* motion to reduce his sentence and a *pro se* motion to withdraw his guilty plea and vacate his sentence. Due to the allegations in the defendant’s motions, a conflict of interest arose with his plea counsel.

Therefore, the trial court appointed postplea counsel who filed an amended motion to withdraw the defendant's guilty plea and vacate the sentence. The trial court denied the defendant's motions, after a full evidentiary hearing. The defendant now appeals.

¶ 3 On appeal, the defendant argues that: (1) the trial court erred in accepting defendant's plea agreement and after accepting his plea, sentencing the defendant, because the trial court failed to comply with section 5-3-1 of the Unified Code of Corrections (730 ILCS 5/5-3-1 (West 2016)) in doing so; (2) the defendant's *pro se*, postplea complaints of ineffective assistance of postplea counsel requires remand for a preliminary inquiry; (3) the trial court erred in not admonishing the defendant regarding postplea counsel's potential conflict of interest; and (4) the trial court failed to substantially comply with Illinois Supreme Court Rule 402 (eff. July 1, 2012) during the defendant's plea hearing. We find that the defendant's allegation of error regarding the trial court's failure to substantially comply with Rule 402 is dispositive of this appeal and renders the defendant's other claims of error as moot. For the reasons that follow, the defendant's sentence is vacated, and this case is remanded to allow the defendant to withdraw his plea of guilty.

¶ 4 **BACKGROUND**

¶ 5 On May 13, 2016, the State charged the defendant by criminal information with one count of attempt (burglary) (count I), a Class 3 felony, and one count of theft (count II), a Class 4 felony. The criminal information alleged that the defendant's theft charge was a Class 4 felony pursuant to section 16-1(b)(2) of the Criminal Code of 2012 (720 ILCS 5/16-1(b)(2) (West 2016)) based upon a previous robbery conviction from Clinton County, case number 2002-CF-164. The criminal information also alleged that the defendant was

eligible for extended term sentencing on both counts pursuant to section 5-5-3.2(b)(1) of the Unified Code of Corrections (730 ILCS 5/5-5-3.2(b)(1) (West 2016)).

¶ 6 On May 26, 2016, the case was set for preliminary hearing. At that time, plea counsel informed the trial court that there may be a negotiated plea agreement. Upon learning of the negotiated plea, the trial court read the full charge as alleged in count I, attempt (burglary), to the defendant and advised the defendant that the charge was a Class 3 felony, for which the ordinary range of punishment was three to five years. The trial court further advised the defendant that in his case, the State was seeking an extended term of punishment pursuant to section 5-5-3.2(b)(1) of the Unified Code of Corrections. Pursuant to the plea agreement, plea counsel indicated that the defendant was to serve 42 months in IDOC on count I; count II and other pending charges from additional cases were to be dismissed; and the defendant was to pay court costs. The trial court then asked the defendant whether he had heard and understood everything the trial court had just read. The defendant indicated in the affirmative.

¶ 7 Before the trial court accepted the plea, the trial court then questioned the defendant about his age, whether he could read and write English, and whether the defendant had any medical issues, mental, physical, or otherwise. The defendant responded that he was 54 years old and was “halfway decent” at reading and writing English. The defendant affirmed that nothing medical, mental, physical, or otherwise would prevent him from making a clear decision. The trial court also asked the defendant if plea counsel had done a good job for the defendant, and whether the defendant had sufficient time to talk with plea counsel.

The defendant affirmed that he had sufficient time to talk with plea counsel and that plea counsel had done a good job for him.

¶ 8 The trial court next questioned the defendant about the waiver of preliminary hearing form, signed by the defendant. The trial court asked the defendant if it was his signature that appeared on the waiver document. The trial court also advised the defendant of his right to a preliminary hearing, and what the State would have to do at a preliminary hearing. Nevertheless, the defendant acknowledged that he wanted to waive his preliminary hearing. The trial court then advised the defendant regarding the plea of guilty, and informed the defendant that by pleading guilty, he was giving up the right to persist in his plea of not guilty, the right to have the case proven against him beyond a reasonable doubt, the right to have the case tried before a judge or jury, and the right to present evidence, or no evidence at all. The defendant affirmed that he understood he was giving up those rights by pleading guilty.

¶ 9 Finally, the trial court asked the defendant about the written “PLEA OF GUILTY AND WAIVER OF JURY.” The defendant confirmed that he had read and signed the written plea form, and when asked by the trial court whether plea counsel had explained the document to the defendant, he replied, “Oh, yes.” The written plea form stated as follows:

“I, the undersigned, Defendant in the above entitled cause(s), hereby enter a plea of guilty in the manner and form charged therein in the Uniform Citation and Complaint/Information/Bill of Indictment and each count thereof filed in said cause. I hereby waive a Trial by Jury and consent to an immediate

hearing, and also consent that the Court may fix my punishment under my plea herein.”

¶ 10 The trial court then asked the State “whether there was a factual basis and prior criminality to support the plea agreement.” The State then indicated what facts it would introduce into evidence at trial. The State did not offer any factual basis that would have indicated the defendant had a prior criminal history. Despite the lack of any prior history of criminality, when the State concluded its factual basis, the trial court immediately found that there was “a prior criminality and sufficient factual basis to support the plea agreement.” The trial court also made a finding that “the defendant ‘knowingly and voluntarily’ enter[ed] into the plea agreement and understands the conditions of sentence and will enter judgment accordingly.” At the conclusion of the trial court’s pronouncement on the plea agreement, the record of proceedings indicates the defendant had numerous questions about his other charges, and was told they were dismissed as a part of the plea agreement.

¶ 11 On June 15, 2016, the defendant filed his *pro se* motion to reduce his sentence and his *pro se* motion to withdraw his guilty plea and vacate sentence. In his motion for a reduction of sentence, the defendant claimed that he felt misled by plea counsel at the guilty plea hearing. In his motion to withdraw his guilty plea and vacate sentence, the defendant made several allegations that plea counsel and the trial court had conflicts of interest. The defendant also claimed he had not been given his medication at the time of the plea, and that he was confused and did not remember pleading guilty. The defendant also argued that the State used a 2002 robbery conviction, which had been vacated and dismissed, to allege

the defendant was extended term eligible. The defendant alleged that plea counsel “never checked it out.” Following the filing of the defendant’s postplea motions, plea counsel was granted leave to withdraw, and the trial court appointed new, postplea counsel.

¶ 12 Postplea counsel filed an amended motion to withdraw the defendant’s guilty plea and vacate the sentence. The motion stated that count II of the criminal information had been enhanced to a Class 4 felony “by use of the claimed previous conviction in Clinton County 2002-CF-164.” The motion argued that the conviction in case number 2002-CF-164 had been vacated and, therefore, count II should have been charged as a Class A misdemeanor. The motion alleged that the defendant would not have pled guilty if he had only been charged with one felony. The motion also alleged that the defendant had not been receiving his medications prior to the day of the guilty plea hearing. The defendant submitted that had he been properly medicated, he would not have “hastily” pled guilty without further evaluating his case with counsel.

¶ 13 On April 5, 2017, the trial court held a hearing on the defendant’s motions. At the hearing, the defendant testified that he “was kind of threatened with an extended term on a robbery case that was vacated.” The defendant also stated that he did not remember pleading guilty because he was not receiving his medications from the jail. The defendant was diagnosed with schizophrenia, manic depressant, anxiety, seizures, and attention deficit hyperactivity disorder (ADHD). The defendant further stated that he did not make a knowing plea and did not understand what he was doing.

¶ 14 On cross-examination, the defendant testified that he did not remember the day of the plea hearing, and that he had only seen plea counsel twice prior to pleading guilty.

Regarding the defendant's mental health and fitness to proceed, the defendant believed plea counsel should have known, or found out, that defendant was not receiving his medications. Finally, the State admitted the transcript of the guilty plea hearing, and the trial court took the matter under advisement.

¶ 15 On April 25, 2017, in a written order, the trial court denied both of the defendant's *pro se* motions and postplea counsel's amended motion to withdraw guilty plea and vacate sentence. The trial court's order stated that the record showed that the defendant had "entered an informed and negotiated guilty plea to the charges." The order indicated that leave to withdraw a guilty plea should only be granted to correct a manifest injustice under the facts involved. The order further indicated that the defendant had the burden to prove that the plea was entered on a misapprehension of the facts or the law; that there was doubt as to the defendant's guilt; that the accused had a meritorious defense; or that the ends of justice would be served by submitting the case to the jury. The trial court found that "[n]one of the circumstances stated above apply in this case." The next day, the trial court informed the defendant in person of the trial court's ruling. The defendant appeals.

¶ 16

ANALYSIS

¶ 17 On appeal, the defendant submits that his guilty plea should be withdrawn because the trial court failed to substantially comply with Rule 402. The defendant alleges that the trial court did not ascertain whether the defendant was threatened, forced, coerced, or promised anything, other than the terms of the plea agreement, to induce the defendant's guilty plea. The State counters that the defendant has waived this argument because the defendant did not raise this issue in his motion to withdraw his plea of guilty. The State

also contends that any deficiencies in the trial court's admonishments do not rise to the level of plain error because the State believes the trial court substantially complied with Rule 402.

¶ 18 This court recognizes that the defendant did not raise the trial court's failure to substantially comply with Rule 402 in either of his *pro se* or amended motions to withdraw his guilty plea and vacate sentence. Generally, under Illinois Supreme Court Rule 604(d) (eff. Mar. 8, 2016), any issue not raised in the defendant's motion to withdraw a guilty plea shall be deemed waived for appellate review. *People v. Davis*, 145 Ill. 2d 240, 250 (1991). If, however, the trial court fails to give the defendant the admonishments required by Rule 402, this action can amount to plain error, an exception to the waiver rule. *Davis*, 145 Ill. 2d at 250. The plain error doctrine is applied to remedy errors so plain and prejudicial that failure to object does not waive the error for appellate review. *Davis*, 145 Ill. 2d at 251. Our supreme court has held that the application of the waiver rule is “ ‘less rigid where the basis for the objection is the trial judge's conduct.’ ” *People v. Holloway*, 2014 IL App (1st) 131117, ¶ 20 (quoting *People v. Kliner*, 185 Ill. 2d 81, 161 (1998)).

¶ 19 Rule 402(b) provides that a trial court “shall not accept a plea of guilty without first determining that the plea is voluntary.” Ill. S. Ct. R. 402(b) (eff. July 1, 2012). Rule 402(b) requires that the trial court determine whether any force, threats, or promises, apart from the plea agreement, induced the defendant's plea. Ill. S. Ct. R. 402(b) (eff. July 1, 2012); *People v. Wise*, 26 Ill. App. 3d 158, 161 (5th Dist. 1975). “Determining personally from the defendant whether any force, threats or promises were made goes to the very heart of whether the plea was entered voluntarily.” *Wise*, 26 Ill. App. 3d at 161. By questioning the

defendant personally, “ ‘not only will the judge be better able to ascertain the plea’s voluntariness, but he also will develop a more complete record to support his determination in a subsequent post-conviction attack.’ ” *People v. Cummings*, 7 Ill. App. 3d 306, 307 (2d Dist. 1972) (quoting *McCarthy v. United States*, 394 U.S. 459, 466 (1969)).

¶ 20 An improper admonishment, however, does not automatically establish grounds for reversing judgment or vacating a guilty plea. *People v. Dougherty*, 394 Ill. App. 3d 134, 139 (3d Dist. 2009). Each case must be resolved on its own circumstances, and the reviewing court may consider the entire record to determine whether the defendant voluntarily pled guilty. *Dougherty*, 394 Ill. App. 3d at 139. Reversal is required where real justice has been denied or the defendant has been prejudiced by the inadequate admonishments. *Dougherty*, 394 Ill. App. 3d at 139. It is the defendant’s burden to show prejudice. *Dougherty*, 394 Ill. App. 3d at 139. “It is well settled that Rule 402 requires substantial, not literal, compliance with its provisions.” *Dougherty*, 394 Ill. App. 3d at 138. Substantial compliance with Rule 402 is found where the record indicates that the defendant understandingly and voluntarily entered his plea, even if the trial court failed to admonish the defendant as to a specific provision. *Dougherty*, 394 Ill. App. 3d at 138.

¶ 21 In admonishing the defendant, the trial court never ascertained whether any force, threats, or promises, apart from the plea agreement, induced the defendant’s plea of guilty. Neither the trial court’s oral admonishments, nor the written plea of guilty, contain any inquiry or statements regarding the voluntariness of the defendant’s plea.

¶ 22 In his amended motion to withdraw guilty plea and vacate sentence, the defendant alleged that he pled guilty because he believed that he could be found guilty of two felonies

if he did not plead guilty to one felony. He also testified during the hearing on his motion to withdraw his guilty plea and vacate sentence that he was “threatened” with extended term eligibility. The enhancement of count II to a felony, however, was not possible based on the alleged prior conviction in the criminal information—a vacated robbery conviction under 2002-CF-164. As for extended term eligibility, this matter is further complicated by the fact that the defendant’s criminal history was not made part of the record during the plea and sentence. The trial court made a bare bone finding that “prior criminality” existed without the benefit of a presentence investigation report or the State providing a history of such criminality. The only criminal history information available to the trial court was the vacated conviction contained in the criminal information.

¶ 23 The State asks this court to take judicial notice of a felony conviction on the defendant’s criminal record, 2013-CF-27, which the State claims “would have the same effect on the elevation of defendant’s Count II to a felony as the 200[2] conviction did.” This court declines the State’s request. While the State’s position may be true, we must look at the facts and circumstances surrounding the defendant’s plea as they existed at the time of the plea. When the defendant pled guilty, the enhancement of count II to a felony was not possible as charged by the State. Moreover, the record below contains no other information regarding other prior criminality. We are not required to surmise what the State might have done had the error in its charging decision been raised prior to the plea. When the issue regarding the vacated conviction was raised during the hearing on the motion to withdraw guilty plea and vacate sentence, the State did not raise any other criminality to support the enhancement of count II, or extended term eligibility.

¶ 24 The record below shows that the trial court told the defendant, and the defendant believed, that he was eligible for extended term sentencing. At the time of the plea, the trial court was not aware that the conviction that had been vacated. As a direct consequence of these circumstances, the record reveals that the defendant was induced to enter a plea of guilty. As our supreme court has observed, “ ‘[w]here it appears that the plea of guilty was entered on a misapprehension of the facts or of the law, or in consequence of misrepresentations by counsel or the State’s Attorney or someone else in authority ***, the court should permit the withdrawal of the plea of guilty and allow the accused to plead not guilty.’ ” *Davis*, 145 Ill. 2d at 244 (quoting *People v. Morreale*, 412 Ill. 528, 531-32 (1952)). Had the trial court inquired of the defendant as to the voluntariness of his plea, the defendant would have had the opportunity to state that he was pleading guilty because count II had been enhanced from a misdemeanor to a felony, and the defendant was facing extended term eligibility. Therefore, we conclude the defendant has been prejudiced as a result of the trial court’s failure to substantially comply with Rule 402(b)’s requirement to determine the voluntariness of the defendant’s plea.

¶ 25 Based on the foregoing reasons, we reverse the decision of the trial court, vacate the defendant’s conviction and sentence, and remand to the trial court with an order directing that the defendant’s plea of guilty be withdrawn.

¶ 26 Reversed and remanded.