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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Lake County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 07-CF-3495
)	
JOSEPH W. SUMMERS,)	Honorable
)	John T. Phillips,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices McLaren and Hudson concurred in the judgment.

ORDER

¶ 1 *Held:* Because the trial court's admonition to defendant that he would be eligible for probation was consistent with then-prevailing law, the admonition satisfied Supreme Court Rule 402. Because there was no error, the plain error doctrine was not invoked; we affirmed the trial court's judgment.

¶ 2 On September 14, 2009, defendant, Joseph W. Summers pleaded guilty to attempted predatory criminal assault in violation of section 8-4 of the Criminal Code of 1961 (the Criminal Code) (see 720 ILCS 5/8-4 (West 2006)), and the trial court sentenced him to 15 years' imprisonment. Thereafter, the trial court denied defendant's motion to vacate his plea, judgment,

and conviction. Defendant now appeals, contending that, because the trial court did not properly admonish him with respect to the minimum sentence, as required by Illinois Supreme Court Rule 402(a)(2) (eff. July 1, 1997), he did not voluntarily enter into his plea agreement. We affirm.

¶ 3 I. Background

¶ 4 The relevant facts for the purposes of this appeal are not disputed. On September 26, 2007, a grand jury returned an indictment against defendant, charging him with committing the offenses of predatory criminal sexual assault of a child, indecent solicitation of a child, and sexual exploitation of a child. The allegations stemmed from incidents occurring between July 1, 1999, and March 31, 2002. Previously, in 2004, defendant was convicted of an unrelated offense of aggravated criminal sexual abuse, a Class 2 felony.

¶ 5 On September 14, 2010, the parties informed the trial court that they were requesting a conference pursuant to Rule 402, advising that they had reached a partial negotiation. Following the Rule 402 conference, the trial court admonished defendant that the attorneys agreed that the State would reduce count I of the indictment to a Class 1 felony of attempted predatory criminal sexual assault of a child with open sentencing, in exchange for defendant's plea of guilty. The trial court admonished defendant that "open sentencing" meant that a sentencing hearing would be conducted, and defendant "would face a sentence that [the trial court] deems appropriate within the bounds of a Class [o]ne felony at the time." The trial court further admonished defendant:

"Both [attorneys] told me that they believe that the offense is a Class [o]ne felony, carried a Class one felony maximum sentencing, but under your circumstances, both the State and the [d]efense believe that you will be eligible for a term of probation or conditional discharge, rather than a mandatory prison sentence.

Now, they told me that based upon their view of what the law is and was, and they all believe that the law is such that even though you have a [Class 2] felony conviction in your background, the law is that the [Class 2] felony conviction would have to have been before the offense that you're pleading guilty to in order for it to be mandatory prison."

¶ 6 After the trial court admonished defendant, defendant advised the trial court that he wanted to accept the negotiated plea. The trial court admonished defendant that, by accepting the deal, he would be pleading guilty to the Class 1 felony of attempted predatory criminal sexual assault of a child. The trial court further admonished defendant that the crime "carries a sentence *** in your situation, of a minimum of four, and a maximum of 15 years" in the Department of Corrections. Defendant advised the trial court that he understood the sentencing range. The trial court once again admonished defendant with respect to probation, asking defendant:

"Do you understand that based upon the belief of the State and the [d]efense, you are eligible for a possible disposition of probation or conditional discharge rather than prison, that could be for a period of up to four years maximum, and it could have many conditions.

Those conditions could include periodic imprisonment for a minimum of three and a maximum of four years, as well as an additional six months in the Lake County jail."

Defendant advised the trial court that he understood the admonition.

¶ 7 Thereafter, the trial court accepted defendant's plea. The trial court conducted a sentencing hearing on February 18, 2010, and March 16, 2010, during which it heard testimony from witnesses for both the State and defendant. Defendant spoke in allocution. Defendant expressed sorrow that a child was hurt. Defendant further stated:

"If the [c]ourt gives me a chance to keep my family surviving, you will not be disappointed. I will fulfill every restriction, every avenue you tell me to do. I will complete

my probation successfully. I just ask that you give me a chance to stay with my kids who need me, my wife who needs me, and help my family survive.”

Following defendant’s statement, the trial court sentenced defendant to the statutory maximum of 15 years’ imprisonment.

¶ 8 On April 15, 2010, defendant filed a motion to vacate plea, judgment, and conviction. As amended, defendant’s motion alleged that, on the day he entered his plea, he had consumed a number of prescription drugs, including Ambien, Vicodin, Baclofen, Tramadol, Voltaren, and a codeine blood pressure pill. Defendant claimed that he did not remember going to court and entering a guilty plea. The trial court denied defendant’s motion. On February 28, 2012, we granted defendant leave to file a late notice of appeal.

¶ 9 II. Discussion

¶ 10 Defendant’s only contention on appeal is that his guilty plea was not voluntary because the trial court, the State, and his attorney misled him into believing that he would be eligible for probation. Defendant argues that his belief was “illusory” because, as a result of his prior Class 2 felony conviction having occurred within 10 years of the act for which he was being sentenced in this case, he was statutorily ineligible for probation pursuant to section 5-5-3(c)(2)(F) of the Unified Code of Corrections (the Corrections Code) (730 ILCS 5/5-5-3(c)(2)(F) (West 2010)). Defendant concedes that he raises this issue for the first time on appeal, but maintains that we can review his contention under the plain-error doctrine.

¶ 11 The plain-error doctrine allows a reviewing court to reach a forfeited error affecting substantial rights in two circumstances: (1) where the evidence in a case is so closely balanced that the jury’s guilty verdict may have resulted from the error and not the evidence, the reviewing court may consider the forfeited error to preclude an argument that an innocent person was wrongly

convicted; and (2) where the error is so serious that the defendant was denied a substantial right and thus a fair trial, the reviewing court may consider the forfeited error to preserve the integrity of the judicial process. *People v. Cosby*, 231 Ill. 2d 262, 272 (2008) (citing *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005)). However, the first step in plain-error review is to determine whether an error occurred because “[a]bsent reversible error, there can be no plain error.” *Cosby*, 231 Ill. 2d at 273.

¶ 12 The gravamen of defendant’s appeal is that he was ineligible for probation pursuant to the plain language of section 5-5-3(c)(2)(F) of the Corrections Code. Section 5-5-3(c)(2) provides:

“A period of probation, a term of periodic imprisonment or conditional discharge shall not be imposed for the following offenses. The court shall sentence the offender to not less than the minimum term of imprisonment set forth in this Code for the following offenses ***.”
730 ILCS 5/5-5-3(c)(2) (West 2010).

Subsection (F) of that provision provides:

“A Class 2 or greater felony if the offender has been convicted of a Class 2 or greater felony *** within 10 years of the date on which the offender committed the offense for which he or she is being sentenced ***.” 730 ILCS 5/5-5-3(c)(2)(F) (West 2010).

Defendant notes that he was convicted in 2004 and sentenced in 2005 for an unrelated Class 2 felony. Further, the indictment in this case alleged that defendant committed the acts between July 1, 1999, and March 31, 2002. Defendant maintains that, pursuant to the plain language of section 5-5-3(c)(2)(F) of the Corrections Code, he was ineligible for probation in this case because he had committed a Class 2 felony within 10 years of committing the offenses for which he was being sentenced. Defendant emphasizes that his conviction and sentence for the 2004 felony after he committed the acts giving rise to his sentence in this case is inconsequential. According to defendant, because he committed a Class 2 felony within 10 years of the attempt charge in this case,

he was ineligible for probation. Thus, defendant maintains that he involuntarily entered into a plea agreement as a result of the trial court's admonition that he would be eligible for probation, in violation of Rule 402(a)(2).

¶ 13 Rule 402(a)(2) (eff. July 1, 1997), provides that, during a hearing on a guilty plea, the trial court must make certain admonitions to the defendant, including informing the defendant of “the minimum and maximum sentenced proscribed by law, including *** the penalty to which the defendant may be subjected because of prior convictions or consecutive sentences.” *Id.* Substantial compliance with Rule 402 is sufficient to satisfy due process, and an imperfect admonition is not reversible error “unless real justice has been denied or the defendant has been prejudiced by the inadequate admonishment.” *People v. Whitfield*, 217 Ill. 2d 177, 195 (2005). Further, “whether a guilty plea is intelligent and voluntary is judged in light of the law that existed when his plea was entered and a voluntary plea is not invalidated by later changes in the law.” *People v. Beronich*, 334 Ill. App. 3d 536, 541 (2002).

¶ 14 In this case, the trial court complied with Rule 402(a)(2) because its admonition with respect to probation was consistent with then-prevailing law. In *People v. Wanke*, 311 Ill. App. 3d 801 (2000), this court addressed the issue of whether a defendant was eligible for probation under section 5-5-3(c)(2)(F) of the Corrections Code. *Id.* at 806. In *Wanke*, the defendant had been convicted in 1997 for an unrelated 1991 burglary that occurred in De Kalb. *Id.* However, the defendant committed the burglary at issue in *Wanke* in 1992, approximately one year after the commission of the De Kalb burglary but approximately five years before he was convicted of that crime. The defendant argued that section 5-5-3(c)(2)(F) applied only when a defendant was convicted of a Class 2 felony within the 10-year period prior to his commission of another Class 2 felony. Because he was not convicted of the 1991 De Kalb burglary until 1997, which occurred approximately five

years after the commission of the burglary at issue in *Wanke*, section 5-5-3(c)(2)(F) did not preclude probation. *Id.* Thus, the defendant maintained that the statute “[made] clear that a prior conviction had to exist before the commission of the offense that [the] defendant now faces.” *Id.* The State countered that a plain reading of section 5-5-3(c)(2)(F) did not require that the conviction of a Class 2 offense precede the commission of the offense for which the defendant was being sentenced. *Id.*

¶ 15 This court concluded that, because the State’s and the defendant’s readings of section 5-5-3(c)(2)(F) were reasonable, the provision was ambiguous. *Id.* at 807. Applying the principle of lenity, the reviewing court interpreted the statute to mean that “a sentence of imprisonment must be imposed on any offender who commits a Class 2 felony within 10 years of a *prior* conviction of a Class 2 felony.” (Emphasis added.) *Id.* Therefore, because the defendant was not convicted of the unrelated burglary until 1997, and committed the offense at issue in 1992, the prohibition of probation in section 5-5-3(c)(2)(F) was not applicable. *See id.*

¶ 16 *Wanke* is on par with the current matter. Here, the indictment charged that defendant committed the acts to which he later pleaded guilty between July 1, 1999, and March 31, 2002. However, defendant was convicted of an unrelated Class 2 felony in 2004. Thus, pursuant to the holding in *Wanke*, because defendant’s 2004 Class 2 felony came after he committed the acts at issue in this case, defendant was eligible for probation. *See id.*

¶ 17 Defendant argues that the holding in *Wanke* is erroneous and should not control. Specifically, defendant argues that *Wanke* wrongly concluded that section 5-5-3(c)(2)(F) was ambiguous; the court in *Wanke* disregarded the legislative intent in enacting that section; and the court disregarded a “fundamental principle of statutory construction” because, unlike other sentencing statutes, section 5-5-3(c)(2)(F) makes no reference to the timing of the offense for which the defendant was being sentenced. Defendant’s counsel further argued at oral argument that the

holding in *Wanke* with respect to section 5-5-3(c)(2)(F) was not necessary to the resolution of that case, and was therefore purely advisory and should not be given any weight.

¶ 18 Defendant's argument is misplaced. As noted above, whether a guilty plea was voluntary and intelligently made is judged in light of the law that existed at the time the plea was entered. *Beronich*, 334 Ill. App. 3d at 541. Thus, even if we were to agree with defendant's arguments and decline to follow *Wanke*, that case would still have been the prevailing law at the time the trial court admonished defendant. As the court in *Beronich* noted, "a voluntary plea is not invalidated by later changes in the law." See *id.*

¶ 19 Moreover, we comment on defendant's argument that *Wanke* was an advisory opinion and should not be entitled to any weight. In *People v. Grever*, 222 Ill. 2d 321 (2006), our supreme court discussed the distinction between *obiter dictum* and judicial *dictum*. The court noted that, on one hand, *obiter dictum* was generally an abbreviation for the term "*dictum*" and meant a remark or opinion uttered by the way. *Id.* at 336 (quoting *Nudell v. Forest Preserve District*, 207 Ill. 2d 409, 416 (2003)). The court emphasized that such an opinion was, as a general rule, not binding as precedent within the doctrine of *stare decisis*. *Grever*, 222 Ill. 2d at 336 (quoting *Nudell*, 207 Ill. 2d at 416). On the other hand, judicial *dictum* involved an opinion upon a point in a case argued by counsel and deliberately passed upon by the court, despite not being essential to the disposition of the cause. *Grever*, 222 Ill. 2d at 336 (quoting *Nudell*, 207 Ill. 2d at 416). Further, judicial *dictum* was entitled to substantial weight and should be followed unless found to be erroneous. *Grever*, 222 Ill. 2d at 336 (quoting *Nudell*, 207 Ill. 2d at 416). The *Grever* court noted that, in its prior decision in *Fellhauer v. City of Geneva*, 142 Ill. 2d 495 (1991), whether the plaintiff would have been guilty of official misconduct if he had complied with a request from the mayor was directly at issue because the parties had briefed and argued that issue. See *Grever*, 222 Ill. 2d at 336. Thus, even though that

issue was not necessary to the court's resolution in *Fellhauer*, the discussion of that issue met the definition of judicial *dictum* and was therefore entitled to "substantial weight." See *id.* at 336-37.

¶20 Similarly, the interpretation of section 5-5-3(c)(2)(F) of the Corrections Code in *Wanke* meets the definition of judicial *dictum*. The interpretation of section 5-5-3(c)(2)(F) was raised by the parties. *Wanke*, 311 Ill. App. 3d at 806 (noting that the defendant raised the issue of probation under section section 5-5-3(c)(2)(F)). Thus, although it is not necessary for us to consider the holding in *Wanke* because, as noted above, that decision was prevailing law when the trial court admonished defendant, defendant's argument that *Wanke* is not entitled to deference is erroneous. On the contrary, because the discussion of section 5-5-3(c)(2)(F) in *Wanke* constituted judicial *dictum*, the discussion of section 5-5-3(c)(2)(F) "is entitled to substantial deference." See *Grever*, 222 Ill. 2d at 337.

¶21 Finally, defendant's reliance on *People v. Davis*, 145 Ill. 2d 240 (1991), is likewise misplaced. In *Davis*, our supreme court addressed the issue of whether the trial court should have granted the defendant's motion to withdraw his guilty plea after the trial court mistakenly advised him that he would be eligible for probation. *Id.* at 243, 248. The defendant was charged with committing the offenses of burglary and residential burglary; he pleaded guilty to the burglary offense and the other offense was dismissed, with no agreement as to the sentence. *Id.* at 243. During the plea hearing, the trial court advised the defendant:

"If you plead guilty to or are convicted of [burglary], a Class 2 felony, which is a lesser included offense of that charged in the indictment, *and if probation or conditional discharge were thought to be an appropriate sentence for you, you could be sentenced to a term of probation or conditional discharge *** for any term not to exceed four years.*" (Emphasis in original.) *Id.* at 248.

¶ 22 At sentencing, the defendant's counsel requested a continuance, advising that the defendant had been informed that, due to his criminal record, he would not be eligible for the probation program. *Id.* The trial court denied the motion and imposed a 10-year sentence. *Id.* Thereafter, the trial court denied the defendant's motion to withdraw his plea, which motion argued that his counsel relied on the misunderstanding that he would have been eligible for probation. *Id.* at 243-44.

¶ 23 Although the defendant did not raise the issue before the trial court or on direct appeal, the supreme court addressed the issue of the trial court's admonition pursuant to the plain-error doctrine. *Id.* at 250-51. The supreme court noted that "the failure to properly admonish a defendant, alone, does not automatically establish grounds for reversing the judgment or vacating the plea," and therefore, "that the trial court improperly admonished defendant as to his minimum sentence should not, in and of itself, provide grounds for reversal of the trial court's decision." *Id.* at 250. Rather, the supreme court opined, whether reversal was required depended on "whether real justice has been denied or whether [the] defendant has been prejudiced by the inadequate admonishment." *Id.* The supreme court concluded that there was no evidence to indicate whether the defendant knew he was ineligible for probation and whether the defendant would have pleaded guilty to an open sentence had he known that he was ineligible for probation. *Id.* Instead, due to his misapprehending the law, he did not attempt to negotiate a lesser term of incarceration and forewent the opportunity to go to trial, where he could have been acquitted. *Id.* The supreme court concluded that, while the defendant's claimed misapprehension of his eligibility of probation alone might not have been sufficient to disturb the trial court's ruling, that misapprehension coupled with the trial court's incorrect admonition further led the defendant to believe that he was eligible for a sentence other than incarceration. *Id.* at 251. Thus, plain error existed. *Id.*

¶ 24 *Davis* is distinguishable from the current matter. In *Davis*, the trial court's admonition was not supported by prevailing law. See *id.* (explaining that, despite the trial court's admonition, the defendant was not eligible for probation). Conversely here, as discussed above, the trial court's admonition to defendant that he would be eligible for probation, notwithstanding his prior Class 2 felony conviction, was consistent with the reviewing court's holding in *Wanke*. Therefore, the trial court properly admonished defendant with respect to the minimum sentence.

¶ 25 Accordingly, because the trial court's admonition to defendant that he would be eligible for probation was consistent with prevailing law, we conclude that the trial court complied with Rule 402(a)(2). Because there was no error, there can be no plain error. See *Cosby*, 231 Ill. 2d at 285.

¶ 26 III. Conclusion

¶ 27 For the foregoing reasons, we affirm the judgment of the circuit court of Lake County.

¶ 28 Affirmed.