



from judgment under section 2-1401. We reverse and remand.

¶ 4 On August 8, 2008, the State charged defendant by information with one count of aggravated fleeing or attempt to elude a police officer (625 ILCS 5/11-204.1(a)(4) (West 2006)). The trial court informed defendant about the charge pending against him and his potential sentence. Defendant waived a preliminary hearing and agreed to plead guilty in exchange for the State agreeing to cap its sentencing recommendation at four years and dismiss five other pending traffic cases against defendant. At the plea hearing, the following exchange occurred.

"[THE STATE]: Judge, just for – this is going to be a cap situation, so I think a PSI will ultimately be prepared.

[TRIAL COURT]: Okay, I'm sorry, I thought this was an agreed plea. I totally misunderstood.

[DEFENSE COUNSEL]: Your Honor, it's open, cap of four. We have a resolution, contingent upon certain things.

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[TRIAL COURT]: All right, that's all right, that's fine. Mr. Brown, \*\*\* this is an agreed plea to the extent that the State is agreeing to forego a certain part of this sentence. In other words, they're not going to ask \*\*\* or recommend to me more than a four-year sentence in the Department of Corrections. There will be a presentence report. You understand that, sir?

[DEFENDANT]: Yes, I do.

\* \* \*

[TRIAL COURT]: Plea agreement, to the extent that there is one.

[THE STATE]: Judge, the State has agreed to recommend a sentence of no more than four years in the Illinois Department of Corrections. In addition, we will dismiss 7TR3205, 8TR8852 and 53, also 8TR18363 and 64, which I believe those last two are the underlying tickets that gave rise to this. In addition, Mr. Brown has warrants on those other cases. Bond would be discharged with the dismissal, and the State would not object to him being released on his own recognizance in this case. He's currently held on \$100,000 bond.

[DEFENSE COUNSEL]: That is the agreement.

\* \* \*

[TRIAL COURT]: Mr. Brown, you understand everything that Mr. Kanjis said about what the State's promising you in return for your guilty plea in this case?

[DEFENDANT]: Yes, I do.

[TRIAL COURT]: Is that the agreement that you're entering into with the State?

[DEFENDANT]: Yes."

¶ 5 Defendant pleaded guilty to aggravated fleeing or attempting to elude a police officer and the trial court accepted defendant's plea, stating:

"The record will reflect that the defendant has been advised of his

rights, knowingly, intelligently, and voluntarily waives those rights. The plea is made voluntarily. There's a factual basis for the plea. Based on those findings I accept the plea."

Defense counsel then "put on the record" that he advised defendant that the State's offer was "conditional upon certain things happening between now and the sentencing date \*\*\* what [the State] asks the court for is totally dependent upon him meeting those conditions." Defendant confirmed that defense counsel's statement was "accurate." The court set the matter over for "open sentencing" on October 1, 2008.

¶ 6 Defendant did not appear at his sentencing hearing and the trial court issued a warrant for his arrest. On February 1, 2009, defendant was arrested on the outstanding warrant. On February 26, 2009, defendant appeared for sentencing. The State recommended that the court impose a six-year prison sentence. The court sentenced defendant to 66 months in prison.

¶ 7 On March 25, 2009, defendant filed a motion to reconsider sentence arguing the trial court should impose a sentence "in the range of 36 to 42 months." The court denied defendant's motion to reconsider sentence.

¶ 8 On July 6, 2010, defendant filed a *pro se* petition for relief from judgment under section 2-1401 of the Procedure Code (735 ILCS 5/2-1401 (West 2008)). Defendant alleged that his due process rights were violated when the trial court "did not impose the agreed-upon sentence or continue the hearing and allow defendant to withdraw his guilty plea." On October 18, 2010, the trial court *sua sponte* dismissed defendant's section 2-1401 petition upon finding that it was frivolous and without merit.

¶ 9 This appeal followed.

¶ 10 Defendant argues that the trial court erred by striking his section 2-1401 petition because he did not receive the benefit of the bargain he made with the State when he pled guilty. When a trial court enters a judgment on the pleadings or a dismissal in a section 2-1401 proceeding, our review is *de novo*. *People v. Vincent*, 226 Ill. 2d 1, 18, 871 N.E.2d 17, 28 (2007).

¶ 11 Section 2-1401 of the Procedure Code (735 ILCS 5/2-1401 (West 2008)) sets forth the procedure to vacate a final judgment order older than 30 days. "In criminal proceedings, a petition filed pursuant to section 2-1401 seeks to correct all errors of fact occurring in the prosecution of a case that were unknown to the petitioner and the court at the time of trial, which, if then known, would have prevented the judgment from being entered." *People v. Thomas*, 364 Ill. App. 3d 91, 98, 845 N.E.2d 842, 850 (2006). "Relief under section 2-1401 is predicated upon proof, by a preponderance of evidence, of a defense or claim that would have precluded entry of the judgment in the original action and diligence in both discovering the defense or claim and presenting the petition." *Vincent*, 226 Ill. 2d at 7-8, 871 N.E.2d at 22. The supreme court has noted that "section 2-1401 is a civil remedy that extends to criminal cases as well as to civil cases." *Vincent*, 226 Ill. 2d at 8, 871 N.E.2d at 22-23.

¶ 12 Defendant contends that the parties "anticipated and agreed to a cap of 4 years' imprisonment, and the lower court accepted this agreement and entered judgment." The State contends that the trial court "never made any Rule 402(d)(2) concurrence or conditional concurrence [but] merely accepted defendant's plea of guilty."

¶ 13 Pursuant to Illinois Supreme Court Rule 402 (eff. July 1, 1997), every defendant who enters a plea of guilty has a due process right to be properly and fully admonished. *People*

v. *Wheatfield*, 217 Ill. 2d 177, 188, 840 N.E.2d 658, 666 (2005). Rule 402(d) states as follows:

"when there is a plea discussion or plea agreement, the following provisions, in addition to the preceding paragraphs of this rule, shall apply:

(1) The trial judge shall not initiate plea discussions.

(2) If a tentative plea agreement has been reached by the parties which contemplates entry of a plea of guilty in the expectation that a specified sentence will be imposed or that other charges before the court will be dismissed, the trial judge may permit, upon request of the parties, the disclosure to him of the tentative agreement and the reasons therefor in advance of the tender of the plea. At the same time he may also receive, with the consent of the defendant, evidence in aggravation or mitigation. The judge may then indicate to the parties whether he will concur in the proposed disposition; and if he has not yet received evidence in aggravation or mitigation, he may indicate that his concurrence is conditional on that evidence being consistent with the representations made to

him. If he has indicated his concurrence or conditional concurrence, he shall so state in open court at the time the agreement is stated as required by paragraph (b) of this rule. If the defendant thereupon pleads guilty, but the trial judge later withdraws his concurrence or conditional concurrence, he shall so advise the parties and then call upon the defendant either to affirm or to withdraw his plea of guilty. If the defendant thereupon withdraws his plea, the trial judge shall recuse himself.

(3) If the parties have not sought or the trial judge has declined to give his concurrence or conditional concurrence to a plea agreement, he shall inform the defendant in open court at the time the agreement is stated as required by paragraph (b) of this rule that the court is not bound by the plea agreement, and that if the defendant persists in his plea the disposition may be different from that contemplated by the plea agreement." Ill. S. Ct. R. 402(d) (eff. July 1, 1997).

conditional concurrence in the terms of the plea agreement. Yet there was no compliance with the requirement that, in the case of plea discussions and agreements, the court must inform the defendant in open court that it is not bound by the agreement and could impose any sentence legally available for the offense. From a thorough reading of the record, it is clear that before accepting the plea the trial court said absolutely nothing to defendant in regard to how the court could handle the sentencing recommendation of the State pursuant to the plea agreement.

¶ 15 The cases cited by defendant are distinguishable from the instant case. In *People v. Collier*, 376 Ill. App. 3d 1107, 1109, 879 N.E.2d 982, 985 (2007), the trial court advised the defendant that the "penalty range will be anything from possibly some form of probation up to a maximum of two years in the Department of Corrections as opposed to some form of probation up to six years. *Your penalty range will be confined to probation up to two years.*" (Emphasis in original.) In *People v. Rossman*, 309 Ill. App. 3d 662, 664, 722 N.E.2d 1216, 1218 (2000), the trial court affirmatively stated that "the plea agreements are conditionally accepted \*\*\* I am going to conditionally concur in the negotiations of the parties."

¶ 16 Here, where the court did not state its concurrence or conditional concurrence in the terms of the plea agreement, and failed to indicate to defendant that the court was not bound in sentencing by the recommendation of the State pursuant to the plea agreement, the Rule 402(d) admonishments were not sufficient to ensure that defendant's guilty plea was intelligently and voluntarily made. See *People v. Collins*, 100 Ill. App. 3d 611, 614, 426 N.E.2d 1274, 1276 (1981) ("We deem the crucial due process aspect of the procedure under Rule 402(d) to be the requirement that the court must tender to a defendant the opportunity (1) to affirm or withdraw a guilty plea entered upon a court's subsequently withdrawn concurrence or conditional

concurrence in a plea agreement, or (2) to persist in or withdraw a guilty plea entered on a plea agreement after a court that has not concurred in the agreement has explained its right to disregard the agreement and the consequences of its doing so").

¶ 17 In light of our disposition, we need not address defendant's remaining contentions.

¶ 18 For the foregoing reasons, we reverse the trial court's judgment and remand the cause to allow defendant to plead anew.

¶ 19 Reversed and remanded with directions.

¶ 20 PRESIDING JUSTICE TURNER, specially concurring in part and dissenting in part:

¶ 21 While I agree with the majority's reversal of the trial court's *sua sponte* dismissal of defendant's section 2-1401 petition, I disagree with its analysis and respectfully dissent from that part of the majority's order, granting summary judgment in defendant's favor on that petition and providing defendant relief of withdrawing his guilty plea and pleading anew. I would remand the cause for further proceedings on defendant's section 2-1401 petition.

¶ 22 First, the majority notes a petition filed in criminal proceedings pursuant to section 2-1401 " 'seeks to correct all errors of fact occurring in the prosecution of a case that were *unknown* to the petitioner and the court at the time of trial.' " (Emphasis added.) *Infra* ¶ 11. However, it fails to explain what facts defendant did not know at the time of sentencing that he now knows that render his sentence improper. I strongly question whether this case involves a matter of a newly discovered factual error but neither party adequately addresses the issue.

¶ 23 Second, at the *sua sponte* dismissal stage, the well-pleaded facts are admitted and the court considers whether the allegations in the petition entitle the defendant to relief as a matter of law. *Vincent*, 226 Ill. 2d at 9-10, 871 N.E.2d at 24. (Contrary to the State's assertion, I note my review of the record does not indicate a notice issue rendering the petition not ripe for adjudication.) The court may consider "the pleadings, affidavits, exhibits and supporting material before it, including the record of the prior proceedings." *Vincent*, 226 Ill. 2d at 9, 871 N.E.2d at 23. In section 2-1401 cases, our supreme court has recognized the following five possible final dispositions: "the trial judge may dismiss the petition; the trial judge may grant or deny the petition on the pleadings alone (summary judgment); or the trial judge may grant or

deny relief after holding a hearing at which factual disputes are resolved." *Vincent*, 226 Ill. 2d at 9, 871 N.E.2d at 23-24. Summary judgment is inappropriate where a material issue of fact exists. *Vincent*, 226 Ill. 2d at 9, 871 N.E.2d at 23. Accordingly, the focus at this point in the section 2-1401 proceedings is on defendant's petition and whether (1) it states a claim entitling him to relief and (2) questions of material fact exist.

¶ 24 Here, the State does not actually challenge the legal basis for defendant's claims, asserting a violation of his due process rights and Rule 402(d)(2) (eff. July 1, 1997) based on the trial court sentencing him to a term greater than the parties' agreed-upon sentencing cap without allowing him to withdraw his guilty plea. Under Illinois law, a defendant's plea is rendered involuntary and in violation of the defendant's due process rights when the defendant receives a sentence more onerous than the sentence contemplated by the plea agreement and the error is not attributable to the defendant. See *Whitfield*, 217 Ill. 2d at 195, 840 N.E.2d at 669 (addressing an agreed specific sentence increased by a mandatory-supervised-release term of which the defendant was not properly admonished); *People v. Walker*, 256 Ill. App. 3d 466, 469, 628 N.E.2d 207, 209 (1993) (where the State breached the plea agreement by recommending a sentence higher than the agreed-upon cap). Additionally, in *Rossmann*, 309 Ill. App. 3d at 668, 722 N.E.2d at 1222, this court held that, when a trial court's sentence is greater than the one provided by the agreement, Rule 402(d)(2) (eff. July 1, 1997) is violated. When the trial court does not sentence a defendant in accordance with the plea agreement, the trial court effectively withdraws its concurrence to the plea agreement. *Rossmann*, 309 Ill. App. 3d at 668, 722 N.E.2d at 1222. When a trial court withdraws its concurrence, its only options are to impose the agreed-upon sentence or continue the hearing and allow the defendant to affirm or withdraw the

guilty plea. *Rossmann*, 309 Ill. App. 3d at 668, 722 N.E.2d at 1222. With a Rule 402(d)(2) violation, the defendant's conviction and sentence are vacated and the cause remanded for compliance with the rule. See *Rossmann*, 309 Ill. App. 3d at 668, 722 N.E.2d at 1222. Thus, defendant's claims have a legal basis.

¶ 25 The crux of this appeal is whether material facts exist warranting an evidentiary hearing. I agree with the State such facts exist as the record evidences some failure on defendant's part. Moreover, the State recommended a sentence greater than the cap and defendant did not raise the cap in response to the State's recommendation. The failure to raise the cap by both parties suggests it was no longer before the trial court, and thus the trial court would not have withdrawn its concurrence in the plea agreement as suggested by defendant. I also note defendant's affidavit indicates he was unsure of the reason for the nonenforcement of the cap. I find an evidentiary hearing is clearly warranted in this case. Moreover, I disagree with the majority's conclusion the record does not show the trial court's concurrence in the plea agreement (*infra* ¶ 14). I find a reasonable person could conclude from the court's statements at the plea hearing and its setting forth the agreement in its written order on the guilty plea that it had accepted the plea agreement in open court. Thus, a material question of fact exists on this matter as well.

¶ 26 Since material questions of fact exist, the trial court erred by dismissing defendant's petition *sua sponte*, and the majority errs by granting defendant judgment on his petition. Accordingly, this cause should go back to the trial court for further proceedings on defendant's section 2-1401 petition.

¶ 27 Last, I note the majority grants defendant relief he has not requested and

specifically does not seek. Defendant does not wish to withdraw his plea but instead asks this court to enforce a four-year cap on his sentence. Thus, I also disagree with the relief granted defendant.