

motions to withdraw the plea and to reduce the sentence, both of which were denied. He filed a timely notice of appeal. We affirm.

¶ 3

BACKGROUND

¶ 4

The defendant's trial was scheduled for August 3, 2009. On that date, the defendant entered an open plea to one count of vehicular invasion in exchange for the dismissal of the other three counts against him. The court described the charge and asked the defendant if he understood the charge. He indicated that he did. The court then explained as follows:

"That charge is a Class 1 Felony which carries a maximum fine of \$25,000. It carries a maximum sentence of up to 15 years in the Illinois Department of Corrections. Any sentence to the Department of Corrections for this offense would be followed by 2 years of Mandatory Supervised Release, what most people call parole. Do you understand that?"

The defendant answered in the affirmative. The court then asked the defendant again if he understood the charge and the possible penalties, and he again responded that he did.

¶ 5

The court told the defendant that he was not required to plead guilty and that he should only plead guilty if it was a free and voluntary act. It told the defendant that he had a right to a trial by a jury or a judge and that a jury was present and they could proceed with his trial that day. The court explained that in a bench or jury trial, the State would have to prove his guilt beyond a reasonable doubt and that he was not required to prove anything. He indicated that he understood. The court stated as follows:

"If you plead guilty the only thing that's going to remain for me to do is to set your penalty somewhere within the range allowed by law. In your case it could apparently be anywhere from putting you on probation up to 15 years in the Department of

Corrections; no fine up to \$25,000 fine. Do you understand that, sir?"

The defendant responded "yes." The defendant said he had no questions and stated that he had the opportunity to discuss the plea with his attorney. He then pleaded guilty.

¶ 6 As a factual basis for the plea, the State said that if the case went to trial, Vandalia police officer Todd Waggoner would testify that in the afternoon of April 17, 2009, he was called to the home of Heather Cox. When he arrived, he found Ms. Cox outside her residence crying. Her left cheek orbital bone area was severely swollen with a slight laceration on the swollen area, her chin had blood on it, her right wrist had a small scratch with fresh blood, and her left tricep had a fresh laceration. Ms. Cox's brother Timothy Gilmore was standing with her. Ms. Cox told Officer Waggoner that the defendant caused the injuries and fled the scene. She told him that when she pulled into her driveway after work, the defendant pulled in behind her. She locked the car doors, rolled up the windows, and called 9-1-1 on her cell phone. Ms. Cox told Officer Waggoner that the defendant approached the driver's side window and kicked it, breaking the window and showering her with glass. He then struck her with a closed fist while screaming "why did you have me arrested?" and threatening to take her to the country to "get rid of her for what she had did." Ms. Cox told Officer Waggoner that she was temporarily knocked unconscious, but that she remembered the defendant in the vehicle trying to start the car and that she feared he would take her to the country and kill her. Mr. Gilmore then intervened and chased the defendant away with a board. Ms. Cox told Officer Waggoner that the defendant took her purse containing \$400, two prescriptions, and credit cards. The court found a factual basis to support the plea.

¶ 7 The court then asked the defendant:

"You understand even though you have already told me you wanted to plead guilty,

we have talked about it at great length, by signing this document and having [your attorney] hand it up you are, in fact, pleading guilty to this count that I just read to you?"

The defendant responded that he understood.

¶ 8 At the sentencing hearing on October 23, 2009, the defendant called his 13-year-old son, Austin Cox, as a mitigation witness. Austin testified that he had spent the last three years with the defendant and that during that time they had a good relationship. He described the relationship between his mother, Ms. Cox, and the defendant as good. He said he saw them argue, but that he never saw physical violence between them. Austin stated that he had two siblings and that the defendant had a good relationship with them.

¶ 9 Ms. Cox testified that she had known the defendant for 20 years and that they started living together about 3 years prior. She described their relationship as good except when he was using drugs. She stated that when the defendant was on drugs he was a "walking time bomb." In describing the incident from which the defendant's guilty plea stemmed, she stated she was "not a hundred percent sure how the window was busted out of my car." She testified that the defendant got in the car, started hitting her, knocked her unconscious, and threatened to take her out in the country and kill her. She stated that her brother came to her rescue and that the defendant tried to run him over.

¶ 10 Ms. Cox testified that in December 2007, the defendant hit her and tried to run her and her children over with his car. She admitted that in February 2007, she gave a handwritten statement to the police that the defendant yelled at her, threw a coffee cup at the wall, and said he was going to make her life like hell. She tried to leave, but he took her car keys. She tried to call the police, and he bit her. Ms. Cox stated

that the defendant was on drugs when these incidents occurred.

¶ 11 Jeffrey Taylor, the defendant's uncle, testified that the defendant started using marijuana at around 12 or 13 years of age. He stated that he helped the defendant go to rehabilitation a couple of times and that the defendant had a problem with heroin addiction. Mr. Taylor testified that when the defendant is under the influence of drugs he is abrupt, temperamental, and impulsive. When he is not on drugs he is personable, outgoing, and helpful.

¶ 12 The defendant gave a statement of allocution. He told the court that he realized he made a mistake. He stated that he thought he had his addiction under control, but that it was something he had to be aware of every day so that "this mistake doesn't ever happen again." He stated that he wanted to put this behind him so he could take care of his family.

¶ 13 The State requested that the defendant receive the maximum sentence of 15 years' imprisonment. Defense counsel asked that the defendant receive the four-year minimum sentence and be given the chance to show the judicial system that he can change.

¶ 14 The defendant's presentence investigation report indicates that the defendant was convicted of battery in July 1997, escape of a felon from a penal institute in July 1999, aggravated battery in January 2004, obstruction of justice/destruction of evidence in December 2005, retail theft in September 2005, domestic battery in February 2007, and domestic battery in December 2007.

¶ 15 The court admonished the defendant for referring to his crime as a mistake. It said:

"A mistake is turning left when you should have turned right. A mistake isn't smashing a car window and reaching in and knocking your fiancé [*sic*] or girlfriend

unconscious. That's a crime, not a mistake."

The court found that the defendant's admission of responsibility for the offense mitigated the sentence to be imposed on him. The court further found that the defendant:

"also has been placed on TASC Probation, he's been placed on probation, he's been placed on conditional discharge. He's not a person who can complain coming into this court, hey, you never gave me a chance. The criminal justice system has given him lots of chances. He's been in and out of drug treatment programs with limited success and apparently limited commitment to change."

The court found that the factors in aggravation outweighed those in mitigation and sentenced the defendant to 12 years' imprisonment.

¶ 16 On October 26, 2009, defense counsel filed a motion to withdraw as counsel, arguing that discussions between himself and the defendant raised issues that could create a conflict. On November 4, 2009, the motion was called for hearing before a different judge than the one who accepted the defendant's plea. Defense counsel asked that the motion to withdraw toll the period to file postsentencing motions. The State agreed to allow the time to file posttrial motions to be tolled. The court set the motion to withdraw for hearing before the judge who accepted the defendant's plea and stated that "the time for appeal be tolled until the motion to withdraw is heard." On December 2, 2009, defense counsel's motion to withdraw was granted.

¶ 17 On December 29, 2009, the defendant filed a *pro se* motion to withdraw guilty plea and vacate sentence. Amended motions to withdraw the plea and reduce sentence were filed by the defendant's counsel on January 4, 2010. The motions were heard on March 26, 2010. Ms. Cox testified that upon further reflection about what happened on the date of the vehicular invasion, she realized that Mr. Gilmore broke her car window, not the defendant. She further stated that she had given the

defendant permission to enter her vehicle to retrieve an item that belonged to him. Ms. Cox testified that he did not take her purse; rather, she left it on the hood or on top of the car. She stated that when she made her police report she was on the pain reliever Vicodin and an antidepressant, Effexor. She testified that she has had time to think over the events and that her current testimony was the accurate version of what took place.

¶ 18 Bode Scott testified that he was the defendant's court-appointed attorney for the plea and sentencing hearings. He stated that he had at least four or five meetings with the defendant prior to the defendant entering his guilty plea. Mr. Scott stated that the State offered the defendant eight years' imprisonment if he pleaded guilty. The defendant rejected that offer. The State then offered the defendant 7½ years' imprisonment if he pleaded guilty, which he also rejected. Mr. Scott said he told the defendant that because he refused the State's offer, there were only two options: entering an open plea or going to trial. He stated he did not discuss the difference between an open and a negotiated plea with the defendant. However, because the judge determines the sentence when an open plea is entered, Mr. Scott clarified that he did not tell the defendant that he was guaranteed a certain sentence.

¶ 19 The defendant testified that he did not have any discussions with Mr. Scott about the elements of vehicular invasion. He stated that after researching the charge, he realized he did not commit the crime of vehicular invasion. He testified that he took the open plea because he thought that the State would ask for 7½ years' imprisonment, that his counsel would request a minimum sentence, and that the court would "meet somewhere in the middle." He stated that Mr. Scott never told him that the State could ask for a higher sentence.

¶ 20 The defendant argued that his open plea was involuntary because he did not

understand the difference between an open and a negotiated plea and because he felt compelled to enter a guilty plea because Mr. Scott had not done any of the discovery the defendant requested of him. He asked the court that, should it deny his motion to withdraw his guilty plea, it reduce his sentence in light of Ms. Cox's new testimony.

¶ 21 The court found that, although there was a jury available to hear his case on the day of the plea, the court "spent some considerable time allowing [the defendant] additional opportunities to meet with Mr. Scott to determine exactly what he wanted to do. And that is reflected in the transcript of the plea, that we took recesses." The court found it explained to the defendant "a couple of times" that he was facing up to 15 years in the Department of Corrections and gave him the opportunity to ask questions. It found that the defendant's plea was knowingly and voluntarily entered. It found, "[T]he plea didn't save you as much time as maybe you thought it was going to, but you had no promises along those lines or any reason to think that you had promises along those lines." The court denied the defendant's motion to withdraw his guilty plea. It further found the testimony of Ms. Cox to be "incredible, unbelievable, and I would have to find Miss Cox perjured herself today on the witness stand." The court denied the defendant's motion to reduce sentence. The defendant filed a timely notice of appeal.

¶ 22 ANALYSIS

¶ 23 The defendant argues that this court has jurisdiction to hear the instant appeal because the circuit court granted his motion to extend the time for filing postplea motions until 30 days after defense counsel's motion to withdraw as counsel was heard. The State concurs with the defendant's analysis of the jurisdictional issue.

¶ 24 Supreme Court Rule 604(d) provides that no appeal from a judgment upon a

plea of guilty shall be taken unless the defendant files a motion to withdraw the guilty plea and vacate the judgment within 30 days of the date on which the sentence was imposed. Ill. S. Ct. R. 604(d) (eff. July 1, 2006). The filing of a Rule 604(d) motion is a condition precedent to an appeal from a judgment on a plea of guilty and, generally, the failure to file a timely Rule 604(d) motion precludes the appellate court from considering the appeal on its merits. *People v. Flowers*, 208 Ill. 2d 291, 303 (2003). "Nothing in Rule 604(d) states that the trial court does not have authority to extend the time for filing a motion to reconsider sentence or a motion to withdraw guilty plea." *People v. Church*, 334 Ill. App. 3d 607, 613-14 (2002). A trial court has the inherent authority to grant an extension of time to file a motion to reconsider sentence or a motion to withdraw guilty plea, upon proper application and showing of good cause. *Id.* After carefully examining the record, we conclude that the trial court properly extended the time to file the motions to withdraw the guilty plea and to reduce sentence, the motions were filed within the extended time, the circuit court had jurisdiction to hear the motions, and this court has jurisdiction to hear the appeal.

¶ 25 The defendant next argues that he was denied effective assistance of counsel because his attorney failed to interview the complaining witness prior to the plea and failed to explain the difference between an open and a negotiated guilty plea. Claims of ineffective assistance of counsel are reviewed under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, a defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687. "To satisfy the first prong of the *Strickland* standard in a case where a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the defendant must

show that his counsel's advice fell below an objective standard of reasonableness, and not whether a court would in retrospect consider the advice to be right or wrong." *People v. Fuller*, 205 Ill. 2d 308, 330 (2002). Because of the variety of factors that go into trial strategy, claims of ineffectiveness of counsel must be judged on a circumstance-specific basis, not viewed in hindsight, but from the time of counsel's conduct and with great deference to counsel's decisions on review. *Id.* at 331. To establish prejudice, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. *Id.* Both the performance and prejudice prongs of *Strickland* must be satisfied for the defendant to succeed on an ineffectiveness of counsel claim. *People v. Evans*, 209 Ill. 2d 194, 220 (2004).

¶ 26 The defendant alleges that he was harmed by his counsel's failure to interview Ms. Cox prior to his guilty plea. He argues that at the hearing on the motion to withdraw, Ms. Cox testified that when she made the initial police report she was upset and on medications. She stated that, after reflection, she recalled events differently and that it was her brother, not the defendant, who broke the car window. Additionally, she testified that she gave the defendant permission to enter her car. She further testified that the defendant did not take her purse; instead, she left it on the hood or roof of his car as he drove away. The defendant argues that had Mr. Scott interviewed Ms. Cox prior to him pleading guilty, "she might have recalled the events more accurately, and [he] might not have pled guilty."

¶ 27 "To prevail on a claim of ineffective assistance of counsel based on a failure to investigate, defendant must show that substantial prejudice resulted and that there is a reasonable probability that the final result would have been different had counsel properly investigated." *People v. Orange*, 168 Ill. 2d 138, 151 (1995). Counsel is

allowed latitude in determining whether investigation is necessary, and if counsel chooses not to investigate, such a decision must be assessed for reasonableness in all the circumstances, giving deference to counsel's judgment. *Fuller*, 205 Ill. 2d at 335-36.

¶ 28 Examining the instant case at the time the defendant entered his guilty plea, defense counsel had the police report made at the time of the vehicular invasion. The facts Ms. Cox related to the police and recorded in the report state that the defendant kicked in the driver's side window of her car showering her with glass, that he hit her in the face and knocked her unconscious, and that he forced his way into her car and threatened to take her to the country and kill her. Her brother chased the defendant away with a board, and the defendant tried to run him over. Ms. Cox's testimony at the sentencing hearing was virtually identical to the police report. The only difference between what she told the police and her testimony at the sentencing hearing was that, at the sentencing hearing, she was "not a hundred percent sure" how the window of her car was broken. Had the case proceeded to trial, the trial would have taken place on the same day as the defendant pleaded guilty. Ms. Cox would have testified in accordance with her statements in the police report because her testimony at the sentencing hearing, six months after the incident, was substantially the same as her statement to the police at the time of the incident. As the trial court noted at the hearing on the motion to withdraw guilty plea and reduce sentence, Ms. Cox was not "struck with the realization that it wasn't" the defendant until sometime between the sentencing hearing and the motion hearing. The trial court found that had Mr. Scott interviewed Ms. Cox prior to the defendant's guilty plea, "she was still under the impression that it was [the defendant] that broke her window. So I don't see where speaking to her could have changed in any way his understanding of the evidence,

especially in light of the fact that had she testified at trial the facts she testified to now, the State would have impeached her with her handwritten statement." Giving deference to Mr. Scott's judgment, under the circumstances, it was not unreasonable for him not to investigate. Additionally, given that the defendant pleaded guilty on the day his trial was scheduled to start and given Ms. Cox's testimony at the sentencing hearing, the defendant failed to show that there was a reasonable probability that the final result would have been different had Mr. Scott investigated. The defendant failed to establish ineffective assistance of counsel for failure to investigate under either prong of the *Strickland* analysis.

¶ 29 The defendant next argues that Mr. Scott was ineffective for failing to explain to him the difference between an open and a negotiated plea. The State made two plea offers to the defendant, the first for an 8-year sentence and the second for a 7½-year sentence. The defendant rejected both. The defendant argues that he did not understand that by pleading guilty he could receive a sentence of more than 7½ years' imprisonment. He claims that he pleaded guilty under the misapprehension of sentence and that his plea was not voluntary because it was given without the assistance of competent counsel. He asserts that, but for Mr. Scott's deficiencies, he would not have pleaded guilty, but would have insisted upon proceeding to trial.

¶ 30 The belief or hope that by pleading guilty a defendant will receive a shorter sentence does not entitle him to relief when that expectation is disappointed. *People v. Fernandez*, 222 Ill. App. 3d 80, 87 (1991). A defendant must prove that he entered the plea under a misapprehension of fact or law by showing that the circumstances that existed at the time of the plea, judged by objective standards, reasonably justified his mistaken impression. *Id.* "A guilty plea made in reliance on the incorrect advice

of counsel as to the anticipated terms of a sentence is still a voluntary plea." *People v. Robinson*, 157 Ill. App. 3d 622, 629 (1987).

¶ 31 In the instant case, the record establishes that the defendant was thoroughly admonished of his rights and of the consequences of his plea. He was advised by the trial court, more than once, that the charge against him carried a possible sentence of up to 15 years' imprisonment. Each time he stated that he understood. The trial court specifically told him, "If you plead guilty the only thing that's going to remain for me to do is to set your penalty somewhere within the range allowed by law." The trial court explained to the defendant that he had a right to plead not guilty and that he had a right to a jury trial. The defendant stated he understood his rights. The court carefully inquired whether the defendant was entering the plea because he was threatened or being forced into taking that action. He stated that he understood that if he was going to plead guilty it should be his free and voluntary act. Mr. Scott testified, at the hearing to withdraw the guilty plea and to reduce sentence, that he did not explain to the defendant the difference between an open and a negotiated plea. However, he stated that he never told the defendant that in entering his plea he would be guaranteed a certain sentence. Accordingly, the evidence in the present case, at best, supports the conclusion that the defendant was under a subjective, mistaken belief that he could not receive a sentence of more than 7½ years' imprisonment. Judged by objective standards, the defendant's mistaken impression that he could not receive a sentence greater than 7½ years was not reasonable. The defendant's plea was knowingly and voluntarily made.

¶ 32 The defendant argues that Mr. Scott provided ineffective assistance of counsel because he failed to explain the difference between an open and a negotiated plea, and, but for this error, he would not have pleaded guilty. The defendant was offered

two different deals by the State and he refused both. Mr. Scott testified that he told the defendant that by rejecting the State's offers he only had two options: to enter an open plea or to go to trial. The defendant opted to enter an open plea. Mr. Scott testified that while he did not explain the difference between the different types of pleas, he did not tell the defendant that he was guaranteed a certain sentence. The defendant testified: "I'm not sure if it was exactly discussed. I mean, I just—that was my understanding, that the State was going to ask for the seven-and-a half and we'd ask for the minimum, and hopefully the judge would meet somewhere in the middle." He stated that during his conversations with Mr. Scott about the open plea, Mr. Scott told him that "hopefully things will end up on the lesser side of the middle." He further testified that although the trial court advised him that the possible penalty would be between probation and 15 years, "[t]hat wasn't my interpretation. I mean, I could—no. I thought the most I was going to get was seven-and-a-half years." At the hearing to withdraw his guilty plea and reduce sentence, the trial court found, "The plea didn't save you as much time as maybe you thought it was going to, but you had no promises along those lines or any reason to think that you had promises along those lines." The defendant failed to show that his counsel's advice fell below an objective standard of reasonableness. No evidence was presented that Mr. Scott told him that he would not receive a sentence in excess of 7½ years. As previously discussed, the defendant entered a knowing and voluntary plea. Because the defendant failed to satisfy the performance prong of the *Strickland* analysis, there is no need to address the prejudice prong, and he failed to show ineffective assistance of counsel.

¶ 33 Lastly, the defendant argues that his 12-year sentence was excessive in light of the facts of the case and his strong rehabilitative potential. He asserts that the sentence of 12 years' imprisonment is three times the minimum for a Class 1 felony

and it does not reflect his character or rehabilitative potential.

¶ 34 The trial court has broad discretion in imposing a sentence. *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). Supreme Court Rule 615(b)(4) (eff. Aug. 27, 1999) grants a reviewing court the power to reduce a sentence. A trial court's sentencing decision is entitled to great deference, and a reviewing court may not alter a defendant's sentence absent an abuse of discretion. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). A trial court is generally in a better position than the reviewing court to determine the appropriate sentence because it has the opportunity to weigh such factors as the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age. *Stacey*, 193 Ill. 2d at 209. Because a reviewing court must rely on a cold record, it must not substitute its judgment for that of the trial court merely because it would have weighed these factors differently. *Alexander*, 239 Ill. 2d at 213. "A sentence within statutory limits will be deemed excessive and the result of an abuse of discretion by the trial court where the sentence is greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense." *Stacey*, 193 Ill. 2d at 210.

¶ 35 The defendant argues that the trial court should have given more consideration to his unfulfilled potential and allowed him one more chance at rehabilitation. The record shows that the trial court considered the appropriate factors in aggravation and mitigation. The trial court did consider his unfulfilled potential. At the sentencing hearing, it acknowledged that the defendant made "one of the more eloquent statements in allocution that I've ever heard in my years on the bench or previously in my prior career with an involvement in the criminal justice system." The trial court noted that his statement indicated that the defendant had a background of exposure to educated people, native intelligence, and some ability. The trial court also noted

that his statement of allocution indicated that the defendant was "a person who had promise or potential that has clearly been unfulfilled." The trial court found that the defendant blamed all his problems on his drug use, yet he managed to avoid any drug convictions. It found that "if his problems are drug related, his drug addiction has manifested itself unlike those of many other persons who have drug problems, usually in crimes of violence." The trial court stated that the defendant certainly had potential, but that he had been given numerous chances, including TASC probation, probation, conditional discharge, and drug treatment programs, and he has had limited success and commitment to change. The court found that the defendant hurt innocent people and was a threat to society. It noted the particular seriousness of the domestic battery in December 2007 and the fact that the case at issue "could have easily crossed the line from the offense to which he pled guilty to even more serious offenses but for the intervention of Ms. Cox's brother." The court stated that his admission of responsibility was a mitigating factor. It stated, "I am going to take into consideration the fact that you entered a plea, but in all other respects the factors in aggravation greatly outweigh those in mitigation."

¶ 36 "It is well settled that a court is not required to give a defendant's rehabilitative potential more weight in its sentencing decision than it gives the seriousness of an offense." *People v. Smith*, 214 Ill. App. 3d 327, 341 (1991). There was evidence showing that the defendant had rehabilitative potential, and there was evidence that negated it. The defendant's sentence was within the statutory limits. The trial court adequately considered the appropriate factors, and the sentence imposed on the defendant was not greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense. The trial court did not abuse its discretion in sentencing the defendant.

¶ 37

CONCLUSION

¶ 38 For the foregoing reasons, the judgment of the circuit court of Fayette County is affirmed.

¶ 39 Affirmed.