

Nos. 1-12-3145 & 1-13-1777 (Cons.)

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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
	)	Cook County.
v.	)	
	)	No. 11 CR 13728
	)	
DARIUS JACKSON,	)	The Honorable
	)	Michael Brown,
Defendant-Appellant.	)	Judge Presiding.
	)	

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JUSTICE McBRIDE delivered the judgment of the court.  
Justices Gordon and Reyes concurred in the judgment.

**ORDER**

¶ 1 *Held:* Police reports and transcript of a bond hearing provided a sufficient factual basis for a guilty plea to unlawful use of a weapon by a felon. However, the sentence was vacated and the cause was remanded for a new sentencing hearing where there was no written report regarding defendant's criminal history, and where the circuit court did not enter findings regarding defendant's criminal history at the sentencing hearing.

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¶ 2 Pursuant to a negotiated guilty plea, defendant Darius Jackson was found guilty of unlawful use of a weapon by a felon (count 1), and was sentenced to a six-year prison term with a recommendation for impact incarceration (boot camp). Other charges were disposed of by means of *nolle prosequi* pursuant to the plea. Defendant initially filed a *pro se* notice of appeal (which was assigned appeal number 1-12-3145) supported by a handwritten letter to the circuit court, which the circuit court treated as a motion to withdraw the guilty plea and vacate the judgment. The circuit court denied that motion, and defendant has appealed (that appeal was assigned appeal number 1-13-1777), contending that defense counsel was ineffective because he failed to amend the motion to withdraw the guilty plea to allege a defect in the plea proceeding, namely, that the parties had stipulated to a factual basis for the guilty plea without having spread the factual basis of record. Defendant maintains that the cause should be remanded to allow him to withdraw the guilty plea. Defendant alternatively contends that his sentence should be vacated as void because the circuit court imposed it without ordering a presentence investigative report (PSI) and without entering any findings regarding his criminal history, and he maintains that the cause should be remanded for resentencing following the preparation of a PSI or the circuit court's entry of findings on the record regarding his criminal history.

¶ 3 Defendant was arrested on August 14, 2011, and he was charged with multiple weapons offenses. The arrest report reflects that defendant was on parole for an armed carjacking conviction in Indiana when Chicago police officers saw him and two other individuals walking northbound on the sidewalk in the area of 82nd and Kingston Avenue. The officers saw a handgun protruding from defendant's back pocket. When the officers confronted defendant, he

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removed the gun from his waistband, threw it toward the ground, and ran. The officers caught defendant, but the other two individuals escaped. The inventory report numbered 12392775 reflects that the police recovered a firearm and ammunition from defendant. At the station, following the administration of *Miranda* (*Miranda v. Arizona*, 384 U.S. 436, 479 (1966)) warnings, defendant told the officers that he needed the gun for protection after his brother had been shot the previous year, and that the other two individuals also were armed with weapons.

¶ 4 Count 1 of the information charged defendant with unlawful use or possession of a weapon by a felon:

"in that he, knowingly possessed on or about his person any weapon prohibited by section 24-1 of this code, to wit: firearm, after having been previously convicted of the felony offense of carjacking, under case number IN032035C, under the laws of the state of Indiana, in violation of chapter 720 act 5 section 24-1.1(a) of the Illinois Compiled Statutes \*\*\*."

¶ 5 On November 1, 2011 (erroneously dated 2012 in the report of proceedings), the circuit court held a bond hearing during which the assistant State's Attorney provided the facts of the case and defendant's criminal history as follows. At approximately 10:30 p.m. on August 14, 2011, police were working in plainclothes and in an unmarked vehicle near 8216 South Colfax Avenue in Chicago when they saw defendant and two other individuals walking on 82nd and Kingston Avenue. The police saw a handgun protruding from the rear pocket of one of the individuals. When the officers approached, all three individuals ran. The officers then saw

defendant remove a dark blue steel handgun from his waistband and throw it. The officers continued chasing and "giving out messages." The firearm was a high powered gun with a 3½-inch barrel. The assistant State's Attorney believed that it was loaded. Regarding defendant's criminal history, he was on parole from an Indiana robbery when he was arrested and charged with carjacking. He also had a juvenile arrest for PSMV.

¶ 6 During the guilty plea proceeding on September 6, 2012, the circuit court asked:

"Do the parties agree and stipulate that a sufficient factual basis exists for the plea of guilty pursuant to the information the Court received at the 402 conference?"

¶ 7 Counsel for both sides responded, "So stipulated," without stating the facts of the case. The court found that a factual basis existed for the plea. After accepting the guilty plea, the circuit court sentenced defendant to a six-year prison term with a recommendation for impact incarceration (boot camp). Defendant had waived his right to a PSI, and the circuit court did not enter any findings regarding his criminal history.

¶ 8 Defendant alleged in his *pro se* motion to withdraw that he entered into the guilty plea because of boot camp and because defense counsel would not properly represent him due to financial issues, that he was not being considered for boot camp, that he was innocent, and that he wished to change his plea to not guilty and to stand trial.

¶ 9 Through new counsel, defendant subsequently filed a supplemental motion to withdraw the guilty plea, alleging as follows. On September 6, 2012, while represented by private counsel, defendant had a Rule 402 conference. As a result of the conference, defendant pleaded guilty to

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count 1, a Class 2 felony, and was sentenced to a six-year prison term with a recommendation for boot camp. Defendant was sent to prison, has "not been considered" for boot camp, and therefore sent a letter to the circuit court stating that he wished to change the guilty plea to not guilty and to stand trial. The motion was supported by an affidavit of counsel stating that defendant's letter explained his reasons for wishing to withdraw the guilty plea. The motion did not allege that the factual basis had not been spread of record.

¶ 10 Counsel also filed a certificate pursuant to Illinois Supreme Court Rule 604(d) (eff. Feb. 6, 2013) in which he stated that he had consulted with defendant in person to ascertain his contentions of error in the sentence or the plea, that he had examined the trial court file and the report of the plea proceedings and had made any amendments in the motion to withdraw the plea that were necessary for the adequate presentation of any defects in the proceedings, and that he had attached defendant's "affidavit," which was his letter to the circuit court, containing facts *dehors* the record.

¶ 11 The State filed a response in which it alleged that the circuit court clearly admonished defendant that the recommendation for boot camp was not a guarantee. The State further alleged that there had been no manifest injustice and that defendant was not reasonably justified in his mistaken impression.

¶ 12 The court denied the motion to withdraw the guilty plea, and defendant has appealed.

¶ 13 On appeal, defendant contends first that he received ineffective assistance of counsel because counsel failed to include the defect--that the record reflects only that the parties

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stipulated to a factual basis rather than the actual contents of the factual basis--in an amended motion to withdraw the guilty plea.

¶ 14 The State responds that the factual basis was sufficient and no amendments to the motion or to the Illinois Supreme Court Rule 604(d) (eff. Feb. 6, 2013) certificate were necessary because the factual basis need not be on the record and in this case was based on a conference pursuant to Illinois Supreme Court Rule 402 (eff. July 1, 2012) during which the parties discussed the facts and circumstances of the case. Therefore, the trial court heard the factual basis for the guilty plea off of the record.

¶ 15 Defendant replies that *People v. Barker*, 83 Ill. 2d 319, 327-28, 333 (1980), held that the factual basis must be spread of record and that *Barker* is controlling.

¶ 16 We review *de novo* the circuit court's compliance with a supreme court rule. *People v. Dominguez*, 2012 IL 111336, ¶ 13; *People v. Gougisha*, 347 Ill. App. 3d 158, 162 (2004). Illinois Supreme Court Rule 402(c) (eff. July 1, 2012) states:

"Determining Factual Basis for Plea. The court shall not enter final judgment on a plea of guilty without first determining that there is a factual basis for the plea."

¶ 17 The unlawful use of a weapon by a felon statute under which defendant was convicted states in relevant part:

"It is unlawful for a person to knowingly possess on or about his person \*\*\* any firearm or any firearm ammunition if the

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person has been convicted of a felony under the laws of this State or any other jurisdiction." 720 ILCS 5/24-1.1(a) (West 2012).

¶ 18 Pursuant to *Barker*, 83 Ill. 2d at 327-28:

"All that is required to appear on the record is a basis from which the judge could reasonably reach the conclusion that the defendant actually committed the acts with the intent (if any) required to constitute the offense to which the defendant is pleading guilty."

¶ 19 The factual basis for the guilty plea cannot be based on a stipulation between the attorneys. See *People v. Allen*, 323 Ill. App. 3d 312, 316-17 (2001). However, police reports can provide a factual basis for a guilty plea. *Id.* at 317; see also *People v. Stice*, 160 Ill. App. 3d 132, 136 (1987) (judge may consider police reports to find a sufficient factual basis for the plea). In *Allen*, the police reports provided a factual basis for the offense of resisting a peace officer. *Id.* There, the issue was forfeited because it was not asserted in the defendant's motion to withdraw the plea, and it did not rise to the level of plain error.

¶ 20 In the present case, we do not treat the issue as forfeited because defendant argues that his attorney rendered ineffective assistance by failing to assert the issue in an amended motion to withdraw. However, defendant is wrong that the record does not reveal a factual basis for the plea. The police reports, specifically the arrest report and the inventory report, contain sufficient facts to establish the offense of unlawful use of a weapon by a felon. Those police reports established that defendant, while on parole for a previous felony conviction in Indiana, was

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walking down a public street in Chicago with a firearm protruding from his back pocket. He also possessed ammunition for the gun. When confronted by police, he tried to dispose of the weapon and he tried to flee. At the station, he admitted that he had the gun for protection because his brother had been shot. Those circumstances show that defendant knowingly possessed a firearm and firearm ammunition on or about his person after he had been convicted of a felony in another jurisdiction. Thus, the police reports established a factual basis for the crime of unlawful use of a weapon by a felon. See 720 ILCS 5/24-1.1(a) (West 2012). Additionally, during the November 1, 2011, bond hearing, the assistant State's Attorney informed the court of the facts of the case. Although defendant professed his innocence in his letter to the circuit court, that was no reason to withdraw the guilty plea because the factual basis evident from the arrest report and the inventory report, as well as the bond hearing, established that defendant committed the offense of unlawful use of a weapon by a felon. See *Barker*, 83 Ill. 2d at 333; see also 720 ILCS 5/24-1.1(a) (West 2012). Therefore, in the present case, the error, if any, stemming from the attorneys' stipulation without stating the content of the factual basis on the record, was harmless because the arrest report and inventory report in the record established a factual basis for the guilty plea, as did the bond hearing transcript. We conclude that the circuit court complied with Rule 402(c), and that defense counsel was not ineffective because there was no issue to raise regarding the factual basis for the guilty plea in an amended motion to withdraw or a Rule 604(d) certificate.

¶ 21 Defendant alternatively contends that his sentence should be vacated as void because the circuit court imposed it without ordering a PSI and without entering any findings regarding his criminal history. Defendant argues that the court lacked authority to accept his waiver of the PSI

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because the court failed to enter findings on the record regarding his criminal history. He asserts that his failure to include this issue in the motion to withdraw does not preclude review because a void order can be challenged at any time. Finally, he maintains that the sentence should be vacated and the cause remanded for a new sentencing hearing after a PSI is prepared and reviewed, or after the court enters findings on the record regarding his criminal history.

¶ 22 The State responds that the parties waived the PSI and the circuit court was aware of defendant's criminal background because it previously had been placed on the record during the bond hearing. During that proceeding, the State informed the court that, at the time of his arrest, defendant was on parole from an Indiana robbery and he was charged with carjacking. The State also informed the court that defendant had a juvenile arrest for PSMV. The State alternatively argues that, if this court finds that the circuit court did not comply with section 5-3-1, the cause should be remanded for the limited purpose of resentencing defendant on the guilty plea.

¶ 23 Defendant replies that his sentence was void because the circuit court failed to enter a finding on the record regarding his criminal history *during the sentencing hearing*. Defendant argues that the remarks during the bond hearing almost one year earlier for a different purpose did not satisfy section 5-3-1.

¶ 24 Section 5-3-1 of the Unified Code of Corrections states:

"A defendant shall not be sentenced for a felony before a written presentence report of investigation is presented to and considered by the court. However, \*\*\*, the court need not order a presentence report of investigation where both parties agree to the

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imposition of a specific sentence, provided there is a finding made for the record as to the defendant's history of delinquency or criminality, including any previous sentence to a term of probation, periodic imprisonment, conditional discharge, or imprisonment."

730 ILCS 5/5-3-1 (West 2012).

¶ 25 Compliance with section 5-3-1 of the Unified Code of Corrections (730 ILCS 5/5-3-1 (West 2012)) is mandatory, and whether the court complied with section 5-3-1 is reviewed *de novo*. *People v. Walton*, 357 Ill. App. 3d 819, 822 (2005). The purpose of the PSI is to enlighten the court and benefit the defendant and therefore the existence or lack of a defendant's criminal history is important. *Id.*; *People v. Youngbey*, 82 Ill. 2d 556, 565 (1980). Thus, it is error to sentence a defendant without either a PSI or disclosure of his complete criminal history. *Walton*, 357 Ill. App. 3d at 823.

"Substantial compliance" with the statutory requirements through the inclusion in the record of information that would have appeared in such a report does not excuse the express requirement of a written report." *People v. Jennings*, 364 Ill. App. 3d 473, 484 (2005).

¶ 26 Here, the circuit court did not strictly comply with section 5-3-1, and that constitutes error. Even assuming that the parties agreed upon the specific sentence (which defendant disputes), there was no written report, and the circuit court made no findings, regarding defendant's criminal history at the sentencing proceeding. This rendered defendant's sentence

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voidable. *People v. Sims*, 378 Ill. App. 3d 643, 650 (2007). The information regarding defendant's criminal history that was presented approximately 10 months earlier at the bond hearing might not have been complete. There was no indication in the record that it was complete, nor was there any indication that the circuit court recalled the information 10 months later during the sentencing proceeding. Under these circumstances, we vacate defendant's sentence and remand the cause for a new sentencing hearing. *Id.* at 824. The circuit court is directed to consider defendant's criminal history before imposing the sentence. Defendant may withdraw his plea only if the circuit court no longer agrees with the six-year sentence and recommendation for boot camp.

¶ 27 The sentence is vacated and the cause is remanded with the above directions.

¶ 28 Affirmed in part; vacated in part; cause remanded with directions.