

NOTICE
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2016 IL App (5th) 120466-UB

NO. 5-12-0466

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,)	Williamson County.
)	
v.)	No. 10-CF-504
)	
JOSEPH S. THOMAS,)	Honorable
)	John Speroni,
Defendant-Appellant.)	Judge, presiding.

PRESIDING JUSTICE SCHWARM delivered the judgment of the court.
Justices Stewart and Moore concurred in the judgment.

ORDER

¶ 1 *Held:* The defendant's extended-term sentence, which the circuit court imposed after revoking probation, was reduced to a nonextended term because the record did not demonstrate that, when the defendant pled guilty, he knew that extended-term sentencing was a possibility.

¶ 2 After the circuit court sentenced him to a six-year extended term of imprisonment, the defendant, Joseph S. Thomas, filed a motion to reconsider, challenging the excessiveness of his sentence. The circuit court denied the motion. On appeal, the defendant argued that the circuit court improperly imposed the extended-term sentence in violation of section 5-8-2(b) of the Unified Code of Corrections (the Code) (730 ILCS 5/5-8-2(b) (West 2010)). We agreed and vacated the extended-term portion of the

defendant's sentence. See *People v. Thomas*, 2014 IL App (5th) 120466-U. Thereafter, the Illinois Supreme Court directed this court to vacate and reconsider our judgment in light of *People v. Castleberry*, 2015 IL 116916. See *People v. Thomas*, No. 118074 (Jan. 20, 2016). For the reasons set forth below, we vacate the extended-term portion of the defendant's sentence.

¶ 3

BACKGROUND

¶ 4 On December 6, 2010, the defendant was charged by information with domestic battery (720 ILCS 5/12-3.2(a)(2) (West 2010)) and violation of an order of protection (720 ILCS 5/12-30 (West 2010)). In February 2011, pursuant to negotiations with the State, the defendant pled guilty to unlawfully violating an order of protection (720 ILCS 5/12-30 (West 2010)), in exchange for the State's dismissal of the remaining charge (720 ILCS 5/12-3.2(a)(2) (West 2010)). At the guilty plea hearing, the following colloquy ensued:

"THE COURT: Okay. Possible penalties on a Class IV felony, you could be sentenced to the Department of Corrections for one year or up to three years. If extended term applies, for three years or as long as six years. You could be fined up to \$25,000. Is this offense where the Mandatory Supervisory Release has been increased to four years?

[Assistant State's Attorney]: I don't believe so, your Honor.

THE COURT: It's just domestic?

[Assistant State's Attorney]: I think it's just a domestic.

THE COURT: There is a one-year term of Mandatory Supervisory Release, or you could be placed on probation.

[Assistant State's Attorney]: I apologize. It is an extended term.

THE COURT: For four years?

[Assistant State's Attorney]: For four years, yes.

THE COURT: I am sorry. The term of Mandatory Supervisory Release is not one year. It's four years. Okay. What Mandatory Supervisory Release is, that is a term if you were sentenced to prison you would have to serve that time of Mandatory Supervisory Release after you were out of prison. Similar to what used to be known as parole, okay? Do you have any questions about that?

THE DEFENDANT: Only one year. It goes up to four years.

THE COURT: It's four years Mandatory Supervisory Release. That's right, sir.

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Or you could be placed on probation or conditional discharge for up to 30 months. Do you have any questions about the nature of the charge or possible penalties?

THE DEFENDANT: No, sir."

The circuit court thereafter heard the factual basis for the plea. Pursuant to the State's recommendation, the circuit court sentenced the defendant to 30 months' probation.

¶ 5 On March 1, 2012, the State filed a petition to revoke the defendant's probation on the basis that he committed the offense of disorderly conduct for effecting a false bomb

threat (720 ILCS 5/26-1(a)(3) (West 2012)). On May 1, 2012, after hearing evidence, the circuit court revoked the defendant's probation. At resentencing on July 5, 2012, the circuit court imposed the maximum extended-term sentence of six years' imprisonment, based on the defendant's prior criminal history, with one year mandatory supervised release and with 188 days' credit for time served.

¶ 6 On July 18, 2012, the defendant filed a motion to reconsider sentence, arguing that his sentence was excessive. After a hearing on October 1, 2012, the circuit court denied the defendant's motion to reconsider his sentence. On October 10, 2012, the defendant filed a timely notice of appeal.

¶ 7 On appeal, this court reduced the defendant's extended-term sentence to a nonextended term because the record did not demonstrate that when he pled guilty, the defendant knew that extended-term sentencing was a possibility. *Thomas*, 2014 IL App (5th) 120466-U. This court held that the circuit court's extended-term sentence did not conform to the statutory requirements and was therefore void. *Id.* ¶ 9. On January 20, 2016, the Illinois Supreme Court denied the defendant's petition for leave to appeal, and in the exercise of its supervisory authority, directed this court to vacate and reconsider our judgment in light of *Castleberry*, 2015 IL 116916. See *Thomas*, No. 118074 (Jan. 20, 2016). On March 3, 2016, this court ordered the parties to file supplemental briefs addressing the *Castleberry* issue.

¶ 8

ANALYSIS

¶ 9 In this court's previous disposition, we rejected the State's contention that the defendant had forfeited his sentencing challenge for failing to raise it within 30 days after

his plea or to include it in his postrevocation motion to reconsider. We determined that the sentence did not conform to statutory requirements and was therefore void, and a void order may be attacked at any time or in any court, either directly or collaterally. See *Thomas*, 2014 IL App (5th) 120466-U, ¶ 9. Thereafter, in *Castleberry*, 2015 IL 116916, ¶ 19, the Illinois Supreme Court abolished as constitutionally unsound the void sentence rule. The court held that whether a circuit court complies with a statutory sentencing requirement in a criminal proceeding is irrelevant to the question of jurisdiction and does not render the sentencing order void. *Castleberry*, 2015 IL 116916, ¶¶ 16, 19.

¶ 10 Pursuant to the supreme court's direction, we have reconsidered our holding in light of *Castleberry*. However, in our previous disposition, we addressed the defendant's sentencing error not only on the basis that the order was void, which has now been determined to be error, but also on the basis that the defendant's claim was reviewable as plain error. *Thomas*, 2014 IL App (5th) 120466-U, ¶ 9. Accordingly, because we find that plain error review is still appropriate, our result remains unchanged.

¶ 11 As noted in our previous disposition, sentencing issues generally must be raised in a postsentencing motion in order to preserve them for appellate review. See 730 ILCS 5/5-4.5-50(d) (West 2010); *People v. Heider*, 231 Ill. 2d 1, 15 (2008); see also Ill. S. Ct. R. 604(d) (eff. July 1, 2006). The defendant in this case filed a motion to reconsider his extended-term sentence, arguing that the sentence was excessive.

¶ 12 Notwithstanding his motion to reconsider, however, an improper increase in sentence is a matter affecting a defendant's substantial rights. Ill. S. Ct. R. 615(a) (plain errors or defects affecting substantial rights may be noticed although they were not

brought to the attention of the trial court); *People v. Owens*, 377 Ill. App. 3d 302, 304 (2007) (sentencing issues affect a defendant's substantial rights and may be addressed when not properly preserved); *People v. Hill*, 294 Ill. App. 3d 962, 967 (1998) (erroneous imposition of extended-term sentence affects fundamental right to liberty and warrants review even when not properly preserved); *People v. Lindsay*, 247 Ill. App. 3d 518, 527 (1993) (imposition of extended-term sentence affects substantial rights and is reviewable even when not properly preserved). Likewise, where the circuit court fails to properly admonish the defendant regarding the sentence he faces, the issue may be addressed pursuant to the plain error doctrine, even though it was not raised in the trial court. *People v. Whitfield*, 217 Ill. 2d 177, 201-02 (2005); *People v. Fuller*, 205 Ill. 2d 308, 322-23 (2002); *People v. Davis*, 145 Ill. 2d 240, 250 (1991); *People v. Mendoza*, 342 Ill. App. 3d 195, 201 (2003); *People v. Hayes*, 336 Ill. App. 3d 145, 151 (2002); *People v. McCracken*, 237 Ill. App. 3d 519, 521 (1992).

¶ 13 Section 5-8-2(b) of the Code states as follows:

"If the conviction was by plea, it shall appear on the record that the plea was entered with the defendant's knowledge that [an extended-term sentence] was a possibility. If it does not so appear on the record, the defendant shall not be subject to such a sentence unless he is first given an opportunity to withdraw his plea without prejudice." 730 ILCS 5/5-8-2(b) (West 2010).

¶ 14 As held in our previous disposition, pursuant to this section of the Code, the defendant's extended-term sentence, imposed upon revocation of the defendant's probation, was improper because the trial court had failed to adequately admonish him

regarding extended-term sentencing prior to accepting his guilty plea. See *People v. Taylor*, 368 Ill. App. 3d 703, 708 (2006); *People v. Eisenberg*, 109 Ill. App. 3d 98, 100 (1982); see also *People v. McBride*, 395 Ill. App. 3d 204, 209 (2009). The circuit court's conditional, tentative admonishment left the defendant to speculate whether an extended-term sentence was indeed possible. See *Taylor*, 368 Ill. App. 3d at 708. Accordingly, the record does not establish that section 5-8-2(b) of the Code had been satisfied. See *id.*

¶ 15 Because the record does not reveal that the defendant's plea was entered with his knowledge that an extended-term sentence was a possibility, the defendant was not subject to an extended-term sentence at the time of his initial sentencing. See *People v. Johns*, 229 Ill. App. 3d 740, 743 (1992). Upon revocation of probation, the court could impose only another sentence that was available at the time of initial sentencing. See *People v. Witte*, 317 Ill. App. 3d 959, 963 (2000); 730 ILCS 5/5-6-4(e) (West 2010); see also *Johns*, 229 Ill. App. 3d at 742 (upon revocation of probation, trial court is limited in sentencing by maximum penalty upon which defendant had originally been admonished). Accordingly, the defendant was not subject to the extended term upon revocation of his probation. See *Eisenberg*, 109 Ill. App. 3d at 100; see also *People v. Butler*, 186 Ill. App. 3d 510, 520 (1989).

¶ 16 Section 5-8-2(b)'s remedy, to move to withdraw a guilty plea, is unavailable where the trial court does not initially sentence the defendant to an extended term, but does so only after the revocation of probation. See *Taylor*, 368 Ill. App. 3d at 708. We therefore conclude that upon revocation of probation, when the record does not demonstrate that the defendant knew when he entered his plea that extended-term sentencing was possible,

the proper remedy is to vacate the extended-term sentence so that the defendant may be sentenced in accordance with the admonishments that he received when he pled guilty. *Id.*; see also *People v. Gregory*, 379 Ill. App. 3d 414, 421-22 (2008) (when sentencing admonishment is improper but sentencing order is not void, the available remedy is a sentence in accordance with the improper admonishment).

¶ 17 The circuit court here sentenced the defendant to the maximum extended term. Given the circuit court's apparent intent to sentence the defendant to the maximum term, we hereby vacate the defendant's extended-term sentence but modify the defendant's sentence to the maximum possible nonextended term. See 730 ILCS 5/5-4.5-45 (West 2010); see also *Taylor*, 368 Ill. App. 3d at 709 (because record established that the trial court intended to impose the maximum available sentence for each conviction, the circuit court reduced the defendant's sentences to the maximum nonextended terms). Accordingly, pursuant to Supreme Court Rule 615(b)(4), we reduce the defendant's sentence to the maximum, nonextended three-year term of imprisonment.

¶ 18 **CONCLUSION**

¶ 19 For the reasons stated, we vacate the extended-term portion of the defendant's sentence and reduce his sentence to the maximum nonextended term of three years' imprisonment.

¶ 20 Vacated in part; affirmed as modified.