2018 IL App (2d) 160693-U
No. 2-16-0693
Order filed December 10, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. DAVID A. HILL, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Lake County. No. 15-CF-2861 Honorable George D. Strickland, Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Justices Jorgensen and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: (1) We reduced defendant's extended-term sentence to the maximum nonextended sentence, as the trial court had not sufficiently admonished him, when he pleaded guilty, of the possibility of an extended term; the court's conditional admonishment of what the extended range would be if defendant were eligible was insufficient; (2) because the trial court failed to properly inquire under *Krankel* into the basis for defendant's claim of ineffective assistance of counsel, we remanded for that inquiry.

¶ 2 Defendant, David A. Hill, pleaded guilty to violating an order of protection (720 ILCS 5/12-3.4(a) (West 2014)) and was sentenced to probation. The State filed a petition to revoke probation, which was granted following a hearing, and the trial court sentenced defendant to an

extended-term prison sentence of four years. Defendant appealed. On appeal, defendant argues that the trial court erred in sentencing him to an extended term where he was not told when he pleaded guilty that he was eligible for an extended term. He asks that we reduce his sentence to the maximum nonextended-term sentence of three years. In addition, defendant argues that, because the trial court failed to inquire into defendant's postsentencing claim of ineffective assistance of counsel, we should remand for a proper inquiry. For the reasons that follow, we reduce defendant's sentence to the maximum nonextended term of three years, and we remand.

¶ 3 I. BACKGROUND

¶ 4 On December 9, 2015, defendant was indicted (in case No. 15-CF-2861) on one count of violating an order of protection. At defendant's arraignment, on December 17, 2015, the trial court advised defendant as follows:

> "In 15 CF 2861 the grand jury returned an indictment against you for unlawful violation of an order of protection, and in 15 CF 2978 they returned an indictment against you for the same charge. Both of those offenses are Class 4 felonies, meaning they carry with it the possibility of one to three years in the Illinois Department of Corrections, up to six years if you were eligible for an extended sentence, followed by a period of mandatory supervised release or parole of four years since this offense is domestic in nature.
>
> You could be eligible for sentences of probation or conditional discharge for a period of up to 30 months, you could be fined up to $25,000, and you could be subject to a period of local incarceration or periodic imprisonment of 18 months. *** The fine is on both cases, so you could be fined separately an amount up to $25,000 on each case. Do you understand that?"

Defendant indicated that he understood.

¶ 5 On January 14, 2016, the State advised the court that the parties had reached an agreement pursuant to which defendant would plead guilty to the violation of the order of protection charged in case No. 15-CF-2861, in exchange for a sentence of 24 months' probation, with certain conditions, and the dismissal of case No. 15-CF-2978. During the course of admonishing defendant, the court told him:

> "As a Class 4 felony, this is an offense where you could be sentenced to the Department of Corrections from one until three years, once you would be released. It would require you to serve an additional four years mandatory supervised release period of time. This offense is probabtionable [*sic*], and you could be placed on a period of probation or conditional discharge for up to 30 months, periodic imprisonment for up to 18 months, and you face a fine of up to $25,000. Do you understand that?"

Defendant indicated that he understood. The court ultimately accepted defendant's guilty plea and sentenced him in accordance with the plea agreement.

¶ 6 On February 2, 2016, defendant filed a motion to withdraw the guilty plea.

¶ 7 On February 9, 2016, the State petitioned to revoke defendant's probation.

¶ 8 On March 7, 2016, the court heard and denied defendant's motion to withdraw his guilty plea.

¶ 9 An evidentiary hearing on the State's petition to revoke probation took place on March 8, 16, and 17, 2016. Following the hearing, the trial court found that defendant had violated his probation.

¶ 10 The parties were before the court on May 5, 2016. The court advised the parties that it had received from defendant, via mail, a *pro se* motion to replace defense counsel. According to

the court, defendant alleged that counsel had not met with him since March 17, 2016. The court then explained to defendant that it was going to conduct a *Krankel* hearing to determine if his claims had merit. The court inquired of both counsel and defendant and found the allegation to be without merit. Defendant advised the court that he had another concern. Defendant claimed that he had provided counsel with certain evidence and that counsel did not present it at the hearing on the petition to revoke probation. Defendant referred to other individuals against whom the petitioner had also sought orders of protection, specifically mentioning "Pete Davis" and "Ramondo Cruz." In addition, defendant stated that he had provided counsel with the names of witnesses, including Davis, who would have testified in his defense. Defendant agreed that counsel was "a good attorney." He stated, "[M]y only argument was those allegations as far as getting the evidence and hearing me out as far as witnesses concerned on my behalf." The court found that defendant's allegations did not show that counsel neglected his case and it denied the motion.

¶ 11 The cause proceeded to resentencing on July 5, 2016. The State asked that defendant be sentenced to the maximum of six years. Defendant asked for a sentence of intensive probation with a maximum term of periodic imprisonment, or, in the alternative, a prison sentence of 12 to 18 months. The court found that defendant was eligible for an extended-term sentence, given a previous conviction of felony domestic battery, and it imposed a four-year prison sentence to be followed by four years of mandatory supervised release.

¶ 12 On July 15, 2016, defense counsel filed a motion to reconsider the revocation of defendant's probation and a motion to reconsider defendant's sentence. In the motion to reconsider defendant's sentence, counsel argued that the sentence was excessive, that the court

failed to give appropriate weight to mitigating factors, and that the court improperly considered the manner in which defendant violated his probation.

¶ 13 Between July 18 and August 16, 2016, defendant filed five *pro se* motions raising a variety of claims. In his *pro se* motion to reduce his sentence, filed August 1, 2016, defendant alleged as follows:

> "3) Justice requires a reduction of sentence for the following reasons:
>
> a) A Court Subpoena set for Pete Davis ***, Eric Harris, Richard Lewis, Jerome Gray, and Dominoes Manager Geogre [*sic*] Baldwin *** as key witnesss [*sic*] that on 1-15-16 between 8:30 and 9:30 pm I [defendant] was no where near [the petitioner] and Dominoes [*sic*] Pizza.
>
> b) Illinois Supreme Court Rule 412. Constitutes the rights were as the State has to Produce anything we Believe exist about the State witness. As far as [the petitioner] repeated these same actions with Defendant ***, Pete Davis, Ryan Bills, Roman Delacruz. If the State can't Produce the work product it Deemed the witness as Bogus.
>
> c) Public Defender *** failed to enter key evidence in the Defendant's case being well aware, which deemed Incompetents [sic] of Counsel.
>
> d) The Defendant was not provided with a copy of the transcript as provided rule 402(e) Illinois Supreme Court rule (604)(d)."

¶ 14 On August 17, 2016, the State and defense counsel appeared in court for a hearing on the two motions filed by defense counsel. Defendant was not present. Defense counsel told the court that he would stand on the motions and had no further argument. The State made no argument in response. The court advised defense counsel of defendant's *pro se* motions and

stated: "So, I am assuming that the only motions that you have embraced are the motions to reconsider the finding and the sentence; is that right?" Defense counsel agreed. Thereafter, the court stated, "Okay. So, the Court's ruling is going to stand."

¶ 15 Defendant appealed.

¶ 16 II. ANALYSIS

¶ 17 Defendant argues that his four-year sentence must be vacated, because the trial court's admonishments at the guilty plea hearing were inadequate to establish that he knew that he would be subject to an extended-term sentence. He asks that we reduce his sentence to a three-year term.

¶ 18 First, we note that, although defendant filed a motion to reconsider his sentence, he did not include this issue in the motion. It is well settled that, to preserve a claim of sentencing error, both a contemporaneous objection and a written postsentencing motion raising the issue are required. *People v. Reed*, 177 Ill. 2d 389 (1997); see also 730 ILCS 5/5-4.5-50(d) (West 2016) ("A defendant's challenge to the correctness of a sentence or to any aspect of the sentencing hearing shall be made by a written motion filed *** within 30 days following the imposition of sentence."). Here, because defendant did not raise the issue below, he has forfeited it.

¶ 19 Nevertheless, despite defendant's forfeiture, in its brief the State "urges this Court to not find the issue forfeited." (At oral argument, the State noted that, although it urged us to ignore defendant's forfeiture in its brief, it would like us to hold defendant to his forfeiture should we disagree with the State's arguments on the merits.) Regardless of the State's position on forfeiture, we will consider the issue. See *People v. McCoy*, 281 Ill. App. 3d 576, 585 (1996) (considering the defendant's sentencing issue despite his failure to raise it in his posttrial motion as "[w]aiver limits the parties, but not the courts").

¶ 20 Turning to the merits, section 5-8-2(b) of the Unified Code of Corrections (Code) provides 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 2016).

Thus, if the record fails to show that a defendant was advised that an extended-term sentence was a possibility at the time of his initial sentencing, the defendant is not subject to an extended-term sentence upon the revocation of probation. *People v. Taylor*, 368 Ill. App. 3d 703, 707-09 (2006); *People v. Eisenberg*, 109 Ill. App. 3d 98, 101 (1982). When a defendant is improperly sentenced to an extended-term sentence following the revocation of probation, section 5-8-2(b)'s remedy, to move to withdraw the guilty plea, is unavailable. See *Taylor*, 368 Ill. App. 3d at 708. Instead, the proper remedy in such a case is to vacate the extended-term sentence so that the defendant may be sentenced in accordance with the admonishments that he received before pleading guilty. *Id.*

¶ 21 Here, there is no dispute that the trial court said nothing about an extended-term sentence when defendant pleaded guilty. Nevertheless, the State argues that the record otherwise supports the conclusion that defendant was properly advised. Specifically, the State relies on the admonishments given at the December 17, 2015, arraignment, where the court stated:

> "Both of those offenses are Class 4 felonies, meaning they carry with it the possibility of one to three years in the Illinois Department of Corrections, *up to six years if you were*

eligible for an extended sentence, followed by a period of mandatory supervised release or parole of four years since this offense is domestic in nature." (Emphasis added.)

Assuming, *arguendo*, that admonishments given at an arraignment can be deemed sufficient to advise a defendant for purposes of section 5-8-2(b) of the Code, this court has previously found that similarly worded admonishments *given at guilty plea proceedings* were insufficient. See *Taylor*, 368 Ill. App. 3d at 707-08.

¶ 22 In *Taylor*, the parties agreed that the defendant would plead guilty to aggravated battery and criminal trespass to a residence. *Id.* at 703. In admonishing the defendant on the charge of aggravated battery, the court told the defendant: " 'If extended term applies, it's 2 to 10 years.' " *Id.* at 704. Similarly, in admonishing defendant on the charge of criminal trespass to a residence, the court told defendant: " 'If extended term applies, the term is instead of 1 to 3 years in prison, it's 1 to 6 years in prison.' " *Id.* We found that "[t]his type of conditional, tentative admonishment leaves a defendant to speculate whether an extended-term sentence is indeed possible in his case" and thus did not satisfy section 5-8-2(b) of the Code. *Id.* at 708. Thus, based on *Taylor*, it is clear that section 5-8-2(b) has not been satisfied here.

¶ 23 Nevertheless, the State urges us to reconsider our holding in *Taylor* and adopt the reasoning of the dissent, which found that the conditional language of the admonishment was sufficient to advise the defendant of the possibility of the extended-term sentence. *Id.* at 710-12 (Kapala, J., concurring in part and dissenting in part). According to the dissent, section 5-8-2(b) required only that the defendant knew that an extended-term sentence was a " 'possibility.' " (Emphasis in original.) *Id.* at 711 (citing 730 ILCS 5/5-8-2(b) (West 2004)). The dissent noted that Black's Law Dictionary defined " 'possibility' " as " 'An event that may or may not happen.' " *Id.* (citing Black's Law Dictionary 1185 (7th ed. 1999)). The dissent stated:

> "I do not believe that using the term 'if' before 'extended term' negates the defendant's knowledge of the possibility of extended-term sentencing. In fact, by using the term 'if,' the trial court specifically indicated that extended-term sentencing may or may not apply and thus, suggested that it was a possibility for defendant." *Id.*

As the State offers no compelling reason for us to disregard our own precedent, we adhere to the majority's holding. Indeed, simply advising a defendant of the length of an extended-term sentence, if the defendant were eligible, is not the same as advising a defendant that he is actually eligible, *i.e.*, that such a sentence is actually possible.

¶ 24 We also reject the State's argument that the similar admonishments concerning an extended-term sentence given to defendant when the petition to revoke probation was filed (along with his failure to object) were sufficient to establish defendant's knowledge of the possibility of an extended-term sentence. This record of events occurring after defendant pleaded guilty do not support a finding that defendant knew *when he pleaded guilty* that extended-term sentencing was a possibility.

¶ 25 Accordingly, pursuant to Illinois Supreme Court Rule 615(b)(4) (eff. Jan. 1, 1967), we reduce defendant's sentence to the maximum nonextended three-year term of imprisonment.

¶ 26 Defendant next argues that the trial court erred by failing to inquire into the *pro se* claim of ineffective assistance of counsel that he raised in his August 1, 2016, *pro se* motion to reconsider his sentence.

¶ 27 When a defendant brings a *pro se* posttrial claim that trial counsel was ineffective, the trial court must adequately inquire, pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984), into the claim and, under certain circumstances, must appoint new counsel to argue the claim. *People v. Ayres*, 2017 IL 120071, ¶ 11; *People v. Remsik-Miller*, 2012 IL App (2d) 100921, ¶ 9.

> "The purpose of the preliminary inquiry is to ascertain the underlying factual basis for the ineffective assistance claim and to afford a defendant an opportunity to explain and support his claim. In this way, the circuit court will have the necessary information to determine whether new counsel should be appointed to argue the claim of ineffective assistance of counsel." *Ayres*, 2017 IL 120071, ¶ 24.

To trigger the court's duty to inquire, "[a] *pro se* defendant is not required to do any more than bring his or her claim to the trial court's attention." *Ayres*, 2017 IL 120071, ¶ 11 (quoting *People v. Moore*, 207 Ill. 2d 68, 79 (2003)).

¶ 28 New counsel is not automatically required merely because the defendant presents a *pro se* posttrial claim that his counsel was ineffective. *Id.*; *Remsik-Miller*, 2012 IL App (2d) 100921, ¶ 9. Instead, the trial court must first examine the factual basis of the claim. *Ayres*, 2017 IL 120071, ¶ 11; *Remsik-Miller*, 2012 IL App (2d) 100921, ¶ 9. If the defendant's allegations show possible neglect of the case, the court should appoint new counsel to argue the defendant's claim. *Ayres*, 2017 IL 120071 ¶ 11; *Remsik-Miller*, 2012 IL App (2d) 100921, ¶ 9. However, if the court concludes that the defendant's claim lacks merit or pertains only to matters of trial strategy, the court may deny the claim. *Ayres*, 2017 IL 120071, ¶ 11; *Remsik-Miller*, 2012 IL App (2d) 100921, ¶ 9.

¶ 29 In reviewing the posttrial proceedings on the defendant's *pro se* motion, our primary objective is to determine " 'whether the trial court conducted an adequate inquiry into the defendant's *pro se* allegations of ineffective assistance of counsel.' " *Ayres*, 2017 IL 120071, ¶ 13 (quoting *Moore*, 207 Ill. 2d at 78.) "If the court fails to conduct the necessary preliminary examination as to the factual basis of the defendant's allegations, the case must be remanded for

the limited purpose of allowing the court to do so." *Remsik-Miller*, 2012 IL App (2d) 100921, ¶ 9.

¶ 30 Here, defendant filed a *pro se* motion to reduce his sentence, in which he alleged, *inter alia*, that defense counsel "failed to enter key evidence in the Defendant's case being well aware, which deemed Incompetents [*sic*] of Counsel." When defense counsel appeared in court to argue the postjudgment motions that he had filed on defendant's behalf, the trial court advised defense counsel that defendant had sent a number of motions directly to the court. Defense counsel indicated that he was standing on only the motions that he had filed. The trial court denied the motions without speaking with defendant. Indeed, defendant was not even present. Thus, there is no question that the trial court failed to conduct *any* inquiry into the factual basis of defendant's *pro se* claim of ineffectiveness.

¶ 31 Nevertheless, the State maintains that the trial court adequately reviewed defendant's claim during the prior *Krankel* proceedings. To be sure, at a hearing on May 5, 2016, the trial court conducted a *Krankel* hearing with respect to certain *pro se* allegations raised by defendant. At the hearing, defendant claimed that he had provided counsel with certain evidence and that counsel did not present it at the hearing on the petition to revoke probation. The trial court denied the motion. (Defendant does not dispute that this earlier *Krankel* hearing was properly conducted, nor does he claim that the trial court reached the wrong result.) According to the State, the claim raised by defendant in his August 1, 2016, motion—that defense counsel "failed to enter key evidence in the Defendant's case being well aware, which deemed Incompetents [*sic*] of Counsel"—is the same claim that was addressed at the May 5 hearing. However, as defendant notes, in his August 1 motion, he asked the trial court to reduce his sentence for several reasons, which he listed as "(a)," "(b)," "(c)," and "(d)." Although he specifically

mentioned counsel only in (c), the others might have implicated counsel as well. In any event, given that the earlier *Krankel* hearing took place prior to sentencing and that defendant's new claim arose in a motion to reconsider his sentence, it is possible that defendant's claim could have implicated counsel's performance at his sentencing hearing. Without an inquiry into defendant's claim, we can only speculate as to what defendant was trying to allege. Thus, we remand for the limited purpose of inquiring into defendant's claim.

¶ 32 III. CONCLUSION

¶ 33 For the reasons stated, we affirm defendant's conviction of violating an order of protection, but we reduce his sentence to three years in prison. We remand for the limited purpose of allowing the trial court to inquire into the factual basis of defendant's ineffective-assistance claim. If defendant's allegations show possible neglect of the case, the court should appoint new counsel to argue defendant's claim of ineffective assistance. However, if the court concludes that defendant's claim lacks merit or pertains only to matters of trial strategy, the court may deny the claim.

¶ 34 Affirmed as modified and cause remanded.