2018 IL App (3d) 160336-U

Order filed November 21, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
Plaintiff-Appellee,	)	Will County, Illinois.
	)	
v.	)	Appeal No. 3-16-0336
	)	Circuit No. 13-CF-2690
TIMOTHY A. KOCH,	)	
	)	The Honorable
Defendant-Appellant.	)	Amy M. Bertani-Tomczak
		Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Presiding Justice Carter concurred in the judgment.
Justice Wright dissented.

ORDER

¶ 1 *Held*: Trial court erred in sentencing defendant, who pled guilty to child pornography, to two consecutive 4-1/2 year terms of imprisonment after his probation was revoked where court admonished defendant during plea proceedings that sentence for child pornography charges was three to seven years.

¶ 2 Defendant Timothy A. Koch was charged with five counts of child pornography. He pled guilty to two counts in exchange for a 3-year term of probation and time served. Before accepting his guilty plea, the trial court informed defendant that he could be sentenced to three to

seven years in prison for child pornography. While on probation, defendant was charged with several new crimes. The State filed a petition to revoke defendant's probation, and defendant pled guilty to violating his probation. The trial court ultimately sentenced defendant to two consecutive 4-1/2 year terms of imprisonment for child pornography. Defendant filed a motion to reconsider his sentence, which the trial court denied. Defendant appeals, arguing that the trial court erred in sentencing him to a total of nine years in prison. We vacate defendant's sentence and reduce it to two consecutive 3-1/2 year prison terms.

¶ 3 FACTS

¶ 4 In 2013, defendant was charged with five counts of child pornography (720 ILCS 5/11-20.1(a)(6) (West 2012)). In April 2014, defendant agreed to plead guilty to two counts. During plea admonishments, the trial judge told defendant that if he was tried and convicted of child pornography, he could "be sentenced to prison, three to seven years." The court did not inform defendant that he would be sentenced for each count and that the sentences for each count had to run consecutively. In exchange for defendant's guilty plea, the court sentenced defendant to time served, 36 months of probation and court costs and fines totaling $1,667. As conditions of his probation, defendant was ordered not to violate any criminal statutes or have contact with anyone under 18 years of age.

¶ 5 In January 2015, defendant was arrested and charged with child photography by a sex offender (720 ILCS 5/11-24 (West 2014)), traveling to meet a minor (720 ILCS 5/11-26 (West 2014)), and unlawful grooming (720 ILCS 5/11-25 (West 2014)). The State filed a petition to revoke defendant's probation. Defendant entered a blind plea and admitted to violating his probation. During the plea hearing, the court again told defendant that the sentencing range for child pornography was three to seven years but did not tell him that he would be sentenced

separately for each charge or that the sentences had to run consecutively. The court thought it could choose whether defendant's sentences would run consecutively or concurrently and sentenced defendant to two concurrent terms of five years in prison for child pornography. The court also sentenced defendant to six years for unlawful grooming and nine years for traveling to meet a minor, to be served concurrently to the two concurrent five-year prison terms for child pornography.

¶ 6 Thereafter, the State informed the trial court that defendant's child pornography sentences had to run consecutively. The trial court then held a new sentencing hearing. At the hearing, the prosecutor told the court it could "amend the numbers so that it ends up reflecting the amount of time that you initially had given." The prosecutor further stated: "[Y]ou're within your right to kind of maneuver the numbers so if it was nine years that you intended." The court resentenced defendant to two consecutive 4-1/2 year prison terms for child pornography. Defendant filed a motion to reconsider, arguing that (1) his sentence was excessive in light of his criminal history, and (2) the court failed to properly consider mitigating evidence. The trial court denied the motion.

¶ 7 ANALYSIS

¶ 8 Defendant argues for the first time on appeal that the trial court erred in sentencing him to a total of nine years in prison because he was admonished at plea proceedings that the sentencing range for child pornography was three to seven years.

¶ 9 Generally, any sentencing issue not raised by a defendant in a motion to reconsider sentence is deemed forfeited on appeal. *In re Angelique E.*, 389 Ill. App. 3d 430, 432 (2009). However, a court's failure to give a defendant the admonishments required by Illinois Supreme

Court Rule 402 may constitute plain error, an exception to the forfeiture rule. *People v. Davis*, 145 Ill. 2d 240, 250 (1991); *People v. McCracken*, 237 Ill. App. 3d 519, 520 (1992).

¶ 10 Illinois Supreme Court Rule 402 contains several admonishments that a trial court must give to a defendant in open court before accepting a guilty plea. See Ill. S. Ct. R. 402(a) (eff. July 1, 2012). The purpose of the admonishments "is to ensure that a defendant understands his plea, the rights he has waived by pleading guilty and the consequences of his action." *People v. Dougherty*, 394 Ill. App. 3d 134, 138 (2009). Under Rule 402(a)(2), a trial court must admonish a defendant about "the minimum and maximum sentence prescribed by law, including, when applicable, the penalty to which the defendant may be subjected because of prior convictions or consecutive sentences[.]" Ill. S. Ct. R. 402(a)(2) (eff. July 1, 2012).

¶ 11 A defendant's "awareness of the possibility of receiving a consecutive sentence does not equate with an understanding that a consecutive sentence is mandatory." *People v. Brown*, 217 Ill. App. 3d 66, 69 (1991). A trial court's failure to inform a defendant that a consecutive sentence is mandatory renders the admonishment inadequate under Rule 402. See *id.; People v. Dorethy*, 331 Ill. App. 3d 504, 507 (2002); *People v. Hampton*, 249 Ill. App. 3d 873, 877 (1993). "To say that the possibility of consecutive sentences exists is simply not the same thing as saying that consecutive sentences must be imposed." *Hampton*, 249 Ill. App. 3d at 877.

¶ 12 "[A] court's failure to state the penalty to which a defendant may be subjected because of consecutive sentences renders a defendant's plea involuntary." *People v. Wills*, 251 Ill. App. 3d 640, 643 (1993); *McCracken*, 237 Ill. App. 3d at 521. Whether reversal is required depends on whether the defendant has been denied real justice or been prejudiced by the inadequate admonishment. *Davis*, 145 Ill. 2d at 250. A defendant suffers prejudice if he receives "a more onerous sentence than the one he was told he would receive." *People v. Thompson*, 375 Ill. App.

3d 488, 494 (2007). Additionally, an incorrect admonishment amounts to plain error where a defendant's sentence exceeds the maximum sentence stated by the trial court or where the trial court imposes a consecutive sentence without admonishing the defendant that his sentence will be consecutive. See *id.*; *People v. Hayes*, 336 Ill. App. 3d 145, 151-53 (2002); *McCracken*, 237 Ill. App. 3d at 521-22.

¶ 13 The proper remedy for an involuntary plea is typically to allow the defendant to withdraw his plea and plead anew. See *Dorethy*, 331 Ill. App. 3d at 507; *Hampton*, 249 Ill. App. 3d at 878; *McCracken*, 237 Ill. App. 3d at 521-22; *Brown*, 217 Ill. App. 3d at 70. However, that is not possible when the appeal is from a probation revocation. S*ee People v. Taylor*, 368 Ill. App. 3d 703, 708 (2006). In such a case, "the only available remedy to address the error is a sentence in accordance with the improper admonishment." *People v. Gregory*, 379 Ill. App. 3d 414, 422 (2008). "[U]pon revocation of a defendant's probation, the trial court is limited in sentencing by the maximum penalty upon which the defendant had originally been admonished." *People v. Johns*, 229 Ill. App. 3d 740, 743 (1992) (citin*g People v. Wenger*, 42 Ill. App. 3d 608 (1976)); see also *People v. Taylor*, 368 Ill. App. 3d 703, 708-09 (2006) (only non-extended term could be imposed where defendant was not admonished regarding extended term)*; Wills*, 251 Ill. App. 3d at 644-46 (only concurrent sentence could be imposed where trial court failed to admonish defendant as to possibility of consecutive sentences)*; People v. Jackson*, 13 Ill. App. 3d 232, 235-36 (1973) (reducing defendant's sentence to maximum penalty for which he was admonished).

¶ 14 Here, before accepting defendant's guilty plea, the court admonished defendant that he could be sentenced to prison for "three to seven years" for child pornography. The court made no mention of consecutive sentences and did not inform defendant that because of consecutive

sentencing, he could be subject to a total of 14 years in prison. The court's admonishment violated Rule 402(a)(2) because it did not inform defendant of the correct "minimum and maximum sentence prescribed by law, including *** the penalty to which the defendant may be subjected because of *** consecutive sentences[.]" Ill. S. Ct. R. 402(a)(2) (eff. July 1, 2012).

¶ 15 In its brief, the State cites to *People v. Harris*, 366 Ill. App. 3d 1161 (2006) and *People v. Sanders*, 356 Ill. App. 3d 998 (2005), to support its contention that defendant's consecutive sentences must be considered separately and, as such, they do not exceed the maximum sentence set forth in the trial court's admonition. We disagree.

¶ 16 In both *Harris* and *Sanders*, the issue on appeal was whether, by sentencing defendants to consecutive terms that together were greater than their original sentences, the trial court violated section 5-5-4 of the Unified Code of Corrections (Code) (730 ILCS ILCS 5/5-5-4(a) (West 2016)). Section 5-5-4 prohibits courts from imposing a greater sentence for an offense on remand. The courts held that a defendant's increased aggregate sentence is allowed as long as each individual sentence does not increase. See *Harris*, 366 Ill. App. 3d at 1165-66; *Sanders*, 356 Ill. App. 3d at 1005. *Harris*, *Sanders* and section 5-5-4 of the Code do not apply to this case.

¶ 17 Here, the issue is whether the trial court properly admonished defendant under Rule 402 by stating that his sentence would be "three to seven years" when, in fact, he faced a total of six to fourteen years in prison because of mandatory consecutive sentencing. A trial court's failure to inform a defendant that consecutive sentences are mandatory is an inadequate admonishment and renders the defendant's guilty plea involuntary. See *Dorethy*, 331 Ill. App. 3d at 507; *Hampton*, 249 Ill. App. 3d at 877; *Brown*, 217 Ill. App. 3d at 69; *Wills*, 251 Ill. App. 3d at 643; *McCracken*, 237 Ill. App. 3d at 521.

¶ 18 The State also contends that defendant's sentence was proper because defendant was made aware that consecutive sentences were possible in proceedings subsequent to his guilty plea. Again, we disagree. "The crucial time for determining whether a plea was intelligently and voluntarily made within the mandates of Rule 402 is the time the plea was taken." *People v. Blankley*, 319 Ill. App. 3d 996, 1007 (2001).

¶ 19 In this case, when defendant pled guilty to two counts of child pornography, the trial court improperly advised him that the minimum sentence was three years and the maximum sentence was seven years. The consecutive sentences ultimately imposed by the trial court amounted to a total of nine years, exceeding the trial court's maximum stated sentence. Because defendant's sentence exceeded the longest sentence the trial court told him he could receive, he suffered prejudice. See *Thompson*, 375 Ill. App. 3d at 494. Furthermore, the trial court's improper admonishment renders defendant's guilty plea involuntary and amounts to plain error because defendant was not told that his two child pornography sentences had to be served consecutively. See *id.*; *Hayes*, 336 Ill. App. 3d at 151-53; *McCracken*, 237 Ill. App. 3d at 521. Thus, we must sentence defendant in accordance with the trial court's admonishment. See *Gregory*, 379 Ill. App. 3d at 422. Pursuant to Illinois Supreme Court Rule 615(b)(4) (eff. Jan. 1, 1967), we vacate defendant's sentence and reduce it to two consecutive 3-1/2 year terms of imprisonment for child pornography, making it within the range stated by the trial court.

¶ 20 CONCLUSION

¶ 21 The judgment of the circuit court of Will County is vacated and modified in part.

¶ 22 Vacated and modified in part.

¶ 23 JUSTICE WRIGHT, dissenting:

¶ 24 I respectfully dissent. I would affirm the trial court's order entered on May 26, 2016, based on forfeiture. Plain error does not apply because the final judgment order does not contain any error. Consequently, I respectfully disagree that this court should reduce the sentence imposed by the trial court.

¶ 25 Defendant did not state any objection when the trial court reduced the five year term of incarceration for each probation violation, to four and a half years. In addition, defendant's motion to reconsider did not raise any issue pertaining to incorrect admonishments. The admonishment issue has been forfeited.

¶ 26 To have plain error an error must exist. Contrary to defendant's characterization, resentencing is not present in this record. Instead, the trial court simply reconsidered its own order, twice, before getting it right in the final judgment order dated May 26, 2016. Clearly, the purpose of the court's reconsideration was that the trial court wanted to match, but not exceed, the nine-year term of incarceration defendant originally received from the same judge on April 8, 2016, in a companion offense, Will County case No. 15-CF-17.

¶ 27 I emphasize that this defendant has not been resentenced at all. For example, on May 4, 2016, the trial court clarified each five-year term of imprisonment would be served concurrently. Within 30 days of May 4, 2016, the trial court learned that each five-year term must be served consecutively by statute. *Sua sponte,* the trial court reduced the mandatory consecutive terms of incarceration to four and a half years rather than five years.

¶ 28 I recognize that the trial court took three swings at designing a statutorily compliant sentencing order. However, it is somewhat misleading as well as confusing to describe these events as a resentencing.

¶ 29 I agree defendant was not fully informed of the consequences for the violation of probation before April 8, 2016. However, before the final judgment imposing defendant's sentence was announced by the court, the court's error had been cured. By May 26, 2016, this defendant was very aware that his sentences *would* be consecutive. Yet, defendant did not ask to withdraw the open plea.

¶ 30 Even if we compare the sentence imposed on April 8, 2016, to the final judgment entered on May 26, 2016, prejudice is not present. First, the term of incarceration for each violation of probation was reduced by six months. Second, when combined, these reduced periods of incarceration do not exceed the cumulative nine years of imprisonment the court imposed on April 8, 2016, in Will County case No. 15-CF-17.

¶ 31 In conclusion, I submit the admonishment issue has been forfeited. In addition, I disagree this sentence includes judicial error at all. Finally, assuming the trial court erred in some fashion, prejudice is not present and plain error does not apply. I would affirm the trial court's final order entered on May 26, 2016.