



remand, on August 2, 2017, the trial court denied defendant's motion to withdraw his guilty plea. Defendant appeals, making the following arguments: (1) his trial counsel was constitutionally ineffective because he advised defendant he was eligible for an extended term sentence, which influenced defendant's decision to enter an open guilty plea in order to receive a standard, non-extended sentence; (2) the trial court erred by participating in plea negotiations; and (3) the trial court erred by considering defendant's possession of a methamphetamine precursor as an aggravating factor when sentencing defendant. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In January 2015, the State charged defendant by information with unlawful possession of a methamphetamine precursor (less than 15 grams of a methamphetamine precursor in standard dosage form, being pseudoephedrine pills) (720 ILCS 646/20(a)(1), (a)(2)(A) (West 2014).

¶ 5 On March 5, 2015, the trial court modified defendant's bond to allow defendant to go to the Wells Center for residential treatment. On March 24, 2015, defendant was admitted to the Wells Center for residential treatment. While completing some of his treatment goals, defendant was unsuccessfully discharged from the facility on April 15, 2015, for violating the facility's rule regarding relationships with other patients. Staff members at the Wells Center recommended defendant complete treatment at an all-male residential facility.

¶ 6 On July 31, 2015, defendant filed a motion to modify his bond so he could receive residential treatment at the White Oaks Knolls Rehabilitation Center (Knolls Center), a facility for men in Peoria. The trial court held a hearing on this motion on August 6, 2015. Defendant called as a witness Darla Clanton, a registered nurse who was employed at the Wells Center at the time. Clanton had worked for the Illinois Department of Corrections (IDOC) for over 28

years prior to working at the Wells Center. She testified defendant took his treatment seriously. She did not believe he would receive adequate treatment in prison. Due to budget cuts, she said many prisoners do not receive treatment at all. She believed defendant would do well at the Knolls Center.

¶ 7 The trial court denied defendant's motion to modify his bond to receive residential treatment at the Knolls Center. The court noted defendant's pretrial hearing was approaching. However, the court told defendant:

“if this case were to be continued again past September, the likelihood is I would grant it and allow you to go to Peoria to this treatment facility, or if you were to enter some type of an open plea and you were going to be set in front of the Court for sentencing then I would likely grant you the opportunity to go through this treatment before any sentence if I were the sentencing judge.”

¶ 8 On August 20, 2015, defendant entered on open guilty plea. Prior to accepting his plea, the trial court informed defendant that if the court sentenced defendant to prison for unlawful possession of a methamphetamine precursor (less than 15 grams), a Class 2 felony, the sentencing range would be from 3 to 7 years. The court also told defendant he could receive an extended-term sentence if he had been convicted of a Class 2 or higher felony within the prior 10 years excluding any time he spent in prison. Defendant told the court no one had threatened him or promised him anything in exchange for his guilty plea. After the court accepted his plea, defendant asked for a furlough to attend residential treatment at the Knolls Center. The court took the request under advisement.

¶ 9 On August 24, 2015, over the State's objection, the trial court granted defendant's motion to modify his bond so he could receive residential treatment at the Knolls Center, which

defendant successfully completed.

¶ 10 On October 22, 2015, the trial court held defendant's sentencing hearing. The State recommended a seven year sentence based on defendant's extensive criminal history. The State argued defendant had narrowly avoided being eligible for an extended sentence by a year. If defendant had been eligible for an extended term, the State noted it would have recommended a 14-year sentence. According to the State, the only way to protect society from defendant was to imprison him. Defense counsel recommend a sentence of two years' probation. Defense counsel argued a mitigating factor in this case was defendant's criminal conduct neither caused nor threatened serious harm to another.

¶ 11 The trial court noted it considered the factors in aggravation and mitigation. The court stated it considered defendant's criminal history and deterrence as aggravating factors in this case. In addressing defense counsel's argument the court should consider as a mitigating factor defendant's criminal conduct neither caused nor threatened serious harm to another, the trial court noted the harm methamphetamine addiction had on his community. The court then stated:

“So for [defense counsel] to argue that your conduct, being possession of a precursor[,] which simply implies to the Court that there was an intent to manufacture methamphetamine at some point in time either to be consumed by the Defendant himself or to be sold in this community, I disagree, [defense counsel] that you find that the conduct did not cause or threaten serious harm.

I understand your argument on mitigation that you believe maybe Defendant did not contemplate that that conduct would cause serious harm, but the proof is just overwhelming that methamphetamine is an insidious, dangerous

and destructive drug, and if it could be eradicated from our society right now that would be one of the true blessings. So in that event I disagree with you [defense counsel].”

The court then sentenced defendant to seven years in prison with credit for 267 days served and two years’ mandatory supervised release.

¶ 12 On February 18, 2016, the trial court denied defendant’s amended motion to reduce his sentence.

¶ 13 On March 4, 2016, defendant filed a notice of appeal.

¶ 14 On August 16, 2016, this court granted defendant’s motion for summary remand. We directed defense counsel to file a new Rule 604(d) certificate tracking the language of the rule and granted defendant the opportunity to file a motion to withdraw his guilty plea or file a new motion to reconsider his sentence. If defendant’s postplea motions were denied, defendant could file a new notice of appeal.

¶ 15 On October 31, 2016, defendant filed a second amended motion to withdraw his guilty plea and vacate judgment and/or reconsider his sentence. Defendant made a number of allegations and arguments why he should be allowed to withdraw his guilty plea because it was not knowing and voluntary and why the trial court should reduce his sentence.

¶ 16 Also, on October 31, 2016, defendant’s counsel filed his Supreme Court Rule 604(d) certificate (Ill. S. Ct. R. 604(d) (eff. Mar. 8, 2016)).

¶ 17 On June 5, 2017, the trial court held a hearing on defendant’s second amended motion to withdraw his guilty plea and vacate judgment and/or reconsider his sentence. At the hearing, defendant withdrew his motion to reconsider his sentence and proceeded only on the motion to withdraw his guilty plea. Defendant called the attorney who represented him when he

entered his guilty plea. The attorney testified he told defendant he was extended-term eligible prior to defendant entering his guilty plea. The State's Attorney also allegedly told the attorney that defendant was extended-term eligible. Defendant's attorney testified both he and defendant believed the State's Attorney was not pursuing an extended-term sentence because defendant agreed to plead guilty. On cross-examination, defense counsel noted the State's Attorney indicated the State could charge defendant with additional crimes, which could have resulted in consecutive or extended-term sentences. The State did not charge defendant with these additional offenses after he entered his guilty plea. The trial court took the matter under advisement.

¶ 18 On August 2, 2017, the trial court denied defendant's second amended motion to withdraw his guilty plea.

¶ 19 This appeal followed.

## ¶ 20 II. ANALYSIS

### ¶ 21 A. Ineffective Assistance of Counsel

¶ 22 Defendant first argues his trial counsel was ineffective because counsel advised defendant he was eligible for an extended-term sentence of 6 to 14 years on his charge of unlawful possession of a methamphetamine precursor (less than 15 grams) (720 ILCS 646/20(a)(1), (2)(A) (West 2014)), a Class 2 felony with a normal sentencing range of 3 to 7 years and an extended sentencing range of 6 to 14 years (730 ILCS 5/5-4.5-35 (West 2014)). Defendant contends he entered his guilty plea because he believed the plea would allow him to avoid the extended-term sentence. Defendant now argues he could not make a knowing and voluntary plea because of his attorney's erroneous advice.

¶ 23 To establish a claim of ineffective assistance of counsel, defendant must show (1)

his counsel's performance was objectively unreasonable and (2) defendant was prejudiced by his counsel's performance. *People v. Coleman*, 183 Ill. 2d 366, 397, 701 N.E.2d 1063, 1079 (1998) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984)). For defendant to establish he was prejudiced by his attorney's ineffective assistance, defendant must show a reasonable probability he would not have pleaded guilty and insisted on going to trial absent his attorney's ineffectiveness. *People v. Brown*, 2017 IL 121681, ¶ 26, 102 N.E.3d 205. Our supreme court has stated a defendant has a right to be reasonably informed about the direct consequences of accepting or rejecting a plea offer. *People v. Hale*, 2013 IL 113140, ¶ 16, 996 N.E.2d 607. A defendant's guilty plea may be deemed involuntary if defendant entered it based on erroneous and misleading advice about the consequences of a guilty plea. *People v. Blommaert*, 237 Ill. App. 3d 811, 816-17, 604 N.E.2d 1054, 1058-59 (1992).

¶ 24 In this court's view, the primary question with regard to defendant's claim his trial counsel was ineffective was whether his trial counsel provided inaccurate advice. In other words, was defendant eligible for an extended-term sentence? While it is true the State told the trial court defendant was not extended-term eligible, this does not establish the State was correct for purposes of defendant's ineffective-assistance claim.

¶ 25 Section 5-5-3.2(b)(1) of the Unified Code of Corrections (Corrections Code) provides as follows:

“(b) The following factors, related to all felonies, may be considered by the court as reasons to impose an extended term sentence under Section 5-8-2 upon any offender:

(1) When a defendant is convicted of any felony, after having been previously convicted in Illinois or any other jurisdiction of the same or similar

class felony or greater class felony, when such conviction has occurred within 10 years after the previous conviction, excluding time spent in custody, and such charges are separately brought and tried and arise out of different series of acts[.]”  
730 ILCS 5/5-5-3.2(b)(1) (West 2014).

With regard to section 5-5-3.2(b)(1), our supreme court has stated:

“The clear implication is that ‘time spent in custody’ is not to be counted in determining whether 10 years have elapsed since the offender’s prior conviction. Although the statute does say that the defendant must have been previously convicted ‘in Illinois,’ it does not say ‘excluding time spent in custody as the result of an Illinois conviction,’ and we see no reason to qualify it in this way. We conclude that ‘time spent in custody’ means time spent in any custody as the result of a conviction of a Federal crime or violation of another State’s criminal statute.

This conclusion is reinforced by a consideration of the purpose of the extended-term provision. The aim of recidivist statutes is to impose harsher sentences on offenders whose repeated convictions have shown their resistance to correction. [Citation.] Realistically, one can assess an offender’s tendency to recidivism only when, having served his sentence, he has returned to society; his behavior while in custody can hardly be viewed as a reliable indicator of the likelihood of his committing another offense when released. Thus, though the General Assembly chose to create a ‘statute of limitations’ for the use of prior convictions to extend the sentence of a repeat offender, the limitation is itself limited, so that the incorrigible recidivist will remain subject to the extended term.



The appellate court held that, for the purpose of determining the 10-year period, the date of a conviction is the date of entry of the sentencing order.

Neither party to the appeal disagrees with this holding, and we find it consistent both with the statute and with this court's decisions concerning the date of conviction for purposes of appeal." *People v. Robinson*, 89 Ill. 2d 469, 476-77, 433 N.E.2d 674, 677-78 (1982).

¶ 26 Based on the record in this case, we cannot determine as a certainty whether defendant was or was not extended-term eligible. As a result, we cannot determine whether his counsel's advice was incorrect. If his counsel's advice was correct, which appears to be the case considering defendant's criminal history, defendant did not receive ineffective assistance of counsel. To the contrary, it appears he was well served by his trial counsel as he was able to avoid an extended sentence in this case.

¶ 27 Based on the presentence investigation report (PSI) in this case, defendant was sentenced on January 6, 2003, to four years in the Department of Corrections (Impact Incarceration Program) with credit for 76 days previously served for residential burglary (Mason County Case No. 02-CF-71). Residential burglary is a Class 1 felony. Because this was a higher class felony than his Class 2 conviction in this case, defendant's sentence started the 10-year clock, excluding the time he spent in custody, for purposes of section 5-5-3.2(b)(1) of the Corrections Code (730 ILCS 5/5-5-3.2(b)(1) (West 2014)). From the record, we do not know when defendant was released from prison in case No. 02-CF-71.

¶ 28 However, regardless of defendant's release in that case, defendant has been sentenced to additional prison and jail sentences after his residential burglary conviction. On December 1, 2003, defendant was sentenced to two years in prison for resisting a peace

officer/correctional employee in Fulton County case No. 03-CF-268. On June 29, 2005, defendant's probation on a forgery charge in Mason County case No. 02-CF-121 was revoked, and he was resentenced to three years in prison. On January 4, 2007, defendant was sentenced to four years and six months in prison for a theft conviction in Mason County case No. 06-CF-144. In 2012, defendant was resentenced to five years in prison after his conditional discharge sentence for attempt (aggravated battery) in Mason County case No. 10-CF-21 was revoked. Defendant also had additional cases where he was sentenced to jail time during this period. As a result, it is difficult to see how defendant could have spent more than 10 years outside of custody between his residential burglary sentence and the sentence in this case. Thus, defendant has failed to demonstrate his counsel's performance was objectively unreasonable.

¶ 29 B. Plea Negotiations

¶ 30 Defendant next argues the trial court erred by participating in plea negotiations in this case and improperly influenced his decision to enter an open guilty plea because defendant believed the only way he could ensure his ability to participate in a drug rehabilitation program was to plead guilty. Defendant argues his plea should be deemed involuntary because of the court's "unauthorized involvement."

¶ 31 Citing Illinois Supreme Court Rule 402(d) (eff. July 1, 2012) and *People v. Garibay*, 366 Ill. App. 3d 1103, 1107-08, 853 N.E.2d 893, 897-98 (2006), defendant argues the trial court had no authority to solicit a guilty plea from defendant. Rule 402(d)(1) does state a "trial judge shall not initiate plea discussions." Ill. S. Ct. R. 402(d)(1) (eff. July 1, 2012). Defendant takes issue with the fact the trial court told him the following after denying his request to modify his bond to attend a second residential rehabilitation treatment program:

"I think it's clear from the testimony here is that there's been no rehabilitation for

[defendant] in his multiple stints in the department of corrections, and that is a fundamental problem with the department of corrections.

And obviously [defendant] has pursued this line of relief from the Court on numerous occasions, which indicates to the Court that he does have some desire to change his life. And so substantively I think the motion has a lot of merit, but practically, as [the State] pointed out, we have a pretrial coming up here, and so I'm not going to grant the motion at this time. I'm going to deny it, [defendant].

However, if this case were to be continued again past September, the likelihood is I would grant it and allow you to go to Peoria to this treatment facility, or if you were to enter some type of an open plea and you were going to be set in front of the Court for sentencing then I would likely grant you the opportunity to go through this treatment before any sentence if I were the sentencing judge.”

Defendant stated he understood.

¶ 32 Defendant argues it was this statement that influenced his decision to enter his open guilty plea two weeks later. Defendant argues he wanted to go to the Knolls Center, but the trial court said it would not allow this without defendant first entering a open guilty plea. This is not accurate. Without making any promises to defendant, the court said it would likely allow defendant to go to the Knolls Center if the case was continued past September. Further, the court also said it “would likely” allow him the same opportunity before he was sentenced if defendant entered an open guilty plea. The court’s statements clearly show it was possible the court would allow defendant to attend the Knolls Center without a guilty plea but was not going to delay the

proceedings just for defendant to receive treatment at the Knolls Center. Further, the trial court did not promise defendant the court would allow defendant to attend the Knolls Center even if he entered an open guilty plea. Defendant has not established the court's actions in this case amount to plea negotiations. He has also failed to establish his guilty plea was not knowing and voluntary.

¶ 33 Defendant next argues the trial court did not comply with Illinois law by allowing defendant's request to attend the Knolls Center before his sentencing hearing. According to defendant's brief:

“While judicial efforts to provide treatment in lieu of incarceration to defendants are laudable, they are nonetheless required to comply with applicable law. If [defendant] was to participate in a drug court program, he should have done so either through a pre-adjudicatory drug court program, without the requirement of a plea of guilty, or through a post-adjudicatory drug court program where he would have pled guilty and entered drug court as a condition of his sentence. See 730 ILCS 166/1 *et seq.* (2015). In [defendant's] case, the procedure employed was neither pre nor post adjudicatory.”

We find this argument forfeited and, frankly, unbelievable coming from defendant.

¶ 34 The trial court did give defendant an opportunity to attend a residential treatment facility prior to his guilty plea in this case. Defendant failed to finish the program because he violated the treatment center's rules. Further, in arguing he should be allowed to attend the second treatment center, defendant presented a witness, Darla Clanton, who testified the treatment defendant might receive in prison would not be helpful.

¶ 35 Based on the record in this case, the trial court did not promise defendant he

would be sent to the treatment facility if he entered a guilty plea. However, after entering his guilty plea, defendant asked the court to allow him to attend the Knolls Center before he was sentenced. The trial court allowed defendant to get this treatment before being sentenced. A party cannot ask the trial court to proceed in a certain manner in the trial court and then complain on appeal when the trial court complied with the party's request. *McMath v. Katholi*, 191 Ill. 2d 251, 255, 730 N.E.2d 1, 3 (2000).

¶ 36 C. Defendant's Sentence

¶ 37 Defendant next argues the trial court erred by considering as an aggravating factor that defendant's possession of a methamphetamine precursor caused or threatened serious harm. According to defendant, the harm caused by felony drug possession is inherent in the offense itself. Defendant states the trial court explicitly relied on this improper factor and the fact the court gave defendant the maximum sentence makes it likely the court's reliance on this factor was not insignificant.

¶ 38 The State argues defendant forfeited any issues with regard to his sentence. After this court remanded this case because defendant's post-plea counsel failed to comply with the affidavit requirement found in Illinois Supreme Court Rule 604(d) (eff. Mar. 8, 2016), defendant filed a new motion to withdraw his guilty plea and vacate judgment and/or reconsider his sentence. However, at the hearing on this motion in June 2017, defendant told the trial court he was withdrawing the motion to reconsider sentence. Rule 604(d) provides in part: "Upon appeal[,] any issue not raised by the defendant in the motion to reconsider the sentence \*\*\* shall be deemed waived."

¶ 39 While the State simply alleges forfeiture, we find defendant actually waived any argument he could have made with regard to his sentence by expressly withdrawing his motion

to reconsider sentence. “Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right.” (Internal quotation marks omitted.) *United States v. Olano*, 507 U.S. 725, 733 (1993). As a result, defendant cannot raise his sentencing issue as a matter of right on appeal.

¶ 40 Defendant argues we can still review his argument pursuant to the plain error doctrine. However, as noted earlier, this situation is different than a simple forfeiture and is more in line with the doctrine of invited error, especially considering this case was remanded so defendant would have the opportunity to file a new motion to withdraw his guilty plea and a motion to reconsider his sentence so the trial court could potentially correct any errors it originally might have made.

¶ 41 Regardless of waiver, the transcript of the sentencing hearing shows the trial court did not consider the harm or threatened harm this crime has on the community as an aggravating factor. The trial court stated:

“I have considered the factors in aggravation pursuant to statute and the factors in mitigation. I will specifically find that factors in aggravation present here are that the Defendant has a history of prior delinquency and criminal activity. I’ll further find that a sentence is necessary to deter others from the same crime.”

The court then addressed defense counsel’s argument the court should consider as *mitigation* that defendant’s criminal conduct did not cause nor threaten physical harm to another, stating:

“So for [defense counsel] to argue that your conduct, being possession of a precursor which simply implies to the Court that there was an intent to manufacture methamphetamine at some point in time either to be consumed by

the Defendant himself or to be sold in this community, I disagree, [defense counsel] that you find that the conduct did not cause or threaten serious harm.

I understand your argument on mitigation that you believe maybe Defendant did not contemplate that that conduct would cause serious harm, but the proof is just overwhelming that methamphetamine is an insidious, dangerous and destructive drug, and if it could be eradicated from our society right now that would be one of the true blessings. So in that event I disagree with you [defense counsel].”

Based on the context of the court’s statement, the court was not considering defendant’s possession of these methamphetamine precursors as an aggravating factor. Instead, the court was simply addressing the defendant’s argument with regard to mitigation.

¶ 42 Defendant does correctly point out the trial court—during the February 18, 2016, hearing on his motion to reconsider sentence prior to defendant’s initial appeal—stated “I believe I properly applied the factors in aggravation here that the Defendant’s conduct caused or threatened serious harm.” However, the trial court also stated it had not reviewed the written transcript of the sentencing hearing but only reviewed its notes. The trial court’s recollection was not correct in this instance. When this case was on remand in the trial court in June 2017, the trial court likely would have corrected the misstatement it made during the February 2016 hearing had defendant not withdrawn his motion to reconsider sentence. This may explain why defendant chose to withdraw his motion.

¶ 43 III. CONCLUSION

¶ 44 For the reasons stated, we affirm defendant’s conviction and sentence in this case. As part of our judgment, we award the State its \$75 statutory assessment against defendant as

costs of this appeal (55 ILCS 5/4-2002(a) (West 2016)).

¶ 45            Affirmed.