

2019 IL App (1st) 170234-U

No. 1-17-0234

Order filed on January 29, 2019.

Second Division

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

| | | |
|--------------------------------------|---|----------------------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from the |
| |) | Circuit Court of |
| Plaintiff-Appellee, |) | Cook County. |
| |) | |
| v. |) | Nos. 99 CR 9658, 99 CR 9659 & 99 |
| |) | CR 9660 (cons.) |
| JAMES DOLIS, |) | |
| |) | The Honorable |
| Defendant-Appellant. |) | James D. Egan & |
| |) | Mary Margaret Brosnahan, |
| |) | Judges Presiding. |

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Mason and Justice Pucinski concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant was entitled to withdraw his guilty plea where the State failed to respond to the merits of his assertion that proceedings were not held in open court as required by Illinois Supreme Court Rule 402 (eff. July 1, 1997). Additionally, the order of protection entered in conjunction with defendant's sentence was vacated.

¶ 2 In 2003, defendant James Dolis pled guilty in three consolidated cases to several counts of communicating with a witness and violating an order of protection. Defendant now comes

before us on both his direct appeal and his appeal from the denial of relief following an evidentiary hearing under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2004)). As our learned colleague observed below, “this is a very unusual case, and you would need a flow chart, a very big flow chart to trace the trajectory of these three cases.”

¶ 3 On direct appeal, defendant challenges the guilty plea proceedings and the order of protection entered in these consolidated cases. Because defendant’s guilty plea proceedings were not held in open court, we reverse and remand to give defendant the opportunity to withdraw his guilty plea. We also vacate the order of protection imposed in conjunction with his sentence. Our determination renders the remaining issues raised on direct appeal and under the Act moot.

¶ 4 I. Background

¶ 5 A. Guilty Plea

¶ 6 We limit the facts of this procedurally cumbersome case to a minimum. In 1999, defendant was charged with several offenses involving victim Ellen Stefanitis (Nos. 99 CR 9658, 99 CR 9658, 99 CR 9659 & 99 CR 9660).¹ Eventually, during proceedings that were transcribed but were held in chambers, defendant pled guilty to three counts of communicating with a witness and three counts of violating an order of protection. The parties dispute whether defendant’s plea was negotiated or open. See Ill. S. Ct. R. 604 (eff. Nov. 1, 2000).

¶ 7 The trial court, over the State’s objection, imposed five-year prison terms for communicating with a witness and three-year prison terms for violating a protection order, all to be served concurrently. The court did not, however, admonish defendant that a mandatory supervised release (MSR) term would be added to his sentence. Additionally, the trial court entered an order of protection prohibiting defendant from contacting Stefanitis, Glenn Podeszwa, Stefanitis’ adult son, and Jamie Dolis, the daughter of Stefanitis and defendant. The court also

¹We note that multiple spellings of Ellen’s surname appear in our record.

entered a no contact order and the State nol-prossed other charges that had been filed against defendant.

¶ 8 Defendant then filed a *pro se* motion to withdraw the guilty plea, arguing, among other things, that he was forced to plead guilty because defense counsel, Michael Greco, abandoned his case. Greco himself filed a motion to withdraw the guilty plea the next day, challenging the process by which defendant was charged.

¶ 9 At a hearing on these motions, Greco disputed defendant's assertion that he was not prepared for trial. After the trial court denied the post-plea motions, Greco filed what the State acknowledges to be a deficient Rule 604(d) certificate. Greco also filed a notice of appeal on defendant's behalf, but that appeal was dismissed for want of prosecution. *People v. Dolis*, 1-04-0980 (November 18, 2004) (dispositional order).

¶ 10 B. Collateral Pleadings

¶ 11 Defendant later filed a petition under both the Act and section 2-1401 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-1401 (West 2004)). He alleged, among other things, that he pled guilty because Greco said that he was unprepared for trial, that the court would not enter a continuance and that defendant could plead guilty and withdraw his plea within 30 days. According to defendant, Greco also abandoned defendant's direct appeal. The assistant public defender added that the trial court should reduce defendant's sentences due to the lack of MSR admonishment, citing our supreme court's decision in *People v. Whitfield*, 217 Ill. 2d 177 (2005). Defendant appealed from the court's order granting the State's motion to dismiss that petition (No. 1-10-1027) and also appealed from the court's order dismissing an additional *pro se* section 2-1401 petition, which had asserted that the protection order was void (No. 1-10-2603). The two appeals were consolidated.

¶ 12

C. Collateral Appeal

¶ 13 On appeal, we rejected defendant's assertion that the judgment was void because the trial court, Greco and the State incorrectly believed that communicating with a witness was a Class 3, rather than a Class 4, offense. Next, we vacated the no contact order as void but found defendant had not shown the protection order was void. Additionally, we found defendant forfeited his assertion that the guilty plea proceedings held in chambers violated his constitutional right to a public trial. We further rejected defendant's contention that his sentence should be reduced under *Whitfield*, observing that our supreme court had determined, in *People v. Morris*, 236 Ill. 2d 345, 360, 366 (2010), that *Whitfield* created a new rule to be applied only to cases not final prior to December 20, 2005. Finally, we reversed and remanded for an evidentiary hearing on defendant's claim that Greco was ineffective because he advised defendant that he had an absolute right to withdraw his guilty plea and failed to pursue defendant's direct appeal. *People v. Dolis*, 2013 IL App (1st) 101027-U.

¶ 14

D. Remand

¶ 15 In December 2015, an evidentiary hearing ensued as to whether Greco was ineffective.² The trial court ultimately determined that Greco failed to pursue defendant's direct appeal and granted defendant leave to file a late notice of direct appeal. See *People v. Ross*, 229 Ill. 2d 255, 268 (2008); *People v. Moore*, 133 Ill. 2d 331, 339 (1990). That being said, the court found defendant's claim that Greco said he could withdraw his guilty plea within a month was not credible. Defendant now comes before us on his direct appeal and the denial of postconviction relief following an evidentiary hearing.

¶ 16

II. Analysis

²Greco testified at this evidentiary hearing that he had twice been the subject of Illinois Attorney Registration and Disciplinary Commission proceedings.

¶ 17 On direct appeal, we first consider defendant’s assertion that the trial court violated Illinois Supreme Court Rule 402 (eff. July 1, 1997) by holding guilty plea proceedings in chambers rather than in open court. Initially, however, the State contends this assertion is precluded by collateral estoppel and the law-of-the-case doctrine. We disagree.

¶ 18 The doctrines of collateral estoppel and the law-of-the-case prevent defendants from taking a second bite out of the same appellate apple. *People v. Ortiz*, 235 Ill. 2d 319, 332 (2009). Collateral estoppel applies where a party participates in two separate, consecutive cases arising from different causes of action and a controlling fact or question that is material to both causes was adjudicated in the former action by a court having jurisdiction. *People v. Tenner*, 206 Ill. 2d 381, 396 (2002). The collateral estoppel doctrine requires that (1) the court rendered a final judgment in the earlier case; (2) the party against whom the doctrine is asserted was a party in the prior case or in privity with such a party; and (3) *the issue decided in the prior case is identical to the one currently before the court. Id.*

¶ 19 Similarly, pursuant to the law-of-the-case doctrine, a rule established as controlling in a case generally will continue to be the law of that case, “as long as the facts remain the same.” *People v. Patterson*, 154 Ill. 2d 414, 468 (1992). This doctrine applies to factual and legal questions, and encompasses both a court’s explicit and necessarily implicit decisions. *Siena at Old Orchard Condominium Ass’n v. Siena at Old Orchard, LLC*, 2018 IL App (1st) 182133, ¶ 1. Conversely, a ruling is not binding in subsequent litigation if different issues are involved or underlying facts have changed. *Id.* Thus, both the law-of-the-case doctrine and collateral estoppel require that the court be presented with an issue identical to the one already decided.

¶ 20 The State ignores that the procedural facts of this case have materially changed. Although defendant had previously lost his direct appeal, requiring him to overcome the hurdles of the Act

and section 2-1401, his direct appeal has now been returned to him. See 725 ILCS 5/122-1 *et seq.* (West 2004) (authorizing proceedings for a defendant to raise the denial of *constitutional* rights); *Ross*, 229 Ill. 2d at 269 (stating that postconviction petitions are no substitute for direct appeals); *Warren County Soil and Water Conservation District v. Walters*, 2015 IL 117783, ¶¶ 37, 48 (stating that section 2-1401 requires allegations showing the existence of a meritorious defense, due diligence in presenting the circuit court with the defense and due diligence in filing the section 2-1401 petition, although an allegation that a judgment is void substitutes for the need to show a meritorious defense and due diligence).

¶ 21 According to the State, our 2013 order in this case “specifically rejected, on the merits, *** that his guilty plea was not done in ‘open court’ and as such did not comply with Rule 402.” Not so. In the prior appeal, defendant raised a violation of his constitutional right to a public trial, not a violation of Rule 402’s requirement that proceedings be held in open court. These are fundamentally different legal issues. We found that defendant forfeited his constitutional claim by failing to object to the court holding proceedings in chambers. Neither collateral estoppel nor the law-of-the case doctrine preclude defendant’s claim here because we are not presented with the same issue.

¶ 22 The State’s brief in the present appeal does not respond to the merits of defendant’s argument that the trial court violated Rule 402 by failing to hold proceedings in open court. See Ill. S. Ct. R. 341(h)(7), (i) (eff. July 1, 1997). Instead, the State merely directs us to its brief filed in defendant’s aforementioned 2013 appeal. Because defendant did not raise a violation of Rule 402 in that appeal, the State’s prior brief does not adequately address the alleged Rule 402 error on the merits or specifically argue that defendant forfeited his challenge under this rule. See *People v. Lucas*, 231 Ill. 2d 169, 175 (2008) (observing that the doctrine of forfeiture applies to

the State, which can forfeit a defendant's forfeiture). Absent any meaningful challenge to this Rule 402 violation, we find the State has forfeited the right to contest defendant's assertion on its merits.

¶ 23 Rule 402 refers to the requirement that proceedings occur in "open court" no less than six times. With respect to admonishments, the court must address "the defendant personally in *open court*, informing him or her of and determining that he or she understands" certain fundamental aspects of the plea. (Emphasis added.) Ill. S. Ct. R. 402(a) (eff. July 1, 1997). "If the tendered plea is the result of a plea agreement, the agreement shall be stated in *open court*." (Emphasis added.) Ill. S. Ct. R. 402(b) (eff. July 1, 1997). In addition, "[t]he court, by questioning the defendant personally in *open court*, shall confirm the terms of the plea agreement, or that there is no agreement, and shall determine whether any force or threats or any promises, apart from a plea agreement, were used to obtain the plea." (Emphasis added.) *Id.*

¶ 24 The rule further states that "[i]f the judge has indicated his or her concurrence or conditional concurrence [with a tentative plea agreement], the judge shall so state in *open court* at the time the agreement is stated." (Emphasis added.) Ill. S. Ct. R. 402(d)(2) (eff. July 1, 1997). If no plea agreement exists or the judge has not accepted the agreement, "the judge shall inform the defendant in *open court* at the time the agreement is stated as required by paragraph (b) of this rule that the court is not bound by the plea agreement, and that if the defendant persists in his or her plea the disposition may be different from that contemplated by the plea agreement." (Emphasis added.) Ill. S. Ct. R. 402(d)(3) (eff. July 1, 1997).

¶ 25 Finally, "the proceedings required by this rule to be in *open court* shall be taken verbatim, and upon order of the trial court transcribed, filed, and made a part of the common law record." (Emphasis added.) Ill. S. Ct. R. 402(e) (eff. July 1, 1997). This passage would indicate

that requiring proceedings to be held in open court is meaningfully different from requiring them to be recorded. Thus, having a court reporter present during defendant's guilty plea proceedings held in chambers did not itself negate the failure to hold those proceedings in open court.

¶ 26 Here, the trial court did not comply with Rule 402's numerous provisions requiring proceedings to occur in open court. Consequently, we reverse the trial court's denial of defendant's post-plea motions and remand for the trial court to permit defendant to withdraw his guilty plea. In light of this error, we need not consider defendant's contentions asking that he be allowed to withdraw his plea. Specifically, our determination renders moot defendant's assertions on direct appeal that (1) the trial court failed to admonish him regarding his MSR term; (2) the court failed to investigate his *pro se* post-plea claim that Greco was ineffective; and (3) Greco's deficient Rule 604(d) certificate requires remand. Our determination also renders it unnecessary to address defendant's claim that (4) the trial court improperly denied him postconviction relief by crediting Greco's testimony over his own.

¶ 27 Finally, defendant asserts that the order of protection failed to comply with statute because the State filed no petition seeking the order (750 ILCS 60/202(a)(3)(ii) (West 2002)) and the court made no findings upon issuing the order (750 ILCS 60/214(c)(3) (West 2002)). Initially, the State erroneously represents that our aforementioned 2013 order held "there was no infirmity in the order of protection entered against petitioner even though there was no written petition and no judicial findings made by the court." On the contrary, we held only that any error would not render the judgment void, as was necessary to obtain collateral relief. See also *People v. Dolis*, 2013 IL App (1st) 120774-U. On direct appeal, however, defendant need only show that the order was erroneous.

¶ 28 In any event, here, the order of protection was entered as a condition of defendant's sentence. 730 ILCS 5/5-7-1(f) (West 2002). In light of our determination that defendant must be permitted to withdraw his guilty plea, and its accompanying sentence, we find it appropriate to vacate the order of protection as well. Furthermore, given that the order was to expire two years after defendant's release from prison, this contention may very soon be moot. *People v. Shelton*, 401 Ill. App. 3d 564, 582 (2010) (stating that an issue may be moot where it is not possible to grant effective relief).

¶ 29 For the foregoing reasons, we reverse and remand for further proceedings consistent with this order. We also vacate the order of protection entered in this case. Given the procedural anomalies that have occurred up to this point, we encourage the parties and the trial court to ensure that any further proceedings adhere to our supreme court's rules and Illinois statutes.

¶ 30 Reversed and remanded; order vacated.