2019 IL App (2d) 160552-U
No. 2-16-0552
Order filed March 21, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. MIGUEL GOMEZ, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of McHenry County. No. 15-CF-278 Honorable Sharon L. Prather, Judge, Presiding.

PRESIDING JUSTICE BIRKETT delivered the judgment of the court.
Justices McLaren and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court did not commit plain error by improperly admonishing defendant about the applicable MSR term: defendant was not prejudiced, as the court properly admonished him at other times and defendant did not seek to withdraw his stipulation and (2) the trial court properly denied defendant's request to represent himself, which was untimely and equivocal, and it did not err by failing to hold a *Krankel* hearing, as defendant did not clearly assert a claim of ineffective assistance.

¶ 2 After stipulating to the State's evidence, defendant, Miguel Gomez, was convicted of two counts of criminal sexual assault (720 ILCS 5/11-1.20(a)(1) (West 2014)) and one count of grooming (id. § 11-25(a)). The court sentenced him to consecutive prison terms totaling 13

years, followed by mandatory supervised release (MSR) of three years to life. Defendant appeals, contending that (1) we should vacate his stipulation where the MSR term was longer than that about which he was admonished and (2) where, prior to sentencing, defendant expressed his dissatisfaction with his appointed attorney and a desire to represent himself at sentencing, the court should have either granted his request for self-representation or conducted a *Krankel* hearing. We affirm.

¶ 3 I. BACKGROUND

¶ 4 When defendant was arraigned, the court informed him that he was charged with nine Class 1 felonies, each carrying an MSR term of three years to life. At a March 14, 2016, hearing, defense counsel, Richard Behof, told the court that defendant was ready for trial, but might "have a stipulation to the State's witness's testimony" on counts I, II, and VII of the indictment. The court admonished defendant that counts I and II were Class 1 felony charges of criminal sexual assault, which carried a sentencing range of 4 to 15 years and "two years mandatory supervised release." Count VII alleged grooming, a Class 4 felony with a sentencing range of 1 to 4 years, followed by 1 year of MSR.

¶ 5 The court further informed defendant that, by stipulating that the facts were sufficient for the court to find him guilty, he was waiving his right to trial, to confront the witnesses against him, to present witnesses of his own, and to have his guilt proved beyond a reasonable doubt. Defendant said that he understood. Defendant denied that anyone had forced him to enter into the stipulation or promised him anything in return for doing so. There was no agreement about the sentence.

¶ 6 By way of a factual basis, the prosecutor stated that, with respect to count I, defendant committed an act of sexual penetration by, through the use of force, placing his finger in the

vagina of M.T. As to count II, defendant committed an act of sexual penetration by, through the use of force, placing his penis in M.T.'s vagina. As to count VII, defendant knowingly used a cellular phone to attempt to seduce, solicit, lure, or entice M.T. to engage in unlawful sexual conduct by sending her pornographic depictions.

¶ 7 Behof stated that defendant did "not agree with that rendition." However, "he would stipulate if the State's witnesses were called, that they would testify consistent with what [the prosecutor] just outlined for the Court, and that would be enough for the Court to find [defendant] guilty." The court found that the State had presented sufficient proof for it to find defendant guilty of the charges. The court thus ordered a presentence investigation report.

¶ 8 On May 12, 2016, Behof stated that defendant wished to address the court personally. Defendant, through an interpreter, said, "Your Honor, I just want to tell you that one of those two or three charge [*sic*] that I'm getting accused, it's not true. I never raped anyone." Defendant continued, apparently on his own, "And I never had sex with anyone either. The medical results prove that—what I'm saying right now."

¶ 9 Defendant agreed that he had stipulated to how the State's witnesses would have testified. However, he continued:

> "Your Honor, the only thing I want to tell you that we can continue this trial. But I just want to tell you that I don't want to continue having more hearings and cause more damages to the family of the victim. I know I'm going to prison. But I just want to know that the family knows the truth that I did not have sex with anyone.
>
> * * *
>
> I always tell Mr. Behof from the beginning I got arrested, all right, I know I going to go to prison for multiple years. Doesn't matter. All right. I said in the beginning, I tell him,

I just want to know the truth. And (Unintelligible) medical results to my aunt, to my uncle cause so that they can know the truth. I never rape her. I never have sex with her."

¶ 10 The prosecutor stated that, he had shown the victim and her family test results showing that defendant's DNA was found on a vaginal swab from the victim. On the prosecutor's motion, the court set the matter for sentencing on June 24.

¶ 11 On that date, Behof told the court that defendant wanted to conduct the sentencing hearing himself. In response to the court's question, defendant said that he had learned about sentencing hearings "in Wisconsin when I used to go to court a lot of times." Defendant understood that he was "going to be sentenced today with the false charges, and I'm not going to suggest anything out of that. The State's Attorney is using two false charges against me."

¶ 12 The court again reminded defendant that he had already stipulated to facts sufficient for the court to find him guilty. There followed a lengthy colloquy, which is, to say the least, difficult to summarize. We include the relevant portions *verbatim*.

"THE DEFENDANT: All right. I would like to proceed on my own.

THE COURT: I don't think you know how to proceed, Mr. Gomez.

THE DEFENDANT: So how am I—What am I supposed to do when have somebody representing me and they never suggest anything, but let the State use the false charges? How is that possible?

THE COURT: Whether the charges are false or not, at this point in the proceedings it doesn't matter.

THE DEFENDANT: It doesn't matter then if I have him or not.

THE COURT: It does because ***

THE DEFENDANT: No, it's not, because it's my life, and he never did anything. He just set me up."

¶ 13 The court explained that, by proceeding without legal representation, defendant would only get himself "into a deeper hole." Defendant answered:

"THE DEFENDANT: I understand that, and I been aware of that, too, and the only thing I'm asking [Y]our Honor—I know I've been—Anything I have been asking to [Y]our Honor, I have been—I never have been approved for any motions that I have been asked.

The only thing I want to ask you is to let me say a couple words to my aunt and my uncle. That's all that matters. From here on, it doesn't matter what happens."

¶ 14 The court assured defendant that he would have an opportunity to speak during the sentencing hearing, but he continued:

"That's all I was going to ask, to speak to them—to speak to them and let them know exactly the truth, because they don't know the truth. The State is hiding it. They never gave the whole statement of the medical records. That's—If that's legal for the State doing that, it's—

THE COURT: Mr. Gomez, they have DNA evidence.

THE DEFENDANT: Yeah, but the DNA—The DNA, they can really get it from different ways. All right. I'm not sure there's just one way to get DNA. The medical records show opposite—totally opposite.

THE COURT: Mr. Gomez, if you think these charges are false—

THE DEFENDANT: A hundred percent.

THE COURT: Then why did you agree to stipulate to the facts?"

¶ 15 In response, defendant asserted that Behof "never told me what charges I was stipulating" to. The court reminded defendant that it had reviewed the charges prior to the stipulation, to which defendant responded, "It was too late for me because I was already accepting it, and I was already signing the paperwork with Mr. Behof."

¶ 16 The exchange continued:

"THE COURT: Do you want to withdraw the stipulation and go to trial, Mr. Gomez?

THE DEFENDANT: Your Honor, that's 14 months I've been in custody on false charges. I'll take—

THE COURT: No, no. If you want to stand there and tell me these charges are false, that Mr. Behof forced you to do what you are going to do, I am not proceeding. The stipulation is withdrawn.

THE DEFENDANT: Your Honor—

THE COURT: Do you want to set the case for trial?

THE DEFENDANT: —I would like to finish this today.

THE COURT: No. You are telling me that you are not guilty, that they're false charges, that the State is conspiring against you, that you are doing this against your will.

THE DEFENDANT: I never said I'm not guilty. I only—I only ask—

THE COURT: You just told me they're false.

THE DEFENDANT: They are false. I only ask for the opportunity to say a word to my uncle and my aunt explaining the truth, and then send me to DOC [(Department of Corrections)] or whatever, for how much time you want. If you want to send me to life in DOC, I take lifetime right now."

¶ 17 After some further interchange along the same lines, Behof asked that a special public defender (SPD) be appointed. The court asked the prosecutor for his input, and the prosecutor responded as follows:

> "Judge, my input is that on the date of the stipulation in this matter, there was a knowing, voluntary, and complete stipulation to three of the counts in this case.
>
> I feel like this defendant is trying to derail a perfectly good stipulation to the facts and a perfectly valid sentencing hearing here today, further damaging the victim, further damaging—making a mockery of the court system right now, and delaying what the State believes is the inevitable in this case."

¶ 18 The court responded, "I don't disagree with you at all, Mr. Gibbons. I believe that's what he's trying to do as well. He did freely and voluntarily stipulate to the facts at the time that this stipulation was entered."

¶ 19 Defendant persisted in wanting to be sentenced immediately, stating that he only wanted to talk to "them." Behof opined that defendant "doesn't understand or doesn't want to understand *** what the legal definition of rape is."

¶ 20 The sentencing hearing proceeded, with Behof still representing defendant. At the State's request, defendant was admonished that the MSR term would be three years to life. The court also advised defendant that the sentences on counts I and II would be served at 85 percent. Defendant did not seek to withdraw his stipulation. Defendant was allowed to speak, and he directed his comments to his aunt and uncle. He denied having sex with their daughter. He said that the State had shown his aunt and uncle the DNA results that were best for its case, but had not shown them the "medical results." The court commented that defendant "wouldn't know the meaning of the truth if it bit [him] on the face."

¶ 21 Following the hearing, the court sentenced defendant to consecutive prison terms of six years, six years, and one year. The court ordered defendant to serve three-years-to-life MSR terms on the first two counts and a one-year term on the remaining count. The court admonished defendant that, in order to appeal, he would first have to file a motion to vacate the judgment and withdraw the stipulation.

¶ 22 Defendant attempted to file a letter with the circuit clerk stating that he wanted to appeal his convictions "on grounds of ineffective assistance of counsel and [perjury] of a key witness during [the] trial." Behof filed a motion to reconsider the sentence and a certificate under Illinois Supreme Court Rule 604(d) (eff. Mar. 8, 2016). The court denied that motion on July 28, 2016, and a notice of appeal was filed the next day.

¶ 23 II. ANALYSIS

¶ 24 Defendant first contends that he should be allowed to withdraw the stipulation because the MSR term the court imposed was much greater than that about which the court admonished him before accepting the stipulation. The parties agree that the stipulation here was the functional equivalent of a guilty plea. See Ill. S. Ct. R. 402(a) (eff. July 1, 2012). Due process requires that every defendant who enters a guilty plea be fully admonished of the consequences of the plea, including the minimum and maximum sentences available and the applicable MSR term. *People v. Whitfield*, 217 Ill. 2d 177, 188 (2005); *People v. Wills*, 61 Ill. 2d 105, 109 (1975).

¶ 25 Defendant acknowledges that he forfeited the issue by not raising it in a postjudgment motion (see Ill. S. Ct. R. 605(b)(6) (eff. Oct. 1, 2001)), but contends that the improper admonishments were plain error. Defendant cites *Whitfield* and *People v. Davi*s, 145 Ill. 2d 240

(1991), for the proposition that faulty Rule 402(a) admonishments may constitute plain error. However, those cases are distinguishable.

¶ 26 In *Davis*, the defendant was admonished that he was eligible for probation when, due to his criminal record, he was not. The defendant was also under the mistaken impression that he was eligible for treatment pursuant to Treatment Alternatives to Street Crimes (TASC). The court held that the defendant's mistaken belief that he was eligible for TASC, coupled with the court's incorrect admonishments that led him to believe he was eligible for probation, amounted to plain error so that the defendant should have been able to withdraw his plea. Davis, 145 Ill. 2d at 251.

¶ 27 In *Whitfield*, the defendant, who entered a fully-negotiated plea, was not admonished at all about an MSR term. The supreme court first rejected the State's argument that the defendant had forfeited the claim by failing to raise it in a postplea motion. The court then held that Rule 402 requires that a defendant be fully admonished of the consequences of his plea and, because the defendant was not so admonished, "it would be incongruous to hold that defendant forfeited the right to bring a postconviction claim because he did not object to the circuit court's failure to admonish him." *Whitfield*, 217 Ill. 2d at 188. The court went on to hold that, because a plea bargain is essentially a contract, unilaterally adding an MSR term to the end of his sentence would deprive the defendant of the benefit of his bargain. *Id.* at 190. Because the MSR term was mandatory and could not simply be disregarded, the court reduced the defendant's prison term by the length of the MSR term. *Id.* at 203-04.

¶ 28 In *Davis* and *Whitfield*, the defendants never received the correct admonishments until the time to withdraw their pleas had passed. Thus, they could not have raised the issue sooner.

Here, by contrast, the court did properly admonish defendant at arraignment and again prior to sentencing, yet he still did not seek to withdraw his stipulation. Thus, the issue is forfeited.

¶ 29 We note that the fact that defendant was properly admonished twice was not included in defendant's brief. Illinois Supreme Court Rule 341(h)(6) (eff. Jan. 1, 2016) requires an appellant's brief to contain "the facts necessary to an understanding of the case." Given the importance of these facts to defendant's contentions on appeal, this information should have been included in the fact statement. See *Burmac Metal Finishing Co. v. West Bend Mutual Insurance Co.*, 356 Ill. App. 3d 471, 477-78 (2005) (admonishing appellants' counsel for failing to comply with Rule 341(h)(6)).

¶ 30 In any event, the failure to admonish a defendant properly does not automatically require vacating the plea or stipulation. *Davis*, 145 Ill. 2d at 250. Whether such relief is necessary "depends on whether real justice has been denied or whether defendant has been prejudiced by the inadequate admonishment." *Id.* In *People v. Williams*, 2012 IL App (2d) 110559, this court held that the defendant was not entitled to withdraw his plea despite being inaccurately admonished where he did not allege that he would not have pleaded guilty absent the faulty admonishments. *Id.* ¶ 18 (citing *Davis*, 145 Ill. 2d at 250). Thus, because the defendant did not allege that he would have done anything differently had he been properly admonished, he could not establish prejudice.

¶ 31 *Williams* controls here. Defendant does not allege that he would not have entered the stipulation had he been contemporaneously admonished that the criminal-sexual-assault charges carried MSR terms of three years to life rather than two years. See 730 ILCS 5/5-8-1(d)(4) (West 2014). Thus, he cannot claim that he was prejudiced by the improper admonishments.

¶ 32 Defendant contends that, because an indeterminate MSR term may be terminated only by the Prisoner Review Board and a defendant seeking discharge must pay out-of-pocket for a sex-offender evaluation, his MSR term is effectively a life sentence. See *People v. Rinehart*, 2012 IL 111719, ¶¶ 27-28; 730 ILCS 5/3-14-2.5 (West 2014). Defendant further argues that *Davis* created a "disjunctive" standard under which a plea (or stipulation) may be withdrawn where the defendant is prejudiced *or* real justice has been denied. See *Davis*, 145 Ill. 2d at 250. He contends that failing to admonish him that he would be subject to a potential life term of imprisonment was a denial of real justice.

¶ 33 The State responds that the Prisoner Review Board is a state agency subject to constitutional standards. Thus, the State contends, defendant's concern that the board might arbitrarily refuse to terminate his MSR is purely speculative, as is his concern that the costs associated with the process would be prohibitive.

¶ 34 The State further argues that there is no substantive difference between prejudice and a denial of real justice. As the State notes, the reference to "real justice" in *Davis* comes from *People v. Dudley*, 58 Ill. 2d 57, 60-61 (1974), where, although the terms of a plea agreement had not been stated on the record, the defendant did not allege that the plea was involuntary or that the agreement had not been honored. The court noted, " 'It is not the policy of this court to reverse a judgment of conviction merely because error was committed unless it appears that real justice had been denied ***.' " *Id.* at 61 (quoting *People v. Morehead*, 45 Ill. 2d 326, 332 (1970)). Thus, according to the State, the supreme court intended "denial of real justice" as simply a synonym for prejudice.

¶ 35 We agree. The mere possibility that defendant might never be released from MSR despite compliance with the necessary conditions does not establish that defendant was

prejudiced or denied real justice. See *People v. Tucek*, 2019 IL App (2d) 160788, ¶ 36 (speculative allegations that the defendant might not be able to obtain his release in the future did not state claim that counsel was ineffective for failing to inform the defendant about the possibility of a lifetime MSR term, noting that the ability to obtain release was largely within the defendant's control). Moreover, defendant cites no authority for the proposition that "denial of real justice" is a concept distinct from and more severe than prejudice.

¶ 36 Defendant next contends that the trial court erred by failing to honor his request to represent himself at the sentencing hearing. A defendant has a constitutional right to represent himself. *Faretta v. California*, 422 U.S. 806, 812-18 (1975). Indeed, the right to self-representation is as " 'basic and fundamental as his right to be represented by counsel.' " *People v. Silagy*, 101 Ill. 2d 147, 179 (1984) (quoting *People v. Nelson*, 47 Ill. 2d 570, 574 (1971)).

¶ 37 However, a waiver of counsel must be clear and unequivocal. *People v. Burton*, 184 Ill. 2d 1, 21-22 (1998). "A defendant waives his right to self-representation unless he 'articulately and unmistakably demands to proceed *pro se*.' " *Id.* at 22 (quoting *United States v. Weisz*, 718 F.2d 413, 426 (D.C. Cir. 1983)). This is so because anything short of an express request to proceed *pro se* " 'is an effort to sandbag the court and the opposition, to seek an acquittal with an ace up the sleeve to be whipped out in the event of conviction.' " *Id.* (quoting *Cain v. Peters*, 972 F.2d 748, 750 (7th Cir. 1992)). The timing of a defendant's request is also significant; once the proceedings have begun, the trial judge has discretion to deny a defendant's request to represent himself. *Id.* at 24.

¶ 38 Because defendant's request came immediately prior to the sentencing hearing, the trial court had discretion to deny it. *Id.* The court did not abuse its discretion where defendant's request came during a lengthy and often bizarre diatribe in which he alternately insisted that the

charges against him were false and stood by his stipulation, insisting that he wanted to proceed immediately to sentencing. Many of defendant's remarks were directed toward his aunt and uncle. At one point, he told the court, "The only thing I want to ask you is to let me say a couple words to my aunt and my uncle. That's all that matters." After the court assured him that he would have an opportunity to do so, defendant never renewed his request to represent himself.

¶ 39 In *Burton*, the court found that the defendant's request for self-representation was intended primarily to gain access to certain records in defense counsel's possession. *Id.* Similarly, defendant's request here appears to have been intended to ensure that he would have an opportunity to address his aunt and uncle, which he was allowed to do.

¶ 40 We note that, even under the stricter standard applicable to requests before trial, our opinion would not change. In light of defendant's confusing, often self-contradictory remarks, we cannot say that he clearly and unequivocally requested to represent himself. The court's agreement with the prosecutor that defendant was trying to "delay[] what the State believes is the inevitable in this case" was amply justified.

¶ 41 Defendant alternatively contends that the court should have conducted a *Krankel* hearing to investigate his complaints about defense counsel. When a defendant raises a *pro se* posttrial claim of ineffective assistance of trial counsel, the trial court must conduct some type of inquiry into the underlying factual basis, if any, of the claim. *People v. Ayres*, 2017 IL 120071, ¶ 11.

¶ 42 The court may conduct this inquiry by: (1) questioning trial counsel about the facts and circumstances surrounding the defendant's allegations; (2) requesting more specific information from the defendant; or (3) relying on its own knowledge of counsel's performance at trial and any insufficiency of the defendant's allegations on their face. *People v. Skillom*, 2017 IL App (2d) 150681, ¶ 25. If, from the preliminary investigation, the court concludes that the claim

lacks merit or pertains only to trial strategy, the court should deny the claim. *Id.* But if the allegations show possible neglect of the case, the court should appoint new counsel to argue the claim. *Id.*

¶ 43 This procedure allows the trial court to decide whether to appoint independent counsel to argue the defendant's claim. *Ayres*, 2017 IL 120071, ¶ 11. However, while a defendant need not specifically identify ways in which counsel was ineffective, he or she must nevertheless make a clear claim asserting ineffective assistance of counsel. *Id.* ¶ 18.

¶ 44 As noted, defendant's comments were extremely disorganized and often self-contradictory. On appeal, he points to nothing in those remarks that can be taken as a definitive assertion that counsel was ineffective in the course of the proceedings leading up to the stipulation.

¶ 45 The court did attempt to pin down the precise nature of defendant's complaints but was unsuccessful. The court went so far as to offer to vacate the stipulation and set the case for trial, but defendant repeatedly declined the offer. The court would thus have been justified in concluding that defendant had no complaints about his attorney's representation that would have warranted withdrawing the stipulation. And this was the only relief available.

¶ 46 We note that, although the trial court erred in requesting the State's "input" during its discussion with defendant (see *Skillom*, 2017 IL App (2d) 150681, ¶¶ 26-28), the error was harmless as defendant made clear that his only concern was that he be allowed to address his aunt and uncle, which he was allowed to do.

¶ 47 III. CONCLUSION

¶ 48 The judgment of the circuit court of McHenry County is affirmed. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 49 Affirmed.