NO. 4-10-0153

Filed 6/1/11

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. DENNIS SCOTT McMILLAN, Defendant-Appellant.	))))))))	Appeal from Circuit Court of McLean County No. 08CF995 Honorable Scott Drazewski, Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Steigmann and McCullough concurred in the judgment.

ORDER

Held: If, after pleading guilty, the defendant files no motion to withdraw the guilty plea, Illinois Supreme Court Rule 604(d) (eff. July 1, 2006) bars the defendant from challenging the voluntariness of the plea, or any other aspect of the plea, on direct appeal. The remedy, if any, is in postconviction proceedings.

Psychological illness, presented by way of explanation for a crime, can be both mitigating in the sense of reducing blameworthiness and aggravating in the sense of leading to a finding of future dangerousness, and it is the trial court's prerogative to decide what weight to assign to these two aspects of the illness.

Apprendi-based sentencing claims cannot be heard on appeal from a guilty plea, because a guilty plea waives the right to a trial by jury and waives all nonjurisdictional errors that occurred before the plea.

After defendant, Dennis Scott McMillan, entered an open plea of guilty to first-degree murder (720 ILCS 5/9-1(a)(1) (West 2008)), the trial court sentenced him to 53 years' imprisonment. Defendant appeals. The office of the State Appellate Defender

(OSAD) has moved for permission to withdraw from representing him because, in the opinion of OSAD, any argument made in support of this appeal would be frivolous. See *Anders v. California*, 386 U.S. 738 (1967); *People v. Jones*, 38 Ill. 2d 384 (1967). We notified defendant of his right to file additional points and authorities, but he has not done so. We have carefully reviewed the record, however, and we agree with OSAD's assessment of the merits of this appeal. Therefore, we grant OSAD's motion to withdraw, and we affirm the trial court's judgment.

I. BACKGROUND

On September 10, 2008, a grand jury indicted defendant for six counts of first-degree murder (720 ILCS 5/9-1(a)(1), (a)(2) (West 2008)) and one count of aggravated battery (720 ILCS 5/12-4(b)(1) (West 2008)). The murder counts, counts I through VI, alleged that on August 28, 2008, defendant stabbed Angel Neal to death. According to the first three counts, an aggravating factor made him eligible for the death penalty: at the time of the stabbing, Neal was the subject of an order of protection issued against him. See 720 ILCS 5/9-1(b)(19) (West 2008). Counts IV through VI notified defendant that (if not sentenced to death) he could be sentenced to life imprisonment if the trier of fact found, beyond a reasonable doubt, that "the murder was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty." See 730 ILCS 5/5-8-1(a)(1)(b) (West 2008). The seventh count charged defendant with committing aggravated battery (720 ILCS 5/12-4(b)(1) (West 2008)), also on August 28, 2008, by stabbing "A.T."

On January 5, 2009, the State filed a notice of intent to decline the death penalty. See Ill. S. Ct. R. 416(c) (eff. Mar. 1, 2001).

In a hearing on July 16, 2009, an assistant public defender, Ron Lewis,

informed the trial court that defendant wished to change his not-guilty plea to count III to an open plea of guilty. The trial court admonished defendant, explaining to him, among other points, that while the penalty for murder normally was not less than 20 years' imprisonment and not more than 60 years' imprisonment, he could receive an extended term of up to 100 years' imprisonment, depending on the evidence that the State presented in the sentencing hearing. The court confirmed with defendant that he understood what an open plea was and that no promises had been made to him in return for his guilty plea. Then, after receiving a factual basis, the court found as follows: "[T]he court will find that the defendant understands the nature of the charge pending against him, the possible penalties, as well as his legal rights. I'll further find that he's knowingly entering into a plea of guilty to the offense of first degree murder, and that a factual basis exists to support his plea of guilty to that offense." Accordingly, the court entered a finding of guilt on count III.

In the sentencing hearing on September 17, 2009, the State presented evidence that on August 28, 2008, even though defendant had been served with an order of protection forbidding him to have any contact with Angel Neal and even though he was on probation for the felonious domestic battery of Neal (a subsequent offense), he stabbed her with a knife 57 times, and put out a cigarette butt in her right eye socket. Jealousy, apparently, was a major motive: Angel had received a phone call from a man, and defendant did not believe her when she told him it was about a job interview. During the stabbing, Neal's teenage son, Anthony Troyer, tried to pull defendant off his mother, and defendant swung back at Anthony with the knife, inflicting a deep wound in his chest. Neal told Anthony to go call the police, and he went to the apartment next door and did so.

When the police arrived, they found defendant sitting on the steps of the

apartment building. His clothes were bloody, he smelled of alcohol, and he readily admitted he was the one who had done the stabbing. As Neal's body was being wheeled away on a stretcher, he nodded his head with approval and said, "That's what I'm talking about" and "She won't be sucking dick any more, you can bet on that." A neighbor, Beretta Sims, called down from a window of his upstairs apartment, "You didn't hurt her, did you?" "So what if I did?" defendant replied.

Later on, though, when defendant was in the hospital, being treated for a minor laceration to the palm of his hand, his conscience seemed to revive. He told the police he was wrong and that he should have left Neal's apartment the moment he got angry. He recounted the self-restraint he had recently shown in the alcohol treatment program at Chestnut Health Systems: he could have "snapped" there as well, but he had chosen not to snap. He expressed remorse for losing his self-control in Neal's apartment that evening.

In the hospital, defendant also confessed to killing a woman in Michigan. The record does not seem to reveal when this happened, who this woman was, or whether he had any relationship with her. He simply told the police that he ran over a woman and that when he looked in his rear-view mirror, she still was alive, so he threw the vehicle into reverse and ran over her again. Neal had mentioned to the upstairs neighbor, Sims, that defendant told her he had killed someone, but because Neal did not give Sims any details, it is unclear whether this person was the woman in Michigan.

Defendant had a history of violence toward women. In addition to slapping Neal so hard in the face on December 13, 2006, that he cut the palm of his hand on her teeth (the basis of his felony conviction of domestic battery), he also beat Diane Cephas,

when he was married to her. The police in Alabama had a photograph of Cephas with a bruise on her forehead and two swollen eyes.

By way of explanation for these violent episodes, defendant presented evidence that he suffered from longstanding psychological ailments. A psychiatrist, Terry Killian, testified that defendant suffered from four psychological conditions: (1) post-traumatic stress syndrome, from a horrific childhood, in which his mother habitually beat him and her boyfriends sexually abused him; (2) bipolar mood disorder with mild psychotic symptoms; (3) alcohol dependence; and (4) antisocial personality disorder. Killian denied, however, that defendant's psychological disorders were so severe as to render him substantially incapable of appreciating the criminality of his conduct. Instead of taking medication, defendant had been drinking to control his chaotic, racing thoughts, which, he told Killian, were like a carousel spinning at warp speed. Killian found that when the alcohol was replaced with Depakote, defendant was utterly changed: instead of being edgy and threatening, he was subdued, polite, and rational.

Treatment for alcoholism was not enough, Killian explained. Defendant also needed psychological treatment and medicine. The reason why defendant did poorly in the rehabilitative program at Chestnut Health Systems, shortly before the murder, was that the staff tried to treat his alcoholism without treating the underlying psychological symptoms that drove the alcoholism. Defendant had been using alcohol as medicine for the manic symptoms of his bipolar disorder. Although it was impossible to say whether refraining from alcohol and taking Depakote would have prevented the murder, Killian could say, from personal observation, that when defendant stopped drinking and started taking Depakote, it revolutionized his temperament.

On the other hand, the State called another psychiatrist, Robert S. Hamilton, who was skeptical that Depakote would cure defendant of his violent impulses. Antisocial personality disorder, Hamilton opined, was not amenable to pharmacological treatment. He testified: "[S]omeone that's been chronically violent like that, and as Dr. Killian says, antisocial personality disorder is not particularly respondent to treatment, particularly medications." Hamilton thought that defendant's "presentation [was] generally more consistent with criminal population than with the mental health population that can be assisted by medications."

Not everyone in the sentencing hearing associated defendant with the "criminal population." Defendant called two witnesses, Minnie and James Farris, who testified they had known defendant since he was a child and that they had observed no violent tendencies in him. On the contrary, they perceived him as a thoughtful, helpful, industrious person. For example, Minnie testified that defendant had been employed at Meijer and that, of his own accord, he had done her and her fellow parishioners the favor of painting the walls of their church. James testified that defendant was generous about helping out around the house--replacing a broken spring on his garage door, for instance.

Defendant made a statement in allocution, in which he remarked, first of all, that he was "a broken man" and that he had "been broken the majority of [his] life." He then stated he was "profoundly remorseful for what [he had] done, causing Angel's death, and harming her son and the void it created in the souls and hearts of her family members." While acknowledging that nothing he said could ever "fill that void for them," he emphasized that he had "deep regret that any of this ever happened," and he requested the trial court to have mercy on him.

The trial court stated it had considered the testimony of the witnesses, the presentence investigation report, Killian's reports, the victim-impact statements, the recommendations of counsel, defendant's statement in allocution, and the statutory factors in aggravation and mitigation, and in the court's view, the sentencing range for defendant included life imprisonment. According to the court, life imprisonment was an option because of two aggravating factors.

First, the trial court found that the State had proved, beyond a reasonable doubt, that at the time defendant murdered Neal, she was the subject of an order of protection, which was served on defendant in open court on June 25, 2008, in case No. 08-OP-118. See 730 ILCS 5/5-8-1(a)(1)(b) (West 2008); 720 ILCS 5/9-1(b)(19) (West 2008).

Second, the trial court found defendant to be eligible for an extended term of life imprisonment because the murder was "accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty." 730 ILCS 5/5-8-1(a)(1)(b) (West 2008).

On the other hand, the trial court found some evidence of "substantial grounds tending to excuse or justify the Defendant's criminal conduct, though failing to establish a defense." In this context, the court appeared to be referring to defendant's psychological impairments.

The trial court characterized these impairments, however, as "a double-edged sword" in that they could be aggravating as well as mitigating. The court explained to defendant:

> "The information about a Defendant's mental or psychological, excuse me, impairment may be viewed from the Court's perspective and the State as either mitigating or aggravating

> factors, depending upon whether the trier of fact finds that it evokes compassion or demonstrates possible future dangerousness. And what the Courts are saying there, Mr. McMillan, is it's a double-edged sword. I am giving you the benefit of both sides of the sword, but what I'm telling you is that it isn't just one that can be utilized in defense, that it also is one that the State has the ability to argue, and under the facts of this cause, effectively, argue that the Court should also consider that as a factor in aggravation."

Thus, for purposes of mitigation, the court acknowledged that defendant struggled with psychological infirmities that made it difficult for him to control his impulses--more difficult than for people who were not so afflicted--but for purposes of aggravation, the court recognized the resulting danger to society.

Also, for purposes of aggravation, the trial court took into consideration that for several years, instead of taking prescription medication, defendant self-medicated with alcohol, a regimen that helped to bring him to the point where he was capable of committing murder. The court remarked:

> "Now, it's true that at the time that Mr. McMillan murdered Miss Neal, that he was suffering from some chronic untreated psychiatric symptoms. And while he had taken some recent affirmative action to address his alcoholism and made an attempt to obtain medications for his mental health related considerations, the facts are, Mr. McMillan, that you didn't take

> full responsibility for yourself as it would relate both to the period of time that you were in Chestnut residential, that being the information contained within the reports as to what effort and or lack thereof that you expended while you were there, and also that you had been self medicating, that being through primarily the large ingestion of alcohol and then not having taken any medications for your mental health concerns for some period of time, approximately four years before this incident."

Hence, the court acknowledged that shortly before murdering Neal, defendant sought help for his alcoholism and defendant expressed a desire to get back on medication. But being untreated and self-medicating with alcohol were not things that suddenly happened to defendant; he had been going without treatment and medication for years.

And even untreated, the trial court noted, defendant was capable of choosing right from wrong--but he made one wrong choice after another. He chose to live with Neal, despite the order of protection. He chose to drink to excess the night of the murder. He chose to remain in Neal's apartment when he got angry. He chose to get a knife. He chose to stab Neal scores of times and to embed a cigarette butt in her right eye.

The trial court concluded: "You are a danger to others, Mr. McMillan, particularly when left to your own device, self-medicating with alcohol, not taking medications, with your history of violence, particularly against women. The repeated stab wounds reflect the likelihood of rehabilitation on your part as virtually non-existent." Consequently, the court imposed a sentence of 53 years' imprisonment, 100% of which

defendant would have to serve, as the court had explained to him in the guilty-plea hearing.

Although defendant filed no motion to withdraw his guilty plea, he filed a motion for reconsideration of the sentence, on October 16, 2009. Defendant requested the court to reduce his sentence for six reasons, which he listed in paragraphs 3 through 8 of his motion:

> "3. In light of the evidence presented to the Court, the sentence imposed was excessive.
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> 4. That in its ruling, the court stated Mr. McMillan did not 'take full responsibility for himself' during alcohol treatment at Chestnut Health Systems. Defendant contends the court improperly weighed this item in light of the evidence presented. Dr. Terry Killian testified that Mr. McMillan's performance at Chestnut's alcohol treatment was undermined by the lack of psychiatric medications during the alcohol treatment period. Defendant asserts that he should not be more severely punished because the proper treatment of his 'co-occurring disorders' was not accomplished through the only resources available to him in the community.
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> 5. That the court erred in considering Mr. McMillan's untreated psychiatric illness as an aggravating factor.
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> 6. The court did not sufficiently weigh Defendant's psychiatric illness as a mitigating factor.
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> 7. The court erred in finding Mr. McMillan eligible for a

'natural life' and/or an 'extended term' sentence, over defense objection. (Defendant incorporates the 'Memorandum of Law in Support of Defendant's Objection to "Natural Life" and "Extended Term" Sentencing,' filed at the sentencing hearing on September 17, 2009). Defendant asserts that 'natural life' and/or 'extended term' eligibility was improperly weighed by the court in rendering the 53 year sentence.

8. In sentencing the defendant, the Court failed to follow Article I, Section II of the Illinois Constitution, which states as follows: All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship."

The memorandum referenced in paragraph 7, above, was one that defendant filed on September 17, 2009, and it argued that under our decision in *People v. Callahan*, 334 Ill. App. 3d 636 (2002), defendant was ineligible for life imprisonment or an extended term because the State had not pleaded the aggravating factors in count III of the indictment, the count to which he had pleaded guilty. Count III said nothing about the brutality or heinousness of the murder, and it mentioned the order of protection only in connection with the death penalty, not in connection with an extended term of imprisonment.

On January 26, 2010, the trial court held a hearing on defendant's motion to reconsider the sentence. After tendering a certificate pursuant to Illinois Supreme Court Rule 604(d) (eff. July 1, 2006), Lewis argued (among other points) that the court had improperly considered defendant's eligibility for an extended-term sentence "in arriving at

the high number of 53 years." The court was unpersuaded by that argument because the court had not imposed a sentence of life imprisonment or an extended-term sentence on defendant. The court reasoned: "I think that issue is moot, meaning that even though the court found the defendant eligible for natural life sentence and/or extended term, the fact that I did not impose either stretches credibility from my perspective to argue that even though the court didn't impose such a sentence, that it played a factor in imposing a sentence within the ordinary statutory range of 20 to 60 years." The court adhered to its view that 53 years' imprisonment was a reasonable sentence under the circumstances, and the court declined to reduce the sentence.

This appeal followed.

II. ANALYSIS

A. The Voluntariness of the Guilty Plea

OSAD states: "[N]o colorable argument can be made that the trial court did not substantially comply with Supreme Court Rule 402 in determining that Dennis McMillan's plea of guilty was knowing and voluntary." We are not so sure about that.

The reason for our ambivalence is that it does not appear, from the transcript of the guilty-plea hearing, that the trial court ever asked defendant if anyone had used force or threats to induce him to plead guilty. If, as in this case, there is no plea agreement, the court "shall determine whether any force or threats or any promises, apart from a plea agreement, were used to obtain the plea." Ill. S. Ct. R. 402(b) (eff. July 1, 1997). Although the court asked defendant, in the guilty-plea hearing, if any promises had been made to him, it does not appear that the court asked him if any force or threats had been brought to bear in an effort to persuade him to plead guilty.

This is not to suggest that defendant's guilty plea necessarily was involuntary. It is just that the record fails to prove the negative, *i.e.*, the absence of the influence of force and threats. The record does not "affirmatively reflect" that instead of being the product of force or threats, defendant's wish to plead guilty was the product of his free will. See *People v. Jones*, 174 Ill. App. 3d 794, 797 (1988) ("A guilty plea, being itself a conviction, involves the waiver of several constitutional rights and, as a result, due process requires the record affirmatively reflect that the plea was intelligent and voluntary.").

In any event, even if defendant wished to challenge the voluntariness of his guilty plea, he could not do so on direct appeal, because in trial court, he filed no motion to withdraw his guilty plea. Illinois Supreme Court Rule 604(d) (eff. July 1, 2006) forbids an appeal from a guilty plea unless the defendant files a motion to withdraw the guilty plea and to vacate the judgment, if the plea is being challenged. Because Rule 604(d) must be obeyed, the remedy would lie in postconviction proceedings--assuming there is a constitutional error to be remedied. See *People v. Wilk*, 124 Ill. 2d 93, 106-07 (1988).

B. "Taking Full Responsibility" for Himself

In his motion to reconsider the sentence, defendant contended that the trial court erred by concluding he had failed to "take full responsibility for [himself]" at Chestnut Health Systems. Defendant cited Killian's testimony that defendant's performance in the alcoholic rehabilitation program at Chestnut was undermined by a lack of psychiatric medications.

When referring to the failure to "take responsibility for himself," however, the trial court meant not only the insufficiency of defendant's efforts in the rehabilitative program at Chestnut but, more generally, his mismanagement of his bipolar disorder

during the approximately four years preceding his admission to Chestnut. The money that defendant spent on alcohol during those years arguably would have been better spent on psychiatric treatment and medicine.

C. Psychological Illness as a Double-Edged Sword

Defendant argued to the trial court that it had erred by considering his untreated psychological illness as an aggravating factor. According to defendant, his psychological illness was solely a mitigating factor, and he insisted that his psychological illness deserved more weight as a mitigating factor than the court had given it.

The supreme court has held, however, that "evidence of a defendant's mental or psychological impairments may not be inherently mitigating, or may not be mitigating enough to overcome the evidence in aggravation." *People v. Thompson*, 222 Ill. 2d 1, 42-43 (2006). For example, in *People v. McNeal*, 175 Ill. 2d 335, 370 (1997), the supreme court used the same metaphor as the trial court in this case, calling the defendant's antisocial personality disorder "a double-edged sword for purposes of mitigation and aggravation" as "not every mental or emotional condition that can be classified as a 'disorder' will necessarily be mitigating." And in *People v. Macri*, 185 Ill. 2d 1, 66 (1998), the supreme court held that the prosecutor could legitimately argue that the defendant's antisocial personality disorder was an aggravating factor. In short, a psychological disorder can reduce a defendant's blameworthiness (on the mitigation side), but at the same time, it can--not necessarily, but can--lead to the conclusion that the defendant continues to pose a significant danger to society (on the aggravation side). *McNeal*, 175 Ill. 2d at 370. Retribution, premised on blameworthiness, is not the court's only concern when deciding on a sentence; the court also must consider the need to protect the public. *People v.*

Hunzicker, 308 Ill. App. 3d 961, 966 (1999).

In short, given defendant's history of violence and the exceptional callousness and brutality of this murder, we do not deem 53 years' imprisonment to be unreasonable. We may not overturn a sentence unless we find an abuse of discretion (*People v. Winningham*, 391 Ill. App. 3d 476, 485 (2009)), and we find no abuse of discretion in this case.

D. Consideration of Defendant's Eligibility for Life Imprisonment

Even if, as defendant argued in the hearing on this motion to reconsider the sentence, the trial court took into account his eligibility for life imprisonment when arriving at the sentence of 53 years' imprisonment, *Callahan* could not serve as authority reversing the sentence. In *Callahan*, 334 Ill. App. 3d at 649, we held that under the Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), "the trial judge's finding that [the] defendant's behavior was exceptionally brutal and indicative of wanton cruelty was an element that should have been charged and submitted to the jury." Nevertheless, *Callahan* is distinguishable in that it involved a jury conviction. See *Callahan*, 334 Ill. App. 3d at 637. The present case, by contrast, involves a guilty plea. That is an important distinction. The supreme court has held that because a guilty plea waives the right to a jury trial and waives all nonjurisdictional errors, "*Apprendi*-based sentencing objections cannot be heard on appeal from a guilty plea." *People v. Jackson*, 199 Ill. 2d 286, 296 (2002). See also *People v. Townsell*, 209 Ill. 2d 543, 545-46, 548 (2004).

III. CONCLUSION

For the foregoing reasons, we grant OSAD's motion for withdrawal, and we affirm the trial court's judgment.

Affirmed.