

No. 124337

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Appellate Court of Illinois, Third Judicial District
)	No. 3-17-0450.
Plaintiff-Appellant,)	
)	There on Appeal from the Circuit Court of the Tenth Judicial Circuit, Tazewell County, Illinois,
v.)	No. 13-CF-613.
)	
PHOUVONE V. SOPHANAVONG,)	The Honorable Michael E. Brandt,
Defendant-Appellee.)	Judge Presiding.

**REPLY BRIEF OF PLAINTIFF-APPELLANT
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Defendant Forfeited His Claim Because He Did not Raise It in the Circuit Court.

Supreme Court Rule 604(d) requires a defendant who has entered a negotiated guilty plea to file a written motion to withdraw his plea and vacate the judgment before an appeal challenging the plea will be heard. Ill. S. Ct. R. 604(d). Any issue not raised in that motion is forfeited. *See id.*; *see also* Peo. Br. 13-14.¹ A straightforward application of this long-established rule necessarily leads to the conclusion that, because defendant did not raise his present claim in his initial or amended motion to withdraw his guilty plea, *see* C75, 95-96, he forfeited it.

This Court has stressed that parties must first raise claims in the circuit court because “[f]ailure to raise claims of error before the trial court denies the court the opportunity to correct the error immediately and grant a new trial if one is warranted, wasting time and judicial resources.” *People v. McLaurin*, 235 Ill. 2d 478, 488 (2009). Moreover, “[w]ithout a post-trial motion limiting the consideration to errors considered significant, the appeal is open-ended. Appellate counsel may comb the record for every semblance of error and raise issues on appeal whether or not trial counsel considered them of any importance.” *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (quoting *People v. Caballero*, 102 Ill. 2d 23, 31-32 (1984)). Accordingly, reviewing courts routinely enforce forfeiture in the context of challenges to guilty pleas

¹ Citations to the People’s appellant brief and defendant’s appellee brief appear as “Peo. Br. __” and “Def. Br. __,” respectively.

where the defendant has failed to raise an argument before the circuit court. *See, e.g., People v. Williams*, 2012 IL App (2d) 110559, ¶ 12 (recognizing forfeiture for failure to raise claim in motion to withdraw plea); *People v. Ahlers*, 402 Ill. App. 3d 726, 732 (4th Dist. 2010) (failure to raise claim in post-plea motion resulted in forfeiture).

Defendant asks this Court to carve out an exception to this rule for claims alleging non-compliance with section 5-3-1 of the Code of Corrections, 730 ILCS 5/5-3-1, pertaining to the requirement that the trial court consider a presentence investigation report (PSI) at sentencing. Although this Court has held that the PSI required by section 5-3-1 cannot be waived except in the manner prescribed by the statute, *see People v. Youngbey*, 82 Ill. 2d 556, 561, 564-65 (1980), forfeiture is distinct from waiver: waiver refers to the “voluntary relinquishment of a known right,” while forfeiture is defined as a “failure to timely comply with procedural requirements,” *People v. Hughes*, 2015 IL 117242, ¶ 37. The distinction is important, because although a forfeited issue can be reviewed upon a demonstration of plain error or ineffective assistance of counsel, a waived issue cannot. *See People v. Townsell*, 209 Ill. 2d 543, 547-48 (2004); *see also United States v. Kopp*, 922 F.3d 337, 341 (7th Cir. 2019).

Youngbey did not immunize a section 5-3-1 claim from ordinary forfeiture principles. There, the defendants purported to waive the presentation of a PSI at sentencing. *Youngbey*, 82 Ill. 2d at 558-59. On

appeal, the defendants argued that they could not waive the PSI and that the trial court lacked authority to accept their waivers. *Id.* at 560. Looking to the legislative history of section 5-3-1, this Court found that the PSI served two purposes: it both benefits a defendant by presenting available mitigating information and apprises the sentencing court of the defendant's criminal history. *Id.* at 564-65. Thus, the Court held the PSI requirement is not a personal right of the defendant and cannot be waived except as provided by the statute. *Id.*

But *Youngbey* said nothing about forfeiture. The People did not raise a forfeiture argument, *see id.* at 560, and the Court did not address the issue. Nor does the Court's reasoning support defendant's contention that his section 5-3-1 claim is not subject to forfeiture. *See* Def. Br. 4. *Youngbey* considered whether section 5-3-1 bestowed upon a criminal defendant a personal right that he could affirmatively waive. 82 Ill. 2d at 564-65. Yet forfeiture, unlike waiver, does not concern the voluntary relinquishment of a right; rather, it is a sanction against a party who failed to follow procedural requirements. *People v. Blair*, 215 Ill. 2d 427, 444 n.2 (2005).

Defendant's reliance on *People v. Evans*, 273 Ill. App. 3d 252 (5th Dist. 1994), and *People v. Bryant*, 2016 IL App (5th) 140334, is misplaced. In *Evans*, the defendant raised a section 5-3-1 claim, arguing that the sentencing court was not fully apprised of his criminal record following his negotiated guilty plea. 273 Ill. App. 3d at 255. The appellate court

“decline[d] to apply the waiver rule by defendant’s acquiescence in the procedure or his failure to raise it in his Supreme Court Rule 604(d) motion to withdraw his guilty plea.” *Id.* at 257. Thus, the appellate court failed to recognize the critical distinction between waiver and forfeiture, making *Evans* unpersuasive.

In *Bryant*, following a section 5-3-1 violation, the parties agreed that the case should be remanded for a hearing to inform the sentencing court of the defendant’s criminal history. 2016 IL App (5th) 140334, ¶ 50. Because the People failed to raise a forfeiture argument, forfeiture was not before the appellate court. *Id.* Accordingly, *Bryant* offers no support for defendant’s argument here that his claim cannot be forfeited.

Defendant also argues that section 5-3-1 claims should not be subject to forfeiture because enforcing a defendant’s forfeiture would prevent the sentencing court from rejecting “unconscionable” negotiated guilty pleas and deny criminal defendants their due process right to fair sentencing. Resp. Br. 8-9. Defendant is incorrect. Although trial courts are required to “exercise care and discernment” in accepting plea agreements, such courts’ primary concern should be whether the agreement is knowing and voluntary, not whether the defendant has made a good deal. *See People v. Evans*, 174 Ill. 2d 320, 325-26 (1996). And in the rare instances where a plea deal is so unjustly disproportionate that it is unconstitutional, enforcement of the forfeiture rule properly places the onus on defendants and their counsel to bring perceived

section 5-3-1 errors to the attention of the circuit court at the time of sentencing or, at the latest, through a motion to withdraw and vacate the guilty plea. In this way, the sentencing court and the parties can promptly cure any deficiencies and avoid the needless expense and delay of an unnecessary appeal.

And even where a defendant has forfeited a claim, he could file a postconviction petition arguing that plea counsel either failed to preserve the error or advised him to accept an unconscionable plea offer. *See, e.g., People v. King*, 192 Ill. 2d 189, 196 (2000) (addressing claim that counsel failed to preserve error); *see also Padilla v. Kentucky*, 559 U.S. 356, 364 (2010) (“Before deciding whether to plead guilty, a defendant is entitled to the effective assistance of competent counsel.”) (internal quotation marks omitted). Or a defendant could overcome the forfeiture — and the courts could address a purportedly unconscionable plea deal — if he established that a plain error had occurred. *See People v. Hillier*, 237 Ill. 2d 539, 545-46 (2010). But defendant here raised neither an ineffective assistance claim nor a plain error argument; thus any such argument would itself be forfeited. *Id.* (failure to raise plain error argument forfeits plain error review); *Elementary Sch. Dist. 159 v. Schiller*, 221 Ill. 2d 130, 144 n.2 (2006) (arguments not raised are forfeited).

In sum, defendant forfeited his section 5-3-1 claim by failing to include it in his initial or amended motion to withdraw his guilty plea. Although a

defendant cannot waive a PSI under *Youngbey*, a defendant *can* procedurally default a claim that the PSI did not conform to section 5-3-1's requirements under the analytically distinct forfeiture doctrine. Enforcing a defendant's forfeiture does not prevent a court from rejecting or remedying an unconscionable plea deal, and it properly places the onus on defendants and their counsel to promptly bring such claims of error to the sentencing court. Moreover, forfeiture may be overcome, where appropriate, through a meritorious claim of ineffective assistance of counsel or a demonstration of plain error.

CONCLUSION

This Court should reverse the judgment of the Illinois Appellate Court,
Third District.

October 29, 2019

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CERTIFICATE OF COMPLIANCE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct. I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is seven pages.

/s/ Nicholas Moeller
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PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to 735 ILCS 5/1-109, the undersigned certifies that the statements set forth in this instrument are true and correct. On October 29, 2019, the foregoing Reply Brief of Plaintiff-Appellant People of the State of Illinois was filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, which provided notice to the following registered e-mail addresses:

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