No. 125165

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, v. KEITH GAINES, Defendant-Appellee.	))))))))))	Appeal from the Appellate Court of Illinois, Third Judicial District, No. 3-16-0494 There on Appeal from the Circuit Court of the Twelfth Judicial Circuit, Will County, Illinois, No. 15 CF 2835 The Honorable Edward A. Burmila, Jr., Judge Presiding.

REPLY BRIEF OF PLAINTIFF-APPELLANT PEOPLE OF THE STATE OF ILLINOIS

KWAME RAOUL
Attorney General of Illinois

JANE ELINOR NOTZ
Solicitor General

MICHAEL M. GLICK
Criminal Appeals Division Chief

ERIN M. O'CONNELL
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601-3218
(312) 814-1235
eserve.criminalappeals@atg.state.il.us

Counsel for Plaintiff-Appellant
People of the State of Illinois

ORAL ARGUMENT REQUESTED

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ARGUMENT

A. The Circuit Properly Exercised Its Broad Discretion to Reject Defendant's Guilty Plea.

As explained in the People's opening brief, the prohibition against double jeopardy did not bar defendant's trial for two separate reasons. First, jeopardy did not attach because the circuit court never fully "accepted" defendant's guilty plea. *See* Peo. Br. 9-15.[1] Second, if jeopardy attached, it did not terminate improperly. Rather, based on defendant's statements casting doubt on his guilt, the circuit court properly exercised discretion to withdraw its tentative acceptance of the guilty plea. *See* Peo. Br. 16-18.

Defendant contests both points, but his arguments rest on an overly narrow definition of a circuit judge's discretion in the plea context. In claiming that jeopardy attached, defendant argues that the circuit court fully accepted all terms of his negotiated plea agreement, including the recommended sentence, despite the court's express statement that it did not concur in the proposed disposition. *See* Def. Br. 13. And in claiming that jeopardy was improperly terminated, defendant argues that the circuit court could not withdraw its tentative acceptance of the guilty plea without defendant's consent. *See* Def. Br. 16.

Defendant's arguments misapprehend the circuit court's role in the plea process. Contrary to defendant's assertion that he "had a personal,

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[1] "Peo. Br." denotes the People's opening brief; "Def. Br." denotes defendant's appellee's brief.

constitutional right to plead guilty," Def. Br. 23, "it is . . . well established that a defendant does not have an absolute right to have a guilty plea accepted by the circuit court," *People v. Henderson*, 211 Ill. 2d 90, 103 (2004); *see also Santobello v. New York*, 404 U.S. 257, 262 (1971) ("There is, of course, no absolute right to have a guilty plea accepted."). "A circuit court may reject a plea in the exercise of sound judicial discretion," *Henderson*, 211 Ill. 2d at 103 (citing *Santobello*, 404 U.S. at 262), including a negotiated plea, *see People v. Thomas*, 246 Ill. App. 3d 708, 715 (2d Dist. 1993) ("Rule 402 does not require that the trial court accept a negotiated plea."); *People v. Boyd*, 66 Ill. App. 3d 582, 588 (1st Dist. 1978) ("[E]ven had a plea agreement been offered to the trial court we note that Supreme Court rule 402(d)(2) . . . does not require that the trial court accept the negotiated plea."). A circuit court also has discretion to *sua sponte* vacate a guilty plea that it had tentatively accepted. *People v. Hancasky*, 410 Ill. 148, 154-55 (1951).

The circuit court's partial and tentative acceptance of the plea agreement here was permitted. The parties offered a "tentative plea agreement" that "contemplate[d] entry of a plea of guilty in the expectation that a specified sentence [would] be imposed or that other charges before the court [would] be dismissed." Ill. S. Ct. R. 402(d)(2). In such circumstances, on hearing the terms of a tentative agreement, the circuit court may concur in "the proposed disposition," or not. *Id.* In the latter circumstance, "the judge shall inform the defendant in open court . . . 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." Ill. S. Ct. R. 402(d)(3). Here, the judge stated that he did not concur in the proposed disposition and admonished defendant that if he persisted in pleading guilty, the court could impose any sentence permitted by law. A20. Rule 402 plainly gave the court such discretion.

Defendant's claim that the circuit court was bound by the recommended sentence is not supported by his cited cases, *see* Def. Br. 13, which make clear that parties to a plea deal are bound to their promises, *see People v. Absher*, 242 Ill. 2d 77, 88-91 (2011) (defendant was bound by term in plea agreement prospectively consenting to suspicionless searches); *People v. Evans*, 174 Ill. 2d 320, 332 (1996) (defendant who entered into plea agreement with negotiated sentence could modify agreed sentence only by moving to withdraw plea). Under these cases, the prosecution here was required to (and did) recommend a sentence of 158 days of jail time and two years of probation. But the court was not similarly bound to that sentence, given that it did not concur in the plea agreement.

In sum, because proceedings at the change-of-plea hearing left open the question of sentence (not to mention the question of defendant's guilt), the guilty plea was never fully accepted for purposes of determining when jeopardy attached. Peo. Br. 14-15. Given that the sentence is an essential component of a final judgment, the court's remarks at the hearing could not

possibly have "creat[ed] a final judgment," as defendant claims, Def. Br. 13. Indeed, even the appellate majority recognized that defendant was not convicted (much less sentenced) at the change-of-plea hearing. *Gaines*, 2019 IL App (3d) 160494, ¶¶ 46-47. Defendant's trial therefore did not constitute "a second prosecution for the same offense after conviction" prohibited by double jeopardy principles. *People v. Cabrera*, 402 Ill. App. 3d 440, 447 (1st Dist. 2010).

Nor did the circuit court abuse its discretion when it withdrew its tentative acceptance of defendant's guilty plea. A court "may set aside or withdraw a plea of guilty, on its own motion and without the consent of a defendant[ ] . . . where the court has good reason to doubt the truth of the plea." *Hancasky*, 410 Ill. at 154-55; *see also Cabrera*, 402 Ill. App. 3d at 446. Thus, defendant's claim that the circuit court needed his consent to withdraw its acceptance, *see* Def. Br. 16, is incorrect. Nor was the court constrained by Rule 604(d), which sets forth the preconditions for defendants who seek to appeal judgments resulting from guilty pleas. *See* Def. Br. 21-24. The court's *sua sponte* action in withdrawing its tentative acceptance of a guilty plea without defendant's consent falls outside the scope of that rule.

Furthermore, the trial court's *sua sponte* withdrawal of its tentative acceptance was reasonable under the circumstances. *See* Def. Br. 21-24. A circuit court abuses its discretion only if "no reasonable person would agree with [its] decision." *People v. Peterson*, 311 Ill. App. 3d 38, 45 (1st Dist.

1999). At the very least, a reasonable judge could interpret defendant's comments at the change-of-plea hearing as casting doubt on his guilt. Defendant seeks to turn the deferential standard on its head when he asks whether the circuit court "*had to* take the drastic step of *sua sponte* vacating the plea agreement," Def. Br. 22 (emphasis added), because the question is not whether all or even most judges would have done the same. Rather, the question is whether any reasonable judge would have vacated the plea. The court acted reasonably here, given that defendant declined to adopt the People's factual basis when given the opportunity, claimed that the People's version was overstated, and ultimately disputed whether witnesses would even testify. A22-23. Indeed, in his brief in this Court, defendant explains that "he thought the State's factual basis sounded worse than the actual events." Def. Br. 7. And although initially he appeared to agree that the witnesses would testify as the prosecutor described, he later backtracked and claimed that the witnesses would not testify.

Accordingly, the circuit court did not abuse its broad discretion to withdraw its partial, tentative acceptance of the plea. Thus, even if jeopardy attached at the change-of-plea hearing, it was not improperly terminated, and defendant's ensuing trial and conviction were proper.

B. Jeopardy Did Not Attach Because the Court Never Fully Accepted Defendant's Guilty Plea by Finding Him Guilty or Sentencing Him.

The parties agree that jeopardy attaches when a guilty plea is "accepted," but disagree as to when that occurs. This Court should adopt a bright-line rule to define the point at which jeopardy attaches to a guilty plea, *see Martinez v. Illinois*, 572 U.S. 833, 839-40 (2014) (per curiam) (noting that "bright-line rule[s]" govern attachment of jeopardy at trial), and it should find that jeopardy attaches, as the earliest, when a circuit court accepts a defendant's plea by finding him guilty, *see Cabrera*, 402 Ill. App. 3d at 448 (jeopardy attached where circuit court entered finding of guilt).

Such a rule would be consistent with this Court's precedents. Although this Court reasoned in *People v. Jackson*, 118 Ill. 2d 179, 188-89 (1987), that a defendant need not be sentenced on a guilty plea for jeopardy to attach, it did not specifically identify the point before sentencing when jeopardy attached. It simply stated that "[n]othing further remained to be done to determine the defendant's guilt of the offense charged." *Id.* at 189. Defendant correctly states that "*Jackson* does not stand for the proposition that a finding of guilty *must* be entered for jeopardy to attach" to a plea, Def. Br. 7 (emphasis added), because *Jackson* was silent on that point.

The People instead argue that *Jackson*'s holding is consistent with a rule that jeopardy attaches (at the earliest) when a court finds a defendant guilty. That rule is also consistent with *People v. McCutcheon*, 68 Ill. 2d 101

(1977) (cited at Def. Br. 8), which defendant cites for the proposition that "[j]eopardy attached . . . at the time the guilty plea was accepted by the court." There, the court's acceptance of the guilty plea resulted in a final judgment of conviction, and it was undisputed that jeopardy attached. *See id.* at 106-07.

In sum, this Court should find, consistent with its precedent, that jeopardy did not attach here because the circuit court never found defendant guilty. The trial judge stated that he "accepted" defendant's plea as knowing and voluntary, but immediately withdrew that tentative acceptance without finding defendant guilty or entering a conviction.

The tentative and incomplete acceptance of the guilty plea is further underscored by the lack of agreement as to sentence. Under the authority of other jurisdictions (and contrary to *Jackson*), jeopardy attaches to a guilty plea only on imposition of sentence. *See* Peo. Br. 14-15. Here, defendant was never convicted *or* sentenced — and, more than that, the circuit court never indicated what sentence it intended to impose. This uncertainty about defendant's sentence further demonstrates that the circuit court did not fully accept defendant's guilty plea, such that jeopardy attached.

C. Defendant Has Shown Neither Plain Error nor Ineffective Assistance of Counsel to Overcome His Forfeiture.

Defendant concedes that he forfeited his double-jeopardy claim because he did not object when the circuit court withdrew its tentative acceptance of

the guilty plea. Def. Br. 24. To overcome forfeiture, defendant must either demonstrate plain error or show that trial counsel's failure to object amounted to ineffective assistance. He satisfies neither standard.

First, defendant has not met his "burden of persuasion" on plain error. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). This test requires him to show a "clear or obvious" error. *Id.*; *see also People v. Johnson*, 238 Ill. 2d 478, 484 (2010). In addition, he must satisfy one of the two prongs of the plain-error test, showing either that (1) the evidence was closely balanced or (2) the error was so serious that it undermined "the integrity of the judicial process." *Johnson*, 238 Ill. 2d at 484.

Defendant argues that he has demonstrated second-prong plain error because a double jeopardy violation undermines the integrity of the judicial process. *See* Def. Br. 25. Indeed, this Court has found that a double-jeopardy violation can rise to the level of second-prong plain error. *See People v. Henry*, 204 Ill. 2d 267, 281 (2003). But satisfying this prong of the plain-error test does not circumvent the need for defendant to show that the court's alleged error was clear or obvious. *See People v. Hammons*, 2018 IL App (4th) 160385, ¶ 17 ("under the plain-error doctrine, the existence of an error is not enough to avert a forfeiture"; only an error that "is manifest or patent" qualifies).

Defendant argues that the circuit court plainly erred when it vacated the plea without following the procedures of Rule 604(d), *see* Def. Br. 25, but

that rule applies only to defendants seeking to appeal judgments based on guilty pleas, as explained. Nor was the court's *sua sponte* withdrawal of its tentative acceptance of the guilty plea a clear or obvious error. In fact, the appellate court had endorsed such an exercise of discretion. *See Cabrera*, 402 Ill. App. 3d at 448-50. Because any error was neither clear nor obvious, defendant cannot demonstrate plain error.

Defendant also cannot show that counsel's failure to object resulted from ineffective assistance of counsel. Def. Br. 25-26. Defendant must establish both that counsel's failure to object was objectively deficient and that he was prejudiced. *See People v. Caffey*, 205 Ill. 2d 52, 105-06 (2001). Defendant cannot show prejudice, because there is no reasonable probability that an objection lodged by counsel would have altered the result of the hearing. *See id.* at 106. The trial court withdrew its acceptance of the guilty plea *sua sponte* and without defendant's consent, as it had discretion to do. Defendant's objection would not have altered the result because his consent was not needed. The circuit court withdrew its tentative acceptance based on defendant's statements, which cast doubt on his guilt even as he attempted to plead guilty, and an objection would not have negated those statements.

Accordingly, defendant is not entitled to excuse his forfeiture of the double-jeopardy claim, and the appellate court erred by granting relief on this claim.

D. This Court Should Reinstate Defendant's Domestic Battery Conviction and Remand to the Circuit Court for Sentencing.

Because the circuit court properly rejected defendant's guilty plea, this Court should reinstate the domestic-battery conviction that followed defendant's trial. And because defendant was not sentenced on this count at his post-trial sentencing hearing, this Court should remand to the circuit court to determine the appropriate sentence. Peo. Br. 18.

Alternatively, if this Court were to agree with defendant that the circuit court abused its discretion in vacating his plea, then it should reinstate defendant's conviction pursuant to his plea agreement. In disputing that this is the appropriate relief, defendant attempts to have it both ways. On one hand, he endorses the appellate majority's conclusion that because he was not sentenced at the plea proceeding (which means, as the People have argued, that jeopardy did not attach), there is no conviction to reinstate. *See* Def. Br. 18-20; *see also* A10. On the other hand, in arguing that jeopardy attached at the hearing, petitioner claims that his guilty plea *did* result in a final judgment that included the sentence recommended by the State. *See* Def. Br. 7, 13. If this Court agrees that defendant was convicted at the guilty plea hearing, such that the ensuing trial violated the Double Jeopardy Clause, then it follows that this Court may reinstate defendant's conviction to remedy the circuit court's error in vacating the plea.

CONCLUSION

This Court should reverse the portion of the judgment of the Illinois Appellate Court, Third District, holding that defendant's domestic battery conviction violates the prohibition against double jeopardy; reinstate defendant's conviction for domestic battery; and remand to the circuit court for sentencing on that conviction.

April 23, 2020

Respectfully submitted,

KWAME RAOUL
Attorney General of Illinois

JANE ELINOR NOTZ
Solicitor General

MICHAEL M. GLICK
Criminal Appeals Division Chief

ERIN M. O'CONNELL
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601-3218
Telephone: (312) 814-1235
Fax: (312) 814-1235
eserve.criminalappeals@atg.state.il.us

Counsel for Plaintiff-Appellant
People of the State of Illinois

RULE 341(c) CERTIFICATE

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, and the certificate of service, is 11 pages.

/s Erin M. O'Connell
ERIN M. O'CONNELL
Assistant Attorney General

CERTIFICATE OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On April 23, 2020, 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 automatically served notice on the following e-mail address:

Amber Hopkins-Reed
Assistant Appellate Defender
Office of the State Appellate Defender,
Third Judicial District
770 East Etna Road
Ottawa, Illinois 61350
3rddistrict.eserve@osad.state.il.us

/s/ Erin M. O'Connell
ERIN M. O'CONNELL
Assistant Attorney General