No. 129585

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	On Appeal from the Appellate
	)	Court of Illinois, Fourth District,
Plaintiff-Appellee,	)	No. 4-22-0400
	)	
	)	There on Appeal from the
	)	Circuit Court for the Seventeenth
	)	Judicial Circuit, Boone County,
	)	Illinois, No. 17 CF 202
	)	
ALVIN BROWN,	)	The Honorable
	)	C. Robert Tobin III,
Defendant-Appellant.	)	Judge Presiding.

BRIEF OF PLAINTIFF-APPELLEE
PEOPLE OF THE STATE OF ILLINOIS

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SUBMITTED - 26672682 - Criminal Appeals, OAG - 3/5/2024 9:47 AM

TABLE OF CONTENTS

Page(s)

NATURE OF THE CASE 1

ISSUES PRESENTED FOR REVIEW 1

JURISDICTION 2

STATUTES INVOLVED 2

STATEMENT OF FACTS 4

POINTS AND AUTHORITIES

STANDARDS OF REVIEW 8

People v. Gorss, 2022 IL 126464 8

People v. Hunter, 2017 IL 121306 8

People v. Johnson, 2021 IL 126291 8

People v. Sutherland, 223 Ill. 2d 187 (2006) 8

ARGUMENT 8

5 ILCS 70/4 9

Ill. S. Ct. R. 604 9

I. The Invited-Error Doctrine Precludes Defendant from Claiming that He Is Entitled to Resentencing Under the Amendment to the Recidivism Statute. 10

People v. Carter, 208 Ill. 2d 309 (2003) 10

People v. Gancarz, 228 Ill. 2d 312 (2008) 11

People v. Hollins, 51 Ill. 2d 68 (1972) 11

People v. Jones, 2023 IL 127810 10

SUBMITTED - 26672682 - Criminal Appeals, OAG - 3/5/2024 9:47 AM

People v. Strebin, 209 Ill. App. 3d 1078 (4th Dist. 1991) 11

II. Defendant Fails to Demonstrate Counsel Was Ineffective by Acknowledging that the Amendment to the Recidivism Statute Did Not Apply Retroactively. 12

People v. Perry, 224 Ill. 2d 312 (2007) 12

Strickland v. Washington, 466 U.S. 668 (1984) 12

A. Counsel did not perform deficiently because the amendment does not apply retroactively to defendant. . 12

Caveney v. Bower, 207 Ill. 2d 82 (2003).. 13

Doe A. v. Diocese of Dallas, 234 Ill. 2d 393 (2009) 13

People v. Hunter, 2017 IL 121306... 13

Perry v. Dep't of Fin. & Pro. Regul., 2018 IL 122349....................................... 13

1. The General Assembly clearly stated its intent that the amendment apply prospectively only in the Public Act itself. 13

Doe A. v. Diocese of Dallas, 234 Ill. 2d 393 (2009) 15

General Motors Corp. v. Pappas, 242 Ill. 2d 163 (2011) 13

People v. Broadway, 2022 IL App (4th) 210417-U.................................... 14, 15

People v. Brown, 225 Ill. 2d 188 (2007) 14

People v. Howard, 2016 IL 120729 13

People v. Ware, 2021 IL App (1st) 192017-U.. 14

Public Act 101-652 .... 14, 15

SUBMITTED - 26672682 - Criminal Appeals, OAG - 3/5/2024 9:47 AM

730 ILCS 5/5-4.5-95 14

2. In the alternative, the General Assembly clearly indicated its intent that the amendment not apply retroactively in § 4 of the Statute on Statutes. 15

5 ILCS 70/4 15

a. The amendment does not apply retroactively to defendant under § 4 of the Statute on Statutes. 16

Dobbert v. Florida, 432 U.S. 282 (1977) 16

Ogdon v. Gianakos, 415 Ill. 591 (1953) 17

People v. Hansen, 28 Ill. 2d 322 (1963) 17

People v. Bilderback, 9 Ill. 2d 175 (1956) 17

People v. Bradford, 106 Ill. 2d 492 (1985) 17

People v. Howard, 2016 IL 120729 16

People v. Hunter, 2017 IL 121306 .... 16, 17

People v. Walls, 2022 IL 127965 17

Warden v. Marrero, 417 U.S. 653 (1974) 18

5 ILCS 70/4 .... 16, 17

730 ILCS 5/5-4.5-35 16

730 ILCS 5-4.5-95 16

Today's Law and Yesterday's Crime: Retroactive Application of Ameliorative Criminal Legislation, 121 U. Pa. L. Rev. 120 (1972) 18

SUBMITTED - 26672682 - Criminal Appeals, OAG - 3/5/2024 9:47 AM

b. Defendant's arguments are contrary to the plain language of § 4 of the Statute on Statutes. 18

Cutinello v. Whitley, 161 Ill. 2d 409 (1994) 24

Dorsey v. United States, 567 U.S. 260 (2012) 23

Griffith v. Kentucky, 479 U.S. 314 (1987) 21

Nassar v. Commonwealth, 171 N.E.2d 157 (Mass. 1961) 23, 24

People v. Bilderback, 9 Ill. 2d 175 (1956) 23

People v. Bradford, 106 Ill. 2d 492 (1985) 22

People v. Burnett, 237 Ill. 2d 381 (2010) 20, 21

People v. Feldman, 409 Ill. App. 3d 1124 (5th Dist. 2011) 18

People v. Gray, 2019 IL App (1st) 161646-U 22

People v. Hansen, 28 Ill. 2d 322 (1963) 22

People v. Hunter, 2017 IL 121306 .... 19, 20, 21, 22

People v. Johnson, 225 Ill. 2d 573 (2007) 21

People v. Lisle, 390 Ill. 327 (1945) 23

People v. Pingelton, 2022 IL 127680 25

People v. Richardson, 2015 IL 118255 23

People v. Spears, 2022 IL App (2d) 210583 .... 18, 19, 22

People v. Stevenson, 2023 IL App (3d) 220055 21

People v. Walls, 2022 IL 127965 18

Perry v. Dep't of Fin. & Pro. Regul., 2018 IL 122349 24

5 ILCS 70/4 .... 19, 20, 22

SUBMITTED - 26672682 - Criminal Appeals, OAG - 3/5/2024 9:47 AM

B. Counsel's allegedly deficient performance did not prejudice defendant. 25

People v. Arbuckle, 2016 IL App (3d) 121014-B.. 27

People v. Perry, 224 Ill. 2d 312 (2007) 25

People v. Price, 2011 IL App (4th) 100311 28

People v. Riegle, 246 Ill. App. 3d 270 (3d Dist. 1993) 28

People v. Segoviano, 189 Ill. 2d 228 (2000) 26

730 ILCS 5-4.5-95 26

730 ILCS 5/5-5-3.2 .... 26, 27

II. Counsel Complied with Rule 604(d) and Did Not Leave Defendant with No Issues for Appeal.... 28

People v. Gorss, 2022 IL 126464 29

People v. Little, 337 Ill. App. 3d 619 (4th Dist. 2003) 31

People v. Shirley, 181 Ill. 2d 359 (1998) 30, 31

Ill. S. Ct. R. 604 .... 28, 29, 31

CONCLUSION 32

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF FILING AND SERVICE

SUBMITTED - 26672682 - Criminal Appeals, OAG - 3/5/2024 9:47 AM

NATURE OF THE CASE

Defendant appeals from the appellate court's judgment affirming the denial of his motion under Supreme Court Rule 604(d) to reconsider his sentence. No issue is raised concerning the charging instrument.

ISSUES PRESENTED FOR REVIEW

Defendant pleaded guilty to a Class 2 felony and, in 2019, was sentenced to nine years in prison as a Class X offender under the recidivism statute in effect at the time. In February 2021, while defendant's post-judgment motion was pending, the Governor signed into law Public Act 101-652, which, in relevant part, amended the recidivism statute to preclude Class X sentencing for an offender who was not convicted of a forcible felony. The Public Act expressly stated the effective date of the amendment as July 1, 2021.

Because defendant stood convicted of a nonforcible felony, he would not have been subject to Class X sentencing under the amendment but would have been eligible for an extended term sentence of 3 to 14 years in prison. At the hearing on defendant's post-judgment motion, post-plea counsel conceded that the amendment does not apply retroactively to defendant but asked the trial court to take it into account when reconsidering defendant's sentence. The trial court found the nine-year sentence appropriate for defendant and denied the motion.

SUBMITTED - 26672682 - Criminal Appeals, OAG - 3/5/2024 9:47 AM

The issues presented are:

1. Whether defendant's claim that he is entitled to resentencing under the amendment to the recidivism statute is barred by the invited error doctrine.

2. Whether post-plea counsel provided ineffective assistance by agreeing that the amendment does not apply retroactively to defendant.

3. Whether post-plea counsel failed to comply with Rule 604(d) by leaving defendant with no issues preserved for appeal.

JURISDICTION

Jurisdiction lies under Supreme Court Rules 315(a) and 612(b)(2). On September 27, 2023, this Court allowed defendant's petition for leave to appeal.

STATUTES INVOLVED

5 ILCS 70/4

> No new law shall be construed to repeal a former law, whether such former law is expressly repealed or not, as to any offense committed against the former law, or as to any act done, any penalty, forfeiture or punishment incurred, or any right accrued, or claim arising under the former law, or in any way whatever to affect any such offense or act so committed or done, or any penalty, forfeiture or punishment so incurred, or any right accrued, or claim arising before the new law takes effect, save only that the proceedings thereafter shall conform, so far as practicable, to the laws in force at the time of such proceeding. If any penalty, forfeiture or punishment be mitigated by any provisions of a new law, such provision may, by the consent of the party affected, be applied to any judgment pronounced after the new law takes effect. This section shall extend to all repeals, either by express words or by implication, whether the repeal is in the act making any new provision upon the same subject or in any other act.

SUBMITTED - 26672682 - Criminal Appeals, OAG - 3/5/2024 9:47 AM

Public Act 101-652

Section 10-281. The Unified Code of Corrections is amended by changing Sections 3-6-3, 5-4-1, 5-4.5-95, 5-4.5-100, 5-8-1, 5-8-6, 5-8A-2, 5-8A-4, and 5-8A-4.1 and by adding 5-6-3.8 as follows:

* * *

(730 ILCS 5/5-4.5-95)

Sec. 5-4.5-95. GENERAL RECIDIVISM PROVISIONS.

* * *

(b) When a defendant, over the age of 21 years, is convicted of a Class 1 or Class 2 forcible felony~~, except for an offense listed in subsection (c) of this Section,~~ after having twice been convicted in any state or federal court of an offense that contains the same elements as an offense now (the date the Class 1 or Class 2 forcible felony was committed) classified in Illinois as a Class 2 or greater Class forcible felony~~, except for an offense listed in subsection (c) of this Section,~~ and those charges are separately brought and tried and arise out of different series of acts, that defendant shall be sentenced as a Class X offender. This subsection does not apply unless:

(1) the first forcible felony was committed after February 1, 1978 (the effective date of Public Act 80-1099);

(2) the second forcible felony was committed after conviction on the first~~; and~~

(3) the third forcible felony was committed after conviction on the second; and

(4) the first offense was committed when the person was 21 years of age or older.

(c) (Blank). ~~Subsection (b) of this Section does not apply to Class 1 or Class 2 felony convictions for a violation of Section 16-1 of the Criminal Code of 2012.~~

A person sentenced as a Class X offender under this subsection (b) is not eligible to apply for treatment as a condition of probation as provided by Section 40-10 of the Substance Use Disorder Act (20 ILCS 301/40-10).

(Source: P.A. 99-69, eff. 1-1-16; 100-3, eff. 1-1-18; 100-759, eff. 1-1-19.)

SUBMITTED - 26672682 - Criminal Appeals, OAG - 3/5/2024 9:47 AM

> Section 99-999. Effective date. This Act takes effect July 1, 2021, except that Article 25 takes effect January 1, 2022, Sections 10-105, 10-110, 10-115, 10-120, 10-140, 10-155, 10-160, 10-175, 10-180, 10-185, 10-190, 10-195, 10-200, 10-205, 10-210, 10-215, 10-255, 10-265, 10-270, 10-275, 10-280, 10-285, 10-290, 10-295, 10-300, 10-305, 10-310, 10-315, 10-320, and 10-325 take effect January 1, 2023, and Article 2 takes effect January 1, 2025.

STATEMENT OF FACTS

In July 2017, a grand jury indicted defendant on the Class 2 felony of driving while his driver's license was revoked (DWLR). C15.[1] Defendant's license had been revoked for the offense of driving under the influence of alcohol in violation of 625 ILCS 5/11-501(a), and he had 14 prior DWLR convictions. *Id.* The indictment alleged that defendant was subject to Class X sentencing due to his past felony convictions. *Id.*; *see* 730 ILCS 5/5-4.5-95(b) (2017).

In October 2019, defendant entered an open guilty plea to the charged offense. C58; R32-39. The factual basis for the plea showed that defendant was caught driving with a revoked license as the getaway driver for a retail theft. R36.

During the plea proceedings, the trial court admonished defendant as to the potential sentences. Specifically, defendant's minimum sentence for the Class 2 felony was 3 years in prison, but if he had previously been convicted of two felonies that were Class 2 or higher, then defendant would

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[1] "C_" and "R_" refer to the common law record and report of proceeding; "Def. Br. _" and "A_" refer to defendant's opening brief and its appendix.

SUBMITTED - 26672682 - Criminal Appeals, OAG - 3/5/2024 9:47 AM

be subject to Class X sentencing pursuant to the recidivism statute and receive a sentence between 6 and 30 years in prison. R33-35; *see* 730 ILCS 5/5-4.5-35(a) (2019); 730 ILCS 5/5-4.5-95(b) (2019).

At the November 2019 sentencing hearing, the trial court found that defendant had at least two prior qualifying Class 2 felony convictions, including convictions for burglary, rape, and robbery. R48. The court sentenced defendant to nine years in prison, to be served consecutively to the sentence he was serving for another DWLR conviction. C64; R82.

In December 2019, defendant, proceeding pro se, filed both a motion to withdraw his guilty plea, C70, and a motion to reconsider his sentence, C75. The trial court appointed defendant new counsel. C81. In July 2020, defendant informed the trial court that he did not wish to pursue the motion to withdraw his plea and wanted to proceed only with the motion to reduce his sentence. R105. That same day, post-plea counsel filed a Rule 604(d) certificate, which stated that counsel had consulted with the defendant to "ascertain the defendant's contentions of error in the sentence." C106. The trial court denied the motion to reconsider sentence. R109.

On appeal, defendant filed an unopposed motion for summary remand because post-plea counsel's certificate failed to strictly comply with Rule 604(d). C151. In December 2020, the appellate court granted defendant's motion, vacated the denial of defendant's motion to reconsider his sentence, and remanded for "(1) the filing of a [valid] Rule 604(d) certificate; (2) the

SUBMITTED - 26672682 - Criminal Appeals, OAG - 3/5/2024 9:47 AM

opportunity to file a new motion to withdraw the guilty plea and/or reconsider the sentence, if counsel concludes that a new motion is necessary; and (3) a new motion hearing." *Id.*

In January 2021, after the trial court admonished defendant about his opportunity to file a new motion and have a new hearing, defendant informed the court that he wanted counsel to file a corrected Rule 604(d) certificate and proceed with an appeal from the denial of his motion to reconsider sentence. R114-15. Counsel filed the certificate, C153, but the trial court did not enter a new order denying the motion to reconsider the sentence.

Over a year later, in March 2022, defendant filed a motion to withdraw his guilty plea and vacate the sentence. C159. In May 2022, counsel informed the trial court that defendant did not wish to pursue the motion to withdraw his guilty plea but wanted to pursue the original motion to reconsider the sentence — i.e., the motion filed in December 2019. R129.

In support of the motion to reconsider sentence, counsel cited July 2021 changes to the recidivism statute. R130. Recognizing that the amended statute was "not retroactive," counsel argued that the changes nonetheless favored a lower sentence because defendant stood convicted of a nonforcible felony and thus would not be eligible for Class X sentencing under the amended statute. *Id.*; *see* 730 ILCS 5/5-4.5-95(b) (2022) (qualifying Class 2 felony offense for Class X sentence must be "forcible felony"). The prosecutor confirmed that the statutory changes were not retroactive. R131.

SUBMITTED - 26672682 - Criminal Appeals, OAG - 3/5/2024 9:47 AM

The trial court denied the motion to reconsider. R132. The court noted that defendant was eligible for an extended term sentence, so that his range was 3 to 14 years even if the amended recidivism statute applied. R131. Ultimately, it found defendant's nine-year sentence appropriate and merited by his continued criminal actions. R132.

That same day, post-plea counsel filed a Rule 604(d) certificate stating that he consulted with defendant "to ascertain the defendant's contentions of error in the entry of the plea of guilty and in the sentence." C170.

Defendant appealed, arguing that (1) the trial court erred in denying his motion to reconsider sentence because he was entitled to resentencing under the recidivism statute in effect at the time of the May 2022 hearing on his motion to reconsider sentence; and (2) post-plea counsel failed to comply with Rule 604(d) because he orally pressed only an excessive sentence claim that was not included in the 2022 motion to withdraw the plea. A20, 30 ¶¶ 25, 53. Defendant acknowledged that he had forfeited the first issue by not raising it in his post-judgment motion. A20, ¶ 26. But he argued that the appellate court could relax the forfeiture rule because the issue concerned his right to elect application of an amended sentencing statute. *Id.* In the alternative, defendant argued that he was entitled to relief under the plain error doctrine or because post-plea counsel was ineffective for not seeking resentencing under the amended statute. *Id.*

SUBMITTED - 26672682 - Criminal Appeals, OAG - 3/5/2024 9:47 AM

The appellate court found that defendant's actions in the trial court went beyond forfeiture, and that he invited the alleged error because post-plea counsel agreed that the amendment did not apply retroactively. A21-22, ¶ 29-30. As a result, defendant was not entitled to plain-error review. A22, ¶ 31. Further, the court found that post-plea counsel was not ineffective because the amendment does not apply retroactively to defendant. A30, ¶ 51. Finally, the court found that post-plea counsel complied with Rule 604(d) by preserving an excessive-sentence claim for appeal. A33, ¶¶ 60-61.

STANDARDS OF REVIEW

This Court reviews de novo whether the doctrine of invited error applies to defendant's claim, *see People v. Sutherland*, 223 Ill. 2d 187, 197 (2006), whether a defendant was denied the effective assistance of counsel, *People v. Johnson*, 2021 IL 126291, ¶ 52, whether a statutory amendment applies retroactively, *People v. Hunter*, 2017 IL 121306 ¶ 15, and whether counsel complied with Rule 604(d), *People v. Gorss*, 2022 IL 126464, ¶ 10.

ARGUMENT

The appellate court correctly held that defendant is not entitled to resentencing under the amended recidivism statute. Defendant's request for resentencing is barred by the invited-error doctrine because post-plea counsel affirmatively informed the trial court that the amendment does not apply retroactively to defendant.

SUBMITTED - 26672682 - Criminal Appeals, OAG - 3/5/2024 9:47 AM

Moreover, defendant fails to demonstrate that counsel provided ineffective assistance by making this concession. Counsel did not perform deficiently because the amendment became effective 20 months after defendant was sentenced, and the General Assembly clearly stated its intent that the amendment apply prospectively only by expressly delaying the amended statute's implementation in the Public Act itself. But even if the General Assembly did not state its intent for prospective application in the language of the Public Act, it stated its intent that the amendment not apply retroactively to defendant in § 4 of the Statute on Statutes, 5 ILCS 70/4: the amendment both constitutes a substantive change in the quantum of punishment, and cannot be applied to defendant because it mitigates punishment and the final judgment in his case was pronounced before the amendment took effect.

Defendant also fails to demonstrate prejudice because, even if the amendment applies retroactively and counsel performed deficiently for arguing otherwise, there is no reasonable probability that defendant's sentence would have been lower. He still would have been subject to an extended term sentence, his sentence is at the lower end of the extended term range, and the trial court accounted for these facts and made clear that defendant's conduct warranted the nine-year sentence.

Finally, defendant fails to demonstrate that counsel did not comply with Rule 604(d) by pursuing an argument not in the written motion to

SUBMITTED - 26672682 - Criminal Appeals, OAG - 3/5/2024 9:47 AM

withdraw the guilty plea. Counsel was clear that defendant was withdrawing the motion to withdraw the plea and pursuing the original motion to reconsider the sentence, which asserted that defendant's sentence was excessive; the trial court denied that original motion to reconsider; thus, defendant could pursue an excessive-sentence claim on appeal.

I. The Invited-Error Doctrine Precludes Defendant from Claiming that He Is Entitled to Resentencing Under the Amendment to the Recidivism Statute.

As the appellate court found, A21-22, ¶¶ 29-30, because post-plea counsel affirmatively informed the trial court that the amendment to the recidivism statute was "not retroactive" to defendant, the doctrine of invited error precludes defendant from claiming that he is entitled to resentencing under the amendment. R130; *see People v. Jones*, 2023 IL 127810, ¶ 41 (by agreeing to answer provided to jury question, defendant invited any error in answer); *People v. Carter,* 208 Ill. 2d 309, 319 (2003) ("Under the doctrine of invited error, an accused may not request to proceed in one manner and then later contend on appeal that the course of action was in error.").

Defendant does not contest the appellate court's invited-error ruling and instead argues that no procedural default rule should apply because the trial court did not advise him of his right to elect sentencing under the amended statute. Def. Br. 18. But, as the decision defendant quotes demonstrates, a trial court's duty to advise a defendant of his right to elect sentencing under an amended statute is triggered only when the amended

SUBMITTED - 26672682 - Criminal Appeals, OAG - 3/5/2024 9:47 AM

statute is in effect "'at the time of *the sentencing hearing*.'" *Id.* (quoting *People v. Strebin*, 209 Ill. App. 3d 1078, 1081 (4th Dist. 1991)) (emphasis added); *see also People v. Hollins*, 51 Ill. 2d 68, 70 (1972). Indisputably, the amended recidivism statute was not in effect at the time defendant was sentenced in November 2019, so the trial court's duty was not triggered. *See* A13, ¶ 5.

Nor would the invited-error doctrine have been applicable if the duty to advise a defendant of the right to elect sentencing under an amended statute applied to a hearing on a motion to reconsider sentence. That duty does not apply when defendant has no applicable right to elect. *People v. Gancarz*, 228 Ill. 2d 312, 319-23 (2008) (holding *Hollins* admonishment unnecessary when change to reckless homicide statute was substantive and thus did not apply retroactively). Here, defense counsel expressly informed the trial court that defendant did not have the right to elect to be sentenced under the amended statute. R130. Thus, this was not a case of a trial court's failure to advise, but a case where the issue of election was discussed, and defendant informed the trial court that he had no such right. This Court should reject defendant's suggestion that the trial court has an ongoing duty to inform a defendant of a right that defendant has informed the court does not apply to him to avoid the estoppel effect of an invited error.

SUBMITTED - 26672682 - Criminal Appeals, OAG - 3/5/2024 9:47 AM

II. Defendant Fails to Demonstrate Counsel Was Ineffective by Acknowledging that the Amendment to the Recidivism Statute Did Not Apply Retroactively.

Defendant cannot prevail on his ineffective assistance claim because he fails to demonstrate "both that: (1) counsel's representation was so deficient as to fall below an objective standard of reasonableness under prevailing professional norms, and (2) the deficient performance so prejudiced defendant as to deny him a fair trial." *People v. Perry*, 224 Ill. 2d 312, 341-42 (2007) (citing *Strickland v. Washington,* 466 U.S. 668, 687-88 (1984)). Counsel correctly agreed that the amendment to the recidivism statute does not apply retroactively to defendant, so defendant cannot show deficient performance. And even if counsel was unreasonable in reaching this conclusion, defendant fails to show a reasonable probability that he would have received a sentence less than nine years in prison. Accordingly, defendant's claim fails under both *Strickland* prongs.

A. Counsel did not perform deficiently because the amendment does not apply retroactively to defendant.

Defendant fails to show that counsel performed deficiently. Counsel correctly conceded that the amendment — which was not in effect at the time of defendant's sentencing and did not go into effect until more than 20 months after his conviction became final when he was sentenced — does not apply retroactively to defendant.

The General Assembly's stated intent as to the temporal reach of a statutory amendment must be given effect "unless to do so would be

SUBMITTED - 26672682 - Criminal Appeals, OAG - 3/5/2024 9:47 AM

constitutionally prohibited." *Perry v. Dep't of Fin. & Pro. Regul.*, 2018 IL 122349, ¶ 40; *accord Hunter*, 2017 IL 121306, ¶ 20. In Illinois, "'the legislature *always* will have clearly indicated the temporal reach of an amended statute, either expressly in the new legislative enactment or by default in section 4 of the Statute on Statutes.'" *Perry*, 2018 IL 122349, ¶ 44 (quoting *Caveney v. Bower*, 207 Ill. 2d 82, 95 (2003) (emphasis in *Caveney*)). "If the temporal reach of a statute has been clearly indicated [in the enactment], there is no need to invoke section 4." *Doe A. v. Diocese of Dallas*, 234 Ill. 2d 393, 406-07 (2009). Here, the General Assembly clearly stated — either in the legislative enactment itself or in § 4 of the Statute on Statutes — its intent that the amendment not apply retroactively to defendants who were sentenced before its effective date.

1. The General Assembly clearly stated its intent that the amendment apply prospectively only in the Public Act itself.

The General Assembly clearly stated its intent that the amendment apply prospectively only when it expressly delayed the amendment's implementation date in the text of the legislation.

As the Court has repeatedly held, "the delayed implementation date of [an] amendment indicates a clear legislative intent for the prospective application of the provision." *General Motors Corp. v. Pappas*, 242 Ill. 2d 163, 187 (2011); *see also People v. Howard*, 2016 IL 120729, ¶ 23 ("a statute that has an express delayed implementation date but is otherwise silent as to

SUBMITTED - 26672682 - Criminal Appeals, OAG - 3/5/2024 9:47 AM

temporal reach will be applied prospectively"); *People v. Brown*, 225 Ill. 2d 188, 201 (2007) (public act that "called for its delayed implementation . . . intended to have only prospective application"). Here, the General Assembly passed Public Act 101-652 in January 2021, and the Governor signed it into law the next month. *See* Pub. Act 101-652; 101st Gen. Assem., Bill Status for HB3653.[2] However, in § 99-999 of the Act, the General Assembly expressly delayed implementation of the changes it made in § 10-281 — which amended the recidivism statute by requiring the qualifying felony offense for Class X sentencing to be a "forcible" felony, Pub. Act 101-652, § 10-281; *see* 730 ILCS 5/5-4.5-95(b) (2022) — to July 1, 2021. *See* Pub. Act 101-652, § 99-999 ("Effective date. This Act takes effect July 1, 2021, except that Article 25 takes effect January 1, 2022, [other specified sections not including § 10-281] take effect January 1, 2023, and Article 2 takes effect January 1, 2025."). Thus, the General Assembly expressly delayed the implementation of the amendment to the recidivism statute, thereby clearly stating its intent that the amendment apply prospectively only. *See People v. Broadway*, 2022 IL App (4th) 210417-U, ¶¶ 70-71 (General Assembly expressly stated its intent in § 99-999 that Public Act 101-652's changes apply only after stated effective date); *People v. Ware*, 2021 IL App (1st) 192017-U, ¶ 22 (by delaying

[2] Both Public Act 101-652 and the Bill Status of House Bill 3653 are available at: https://www.ilga.gov/legislation/billstatus.asp?DocNum=3653&GAID=15&GA=101&DocTypeID=HB&LegID=120371&SessionID=108&SpecSess (last visited Mar. 4, 2024).

SUBMITTED - 26672682 - Criminal Appeals, OAG - 3/5/2024 9:47 AM

Public Act 101-652's effective date in § 99-999, General Assembly clearly stated its intent that the Act apply prospectively).[3]

Accordingly, because the General Assembly clearly stated its intent that the amendment apply prospectively only, the retroactivity inquiry ends there and the Court does not apply the general savings clause provided in § 4 of the Statute on Statutes, as defendant contends, Def. Br. 14. *See Doe A.*, 234 Ill. at 406 ("Because section 4 of the Statute on Statutes operates as a default standard, it is inapplicable to situations where the legislature has clearly indicated the temporal reach of a statutory amendment."); *Broadway*, 2022 IL App (4th) 210417-U, ¶ 71 (Section 4 of the Statute on Statutes "does not apply here because Public Act 101-0652, § 99-999 (eff. July 1, 2021) . . . expressly stated [the effective date]."). And because the amendment applies prospectively only, post-plea counsel was not deficient for declining to argue otherwise.

2. In the alternative, the General Assembly clearly indicated its intent that the amendment not apply retroactively in § 4 of the Statute on Statutes.

Even had the General Assembly not stated its intent in the Public Act itself, the General Assembly clearly stated its intent that the amendment not apply retroactively to defendant in § 4 of the Statute on Statutes.

[3] The nonprecedential Rule 23 orders cited in this brief are available on the Illinois courts' website, at https://www.illinoiscourts.gov/top-level-opinions/.

SUBMITTED - 26672682 - Criminal Appeals, OAG - 3/5/2024 9:47 AM

a. The amendment does not apply retroactively to defendant under § 4 of the Statute on Statutes.

"[S]ection 4 'is a general savings clause, which this [C]ourt has interpreted as meaning that procedural changes to statutes will be applied retroactively, while substantive changes are prospective only.'" *Hunter*, 2017 IL 121306, ¶ 22 (quoting *Howard*, 2016 IL 120729, ¶ 20). A new law that changes the quantum of punishment for certain crimes or defendants by altering the sentencing range is substantive. *See Dobbert v. Florida*, 432 U.S. 282, 293-94 (1977).

The amendment here substantively reduced the penalties that attach to certain offenses committed by recidivist felony offenders. For example, an offender who has at least two prior convictions for forcible Class 2 or greater felonies, and who committed a Class 2 nonforcible felony before July 1, 2021, must be sentenced to 6 to 30 years in prison as a Class X offender; but if an offender with the same criminal history commits the same nonforcible felony after July 1, 2021, his sentencing range is 3 to 7 years, unless the court exercises its discretion to sentence the offender to an extended term of 7 to 14 years. 730 ILCS 5/5-4.5-35(a). By redefining the mandatory minimum and maximum penalties that attach to nonforcible Class 2 felonies committed by defendants with qualifying felony convictions, the General Assembly made a substantive change that applies prospectively only. *See generally Hunter*, 2017 IL 121306, ¶ 56 (statutory change mitigates quantum of punishment where "potential sentence is less severe than under the prior sentencing

SUBMITTED - 26672682 - Criminal Appeals, OAG - 3/5/2024 9:47 AM

scheme"); *Ogdon v. Gianakos*, 415 Ill. 591, 596 (1953) (law that "creates, defines, or regulates rights" is substantive).

Moreover, the second sentence of § 4 expressly provides that statutory changes that mitigate punishment may "'be applied to any judgment pronounced *after* the new law takes effect.'" *Hunter*, 2017 IL 121306, ¶ 53 (quoting 5 ILCS 70/4) (emphasis added). As the amendment mitigates punishment, it cannot apply to defendant because his judgment was pronounced *before*, not "after," the amendment took effect. *Id.* The judgment in a criminal case is the sentence. *See People v. Walls*, 2022 IL 127965, ¶ 19 ("This [C]ourt has consistently and repeatedly held that the final judgment in a criminal case is the sentence.") (internal quotation marks omitted)). Thus, the amendment applies only to defendants sentenced after July 1, 2021. Because the trial court pronounced defendant's sentence in November 2019, and that was the final judgment in his case, the amendment, which became effective approximately 20 months later, did not apply to him.

Indeed, § 4's purpose, in part, is to preserve the State's right to enforce punishment already imposed under a former law. *See People v. Bilderback*, 9 Ill. 2d 175, 180-82 (1956) (section 4 enacted to reverse common-law presumption that extinguished penalties incurred before statutory change); *People v. Bradford*, 106 Ill. 2d 492, 504 (1985) (defendant sentenced before effective date of statute mitigating punishment "not eligible to elect to be sentenced under it"); *People v. Hansen*, 28 Ill. 2d 322, 340-41 (1963) (same,

SUBMITTED - 26672682 - Criminal Appeals, OAG - 3/5/2024 9:47 AM

for defendant sentenced 13 days before new statute's effective date); *see also Warden v. Marrero*, 417 U.S. 653, 660-61 (1974) (Congress enacted general savings clause to avoid abatements resulting from legislative changes that increased or decreased penalties); Comment, *Today's Law and Yesterday's Crime: Retroactive Application of Ameliorative Criminal Legislation*, 121 U. Pa. L. Rev. 120, 127-35 (1972) (describing similar savings clauses across country). For these reasons, the amendment to the recidivism statute worked a substantive change mitigating punishment that cannot apply retroactively to defendant.

b. Defendant's arguments are contrary to the plain language of § 4 of the Statute on Statutes.

Defendant concedes that this Court held in *Walls* that his judgment became final at the time he was sentenced. Def. Br. 14. Nevertheless, relying on *People v. Spears*, 2022 IL App (2d) 210583, ¶ 29, he argues that the amendment applies retroactively to him because his case was "ongoing" in the trial court. Def. Br. 12-14. But *Spears* premised its finding that a defendant's case "remains ongoing" in the trial court when a Rule 604(d) post-judgment motion is pending upon the faulty legal conclusion that "it is the order denying [a defendant's] amended motion to reconsider the sentence that acts as the final judgment in the underlying proceedings." 2022 IL App (2d) 210583, ¶ 29 (citing, in part, *People v. Feldman*, 409 Ill. App. 3d 1124 (5th Dist. 2011), *overruled by Walls*, 2022 IL 127965, ¶ 24). Indeed, under

SUBMITTED - 26672682 - Criminal Appeals, OAG - 3/5/2024 9:47 AM

the plain language of § 4 of the Statute on Statutes, the question is whether a new law mitigating punishment may "be applied to any *judgment* pronounced after the new law takes effect," 5 ILCS 70/4 (emphasis added), not whether the defendant's case remains ongoing in the trial court after judgment has been pronounced, so *Spears*'s holding necessarily depends on its erroneous view of when a judgment becomes final. Thus, *Spears* lacks persuasive value after *Walls*.

Similarly, defendant's argument that "the operative question in this case is whether it is 'practicable' to apply an amended sentencing statute after a defendant has been sentenced, but while proceedings are still ongoing in the trial court," Def. Br. 14, is contrary to § 4's plain language. The question of whether it is "practicable" to apply a change in law arises only when the change is procedural, as provided in § 4's first sentence. *See* 5 ILCS 70/4 ("No new law shall be construed to repeal a former law . . . or in any way whatever to affect . . . any penalty, forfeiture or punishment so incurred, . . . save only that the *proceedings* thereafter shall conform, so far as practicable, to the laws in force at the time of such proceeding." (emphasis added)); *Hunter*, 2017 IL 121306, ¶¶ 30-31 ("substantive amendments may not be applied retroactively, but procedural law changes will apply to *ongoing proceedings*," and "section 4 of the Statute on Statutes, which requires that the proceedings *thereafter* — after the adoption of the new procedural statute

SUBMITTED - 26672682 - Criminal Appeals, OAG - 3/5/2024 9:47 AM

— shall conform, so far as practicable, to the laws in force at the time of such proceeding" (emphasis in original) (internal quotation marks omitted)).

The amendment here is not procedural, so the practicability of applying the amendment to defendant is irrelevant. Indeed, where, as here, the amendment mitigates punishment, § 4's second sentence governs. That sentence includes no practicability language, and instead directs that changes that mitigate punishment apply only to judgments pronounced after the new law takes effect. *See* 5 ILCS 70/4 ("If any penalty, forfeiture or punishment be mitigated by any provisions of a new law, such provision may, by the consent of the party affected, be applied to any judgment pronounced after the new law takes effect."); *compare Hunter*, 2017 IL 121306, ¶¶ 17, 23, 31, 43 (determining that change was procedural and applied retroactively under § 4, and then analyzing whether it was "practicable" to apply procedural change retroactively to defendant), *with id.* ¶¶ 45-46, 52-53 (upon finding that change in law mitigated punishment, applying § 4's second sentence and determining only whether defendant was sentenced before its effective date, not whether it was "practicable" to apply change to defendant). Because defendant was sentenced before its effective date, the amendment does not apply retroactively to defendant. *See supra* Section II.A.2.a.

Nor does the amendment apply to defendant because one purpose of a motion to reconsider sentence "is 'to bring to the circuit court's attention changes in the law.'" Def. Br. 17 (quoting *People v. Burnett*, 237 Ill. 2d 381,

SUBMITTED - 26672682 - Criminal Appeals, OAG - 3/5/2024 9:47 AM

387 (2010)). A new statutory sentencing law may apply retroactively where the General Assembly expressly provides for retroactive application in the enactment itself, in which case § 4 would not apply. *Hunter*, 2017 IL 121306, ¶ 20. Or a motion to reconsider sentence may alert the trial court to an intervening decision that interprets a sentencing statute in a manner inconsistent with how the trial court applied it, or announces a new rule of constitutional sentencing law. *See generally Griffith v. Kentucky*, 479 U.S. 314, 322-23 (1987) (new rules of constitutional law apply retroactively to cases pending on direct review). In sum, applying § 4 as written does not defeat the purpose of a motion to reconsider sentence.

Moreover, contrary to defendant's suggestion, Def. Br. 17, the pendency of his "motion to reconsider sentence [in the trial court] does not change the fact that the judgment had been pronounced before the July 1, 2021, effective date." *People v. Stevenson*, 2023 IL App (3d) 220055, ¶ 18 (finding different amendment in Public Act 101-652 did not apply retroactively to judgment pronounced in May 2021). "The purpose of a motion to reconsider is not to provide a new sentencing hearing but to determine whether the initial sentence was appropriate and correct." *Id.* Thus, only "a retroactive change in the law would affect a sentence, such as defendant's, which was pronounced prior to the effective date of the new law." *Id.*; *see also People v. Johnson*, 225 Ill. 2d 573, 581 (2007) (distinguishing between remand "only for a Rule 604(d) certificate" and resentencing, and

SUBMITTED - 26672682 - Criminal Appeals, OAG - 3/5/2024 9:47 AM

explaining that amendment to Violent Offender Against Youth Registration Act did not apply because defendant's "sentence has been entered" and he "remains convicted").

Finally, defendant is incorrect that applying § 4 as written in accordance with the General Assembly's intent produces "absurd results" because it means that the amended statute would apply to him only if he obtained a new sentencing hearing. Def. Br. 17 (citing *Spears*, 2022 IL App (2d) 210583); *see also People v. Gray*, 2019 IL App (1st) 161646-U, ¶¶ 51-52 (cited Def. Br. 9, 12) (avoiding "absurd result" by finding that amended sentencing statute applied retroactively when it became effective while motion to reconsider defendant's sentence remained pending). This Court has long interpreted § 4 to mean that new sentencing laws do not apply to defendants who have already been sentenced, without finding any absurdity. For example, in *Hansen*, the Court applied § 4 and held that the defendant was not entitled to resentencing under the new criminal code, which went into effect just 13 days after he was sentenced, because "a punishment mitigated by a new law is applicable only to judgments after the new law takes effect." 28 Ill. 2d at 340-41. Similarly, in *Hunter* and *Bradford*, the Court held that the defendants were not eligible to be sentenced under statutory amendments that became effective while their cases were on appeal because they had already been sentenced prior to the statute's effective date. *Hunter*, 2017 IL 121306, ¶ 55; *Bradford*, 106 Ill. 2d at 504. In each of these

SUBMITTED - 26672682 - Criminal Appeals, OAG - 3/5/2024 9:47 AM

cases, the defendants would have obtained the benefit of the statutory changes had their sentences been reversed, but, as the Court explained in *People v. Lisle*, § 4 of the Statute on Statutes "does not give the defendant the right to be sentenced under a law not in full force and effect at the time of his sentence." 390 Ill. 327, 328 (1945). Rather, and contrary to defendant's assertion that *Lisle* "does not specify whether that case was pending on appeal or in the trial court when the amendment became effective," Def. Br. 16, *Lisle* made clear that the amendment "could only apply to those classes of cases in which a new law had become effective prior to the date of the actual sentence," 390 Ill. at 328.

That defendant would prefer that the General Assembly had drawn a different line does not make the line drawn absurd. *See generally People v. Richardson*, 2015 IL 118255, ¶ 11; *Dorsey v. United States*, 567 U.S. 260, 280-81 (2012). Savings clauses by their nature classify persons according to time and may therefore result in disparate treatment, but that does not mean those results are absurd such that the legislative intent should be disregarded. *See Bilderback*, 9 Ill. 2d at 181 (savings clauses "produce their own anomalous results"); *Dorsey*, 567 U.S. at 280-81 ("ordinary practice" of "apply[ing] new penalties to defendants not yet sentenced, while withholding change from defendants already sentenced" reflects "line-drawing effort" and always creates disparities, but does not preclude applying new penalties in accordance with practice as Congress intended); *Nassar v. Commonwealth*,

SUBMITTED - 26672682 - Criminal Appeals, OAG - 3/5/2024 9:47 AM

171 N.E.2d 157, 161 (Mass. 1961) (it is not "absurd and unreasonable" to apply amendment prospectively, "for all statutes must take effect as of some date"). To the contrary, absent some constitutional prohibition, the General Assembly's stated intent as to a statute's temporal reach must be given effect. *Perry*, 2018 IL 122349, ¶ 40; *see generally Cutinello v. Whitley*, 161 Ill. 2d 409, 421 (1994) ("'fact that line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration'" (citation omitted)).

Moreover, it is defendant's line-drawing that could produce absurd results. Indeed, in this case, nothing material occurred between the time the trial court sentenced defendant and when it (again) denied the motion to reconsider the sentence, by which time the amendment had become effective. Counsel simply filed a certificate that strictly complied with Rule 604(d). Defendant was sentenced in November 2019, C64; R82, 20 months before the amendment became effective in July 2021. The trial court first denied defendant's motion to reconsider the sentence in July 2020, R109, a year before the amendment became effective. The appellate court remanded the matter to the trial court only because counsel's Rule 604(d) certificate was technically deficient. *See* C151. In January 2021, six months before the amendment became effective, defendant informed the trial court that he wanted counsel to file a corrected Rule 604(d) certificate and proceed with his appeal. R114-15. However, the trial court mistakenly did not immediately

SUBMITTED - 26672682 - Criminal Appeals, OAG - 3/5/2024 9:47 AM

issue an order denying the 2019 motion to reconsider the sentence, which was necessary because the appellate court had vacated its prior order, so it denied that same motion again in May 2022, for the same reasons it had in 2019. R132 (trial court explains that defendant's "sentence was good then and is good now"). If anything, it would be absurd to grant a windfall to defendant and not the similarly situated defendants who were sentenced following guilty pleas between November 2019 and July 2021, and whose attorneys' Rule 604(d) certificates did not have technical errors that proved immaterial.

In sum, the General Assembly clearly stated its intent that the amendment not apply retroactively to defendant, so counsel was not deficient for declining to argue otherwise. *See People v. Pingelton*, 2022 IL 127680, ¶ 60 (attorney cannot be considered ineffective for failing to raise meritless argument).

B. Counsel's allegedly deficient performance did not prejudice defendant.

Defendant also fails to demonstrate a reasonable probability that his sentence would have been different had counsel argued that the amendment to the recidivism statute applied retroactively. *See Perry*, 224 Ill. 2d at 342 (to demonstrate prejudice, "defendant must prove there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different"). As discussed in Section II.A, *supra*, the amendment does not apply retroactively to defendant, so even had counsel raised the argument, there is no reasonable probability that defendant would have

SUBMITTED - 26672682 - Criminal Appeals, OAG - 3/5/2024 9:47 AM

received a lower sentence. *See People v. Segoviano*, 189 Ill. 2d 228, 246-47 (2000) (defendant could not show prejudice in counsel's failure to preserve claims in post-trial motion because claims were meritless)

Moreover, defendant fails to show a reasonable probability that the trial court would have sentenced defendant to less than nine years in prison even if his counsel had successfully argued that the amendment applied retroactively. Defendant concedes that even if the amendment applied retroactively, he would still be eligible for an extended term sentence ranging from 7 to 14 years due to his prior convictions. Def. Br. 19; 730 ILCS 5/5-5-3.2(b)(1). To be sure, the trial court had discretion not to sentence defendant to an extended term, *see* 730 ILCS 5/5-5-3.2(b)(1), but there is no reasonable probability the trial court would not have exercised its discretion to sentence defendant to the nine-year term it found appropriate for defendant.

The record shows that the trial court found that defendant's extensive criminal history warranted a sentence of nine years in prison. For example, the trial court noted that it declined to impose a sentence greater than nine years because Class X sentencing accounted for that criminal history. *See* R79-80 (trial court notes that while defendant had "a history of criminal activity, . . . this is included in the [Class X] sentencing range so [it was] not double dipping or giving extra weight on that"). And just as the trial court did not sentence defendant to the minimum six years in the Class X range, there is no reasonable probability that it would have sentenced defendant to

SUBMITTED - 26672682 - Criminal Appeals, OAG - 3/5/2024 9:47 AM

the minimum seven years in the extended term range. To the contrary, if Class X sentencing did not apply, then, as the trial court made clear, it would have weighed defendant's additional convictions in favor of a sentence greater than the seven-year extended term minimum, R79-80, as the extended term range accounted for only one of defendant's many prior convictions, *see* 730 ILCS 5/5-5-3.2(b)(1).

Further, the trial court found aggravating factors in addition to defendant's criminal history to support its determination that nine years was the appropriate sentence for defendant. R79-81. For example, noting that defendant drove "the getaway car in a felony theft," R80, the trial court found, "because of the likelihood that you're going to reoffend while out, I do think that a nine-year sentence . . . is appropriate," R82. In addition, the trial court observed that defendant "shift[ed] the blame" away from himself despite his repeated criminal offenses. *Id.* And, in response to defendant's request that the court take into account the amendment to the recidivism statute when reconsidering the sentence, the trial court noted that defendant was eligible for an extended term sentence and confirmed that it believed that defendant's "continued actions merited" the nine-year sentence. R132. Thus, there is no reasonable probability that the trial court would have resentenced defendant to less than nine years, even had counsel asserted that the amendment applied retroactively. *See People v. Arbuckle*, 2016 IL App (3d) 121014-B, ¶¶ 35-37 (no prejudice from alleged failure to oppose

SUBMITTED - 26672682 - Criminal Appeals, OAG - 3/5/2024 9:47 AM

eligibility for extended term sentencing where sentence was within range and nothing showed that trial court would have been any more lenient in sentencing); *People v. Price*, 2011 IL App (4th) 100311, ¶¶ 33-37 (no prejudice when counsel failed to file motion to reconsider sentence when sentence was within range and trial court did not abuse its discretion when imposing sentence); *People v. Riegle*, 246 Ill. App. 3d 270, 275 (3d Dist. 1993) (no prejudice in failure to advise defendant of correct sentencing range when sentence was within that range).

II. Counsel Complied with Rule 604(d) and Did Not Leave Defendant with No Issues for Appeal.

Defendant also contends that counsel failed to comply with Rule 604(d) by leaving him with no appealable issues after withdrawing the arguments in his 2022 motion to withdraw his guilty plea. *See* Def. Br. 24. Defendant is incorrect; counsel pursued defendant's 2019 written motion to reconsider the sentence, which preserved for appeal defendant's claim that his sentence was excessive.

Under Rule 604(d), a defendant may not appeal from a judgment entered upon a plea of guilty without filing a written motion to withdraw the plea or, if only the sentence is challenged, a motion to reconsider the sentence. Ill. S. Ct. R. 604(d). The rule requires that defense counsel certify, among other matters, to having made any amendments necessary to the motion for adequate presentation of the claims. *Id.* Counsel's failure to strictly comply with the provisions of Rule 604(d) requires remand to the

SUBMITTED - 26672682 - Criminal Appeals, OAG - 3/5/2024 9:47 AM

circuit court. *People v. Gorss*, 2022 IL 126464, ¶ 19. Defendant concedes that counsel's certificate complied with Rule 604(d), but he asserts that counsel failed to comply with the Rule 604(d) by orally arguing only that the sentence was excessive when the motion to withdraw the plea contained no such argument, thus leaving no issues preserved for appeal. Def. Br. 20, 23.

Defendant's argument rests on the faulty premise that counsel pursued his March 2022 motion to withdraw the plea but later withdrew the arguments therein. *See* Def. Br. 20. The record demonstrates that counsel informed the trial court that defendant did not wish to pursue the 2022 motion to withdraw the guilty plea and instead wanted to obtain a ruling on the 2019 motion to reconsider the sentence. Specifically, in January 2021, when the case initially returned to the trial court upon remand, defendant informed the trial court that he did not want a new hearing but wanted counsel to file a corrected Rule 604(d) certificate and proceed with his appeal from the denial of his 2019 motion to reconsider his sentence. R114-15. But in March 2022, defendant filed a motion to withdraw his guilty plea. C159. Then, in May 2022, counsel explained that defendant had "filed . . . a motion to withdraw the guilty plea and a motion to vacate the sentence and have him resentenced" but decided to "withdraw" the motion attacking the guilty plea and "go[] back to what [defendant] had brought up at the past hearing" to reduce the sentence. R129. The trial court asked, "So at this point you're seeking a motion to reconsider the sentence, not the motion to withdraw

SUBMITTED - 26672682 - Criminal Appeals, OAG - 3/5/2024 9:47 AM

guilty plea?" *Id.* Counsel responded that this was "[c]orrect." *Id.* At this time, the only pending motion to reconsider sentence was that filed in 2019, before the appellate court remanded for counsel to file a Rule 604(d) compliant certificate. C75 (December 2019 motion to reduce the sentence). And the trial court denied that motion in May 2022. R132 ("the motion to reconsider the sentence is heard and denied").

Moreover, defendant is incorrect that his 2019 motion to reconsider sentence did not preserve the claim that his sentence was excessive. *See* Def. Br. 25. Defendant states that counsel "never explicitly adopted" the motion, *see id.*, but counsel was clear at the initial hearing on the motion to reconsider that defendant was pursuing that motion without amendment, R104-05, and reiterated that position in the post-remand hearing, R129. And defendant is also incorrect that the motion contained no arguments as to why the sentence should be reduced. *See* Def. Br. 25. The motion asserted that the sentence was excessive due to the "substantial extenuating circumstances," C75, which counsel elaborated on at the initial hearing, R107 (arguing that defendant had already served time for only "driving a car" and "was not a young man"), and at the post-remand hearing, *see* R130-31 (adopting arguments made in prior hearing and adding that "recent changes in the law" demonstrated reconsideration was appropriate). This provided defendant a full and fair opportunity to present his claim and complied with Rule 604(d). *See People v. Shirley*, 181 Ill. 2d 359, 365, 370 (1998) (finding

SUBMITTED - 26672682 - Criminal Appeals, OAG - 3/5/2024 9:47 AM

"nothing in the record . . . which indicates any reason why this [C]ourt should remand for a third hearing on defendant's claim that sentences were excessive" when written motion stated that "defendant feels his sentence is excessive" and counsel expounded on circumstances at hearing). Conversely, in the case relied on by defendant, the motion to reconsider sentence stated in its entirety that the defendant "moves for a reduction of his sentence pursuant to 730 ILCS 5/5-8-1(c)" and counsel stated at the motion hearing that it was "a form argument only." *People v. Little*, 337 Ill. App. 3d 619, 620-21 (4th Dist. 2003).

Thus, counsel pursued and obtained a ruling on defendant's motion to reconsider sentence, which provided defendant the opportunity to raise the excessive sentence claim raised therein on appeal. The appellate court's remand order did not require counsel to file a new motion or prevent him from pursuing defendant's 2019 motion to reconsider his sentence. *See* C151 (remand order provides defendant "the opportunity to file a new motion to the guilty plea and/or reconsider the sentence, if counsel concludes that a new motion is necessary"). In sum, defendant's contention that counsel violated Rule 604(d), leaving him without an appealable sentencing issue, fails.

SUBMITTED - 26672682 - Criminal Appeals, OAG - 3/5/2024 9:47 AM

CONCLUSION

This Court should affirm the judgment of the appellate court.

March 5, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 32 pages.

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SUBMITTED - 26672682 - Criminal Appeals, OAG - 3/5/2024 9:47 AM

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 March 5, 2024, the foregoing **Brief of Plaintiff-Appellee 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 served a copy to the e-mail addresses of the persons named below:

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