No. 128474

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, v. BRYAN N. BRUSAW, Defendant-Appellee.	) On Appeal from the Appellate of) Illinois, Third Judicial District,) No. 3-19-0154.)) There on Appeal from the Circuit) Court of the Twelfth Judicial) Circuit, Will County, Illinois) No. 17 CF 1812.)) The Honorable) Sarah F. Jones,) Judge Presiding.

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT PEOPLE OF THE STATE OF ILLINOIS

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NATURE OF THE CASE

Following a Will County bench trial, the trial court found defendant Bryan N. Brusaw guilty of aggravated driving under the influence (DUI) and aggravated driving while license revoked (DWLR) and sentenced him to concurrent prison terms of nine years and six years, respectively. C180.[1] The People appeal from the appellate court's judgment, which reversed defendant's convictions and remanded for a new trial. *People v. Brusaw*, 2022 IL App (3d) 190154-U, ¶ 1; *see also* A1. No question is raised on the pleadings.

ISSUES PRESENTED

1. Whether defendant acquiesced to any error by the trial court in failing to rule on his pro se motion for substitution of judge by subsequently requesting a bench trial in front of the judge named in the substitution motion.

2. Whether, in the alternative, defendant forfeited his claim when he abandoned the motion for substitution of judge and did not include the claim in his post-trial motion.

3. And, if defendant merely forfeited his claim, whether defendant cannot excuse his forfeiture as plain error because he cannot show that clear or obvious error occurred, or that either the evidence was closely balanced or

[1] Citations to the common law record, report of proceedings, and the appendix to this brief appear as "C__," "R__," "and "A__," respectively.

the court's act of not ruling on defendant's pro se motion for substitution of judge was akin to structural error.

JURISDICTION

Jurisdiction lies under Supreme Court Rules 315 and 612(b)(2). On September 28, 2022, the Court granted the People's petition for leave to appeal.

STATUTE INVOLVED

725 ILCS 5/114-5(a) provides:

> Within 10 days after a cause involving only one defendant has been placed on the trial call of a judge the defendant may move the court in writing for a substitution of that judge on the ground that such judge is so prejudiced against him that he cannot receive a fair trial. Upon the filing of such a motion the court shall proceed no further in the cause but shall transfer it to another judge not named in the motion. The defendant may name only one judge as prejudiced, pursuant to this subsection; provided, however, that in a case in which the offense charged is a Class X felony or may be punished by death or life imprisonment, the defendant may name two judges as prejudiced.

STATEMENT OF FACTS

I. Trial Court Proceedings

Defendant was charged with aggravated DUI and aggravated DWLR after a police officer discovered him "passed out" in the driver's seat of a parked van containing two open bottles of alcohol. C15-17; R76-79. The charges were aggravated based on defendant's nine previous convictions for DUI and seven previous convictions for DWLR. R221; C15-17. At the first appearance, the court appointed counsel at defendant's request, R7, and the case was later assigned to the Honorable Sarah F. Jones, R16.

On October 5, 2017, defendant filed a timely pro se motion for substitution of Judge Jones pursuant to section 114-5(a) of the Code of Criminal Procedure (Code) (725 ILCS 5/114-5(a)). C30-31. Defense counsel acknowledged the pro se motion at a subsequent October 2017 hearing and asked to continue the motion to the next court date. R19. The motion to substitute was not mentioned again.

Defendant subsequently waived his right to a jury trial and asked to proceed to a bench trial. C48; R58-61.

At the July 2018 bench trial before Judge Jones, the arresting officer testified that he found defendant "passed out" in the driver's seat of a van that was parked at a gas station. R76. The station's parking lot could only be reached by a public highway. R78. The van was not running, but the key was in the ignition. R80. The officer saw an open, half-empty beer bottle in the center console and a half-empty whiskey bottle between defendant's legs. R79. Once awakened, defendant told the officer that he had come from Springfield and had consumed one-and-a-half beers at home. R83. When the officer asked about the open bottles of alcohol in the van, defendant attempted to hide the whiskey bottle next to his seat. R83. Defendant was unable to recite the alphabet, unable to count backwards accurately, and had a difficult time walking straight. R86-89. He also failed three standardized field sobriety tests. R89. The officer arrested defendant and brought him to

the hospital, where defendant refused to submit to blood and urine tests. R96.

Defendant did not present any witnesses. R132.

The trial court found defendant guilty of both charges. R145. Defense counsel filed a motion to reconsider the verdict, arguing only that the People had failed to prove defendant's guilt beyond a reasonable doubt. C69. Defendant also filed a pro se motion for a new trial, which raised no argument about the lack of a ruling on his pro se motion for substitution of judge. C70. Defense counsel declined to adopt the pro se motion for new trial, and the trial court struck it based on the bar against hybrid representation. R149. Appointed counsel subsequently withdrew, and defendant retained counsel. C74-75. Retained counsel filed an amended post-trial motion, which also solely argued that the People had failed to present sufficient proof of defendant's guilt. C80-88. The trial court denied the amended motion. C203.

The trial court sentenced defendant to nine years in prison for aggravated DUI and six years for aggravated DWLR (which was an extended term), to run concurrently. C190; R232-33.

II. Appellate Court Decision

On appeal, defendant argued that the trial court erred by (1) failing to address his motion for substitution of judge, and (2) imposing an extended term sentence on the less-serious DWLR conviction. A1. The appellate

majority held that the trial court erred in failing to rule on the pro se motion for substitution of judge and reversed defendant's convictions, explaining that section 114-5(a) creates an absolute, personal right for defendants, and thus the motion was not barred by the rule against hybrid representation. A5-6. The majority further held that such motions are self-executing and are not subject to abandonment. A4-5. Although the majority acknowledged that defendant had forfeited the substitution-of-judge issue by failing to include it in his post-trial motion, the majority determined that it was not bound by that forfeiture because the issue "directly implicat[ed] [defendant's] constitutional right to an impartial trial." A5. The majority did not reach defendant's sentencing claim.

Justice Holdridge dissented; he would have held that defendant abandoned his motion for substitution of judge. A6. He reasoned that section 114-5(a) motions are not self-executing because the trial court must still determine whether the motion satisfies the section's requirements. *Id.* Accordingly, he would have affirmed the convictions. *Id.*[2]

[2] As a result, the dissenting justice would have reached the merits of defendant's sentencing claim. Because the People had conceded that it was error to impose an extended term sentence on the lesser offense of DWLR, Justice Holdridge would have "reduced defendant's sentence for aggravated [DWLR] to three years' imprisonment . . . as the defendant and the State agree that such remedy is appropriate." A8-9 (Holdridge, J., dissenting) (citing Ill. S. Ct. R. 615(b)(4)).

ARGUMENT

Defendant's claim that the trial court erred in not ruling on his pro se motion for substitution of judge pursuant to section 114-5(a) is barred because he acquiesced to any error by the trial court. He not only remained silent regarding the pro se motion, but his attorney expressly requested that the court delay considering it. Then, defendant elected to waive his right to a jury and requested that the trial judge named in the motion to substitute act as the trier of fact in his case. Consequently, defendant's actions went beyond mere forfeiture to affirmative acquiescence, and plain error review is unavailable.

But even if defendant's actions do not amount to acquiescence, his inaction clearly establishes forfeiture. Defendant has forfeited his claim both because he abandoned the motion and because he omitted it from his post-trial motion. Contrary to the appellate majority's holding, A5, requests for substitution of judge pursuant to section 114-5(a) are not immune to forfeiture. The right to substitution of judge does not directly implicate the constitutional right to an impartial trial; it is instead a statutory, prophylactic mechanism intended to protect that right. And even if the majority were correct that section 114-5(a) directly implicated a constitutional right, the majority still should have considered whether defendant could excuse his forfeiture as plain error.

Defendant cannot establish plain error because no clear and obvious error occurred. Because defendant was represented by counsel, his pro se motion was barred by the prohibition against hybrid representation. As a result, the pro se motion for substitution of judge was never properly before the trial court, and the court properly declined to rule on the motion.

Even if he established a clear or obvious error, defendant cannot establish first prong plain error because the evidence was not closely balanced. Defendant was found passed out in the driver's seat of his van with open bottles of alcohol. He admitted to drinking before driving and failed several sobriety tests. The People's evidence overwhelmingly established his guilt, and defendant presented no contrary evidence.

Nor can defendant show second prong plain error occurred because error under section 114-5(a) does not amount to structural error. A violation of section 114-5(a) does not necessarily render the trial court biased, other safeguards exist to protect the right to an impartial adjudicator, and there is no evidence that the trial judge here was biased against defendant. Consequently, any error did not rise to the level of second prong plain error.

As the People conceded the merits of defendant's sentencing claim, this Court should vacate his extended sentence for DWLR and reduce it to the maximum non-extended sentence of three years.

I. Standards of Review

Whether defendant acquiesced to, or in the alternative forfeited his claim regarding, any error by the trial court in failing to rule on his motion for substitute of judge presents a question of law, which is reviewed de novo. *See People v. Sophanavong*, 2020 IL 124337, ¶ 21.

Similarly, whether a claim is subject to plain error analysis and whether plain error occurred present questions of law, which are reviewed de novo. *People v. Downs*, 2015 IL 117934, ¶ 15.

II. Defendant acquiesced to, or at least forfeited his claim regarding, any error by the trial court in failing to rule on his pro se motion for substitution of judge.

A. Defendant's acquiesced to any error by the trial court.

Defendant is barred from challenging the propriety of the trial court's failure to rule on his substitution motion because he acquiesced to a trial before the judge named in the motion by requesting a bench trial. *See People v. Parker*, 223 Ill. 2d 494, 507-08 (2006); *People v. Harvey*, 211 Ill. 2d 368, 385 (2004). When a defendant actively participates in proceedings, "'he is not in a position to claim he was prejudiced thereby.'" *People v. Villarreal*, 198 Ill. 2d 209, 227 (2001) (quoting *People v. Schmitt*, 131 Ill. 2d 128, 137 (1989)).

Here, defendant's actions went beyond merely failing to object that the trial court did not rule on his pro se motion. Defense counsel asked the court to delay ruling on the motion and neither defendant nor his counsel mentioned defendant's motion to substitute judge again. Both continued to participate in proceedings before the judge named in the motion without

complaint. Indeed, defendant requested a bench trial before the very judge named in his motion for substitution. C48; R58-61. In other words, defendant not only acquiesced in the proceedings before the judge named in his motion, but he requested that the judge adjudicate his case when he requested a bench trial. Consequently, defendant acquiesced to the trial judge's continued participation in proceedings, and his claim is barred.

Moreover, because defendant acquiesced to any error, his claim is not subject to plain error review. *See Harvey*, 211 Ill. 2d at 385 (claims waived through acquiescence are not subject to plain error review); *see also People v. Patrick*, 233 Ill. 2d 62, 77 (2009).

B. At a minimum, defendant forfeited his claim.

Even if defendant's actions do not amount to acquiescence, his inaction clearly establishes forfeiture. Defendant forfeited his claim by both abandoning it — that is, failing to raise a contemporaneous objection to continued proceedings before the trial judge that was the subject of defendant's motion to substitute — and by omitting the issue from his amended post-trial motion. *People v. Jackson*, 2022 IL 127256, ¶ 15 ("We have long held that, for a criminal defendant to preserve an issue for review on appeal, the defendant must object at trial and raise the issue in a written post-trial motion.").

First, defendant forfeited his claim by abandoning his motion — that is, by failing to seek a ruling before continuing proceedings in front of the

judge named in his motion for substitution. Where a motion is not ruled upon, courts have used the term "abandonment" to describe a party's failure to raise a contemporaneous objection to continued proceedings without a ruling on the motion. *See, e.g.*, *People v. Johnson*, 159 Ill. 2d 97, 123 (1994); *see also People v. Haywood*, 2016 IL App (1st) 133201, ¶ 25. A party filing a motion bears the responsibility of bringing the motion to the court's attention and requesting a ruling, *People v. Stewart*, 412 Ill. 106, 108 (1952); *see also Haywood*, 2016 IL App (1st) 133201, ¶ 25, and when a party fails to do so, the appellate court presumes he has abandoned the motion, *Haywood*, 2016 IL App (1st) 133201, ¶ 25.

Here, assuming arguendo that defendant properly filed the pro se motion for substitution of judge, *but see infra* section III.A, he abandoned the motion by failing to request a ruling from the trial court. Defense counsel initially brought the motion to the court's attention but requested that the court delay ruling until a later date. R19. Neither defense counsel nor defendant mentioned the motion again, much less requested a ruling on the motion at any of the subsequent proceedings. Accordingly, this Court should presume that defendant abandoned the motion and hold that his claim is forfeited for failure to make a contemporaneous objection.

The appellate majority's holding that abandonment principles do not apply to motions for substitution of judge because they are self-executing, A4-5, is incorrect and cannot overcome defendant's forfeiture. First, regardless

of whether defendant abandoned his motion, he did not include it in his post-trial motion, *see* C80-88, which alone renders the claim forfeited. *People v. Enoch*, 122 Ill.2d 176, 186 (1988) ("*Both* a trial objection *and* a written post-trial motion raising the issue are required for alleged errors that could have been raised during trial.") (emphases in original.); *see also People v. Naylor*, 229 Ill. 2d 584, 592 (2008).

Second, motions pursuant to section 114-5(a) are not self-executing. This Court has made clear that before a trial court grants a motion for substitution and transfers proceedings to a new trial judge, it must determine whether "(1) the motion is timely filed; (2) the motion names only one judge unless the defendant is charged with a Class X felony; (3) the motion is made in writing; (4) the motion alleges that the trial judge is prejudiced against the defendant such that the defendant cannot receive a fair trial; and (5) the motion is made before any substantive rulings in the case." *People v. Evans*, 209 Ill. 2d 194, 215 (2004). If the motion fails to meet these criteria, the trial court should deny it. *See id.* at 216 (holding trial court properly denied untimely substitution motion). Accordingly, the appellate court was wrong that motions made pursuant to section 114-5(a) must be automatically granted without any input from the court. Improper or inadequate motions should be denied.

In sum, both because defendant failed to seek a ruling on his motion, which creates the presumption that he abandoned it, and because defendant did not include the claim in his post-trial motion, he has forfeited his claim.

Indeed, the appellate court acknowledged that defendant forfeited his claim, but wrongly excused that forfeiture because it involved "an issue that directly implicates his constitutional right to an impartial trial." A5. The appellate majority's reasoning is flawed in at least two respects. First, constitutional rights — even fundamental rights — are subject to forfeiture. *People v. Allen*, 222 Ill. 2d 340, 352 (2006) ("[E]ven constitutional errors can be forfeited."); *see also People v. Blackwell*, 164 Ill. 2d 67, 74 (1995) (holding defendant may forfeit *Batson* claim by failing to object). The forfeiture doctrine "is fundamental to our adversarial system of justice," as it provides trial courts an opportunity to quickly correct perceived errors without wasting judicial resources with unnecessary appeals. *People v. Jackson*, 2022 IL 127256, ¶ 15. The doctrine also "prevents criminal defendants from sitting idly by and knowingly allowing an irregular proceeding to go forward only to seek reversal due to the error when the outcome of the proceeding is not favorable." *Id.*

Second, a motion for substitution of judge pursuant to section 114-5(a) does *not* directly implicate the constitutional right to an impartial trial (and the decision to deny one does not constitute structural error, *see infra* Section III.B.2). Although section 114-5(a) is related to the right to an impartial

trial, it is merely a prophylactic mechanism for protecting that right. *See People v. Walker*, 119 Ill. 2d 465, 470 (1988). And the failure to apply a statute enacted to protect a fundamental right is not necessarily a failure to protect the underlying right itself. *Jackson*, 2022 IL 127256, ¶ 36. Thus, the appellate majority should have deemed defendant's substitution-of-judge claim forfeited and then determined whether he could excuse his forfeiture under the plain error doctrine. *See id.* ¶¶ 18-19; *see also People v. Heider*, 231 Ill. 2d 1, 27 (2008) (Thomas, C.J., dissenting) ("When a court uses the phrase 'forfeiture is a limitation on the parties and not on the court' as an independent basis for excusing a defendant's forfeiture, it improperly relieves the defendant of his burden of establishing plain error.").

In sum, defendant's claim is, at a minimum, forfeited and, as such, is subject, at best, to plain error review.

III. In any event, defendant cannot establish plain error.

Even if defendant merely forfeited his claim, he cannot excuse his forfeiture as plain error. The plain error doctrine "is a narrow and limited exception" to forfeiture. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). Thus, a defendant's forfeited claim may be reviewed only if a clear or obvious error occurred and (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against defendant, regardless of the seriousness of the error, or (2) the error is so serious that it affected the fairness of defendant's trial and challenged the integrity of the judicial

process, regardless of the closeness of the evidence. *People v. Birge*, 2021 IL 125644, ¶ 24 (citing *People v. Piatkowski*, 225 Ill. 2d 551, 564-65 (2007)). Under either prong of the plain error doctrine, defendant bears the burden of persuasion. *Birge*, 2021 IL 125644, ¶ 24 (citing *People v. Thompson*, 238 Ill. 2d 598, 613 (2010)). Defendant's claim fails at the threshold, for he cannot establish that a clear or obvious error occurred, let alone that any error amounted to first or second prong plain error.

A. Defendant cannot establish any error occurred because his pro se motion was not properly before the trial court.

As an initial matter, defendant cannot establish any error — let alone clear or obvious error. *See People v. Moon*, 2022 IL 125959, ¶ 22 ("The first analytical step under the plain error rule is to determine whether there was a clear or obvious error."). "Absent reversible error, there can be no plain error." *People v. McDonald*, 2016 IL 118882, ¶ 48.

Here, no clear or obvious error occurred because defendant's pro se motion was not properly before the trial court where defendant was represented by counsel when he filed it. This Court has long held that a defendant has a right to either be represented by counsel *or* represent himself. *People v. Ephraim*, 411 Ill. 118, 122 (1952) ("An accused has either the right to have counsel act for him or the right to act himself."); *see also People v. Redd*, 173 Ill. 2d 1, 38 (1996). There is no constitutional right to hybrid representation. *People v. Pecoraro*, 175 Ill. 2d 294, 333 (1997); *Redd*, 173 Ill. 2d at 38. Accordingly, a defendant represented by counsel generally

has no authority to file pro se motions, and courts should not consider such motions. *People v. Williams*, 2021 IL App (3d) 190082, ¶ 22; *People v. Rhodes*, 2019 IL App (4th) 160917, ¶ 18; *Haywood*, 2016 IL App (1st) 133201, ¶ 24; *People v. Patrick*, 406 Ill. App. 3d 548, 564 (2d Dist. 2010).

Defendant requested and was appointed counsel. R7. His subsequent pro se motion was therefore unauthorized and not properly before the trial court. *See, e.g.*, *Williams*, 2021 IL App (3d) 190082, ¶ 22. Because defendant had appointed counsel at the time he purported to file his pro se motion to substitute judge, and because appointed counsel did not adopt defendant's motion or file one of his own, no motion to substitute judge was properly before the trial court. According, the court did not err (much less clearly or obviously err) in not ruling on defendant's pro se motion.

In holding that the bar on hybrid representation does not apply to pro se motions for substitution, the appellate majority relied on *People v. Gold-Smith*, 2019 IL App (3d) 160665, which reasoned that the bar on hybrid representation does not apply to motions for substitution of judge because section 114-5(a) provides that "defendant," rather than "defense counsel," may file a motion for substitution of judge. *Gold-Smith*, 2019 IL App (3d) 160665, ¶ 29; *see also* A5-6. But this reasoning is flawed, and if adopted, it would lead to absurd results.

To begin, most statutes governing criminal procedure refer to the "defendant" rather than "defense counsel." *See, e.g.*, 725 ILCS 5/109-3(e)

("During preliminary hearing or examination the defendant may move for an order of suppression of evidence . . . and may move for dismissal of the charge[.]"); 725 ILCS 5/114-1(a) (describing motion to dismiss a charge as filed "[u]pon the written motion of the defendant"); 725 ILCS 5/114-4(a) ("The defendant or the State may move for a continuance[.]"); 725 ILCS 5/114-6(a) ("A defendant may move the court for a change of place of trial[.]"); 725 ILCS 5/114-9(a) ("On motion of the defendant the court shall order the State to furnish the defense a list of prosecution witnesses[.]"); 725 ILCS 5/114-10(a) ("On motion of the defendant in any criminal case made prior to trial the court shall order the State to furnish the defendant a copy of any written confession made[.]"); 725 ILCS 5/114-11(a) ("Prior to the trial of any criminal case a defendant may move to suppress as evidence any confession given by him[.]"); 725 ILCS 5/114-12(a) ("A defendant aggrieved by an unlawful search and seizure may move the court for the return of property and suppress as evidence anything so obtained[.]").

As a result, if the use of "defendant" in a statute carried the weight ascribed to it by the appellate court in *Gold-Smith*, then counseled defendants would be permitted, or even required, to file routine motions like a motion to suppress, *see* 725 ILCS 5/109-3(e), or motion to dismiss, *see* 725 ILCS 5/114-1(a), pro se. But these statutes use the word "defendant" not because they intend to create a right or obligation to file pro se motions where the defendant is represented by counsel, but because every right in a

defendant's criminal trial is the defendant's right and not a right of defense counsel. *See People v. Phillips*, 217 Ill. 2d 270, 280 (2005) (explaining that defense counsel acts as an agent of defendant). Nevertheless, this Court has explained, defense counsel must have the ability to manage and exercise the defendant's rights, even without direct consultation with defendant, "in order for a representative system of litigation to function." *Id.* Thus, the Court has identified only five constitutional rights so fundamental that the defendant, and not defense counsel, must make the ultimate decision whether to exercise or waive them: "(1) what plea to enter; (2) whether to waive a jury trial; (3) whether to testify in his own behalf; (4) whether to tender a lesser-included-offense instruction; and (5) whether to appeal." *Id.* at 281. The statutory right to an automatic substitution of judge under section 114-5(a) is not included among or comparable to any of these five rights.

Moreover, although related to the constitutional right to an impartial adjudicator, the right created by section 114-5(a) is a statutory right. In this way, it is comparable to the right to peremptorily strike proposed jurors. *See* Ill. S. Ct. R. 434(d). This Court has recognized the right to peremptorily challenge venire members as "'one of the most important of the rights secured to the accused.'" *People v. Daniels*, 172 Ill. 2d 154, 165 (1996) (quoting *Swain v. Alabama*, 380 U.S. 202, 219 (1965)). But despite its importance and its relationship to the right to an impartial trial — and despite Rule 434(d)'s use of the word "defendant," Ill. S. Ct. R. 434(d) — defense counsel makes the

ultimate decision on whom to strike, not defendant. *Phillips*, 217 Ill. 2d at 281.

In other words, because section 114-5(a) is not analogous to the five rights that this Court has held must be exercised by the defendant, and is instead analogous to the right to peremptorily strike jurors conferred by Rule 434(d), which may be exercised by defense counsel without consulting with the defendant, the appellate court erred in holding that the statutory right to challenge a judge through a motion for substitution is not subject to the rule against hybrid representation. Accordingly, defendant's pro se motion for substitution of judge was not properly before the trial court, and it follows that the trial court did not clearly err in not ruling on defendant's pro se motion.

B. If error occurred, defendant cannot establish either first or second prong plain error.

Even if defendant could establish clear or obvious error, defendant could not show that the requirements of the plain error doctrine were satisfied, because the evidence against defendant was not closely balanced, and a violation of section 114-5(a) is not second prong plain error.

1. The evidence was not closely balanced.

Defendant cannot establish first prong plain error because the evidence was not closely balanced. *See Birge*, 2021 IL 125644, ¶ 24 (first prong met when "the evidence is so closely balanced that the error alone

threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error").

The evidence of defendant's guilt of the charged DUI and DWLR offenses was overwhelming. The unrebutted evidence established that an officer found defendant "passed out" in the driver's seat of his parked van with an open, half-empty whiskey bottle in between his legs and an open, half-empty bottle of beer beside him. R76-79. He was in a parking lot that could only be reached by a public highway. R78. And although the van was turned off, its key was in the ignition, establishing defendant's control of the vehicle. R80; *see also City of Naperville v. Watson*, 175 Ill. 2d 399, 402 (1997) (factors establishing actual control include "whether the motorist is positioned in the driver's seat of the vehicle, has possession of the ignition key and has the physical capability of starting the engine and moving the vehicle"). When the officer roused defendant, defendant said he had come from his home in Springfield after drinking "a beer-and-a-half," and he then attempted to hide the half-consumed bottle of whiskey. R83. Defendant failed three standard field sobriety tests, was unable to count backwards, and was unable to recite the alphabet. R86-88. His consciousness of guilt was established by his refusal to submit to blood and urine tests. R96. Finally, defendant's license was revoked at the time. R84. Defendant presented no evidence. In sum, the evidence of defendant's guilt was not closely balanced and he thus cannot establish first prong plain error.

2. The alleged error is not second prong plain error because it is not akin to structural error

Nor can defendant establish second prong plain error. Under this prong of the plain error doctrine, "[p]rejudice to the defendant is presumed because of the importance of the right involved, 'regardless of the strength of the evidence.'" *People v. Herron*, 215 Ill. 2d 167, 187 (2005) (quoting *People v. Blue*, 189 Ill. 2d 99, 138 (2000)). Thus, to show second prong plain error, a defendant must demonstrate that the alleged error is "so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process." *Birge*, 2021 IL 125644, ¶ 24. This Court has equated second prong plain error with structural error, explaining that "automatic reversal is only required where an error is deemed 'structural,' i.e., a systemic error which serves to 'erode the integrity of the judicial process and undermine the fairness of the defendant's trial.'" *People v. Glasper*, 234 Ill. 2d 173, 197-98 (2007) (quoting *Herron*, 215 Ill. 2d at 186). "An error is typically designated as structural only if it necessarily renders a criminal trial fundamentally unfair or an unreliable means of determining guilt or innocence." *Thompson*, 238 Ill. 2d at 609.

As discussed, section 114-5(a) is a statutory mechanism that operates to prophylactically protect a defendant's right to an impartial adjudicator. *Walker*, 119 Ill. 2d at 470. But the fact that a mechanism prophylactically protects a constitutional right does not make it the equivalent of the underlying right. *See Jackson*, 2022 IL 127256, ¶¶ 44-45 (although the

common law right to poll the jury protects the constitutional right to a unanimous jury, the common law right is not itself constitutionally required). Nor does the failure to provide an opportunity to exercise the protective mechanism "necessarily render" a trial unfair. *Thompson*, 238 Ill. 2d at 609. Accordingly, when assessing whether a violation of a statutory right rises to the level of structural error, this Court considers whether the statutory violation inevitably causes a violation of the underlying constitutional right, whether other safeguards exist to protect the underlying right, and whether there is any indication in the record that the underlying right was violated. *Jackson*, 2022 IL 127256, ¶ 47.

Because section 114-5(a) authorizes a substitution of judge without proof — or even any explanation — of the alleged bias on the part of the challenged judge, a violation of the statute does not necessarily result in a trial before a biased judge. Put differently, section 114-5(a) allows a defendant to move for substitution of judge based solely on his assertion the trial judge might be biased against him. But that hardly demonstrates that the judge actually is biased; accordingly, continued proceedings before that judge do not necessarily violate the constitutional right to an impartial adjudicator. Moreover, other safeguards exist to protect the right to an impartial adjudicator. If the trial judge exhibits bias in some demonstrable way, a defendant may move to substitute the judge for cause at any time. *See* 725 ILCS 5/114-5(d). Additionally, Rule 63(c) establishes a trial judge's

independent duty to recuse herself if there is even an appearance of bias. Ill. S. Ct. R. 63(c). Finally, the record here contains no hint that the trial judge was biased. Indeed, defendant chose to have the judge named in his substitution motion decide his case rather than a jury, suggesting that not even he ultimately believed that the judge was biased. C48; R58-61.

In sum, because the failure to rule on a section 114-5(a) motion does not necessarily mean that the defendant's trial occurred before a biased judge, because other safeguards exist to protect the right to an impartial trial, and because there is no indication in the record of actual bias by the trial court here, any error in failing to grant defendant's pro se motion was not second prong plain error.

IV. Defendant's extended sentence should be vacated and reduced to the maximum non-extended sentence.

Because the appellate court reversed defendant's convictions, the court declined to consider defendant's claim that the trial court erred in imposing an extended term sentence on his aggravated DWLR conviction. A6. But the People conceded the merits of defendant's sentencing claim below. A8. Thus, if this Court reverses the appellate court's judgment, it should reduce defendant's sentence on the DWLR conviction pursuant to Rule 615(b)(4) to the maximum non-extended sentence of three years. *See People v. Ramsey*, 2018 IL App (2d) 151071, ¶ 30 (reducing unauthorized extended sentence to maximum non-extended term); *see also* 730 ILCS 5/5-4.5-45(a).

CONCLUSION

This Court should reverse the appellate court's judgment reversing defendant's convictions and, pursuant to the Court's authority under Rule 615(b)(4), reduce defendant's sentence on the DWLR conviction to the maximum non-extended sentence of three years.

March 1, 2023

Respectfully Submitted,

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People of the State of Illinois

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, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 23 pages.

/s/ Nicholas Moeller
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 March 1, 2023 the foregoing Brief and Appendix 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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APPENDIX

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2022 IL App (3d) 190154-U

Order filed April 1, 2022

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2022

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-19-0154 Circuit No. 17-CF-1812
BRYAN N. BRUSAW,	)	Honorable Sarah F. Jones,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Presiding Justice O'Brien concurred in the judgment.
Justice Holdridge dissented.

ORDER

¶ 1 *Held*: The circuit court erred when it failed to rule on defendant's motion to substitute judge.

¶ 2 Defendant, Bryan N. Brusaw, appeals following his convictions for aggravated driving under the influence (DUI) and aggravated driving while license revoked. He argues that the Will County circuit court's failure to rule upon his motion for substitution of judge warrants vacating his convictions and remand for a new trial. He also contends that the court erred in imposing an

extended-term sentence on the lesser of the two offenses. We reverse and remand for further proceedings.

¶ 3 I. BACKGROUND

¶ 4 On September 6, 2017, the State charged defendant by criminal complaint with aggravated DUI (625 ILCS 5/11-501(a)(2), (d)(2)(E) (West 2016)) and aggravated driving while license revoked (*id.* § 6-303(a), (d-3)). The State filed the same charges in an indictment dated September 20, 2017. The indictment alleged that defendant had eight prior convictions for DUI and six prior convictions for driving while license revoked.

¶ 5 At defendant's first appearance, the court appointed an assistant public defender to represent him. Defendant was arraigned on September 29, 2017. At that hearing, the matter was assigned to the courtroom of Judge Sarah F. Jones, with a pretrial date scheduled for October 25, 2017.

¶ 6 On October 5, 2017, defendant filed, as a self-represented litigant, a motion for substitution of judge pursuant to section 114-5(a) of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/114-5(a) (West 2016)). In the motion, defendant expressed concern that he would not receive a fair and impartial trial if the cause was tried before Judge Jones, due to her prejudice against him. For reasons not made clear by the record, a hearing was held on October 11, 2017. Defendant was not present at the hearing. Defense counsel acknowledged that defendant had "filed his own motion," then requested that motion be continued to the previously scheduled hearing.

¶ 7 Defense counsel subsequently filed an emergency motion to advance the October 25 hearing to November. Defendant's motion for substitution of judge was not discussed at the hearing on that emergency motion, nor was it raised at the eventual November hearing. The matter proceeded to trial without the motion for substitution of judge ever having been raised again.

¶ 8 Following a bench trial on July 9, 2018, the court found defendant guilty of both charges. The court sentenced him to a term of nine years' imprisonment for aggravated DUI and a concurrent term of six years' imprisonment for aggravated driving while license revoked.

¶ 9 II. ANALYSIS

¶ 10 On appeal, defendant argues that the circuit court's failure to address his motion for substitution of judge requires vacating his convictions.

¶ 11 Section 114-5(a) of the Code states:

> "Within 10 days after a cause *** has been placed on the trial call of a judge the defendant may move the court in writing for a substitution of that judge on the ground that such judge is so prejudiced against him that he cannot receive a fair trial. Upon the filing of such a motion the court shall proceed no further in the cause but shall transfer it to another judge not named in the motion. The defendant may name only one judge as prejudiced, pursuant to this subsection ***." 725 ILCS 5/114-5(a) (West 2016).

The plain language of the statute gives defendant "an absolute right to one substitution of judge based on nothing more than an uncontestable allegation of prejudice." *People v. Gold-Smith*, 2019 IL App (3d) 160665, ¶ 29. The statute makes no provision for a hearing and requires the court to transfer the case to another judge upon receipt of defendant's motion. *Id.* A court commits reversible error if it erroneously denies a timely-filed motion for substitution of judge. *People v. Tate*, 2016 IL App (1st) 140598, ¶ 19 (collecting cases).

¶ 12 Aside from the statutory limiting factors which are not at play in this case, the parties do not dispute that defendant filed a timely motion to substitute judge under section 114-5(a). Therefore, defendant had an absolute right to one substitution of judge. Nevertheless, Judge

Jones did not "proceed no further" and transfer the cause to another judge. See 725 ILCS 5/114-5(a) (West 2016). Instead, she continued to preside over the case as if the motion had not been filed. Judge Jones's actions contravene the directive of section 114-5(a) and are erroneous.[1] See *Gold-Smith*, 2019 IL App (3d) 160665, ¶ 29; *Tate*, 2016 IL App (1st) 140598, ¶ 20.

¶ 13 The State argues that the court did not err because: (1) defendant abandoned and forfeited his motion to substitute judge, (2) he did not attempt to secure a ruling on the motion or raise the issue in his posttrial motion, and (3) defendant was barred from filing this motion as a self-represented litigant because he was represented by counsel at the time. We are unpersuaded by the State's arguments.

¶ 14 First, the plain language of section 114-5(a) of the Code establishes that the motion is not subject to the common abandonment principal that puts the onus on defendant to secure a ruling on his motion. See *People v. Stewart*, 412 Ill. 106, 108 (1952). The statute expressly states, "Upon the filing of such a motion the court shall proceed no further." 725 ILCS 5/114-5(a) (West 2016). This wording clearly directs a court to respond to the motion before it may proceed any further in the case. Notably, the statute does not provide for a hearing, but requires the court to transfer the case upon receipt of the motion. *Gold-Smith*, 2019 IL App (3d) 160665, ¶ 29. The statutory

[1]The dissent disagrees with this conclusion asserting that, despite the colloquial name of a section 114-5(a) motion as a motion for "automatic substitution," such a motion is not self-executing. To reach this conclusion, the dissent relies on *People v. Johnson*, 159 Ill. 2d 97, 123 (1994) (finding defendant abandoned his motion for substitution by failing to pursue it within a reasonable time after he filed it) and *People v Haywood*, 2016 IL App (1st) 133201, ¶ 25 (finding the mere act of filing a motion to substitute judge "does not constitute a sufficient application."). However, neither *Johnson* nor *Haywood* addressed a motion for substitution of judge filed under section 114-5(a) of the Code. Instead, they reviewed motions filed under section 114-5(d). Section 114-5(d) permits a substitution of judge for cause, and the statutory language of this section does not include the automatic execution phrasing found in section 114-5(a) —"Upon the filing of such a motion the court *shall proceed no further* in the cause *but shall transfer it* to another judge not named in the motion." (Emphases added.) 725 ILCS 5/114-5(a) (West 2016). It is this language that makes a motion filed under section 114-5(a) "automatic" and excepts it from the common rule that the movant bears the burden of obtaining a ruling on his motion.

wording protects the sanctity of the constitutional right to an impartial trial that underlies the need for such an automatic substitution. See *People v. Walker*, 119 Ill. 2d 465, 470 (1988) ("For the past 114 years, Illinois law has protected the constitutional right to a fair and impartial trial in criminal cases by providing for the substitution of a judge who is allegedly prejudiced against a defendant."). Any additional requirements to secure a ruling are beyond the scope of the statute and have the potential to infringe on a defendant's right to an impartial trial.

¶ 15 Second, we find that although defendant did not raise this issue in a posttrial motion, his forfeiture does not prevent our review. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (to preserve an issue for appellate review, a defendant must both object to the issue at trial and raise it in a posttrial motion). However, "Forfeiture is a limitation on the parties, not the court." *People v. Custer*, 2019 IL 123339, ¶ 19. While the supreme court has cautioned that this exception to forfeiture is narrow, we find that it is applicable in this case where defendant raises an issue that directly implicates his constitutional right to an impartial trial. See *In re Br. M.*, 2021 IL 125969, ¶ 39.

¶ 16 In *Tate*, 2016 IL App (1st) 140598, the court considered "the improper denial of a defendant's motion for a substitution of judge" to be a "fundamental defect". *Id.* ¶ 19. Considering the importance of the right protected by a motion to substitute judge, honoring "defendant's procedural default would elevate form over substance." *Id.* ¶ 44. Therefore, we find forfeiture does not preclude our review.

¶ 17 Third, we find that defendant's filing at a time when he was represented by counsel did not prohibit Judge Jones from considering the motion to substitute judge. See *People v. James*, 362 Ill. App. 3d 1202, 1205 (2006) (a defendant cannot receive services of counsel and still file motions as a self-represented litigant). As we found in *Gold-Smith*, 2019 IL App (3d) 160665, ¶ 29,

defendant has an absolute right to one substitution of judge, and that "right belongs to the defendant, not to defense counsel." In effect, the right to seek a substitution of judge is personal to defendant, much like a defendant's right to decide whether to testify, or be represented by counsel. *People v. Corbett*, 387 Ill. 41, 43 (1944); *People v. Barrier*, 359 Ill. App. 3d 639, 642 (2005). Moreover, since this motion carries with it an implied accusation of judicial bias, it logically belongs to defendant.

¶ 18 In this case, defendant personally exercised his right to substitute judge, and the court's failure to immediately address defendant's motion functioned as a denial of the motion. Accordingly, we find that the court erred in failing to address defendant's motion to substitute judge.

¶ 19 Since our ruling moots defendant's sentencing issue, we need not reach it.

¶ 20 III. CONCLUSION

¶ 21 The judgment of the circuit court of Will County is reversed and remanded for further proceedings.

¶ 22 Reversed and remanded.

¶ 23 JUSTICE HOLDRIDGE, dissenting:

¶ 24 I respectfully dissent from the majority's offering, as I would find that the defendant abandoned his motion.

¶ 25 The majority finds that "the plain language of section 114-5(a) of the Code establishes that the motion is not subject to the common abandonment principal that puts the onus on defendant to secure a ruling on his motion." *Supra* ¶ 14. I disagree. A motion for substitution of judge filed pursuant to section 114-5(a) is not self-executing. While such a motion is referred to colloquially as a motion for "automatic substitution," insofar as it does not require a defendant to prove

prejudice, the substitution is not *actually* automatic. *People v. Tate*, 2016 IL App (1st) 140598, ¶ 13. On the contrary, before such a motion is granted, the court must review the motion to ensure that (1) it was made within 10 days of placement of the case on the named judge's call, (2) only one judge is named in the motion, (3) the motion is in writing, (4) the motion makes a sufficient allegation of prejudice and the inability to receive a fair trial, and (5) the motion has been made before a substantive ruling in the case. *Id.*; 725 ILCS 5/114-5(a) (West 2016). Moreover, the statute expressly refers to a defendant's request for substitution as a "motion," which is defined as a "written or oral application requesting a court to make a specified ruling or order." Black's Law Dictionary (11th ed. 2019). A motion, by definition, requires a ruling from the court. Thus, neither in its plain language nor in its practical application can section 114-5(a) of the Code be characterized as self-executing.

¶ 26 Notably, in a similar case, our supreme court found that a defendant abandoned his motion for substitution of judge, stating:

> "The State contends that defendant waited too long to bring the motion to the attention of the court. We agree. Defendant abandoned his motion by failing to pursue it within a reasonable time after he filed it, in late July 1990. The trial did not begin until November 13, 1990, almost four months later, and defendant has provided no good reason why he could not have brought the motion to the attention of his counsel or the court at least by the time of trial." *People v. Johnson*, 159 Ill. 2d 97, 123 (1994).

The First District of our appellate court relied on this reasoning in *People v. Haywood*, 2016 IL App (1st) 133201, ¶ 25, in finding that a defendant had abandoned his motion for substitution of judge, stating:

> "[A]lthough defendant's *pro se* motions were filed with the clerk, the mere act of filing in the clerk's office does not constitute a sufficient application. [Citation.] The party filing the motion has the responsibility 'to request the trial judge to rule on it, and when no ruling has been made on a motion, the motion is presumed to have been abandoned absent circumstances indicating otherwise.' "

¶ 27 I would apply *Johnson* and *Haywood*, here, and find that the defendant abandoned his motion for substitution of judge by failing to pursue a ruling on the motion.[2] It was the defendant's responsibility to ensure that the circuit court ruled on his motion. When a motion is not ruled upon, "the motion is presumed to have been abandoned absent circumstances indicating otherwise." *People v. Van Hee*, 305 Ill. App. 3d 333, 335 (1999). No such circumstances are present here; in fact, the defendant agrees that he made no efforts to procure a ruling on his motion.

¶ 28 Because I would find that the defendant abandoned his motion for substitution of judge, I would reach the merits of the defendant's sentencing argument. The court's sentence of six years' imprisonment for the Class 4 offense of aggravated driving while license revoked was an extended-term sentence. Because the defendant was also convicted of the Class X offense of aggravated DUI, an offense that arose from the same course of conduct, the imposition of an extended-term sentence on the lesser offense was improper. See *People v. Reese*, 2017 IL 120011, ¶ 83. The State concedes that the circuit court erred in imposing that sentence. I would, thus, reduce the

[2]While the majority notes that *Johnson* and *Haywood* concern section 114-5(d), instead of section 114-5(a), we find these cases to be equally applicable, here. This is especially so where neither the majority nor the defendant have been able to point to any caselaw directly on point. The case of *Gold-Smith*, 2019 IL App (3d) 160665, which the majority relies on, does not concern the situation where the defendant failed to seek a ruling on his motion.

defendant's sentence for aggravated driving while license revoked to three years' imprisonment, the maximum nonextended term for a Class 4 felony, as the defendant and the State agree that such remedy is appropriate. See Ill. S. Ct. R. 615(b)(4) (eff. Jan. 1, 1967) (establishing that a reviewing court has authority to "reduce the punishment imposed by the trial court").

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