2025 IL App (5th) 220699-U

NOS. 5-22-0699, 5-22-0700 cons.

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. TRAVIS G. ALLEN, Defendant-Appellant.	)))))))))	Appeal from the Circuit Court of Pope County. Nos. 21-CF-8, 21-CF-10 Honorable Joseph M. Leberman, Judge, presiding.

JUSTICE VAUGHAN delivered the judgment of the court.
Justices Moore and Barberis concurred in the judgment.

ORDER

¶ 1 *Held*: We reverse defendant's convictions and sentences where he established counsel was ineffective for failing to file a motion to withdraw raising a double jeopardy violation.

¶ 2 Defendant appeals from his judgment and sentences that were the result of his partially negotiated plea. On appeal, he argues his conviction for aggravated unlawful possession of a stolen police vehicle violated his double jeopardy rights, and counsel was ineffective for not raising the issue below. He further argues the court failed to conduct adequate *Krankel* proceedings. For the reasons stated below, we reverse and remand.

¶ 3 I. BACKGROUND

¶ 4 On March 10, 2021, defendant was charged with various crimes in Pope County cases 21-CF-8, 21-CF-9, and 21-CF-10, based on his actions on February 20 and 21 of 2021. In Pope County

case No. 21-CF-8, defendant was charged with attempted aggravated vehicular hijacking (720 ILCS 5/8-4(a), 18-4(a)(1) (West 2020)), a Class 1 felony; unlawful possession of a stolen vehicle (625 ILCS 5/4-103(a)(1) (West 2020)), a Class 2 felony; and aggravated battery (720 ILCS 5/12-3.05(a)(1) (West 2020)), a Class 3 felony. In Pope County case No. 21-CF-9, defendant was charged with residential burglary (*id.* § 19-3), a Class 1 felony; theft over $500 (*id.* § 16-1), a Class 3 felony; and criminal damage to property less than $500 (*id.* § 21-1), a Class A misdemeanor.

¶ 5 In Pope County case No. 21-CF-10, defendant was charged with one count of aggravated unlawful possession of a stolen police vehicle (625 ILCS 5/4-103.2(a)(6) (West 2020)), a Class 1 felony, in that defendant possessed a 2008 Ford Explorer with a vehicle identification number of 1FMEU73E98UA8878, knowing that it was the property of Pope County Sheriff's Department and was stolen. He was also charged with aggravated battery (720 ILCS 5/12-3.05(d)(4)(i) (West 2020)), a Class 2 felony. The pertinent charge to this appeal is the aggravated unlawful possession of a stolen police vehicle (625 ILCS 5/4-103.2(a)(6) (West 2020)) in Pope County case No. 21-CF-10. As such, the remaining charges are discussed only to the extent necessary.

¶ 6 On October 15, 2021, the parties presented to the court their plea agreement. The State averred that defendant intended to enter an open plea of guilty to attempted aggravated vehicular hijacking in case No. 21-CF-8 along with aggravated unlawful possession of a stolen police vehicle in case No. 21-CF-10. In exchange, the State agreed to dismiss the remaining counts in case nos. 21-CF-8 and 21-CF-10 and all the charges in case No. 21-CF-9. Defendant agreed that those were the terms of the plea agreement. The court ensured defendant understood the agreement, the charges to which defendant would plead guilty, and the potential penalties of those charges.

¶ 7 The State indicated that defendant would be subject to discretionary consecutive sentences, and the court explained that it could require defendant to serve one sentence then serve the second

sentence, rather than the sentences running at the same time. Defendant stated he understood. The court then admonished defendant of the rights he would waive by pleading guilty. Defendant stated that he understood, and he had no further questions. Defendant confirmed no one forced or threatened him into pleading guilty, and no one promised him anything other than the terms of the agreement to get him to plead guilty.

¶ 8 The State provided the factual basis for the attempted aggravated vehicular hijacking charge in case No. 21-CF-8. Upon the court's questioning, defendant confirmed he did not wish to contradict or deny that factual basis.

¶ 9 For the factual basis in case No. 21-CF-10, the State provided that Deputy Smith of the Pope County Sheriff's Department would testify that on February 21, 2021, he, along with other officers who were searching for defendant, received a call from Troy and Stephanie Allen indicating they believed their son, defendant, broke into their home in Pope County. Once Deputy Smith entered the Allens' home, he observed defendant lying on the floor. At that time, Troy yelled to Deputy Smith to see if his son was in the home, which woke up defendant. Deputy Smith then informed defendant that he was a police officer and attempted to take defendant into custody. A struggle ensued. During that struggle, defendant broke away from Deputy Smith, jumped out the front window of the home, and went into Deputy Smith's 2008 Ford Explorer, which belonged to the Pope County Sheriff's Department. Defendant then left the property in the vehicle. Upon questioning from the court, defendant confirmed he did not want to contradict or deny the factual basis.

¶ 10 The court found that defendant understood the charges and the potential penalties, including that defendant's sentences could run at the same time or back-to-back. It found there was a sufficient factual basis to support the plea of guilty for both counts. The court then accepted

defendant's guilty plea, dismissed the remaining counts in cases 21-CF-8 and 21-CF-10, and dismissed all of the charges in case No. 21-CF-9.

¶ 11 The presentence investigation report was filed on November 23, 2021. Various documents were attached to the report, including some pleadings filed in defendant's previous criminal cases. Among those pleadings included an indictment and judgment filed in Hardin County case No. 21-CF-8. Those documents showed that defendant was convicted—*inter alia*—of unlawful possession of a stolen vehicle (625 ILCS 5/4-103(a)(1) (West 2020)) for possession a 2008 Ford Explorer, owned by Pope County Sheriff's Department, with a vehicle identification number of 1FMEU73E98UA8878 on February 21, 2021. The documents also reflected that defendant's public defender in the Pope County cases, Lacie McDonald, also represented defendant in the Hardin County case.

¶ 12 The sentencing hearing was held on December 8, 2021. After a full hearing on the matter, the court sentenced defendant to 12 years' imprisonment in case No. 21-CF-8 and 8 years' imprisonment in case No. 21-CF-10, with the sentences to be served consecutively. The court then informed defendant of his appeal rights, including that defendant must file a motion to withdraw his plea or reconsider his sentence before appealing and that any issue or claim of error not raised in the motion to reconsider the sentence or motion to withdraw the guilty plea would be waived.

¶ 13 On January 10, 2022, defendant filed a *pro se* motion for reduction of sentence, arguing his sentence was in violation of the one-act, one-crime doctrine and that the consecutive sentences both derived from the same transaction and therefore should have run concurrently. He also argued the punishment imposed was excessive, cruel, and unusual. Defendant also alleged ineffective assistance of counsel for counsel's (1) failure to adequately spend time with defendant and prepare for his defense; (2) failure to provide defendant with a copy of discovery; (3) failure to request and

obtain court ordered drug and alcohol evaluations to evaluate the possibility of a drug court program; (4) failure to properly relay the full terms and conditions of the State's plea offers before the offers expired; (5) failure to adequately and effectively argue defendant's past history and emphasize his drug and alcohol usage; (6) dishonesty in misleading defendant to believe all of the charges to which he pled guilty would run concurrently and could not possibly be more than 15 years; and (7) failure to file any significant or pertinent pretrial motions challenging the several issues that should have been preserved for the record. Defendant further alleged because of counsel's ineffectiveness, he was misled and improperly enticed into agreeing to an unconscionable decision of entering an open blind plea, which was to defendant's detriment and injurious to him. Defendant requested a *Krankel* hearing to formally determine if his appointed counselor was truly ineffective and asserted conflict counsel should have been appointed.

¶ 14 A docket entry entered on February 23, 2022, stated that the court reviewed the file and appointed public defender McDonald to represent defendant on his motion for reduction of sentence. It further noted that McDonald raised concerns due to defendant's allegations of ineffective assistance of counsel. The entry said that the court found such claims were not appropriate allegations for a motion for reduction of sentence and further found each allegation was "wholly without merit based on the record." It also noted several of the allegations involved trial strategy. The entry further stated:

> "The allegations do not raise a sufficient showing of negligence and, therefore, no *Krankel* hearing is required. *** Because the court has found the ineffective assistance claims to be meritless and because the defendant contacted PD McDonald after the sentencing hearing for assistance with post-conviction issues, the court finds there is no conflict with PD

McDonald representing the defendant on the remaining allegations in his Motion for Reduction of Sentence."

¶ 15 On May 20, 2022, defendant filed a *pro se* motion for a continuance on his reduction of sentence hearings. The motion alleged he received no information or notice for when his motion for reduction of his sentence would be placed on the court's docket, heard, or any response to the orders of the court pertaining to the postsentencing process. It also alleged that defendant filed a motion for transcripts, the common law record, and all the discovery from the circuit court and filed an affidavit of assets and liabilities for any fee to be waived.[1] The motion for continuance argued that the court dismissed his earlier filed motion, including his ineffective assistance of counsel claims, without his knowledge, *ex parte*, with no notice pursuant to due process. The motion asserted counsel failed to give any details as to what was happening in court until April 2022 and did not provide any of the documents he requested despite her knowing he sought to review the clerk's file to amend his motion accordingly. The motion also argued that defendant made good faith attempts to speak with counsel in January and February 2022 to discuss his ineffective assistance of counsel claims and counsel simply advised that his claims lacked merit and were therefore dismissed. Defendant again requested that the court hold a *Krankel* hearing and appoint conflict counsel to ensure fundamental fairness. He also requested to be formally apprised of his entire record including any *ex parte* communications. Due to the lack of access to the record, defendant further requested a continuance of any further proceedings or hearings until he received proper counsel and had access to the record.

[1]The motion and affidavit are not in the record.

¶ 16 A docket entry entered on June 1, 2022, stated that all pleadings filed by defendant on May 20, 2022, were stricken. On June 17, 2022, defense counsel McDonald filed a Rule 604(d) certificate (Ill. S. Ct. R. 604(d) (eff. July 1, 2017))

¶ 17 On September 21, 2022, defense counsel McDonald filed an amended motion for reduction of sentence pursuant to Illinois Supreme Court Rule 604 (eff. July 1, 2017). The motion argued the court erred in imposing a consecutive sentence where it failed to consider that the cases were part of the same course of conduct and therefore should have run concurrent with each other. It also argued the court should reconsider its finding that consecutive sentencing was necessary to protect the public from further criminal conduct of the defendant, pursuant to section 5-8-4(c)(1) of the Unified Code of Corrections (730 ILCS 5/5-8-4(c)(1) (West 2020)). The motion further argued that the imposition of 20 total years for the cases violated the proportionate penalties clause and was excessive in light of defendant being subject to law enforcement shooting and injuring him. The same day McDonald filed an amended Rule 604(d) certificate, stating she consulted with defendant to ascertain his contentions of error in the entry of the plea of guilty and sentence, examined the trial court file and report proceedings for the guilty plea and sentencing hearing, and made any amendments to the motion as necessary for the adequate presentation of any defects in those proceedings. After the court heard arguments on the motion at the September 21, 2022, hearing, it denied defendant's motion for reduction of his sentence.

¶ 18 Defendant timely appealed. On appeal, defendant contends error occurred when he pled guilty to the aggravated unlawful possession of a stolen police vehicle, because that charge violated his double jeopardy rights. Alternatively, he argues counsel was ineffective for failing to file a motion to dismiss that charge and raise the double jeopardy violation in a motion to withdraw his

plea pursuant to Rule 604(d). Defendant also asserts the court failed to provide a sufficient *Krankel* inquiry and requests this court to remand for another preliminary *Krankel* hearing.

¶ 19 The State raises concern of forfeiture on appeal but concedes the merits of the issue and agrees that defendant's aggravated unlawful possession of a stolen police vehicle conviction should be vacated. After oral argument, we ordered the parties to provide additional briefing on the impact, if any, that *People v. Ventsias*, 2014 IL App (3d) 130275, and *People v. Perkins*, 2023 IL App (5th) 220423-U, have on this appeal. Both parties filed such supplemental briefing.

¶ 20 II. ANALYSIS

¶ 21 Defendant asserts his conviction for aggravated unlawful possession of a stolen police vehicle violated his double jeopardy rights where he was convicted of the lesser-included offense of unlawful possession of a stolen vehicle for the same act in Hardin County. Both parties agree that this issue is forfeited due to defendant failing to raise the issue in a postplea motion pursuant to Rule 604(d) but contend this court can review the issue under second-prong plain error. We disagree.

¶ 22 Recently, in *People v. Ratliff*, 2024 IL 129356, ¶ 26, the Illinois Supreme Court held that—pursuant to Rule 604(d)—the failure to raise an issue in a postplea motion results in *waiver*, not forfeiture. Waiver is the intentional relinquishment of a known right and is not amendable to plain error review. *People v. Williams*, 2015 IL App (2d) 130585, ¶ 6. Thus, defendant's failure to assert his conviction for aggravated unlawful possession of stolen police vehicle violated his double jeopardy rights in his postplea motion affirmatively waived the issue on appeal. *Ratliff*, 2024 IL 129356, ¶ 28.

¶ 23 Defendant, however, additionally asserts counsel provided ineffective assistance by failing to move for dismissal of the charge prior to the plea or a motion to withdraw the plea arguing that

his conviction for aggravated possession of a police vehicle violated his double jeopardy rights. The State concedes the merits of the claim and agrees counsel provided ineffective assistance of counsel.

¶ 24 Illinois relies on the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), to govern claims of ineffective assistance of counsel. *People v. Albanese*, 104 Ill. 2d 504, 526-27 (1984). "To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced the defendant." *People v. Cathey*, 2012 IL 111746, ¶ 23 (citing *Strickland*, 466 U.S. at 687). "More specifically, a defendant must show that counsel's performance was objectively unreasonable under prevailing professional norms and that there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *Id.* (quoting *Strickland*, 466 U.S. at 694). "[A] defendant must establish both prongs of the *Strickland* test, such that the failure to establish either precludes a finding of ineffective assistance of counsel." *People v. Cherry*, 2016 IL 118728, ¶ 31.

¶ 25 We first consider whether counsel's performance was objectively reasonable. There is a strong presumption that counsel's conduct was sound trial strategy. *People v. Bryant*, 391 Ill. App. 3d 228, 238 (2009). That presumption, however, is rebutted if counsel's actions were irrational or unreasonable. *Id.* To determine whether counsel provided competent representation, we must first determine whether prosecuting defendant for aggravated unlawful possession of a stolen police vehicle in this case violated his double jeopardy rights.

¶ 26 Both the United States and Illinois Constitutions provide that no person shall be twice put in jeopardy for the same offense. U.S. Const., amends. V, XIV; Ill. Const.1970, art. I, § 10; *People v. Sienkiewicz*, 208 Ill. 2d 1, 4 (2003). The clause protects against a second prosecution for the

same offense after acquittal or conviction and against multiple punishments for the same offense. *Sienkiewicz*, 208 Ill. 2d at 4.

¶ 27 Under both the United States and Illinois Constitutions, we look to the test expounded in *Blockburger v. United States*, 284 U.S. 299 (1932), which held a defendant cannot be prosecuted "in successive prosecutions for the same criminal act under different statutes unless each statute 'requires proof of an additional fact which the other does not.' " *Sienkiewicz*, 208 Ill. 2d at 4-6. The "*Blockburger* test" is also known as the "same elements test" and considers "whether each offense contains an element not contained in the other." *Id.* at 5. If each offense does not contain a different element from the other, "double jeopardy bars additional punishment and successive prosecution." *Id.* Under this test, "the prosecution of a lesser-included offense prevents a subsequent prosecution on the greater offense since, by definition, a lesser-included offense requires no proof beyond what is required for the greater offense." *Id.* at 6. A double jeopardy violation can be established on the face of the information. *People v. Villafuerte-Medrano*, 2012 IL App (2d) 110773, ¶ 16; *United States v. Broce*, 488 U.S. 563, 575-76 (1989).

¶ 28 It is undisputed that the aggravated possession of a stolen police vehicle charge in Pope County case No. 21-CF-10 was based the same act as the unlawful possession of a stolen vehicle in Hardin County case No. 21-CF-8. Both charges involved defendant possessing the same police vehicle with the same VIN on the same date. The facts that the possession spanned across, and the prosecutions involved, both Pope and Hardin Counties do not preclude it from a double jeopardy analysis. See *People v. Batterman*, 355 Ill. App. 3d 766, 769 (2005); *People v. Hull*, 2020 IL App (3d) 190544, ¶¶ 8, 11.

¶ 29 The statute cited in the Hardin County case states, in pertinent part, that a person may not possess a vehicle knowing it to have been stolen. 625 ILCS 5/4-103(a)(1) (West 2020). The statute

cited in the Pope County case states that a person may not possess a vehicle, which is owned by law enforcement agency, knowing it is the property of a law enforcement agency and knowing it to have been stolen. The statute in the Pope County case additionally required the State to prove the stolen vehicle was owned by a law enforcement agency and defendant knew the car was owned by a law enforcement agency. The statute cited in the Hardin County case, however, required the State to prove no element different from the Pope County case.

¶ 30 In other words, the charge in the Hardin County case required no proof beyond that required for the charge in the Pope County case. See *People v. Davis*, 2023 IL App (1st) 220231, ¶¶ 59-61 (remanding court to merge unlawful possession of a stolen vehicle into aggravated unlawful possession of a stolen vehicle based on argument that the former is the lesser-included offense of the latter). As such, the prosecution of the lesser unlawful possession of a stolen vehicle in the Hardin County case precluded a subsequent prosecution for the greater offense of aggravated unlawful possession of a stolen police vehicle in the Pope County case.

¶ 31 Because the State could not charge defendant with aggravated unlawful possession of a stolen police vehicle under double jeopardy principles, we find counsel's representation fell below an objectively reasonable standard. The record makes clear that counsel also represented defendant when he pled guilty in Hardin County case. She therefore should have known defendant could not be re-prosecuted in Pope County on the more severe charge. Given the case law above, had counsel raised the issue in a motion to dismiss or motion to withdraw the plea, the court would have likely dismissed the charge. Counsel therefore provided deficient representation in failing to file a motion to dismiss the aggravated unlawful possession of a stolen vehicle charge or raise the double jeopardy violation in a postplea motion.

¶ 32 Both parties argue that defendant suffered prejudice by counsel's failure to file a motion to dismiss or a motion to withdraw the plea raising the double jeopardy violation because the motion would have been granted and the aggravated unlawful possession of a stolen police vehicle charge would have been dismissed. We agree with respect to the motion to withdraw.

¶ 33 Normally, to establish prejudice in cases involving guilty pleas, defendant must show that but for the alleged error, he would have rejected the plea and proceeded to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). However, this test for prejudice was created for situations much different from here. Ineffective assistance of counsel is a constitutional error. *People v. Domagala*, 2013 IL 113688, ¶ 36. Because guilty pleas generally waive all nonjurisdictional errors, including constitutional issues (*People v. Jones*, 2021 IL 126432, ¶ 20), any error from counsel's actions prior to the entry of the plea is generally waived. "However, a defendant may attack the voluntary character of his plea by showing that the advice he received from counsel was not ' "within the range of competence demanded of attorneys in criminal cases." ' " *People v. Miller*, 346 Ill. App. 3d 972, 980-81 (2004) (quoting *Tollett v. Henderson*, 411 U.S. 258, 266 (1973), quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)). Thus, to show a reasonable probability that the result of the proceedings would be different when alleging involuntariness due to counsel's conduct, defendant would need to show that absent the prior conduct, he would not have pled guilty and would have proceeded to trial. See *People v. Hall*, 217 Ill. 2d 324, 335 (2005).

¶ 34 The situation here differs in that defendant also challenges counsel's conduct after he pled guilty, *i.e.*, filing a motion to withdraw his plea. Moreover, unlike most errors occurring prior to a plea, a double jeopardy violation is not waived by a guilty plea. *Menna v. New York*, 423 U.S. 61, 63 n.2 (1975); *People v. Ventsias*, 2014 IL App (3d) 130275, ¶ 15.

¶ 35 The United States Supreme Court has clarified that its caselaw does not hold that guilty pleas waive "all antecedent constitutional violations." *Menna*, 423 U.S. at 63 n.2. It explained that a counseled, voluntary, and knowing guilty plea is an admission of factual guilt that removes the issue of factual guilt from the case. *Id.* "A guilty plea, therefore, simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction if factual guilt is validly established." *Id.* However, double jeopardy violations, as in this case, deny defendant due process of law by the very initiation of the proceeding. *Blackledge v. Perry*, 417 U.S. 21, 30 (1974). "[T]he claim is that the State may not convict *** no matter how validly his factual guilt is established." *Menna*, 423 U.S. at 63 n.2. Thus, a guilty plea "does not waive a claim that judged on its face the charge is one which the State may not constitutionally prosecute." *Id.*; see *Ventsias*, 2014 IL App (3d) 130275, ¶ 15.

¶ 36 Because defendant challenges counsel's conduct after his plea and such claim concerns an error that is not waived by his plea, we find to obtain relief under these circumstances, defendant needs to show that the grounds could have been presented in the motion to withdraw the guilty plea and a reasonable probability the motion would be granted on those grounds. *People v. Beasley*, 2017 IL App (4th) 150291, ¶ 30; *People v. Gomez*, 409 Ill. App. 3d 335, 340 (2011); *People v. Wills*, 2024 IL App (5th) 220638-U, ¶ 62.

¶ 37 Here, the double jeopardy violation could have been asserted in a motion to withdraw a guilty plea. Recognized bases for withdrawing a plea include

> "a misapprehension of the facts or of the law, or in consequence of misrepresentations by counsel or the State's Attorney or someone else in authority, or the case is one where there is doubt of the guilt of the accused, or where the accused has a defense worthy of

consideration by a jury, or where the ends of justice will be better served by submitting the case to a jury." *People v. Mercado*, 356 Ill. App. 3d 487, 494 (2005).

Defendant's claim essentially asserts he entered the plea deal under a misapprehension of law that the State could have charged him with aggravated unlawful possession of a stolen police vehicle. Also, as noted above, defendant's guilty plea did not waive the double jeopardy violation. Thus, a double jeopardy claim under the circumstances here would be a proper basis to request withdrawal of a plea.

¶ 38 Moreover, as the United States Supreme Court has stated, "Where the State is precluded by the United States Constitution from haling a defendant into court on a charge, federal law requires that a conviction on that charge be set aside even if the conviction was entered pursuant to a counseled plea of guilty." *Menna*, 423 U.S. at 62. Given this statement and the case law above, had counsel asserted the issue in a motion to withdraw the plea, the court would have likely granted the motion. As such, defendant sufficiently showed prejudice and that his counsel provided ineffective assistance.

¶ 39 Defendant, and the State, contend the proper remedy is to vacate his aggravated unlawful possession of a stolen police vehicle and not vacate the guilty plea. We disagree.

¶ 40 First, defendant asserts that counsel should have filed a motion to withdraw the plea based on the double jeopardy violation. Such argument necessarily entails the plea should have been withdrawn, rather than vacating the aggravated unlawful possession of a stolen police vehicle conviction while the plea agreement remains intact.

¶ 41 Moreover, the improper conviction was the result of a partially negotiated plea. While the State did not make sentencing concessions, it dismissed several charges in exchange for defendant's guilty plea. Plea agreements are—to some extent—controlled by contract law

principles. *People v. Evans*, 174 Ill. 2d 320, 326 (1996). The main concern when a plea is challenged "is that each party receive the benefit of its bargain." *People v. Richard*, 2012 IL App (5th) 100302, ¶ 24. The Illinois Supreme Court has held that "it would be fundamentally unfair to permit defendants to unilaterally modify their sides of the plea bargains while simultaneously holding the State to its side of the bargain." *People v. Lumzy*, 191 Ill. 2d 182, 187 (2000). Rather, when a defendant successfully challenges a material term of his plea agreement, the proper remedy is to withdraw the plea, vacate the judgment, and return the parties to the status quo. *People v. Absher*, 242 Ill. 2d 77, 87 (2011).

¶ 42 Defendant contends that because the State agrees the proper remedy is to vacate the aggravated unlawful possession of a stolen vehicle conviction without withdrawing the plea agreement, it is not a unilateral modification but rather an agreement to reform the contract under mutual mistake. In support, he cites *People v. Donelson*, 2013 IL 113603.

¶ 43 In *Donelson*, the defendant and State ultimately entered a plea agreement in which defendant pled guilty to first degree murder, home invasion, and aggravated criminal sexual assault in exchange for prison sentences of 50 years, 30 years, and 30 years, respectively, to be served concurrently. *Id.* ¶¶ 4, 8. On appeal from the denial of his section 2-1401 petition for relief, the Illinois Supreme Court found defendant's sentences were void, as the law required consecutive sentencing. *Id.* ¶ 15.[2] The defendant argued that the remedy for such error was withdrawing the plea and placing the parties to their positions prior to the void sentences. *Id.* ¶ 16. Whereas the State argued the court should reform the plea agreement such that the total period of incarceration would be 50 years' imprisonment such that both parties get the benefit of their bargain, and that

[2]The Illinois Supreme Court has since abolished the void sentence rule. *People v. Thompson*, 2015 IL 118151, ¶ 33.

the withdrawal of the plea would prejudice it because it would be forced to retry the case more than 14 years after the defendant committed the crimes. *Id.* ¶ 17. The Illinois Supreme Court agreed with the State and found applicable the contract principle that "contracting parties' mutual mistake may be rectified by recourse to contract reformation [citation], where they are in actual agreement and their true intent may be discerned [citation]." *Id.* ¶ 20. It determined the record indicated that the "defendant's concern—apart from limiting his criminal convictions to three—was to set an upper limit on the time he would spend in prison." *Id.* ¶ 22. The court also noted that the defendant's sentence could be reconfigured in such a way to give him the benefit of his bargain and comply with the sentencing statutes. *Id.* ¶ 27. As such, the Illinois Supreme Court remanded to the circuit court to resentence the defendant in accordance with the plea agreement and applicable statutes. *Id.* ¶ 29.

¶ 44 There are significant differences between the circumstances here and *Donelson*. The record here does not indicate the parties intended to bargain for a specific sentence. In fact, they made no sentencing agreement at all. Rather, defendant and the State intended defendant to plead guilty to two specific offenses. There is no way to reform the contract so that defendant could legally still plead guilty to aggravated unlawful possession of a stolen police vehicle. Their proposed resolution would be contrary to their original intent, as defendant would only be convicted of attempted aggravated vehicular hijacking and receive a prison sentence seven years less than imposed by the court under the original plea agreement. We also could not replace the aggravated possession of a stolen police vehicle with another charge, as defendant did not concede his guilt or the State's factual basis for such charge and the parties would have presented different arguments at the sentencing hearing.

¶ 45 Moreover, unlike *Donelson*, we do not read the State's argument as an agreement to reform the plea agreement due to mutual mistake. The State's supplemental brief makes clear its agreement with defendant's proposed resolution is based on its belief that there is no other choice without giving a windfall to defendant. Such belief is partly based on its misunderstanding that defendant would have to withdraw his plea in both the Pope County case and Hardin County case, under *People v. Perkins*, 2023 IL App (5th) 220423-U, which it contends is illogical considering the Hardin County plea was in no manner connected to the plea in this case. However, *Perkins* does not lead to such a conclusion.

¶ 46 In *Perkins*, the defendant pled guilty to unlawful possession of a weapon by a felon and armed habitual criminal in exchange for consecutive sentences of 10 years and 6 years, respectively, as well as dismissal of other charges. *Id.* ¶ 5. However, the two charges to which he pled guilty were based on the same act and thus violated the one-act, one-crime doctrine. *Id.* ¶ 19. Because the State made concessions in the fully negotiated plea, we determined the only remedy would be withdrawal of the plea. *Id.* ¶ 23.

¶ 47 In *Perkins*, the basis for determining the plea was improper stemmed from two charges in the same case and the same plea. *Id.* ¶¶ 4-7, 19. Because the plea violated the one-act, one-crime doctrine, the only remedy was to withdraw the single plea involving both counts. *Id.* ¶¶ 19, 23. Here, only one plea was made in error, the plea involving the conviction that violates double jeopardy. Not only is the Hardin County case not before this court, the Hardin County conviction does not violate double jeopardy, on this record. It is only the subsequent prosecution of the same offense that violates double jeopardy, *i.e.*, the aggravated unlawful possession of a stolen police vehicle in Pope County case 21-CF-10.

¶ 48 The State's assumption that the application of *Perkins* would result in a windfall to defendant is therefore incorrect, as only the Pope County plea is at issue. We therefore cannot say the State is truly agreeing to contract reformation due to mutual mistake. Indeed, the State recognized and rejected defendant's argument that they were making a bilateral proposed amendment to their contract, stating that "there is simply no contract law that affects both the Pope County plea and the Hardin County plea." Because there is no way to reform the plea to conform to the parties' intent and the State does not agree to reformation based upon mutual mistake, *Donelson* is inapplicable.

¶ 49 To vacate the aggravated unlawful possession of a stolen police vehicle without withdrawing the plea would fly in the face of contract law principles and be inconsistent with constitutional concerns of fundamental fairness. See *People v. Evans*, 174 Ill. 2d 320, 327 (1996). As such, we find the proper remedy for counsel's ineffectiveness is to withdraw the plea and return the parties to the status quo. On remand, defendant should be appointed new counsel. If the State would like to offer a plea agreement in which defendant only pleads guilty to attempted aggravated vehicular hijacking, or any other plea agreement, it may do so on remand. Due to our resolution of this issue, we need not address defendant's *Krankel* claim.

¶ 50 III. CONCLUSION

¶ 51 Defendant established counsel provided ineffective assistance under *Strickland* by failing to raise the double jeopardy violation in a motion to withdraw. Accordingly, we reverse defendant's convictions, vacate the plea, and remand for further proceedings with new appointed counsel.

¶ 52 Reversed and remanded.