

No. 1-12-3147

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 11 CR 14884
)	
BENJAMIN SMITH,)	Honorable
)	Neil J. Linehan,
Defendant-Appellant.)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Justices Cunningham and Harris concurred in the judgment.

O R D E R

¶ 1 *Held:* Defendant's appeal is dismissed where he failed to comply with Illinois Supreme Court Rule 604(d) requiring the filing of postplea motions prior to filing a notice of appeal.

¶ 2 Defendant Benjamin Smith entered into a negotiated plea agreement in which he pled guilty to unlawful use of a weapon by a felon (UUW) and theft, and was sentenced to three years' and two years' imprisonment on the respective counts, with the two-year theft sentence to run concurrent to the UUW sentence. Defendant filed a notice of appeal arguing various

“reason[s] for appealing,” and the State Appellate Defender was appointed to represent defendant on appeal. On appeal, defendant contends that because he demonstrated a desire to appeal, and the trial court failed to inquire into whether defendant sought counsel for his appeal, this court should remand for appointment of counsel.

¶ 3 On September 6, 2012, defendant informed the court of his desire to plead guilty to the U UW and theft charges against him. After the court admonished defendant regarding waiving his right to trial, the State provided the factual basis for each count of the guilty plea, and the defense stipulated to the factual basis. The court then accepted defendant’s guilty pleas. Finding that defendant understood the nature of the charges against him, the possible penalties under the law and his legal rights, that defendant pled guilty knowingly, and a factual basis existed for each guilty plea, the court accepted defendant’s pleas of guilty for U UW and theft. The court entered guilty judgments on both counts.

¶ 4 Defendant was sentenced to three years’ imprisonment on the U UW by a felon count, two years of MSR, ordered to pay fines and costs in the amount of \$429, and received credit for 665 days of actual incarceration. He was sentenced to two years’ imprisonment on the theft count, with a year of MSR, fines and fees additional. This sentence was concurrent to the U UW by a felon sentence and an unrelated federal sentence.

¶ 5 The trial court admonished defendant regarding his appeal rights. Defendant filed a Notice of Appeal on October 9, 2012, in which he argued his “reason[s] for appealing,” including: he is not guilty of unlawful use of weapon or theft, he was denied presentence credit for both offenses, he was denied the return of \$3,000 from his attorney for pleading guilty, he was denied his “right to review” all charges as promised by his attorney, and he was denied legal

assistance by Stateville Correctional Center and was denied his attorney's telephone call three times. The State Appellate Defender was appointed to represent defendant on appeal.

¶ 6 In the instant appeal, defendant asks this court to remand to the trial court for appointment of counsel to assist him in postplea proceedings. He argues that although the document he filed with the clerk of court is labeled "notice of appeal," in which he makes substantive legal arguments, including sufficiency of the evidence and ineffective assistance of counsel, these arguments were appropriate for a postplea motion, and not a notice of appeal, and therefore the trial court erred in failing to appoint counsel to assist defendant with postplea motions. Ill. S. Ct. R. 604(d) (Eff. July 1, 2006). Defendant also argues that this court cannot deny defendant relief in the form of remanding for appointment of counsel without deeming Illinois Supreme Court Rule 604(d) unconstitutional because the 30 days following the entry of a guilty plea is a critical stage of proceedings for which a defendant has the right to counsel.

¶ 7 The State argues, however, that defendant's appeal must be dismissed because this court lacks jurisdiction to review it where defendant entered into a negotiated plea and failed to file the requisite motion to withdraw guilty plea, and instead filed a *pro se* notice of appeal. Further, the State argues that defendant does not have a constitutional right to counsel during the 30 days following his guilty plea because this is not a critical stage of proceedings.

¶ 8 We review issues of compliance with supreme court rules *de novo*. *People v. Dismuke*, 355 Ill. App. 3d 606, 608 (2005). Rule 604(d) provides:

"No appeal from a judgment entered upon a plea of guilty shall be taken unless the defendant, within 30 days of the date on which [the] sentence is imposed, files in the trial court a motion to reconsider the sentence, if only the sentence is being challenged,

or, if the plea is being challenged, a motion to withdraw the plea of guilty and vacate the judgment.” Ill. S. Ct. R. 604(d).

The purpose of Rule 604(d) “is to ensure that before a criminal appeal can be taken from a guilty plea, the trial judge who accepted the plea and imposed sentence be given the opportunity to hear the allegations of improprieties that took place outside the official proceedings and *dehors* the record, but nevertheless were unwittingly given sanction in the courtroom.” *People ex rel. Alvarez v. Skryd*, 241 Ill. 2d 34, 39 (2011) (quoting *People v. Wilk*, 124 Ill. 2d 93, 104 (1988)).

¶ 9 The procedural requirements in Rule 604(d) are a condition precedent for a defendant’s appeal from a guilty plea. *Merriweather*, 2013 IL App (1st) 113789, ¶ 14. Indeed, as a “general rule, the failure to file a timely Rule 604(d) motion precludes the appellate court from considering the appeal on the merits. Where a defendant has failed to file a motion to withdraw the guilty plea, the appellate court, as a general matter, must dismiss the appeal.” *Skryd*, 241 Ill. 2d at 40; see also *Merriweather*, 2013 IL App (1st) 113789, ¶ 14. While the Illinois Supreme Court requires strict compliance with Rule 604(d), defendant’s failure to file a Rule 604(d) motion does not deprive this court of jurisdiction, as the State argues; it does, however, waive the right to appeal. *People v. Gougisha*, 347 Ill. App. 3d 158, 161 (2004).

¶ 10 Our case law is clear on the issue: because defendant failed to file the requisite Rule 604(d) motion, this court must dismiss his appeal. See also *Merriweather*, 2013 IL App (1st) 113789, ¶ 35 (dismissing the defendant’s appeal where the defendant failed to comply with Rule 604(d) requirement of filing a motion to withdraw guilty plea prior to filing a notice of appeal). We reject defendant’s argument that, although labeled “notice of appeal,” the content of the document reveals his intention to withdraw his guilty plea. Apart from the document’s title, the

document alleged that defense counsel provided ineffective assistance of counsel and that the State failed to prove him guilty. As was the case in *Merriweather*, we find no indication in defendant's *pro se* notice of appeal that the defendant desired to withdraw his guilty plea, where it showed that the defendant sought to directly appeal the order of judgment. See *Merriweather*, 2013 IL App (1st) 113789, ¶ 21. We also note that defendant concedes that the admonitions he received were proper; therefore, the admonition exception does not apply. See *Skryd*, 241 Ill. 2d at 41 (discussing the admonition exception).

¶ 11 We also reject defendant's argument, citing *Mempa v. Rhay*, 389 U.S. 128, 134, 136 (1967), that the 30-day period following a guilty plea is a "critical stage" of criminal proceedings during which he has an absolute right to counsel. We recently addressed, and rejected, this very argument in *Merriweather*, 2013 IL App (1st) 113789, ¶ 28. There, we found *Mempa* inapposite and factually distinguishable where the *Mempa* defendant was not represented by counsel during the negotiated guilty plea phase and sentencing.

¶ 12 Finally, defendant cites *People v. Griffin*, 305 Ill. App. 3d 326 (1999), and *People v. Barnes*, 291 Ill. App. 3d 545 (1997), for the proposition that the court must appoint counsel when a defendant expresses a desire to seek relief from judgment or to appeal. Those cases are inapplicable because neither defendant in those cases filed a notice of appeal *prior* to filing a postplea motion under Rule 604(d), as defendant did in the present case. See *Merriweather*, 2013 IL App (1st) 113789, ¶ 27.

¶ 13 For the foregoing reasons, we dismiss this appeal.

¶ 14 Appeal dismissed.