

2014 IL App (2d) 121250-U
No. 2-12-1250
Order filed March 12, 2014

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
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of McHenry County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 12-CM-118
)	
MYCHEL JOZWIAK,)	Honorable
)	Charles P. Weech
Defendant-Appellant.)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices Zenoff and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held:* (1) Although defendant’s “notice of appeal” was not a motion to withdraw his plea as required by Rule 604(d), his failure to comply with that rule was excused by the trial court’s failure to comply with Rule 605(c); thus, we remanded the cause for proper admonishments and for the filing of the motion; (2) as defendant’s \$75 fine for the Violent Crime Victims Assistance Fund was imposed in violation of *ex post facto* principles, we reduced it to \$20, the amount statutorily authorized at the time of his offense.

¶ 2 Defendant, Mychel Jozwiak, pleaded guilty to one count of misdemeanor theft (720 ILCS 5/16-1(a)(1)(A), (b)(1) (West 2010)) in exchange for a one-year term of conditional discharge and a suspended sentence of 30 days in jail. Defendant timely appealed. Defendant argues that

he effectively moved to withdraw his plea, as required by Illinois Supreme Court Rule 604(d) (eff. July 1, 2006), and that we should allow him to withdraw his plea because the trial court failed to admonish him as required by Illinois Supreme Court Rule 402 (eff. July 1, 2012) prior to accepting his plea. In the alternative, defendant argues that, because the trial court also failed to comply with Illinois Supreme Court Rule 605(c) (eff. Oct. 1, 2001), we should remand the case for proper admonishments and to allow defendant to move to withdraw his plea if so desired. Defendant also argues that his \$75 Violent Crime Victims Assistance Fund fine should be reduced to \$20. For the reasons that follow, we agree with defendant's alternative argument and remand the case for proper admonishments and to allow defendant to move to withdraw his plea if so desired. Further, we reduce the \$75 Violent Crime Victims Assistance Fund fine.

¶ 3

I. BACKGROUND

¶ 4 On January 19, 2012, defendant was charged by complaint with misdemeanor theft. On November 6, 2012, defendant entered into a negotiated plea agreement with the State. Under the plea agreement, defendant was to plead guilty in exchange for a one-year term of conditional discharge and a suspended sentence of 30 days in jail. Further, a "petition to revoke" in another case (No. 09-CM-1855) would be dismissed. The court admonished defendant as to the terms of the agreement. The court also told defendant that he needed to appear in court in one year. The court asked defendant if anyone had forced him to sign the waivers of trial and jury. Defendant said no. Thereafter, the court found that defendant understood the consequences of his plea and accepted the terms of the plea. The court entered the agreed sentence.

¶ 5 Later that same day, defendant filed a *pro se* appearance and the following handwritten document, which he entitled "Notice of Appeal":

“Mychel Jozwiak, Defendant[,] is not able to have a trial due to the State conflicting court dates with Kane County and I have a right to a fair trial with out [sic] revoking my domestic case in [‘]09 that I completed all requirements. The State was told the (witness Susan) wanted to drop the charge and I appear in court sick with the flue [sic] unable to afford counle [sic]. Forced to plea of a 30 day jail sentence on top of a conviction with costs of 295.00. I ask to appeal.”

He also filed two form notices of appeal, asking to have appellate counsel appointed. On November 9, 2012, the trial court appointed the appellate defender.

¶ 6

II. ANALYSIS

¶ 7 Defendant first argues that his “notice of appeal” was effectively a motion to withdraw his plea under Rule 604(d), which motion the trial court effectively denied, and that we should allow him to withdraw his plea because the trial court failed to admonish him in accordance with Rule 402. The State responds that defendant failed to file the requisite motion under Rule 604(d), precluding consideration of the Rule 402 issue on appeal. Nevertheless, the State concedes that, because the court failed to admonish defendant as required by Rule 605(c), remand is warranted for proper admonishments and the filing of a motion to withdraw the plea if so desired.

¶ 8 Rule 604(d) provides in pertinent part:

“No appeal shall be taken upon a negotiated plea of guilty *** unless the defendant, within 30 days of the imposition of sentence, files a motion to withdraw the plea of guilty and vacate the judgment. For purposes of this rule, a negotiated plea of guilty is one in which the prosecution has bound itself to recommend a specific sentence, or a specific range of sentence, or where the prosecution has made concessions relating to the sentence

to be imposed and not merely to the charge or charges then pending.” Ill. S. Ct. R. 604(d) (eff. July 1, 2006).

Here, because the State made a sentencing concession, defendant’s plea was negotiated within the meaning of the rule and, to take an appeal, he was obligated to move to withdraw his plea and vacate the judgment.

¶ 9 Defendant acknowledges that he was required to move to withdraw his plea under Rule 604(d). Nevertheless, defendant argues that his *pro se* notice of appeal was effectively the requisite motion under Rule 604(d) as it “was clearly intended to be a motion to withdraw a plea.” We disagree. Defendant filed a document that was clearly labeled “Notice of Appeal.” In it, defendant specifically requested an appeal. Thus, it is clear that defendant failed to comply with Rule 604(d).

¶ 10 Generally, when a defendant fails to file a timely motion to withdraw his guilty plea under Rule 604(d), the appellate court must dismiss the appeal. *People v. Flowers*, 208 Ill. 2d 291, 301 (2003). However, dismissal of an appeal based on a defendant’s failure to file the requisite motion would violate due process if the defendant did not know that filing the motion was necessary. *Id.* Rule 605(c) safeguards the defendant’s right to review of his or her plea by mandating that, when sentence is imposed upon a defendant who has entered a negotiated guilty plea, he or she be admonished substantially as follows:

“(1) that the defendant has a right to appeal;

(2) that prior to taking an appeal the defendant must file in the trial court, within 30 days of the date on which sentence is imposed, a written motion asking to have the judgment vacated and for leave to withdraw the plea of guilty, setting forth the grounds for the motion;

(3) that if the motion is allowed, the plea of guilty, sentence and judgment will be vacated and a trial date will be set on the charges to which the plea of guilty was made;

(4) that upon the request of the State any charges that may have been dismissed as a part of a plea agreement will be reinstated and will also be set for trial;

(5) that if the defendant is indigent, a copy of the transcript of the proceedings at the time of the defendant's plea of guilty and sentence will be provided without cost to the defendant and counsel will be appointed to assist the defendant with the preparation of the motions; and

(6) that in any appeal taken from the judgment on the plea of guilty any issue or claim of error not raised in the motion to vacate the judgment and to withdraw the plea of guilty shall be deemed waived." Ill. S. Ct. R. 605(c) (eff. Oct. 1, 2001).

Thus, the consequences of failing to file the proper motion under Rule 604(d) depend on whether the defendant was properly admonished under Rule 605(c). If the trial court substantially complied with Rule 605(c), the appeal must be dismissed. See *People v. Jamison*, 181 Ill. 2d 24, 28-29 (1998). If not, the proper remedy is to remand to the trial court so that the defendant may be properly admonished. *Id.* at 29-30. Here, the parties agree that the trial court did not substantially comply with Rule 605(c). Thus, remand for proper admonishments is the appropriate remedy.

¶ 11 Last, defendant argues that the imposition of a \$75 Violent Crime Victims Assistance Fund fine (as opposed to a \$20 fine) violated *ex post facto* principles as the increase in the fine from \$20 to \$75 occurred after the date of the offense. See U.S. Const., art. I, § 9; Ill. Const. 1970, art. I, § 16. Defendant maintains that the authorized fine was \$20. Although defendant did not raise this issue below, he is arguing that the \$75 fine was not authorized by statute, and thus

he may do so for the first time on appeal. See *People v. Thompson*, 209 Ill. 2d 19, 24-25 (2004).

We review the issue *de novo*. *People v. Anthony*, 408 Ill. App. 3d 799, 806 (2011).

¶ 12 When defendant committed the offense, the Violent Crimes Victims Assistance Fund fine for a misdemeanor conviction was \$4 for every \$40 of other fines assessed or \$20 if no other fines were assessed. 725 ILCS 240/10(b) (West 2010). However, on July 16, 2012, the fine in misdemeanor cases became \$75. Pub. Act 97-816, § 10 (eff. July 16, 2012); see 725 ILCS 240/10(b)(3) (West 2012). Here, it appears that the \$75 fine was based on the statute that was in effect at the time of sentencing on November 6, 2012. However, the parties agree that defendant must be fined according to the law that was in effect on the date of the offense, January 11, 2012. See *People v. Dalton*, 406 Ill. App. 3d 158, 163 (2010). Because the offense occurred before the effective date of the increase in the Violent Crime Victims Assistance Fund fine, the proper amount of the fine is \$20.

¶ 13

III. CONCLUSION

¶ 14 For the reasons stated, we remand so that the trial court can make the proper admonishments under Rule 605(c). Within 30 days thereafter, defendant may file a motion to withdraw his plea if so desired. We reduce the \$75 Violent Crime Victims Assistance Fund fine to \$20.

¶ 15 Judgment modified; cause remanded.