2017 IL App (1st) 150512-U

No. 1-15-0512

Order filed July 20, 2017

Fourth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 12 C4 40943
	)	
DONALD MASCIO,	)	Honorable
	)	Geary W. Kull,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE BURKE delivered the judgment of the court.
Presiding Justice Ellis and Justice Howse concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's appeal must be dismissed when, although he was admonished in substantial compliance with Supreme Court Rule 605(c) (eff. Oct. 1, 2001), he failed to file a postplea motion prior to filing a notice of appeal.

¶ 2 In January 2015, defendant Donald Mascio entered a negotiated plea of guilty to possession of a controlled substance and was sentenced to an extended-term sentence of four years in prison. On appeal, defendant contends that he was not properly admonished pursuant to Supreme Court Rule 605(c) (eff. Oct. 1, 2001), and, consequently, this case must be remanded to

the circuit court for proper admonishments and the opportunity to file a motion withdraw the plea. We dismiss.

¶ 3 On January 14, 2015, defendant appeared before the court and entered a negotiated plea to possession of a controlled substance in exchange for an extended-term sentence of four years in prison. During questioning by the court, defendant indicated that he was entering the plea of his own free will and that he understood the charge and possible penalties. After accepting the factual basis for the plea and imposing sentence, the trial court stated:

> "Now, if you wanted to withdraw your plea of guilty, you'd have to do it within 30 days. If you don't do it within 30 days, it becomes a final order. In order for you to do that, you have to file something in writing with the Clerk of the Court that sets forth the reasons why I would allow you to withdraw your plea of guilty. If I granted that motion, we'd set the case for trial. On the other hand, if I denied that motion you'd have 30 days to appeal my denial of your motion to withdraw the plea of guilty. Anything you didn't put in writing would be waived. A public defender could be appointed for you if it were determined that you were indigent, and a copy of these proceedings could be provided for you under those circumstances."

¶ 4 The trial court asked if defendant understood, and defendant answered yes. The court then reiterated that "what it amounts to is if you want to change your mind, you have to change your mind within 30 days." The court further stated that if defendant did change his mind, defendant had "to file something in writing that sets forth the reasons." Defendant indicated that he understood.

¶ 5 Defendant filed a *pro se* notice of appeal on January 26, 2015, which was stamped "received" by the circuit court of Cook County on February 24, 2015 and "filed" on February 25, 2015. The notice of appeal was filed in this court on February 26, 2015.

¶ 6 On appeal, defendant contends that the trial court did not comply with Supreme Court Rule 605(c) when it failed to advise him that in order to appeal he had to first move to withdraw the plea and vacate the judgment and failed to tell him where to file the motion. Defendant further argues that the trial court did not tell him that if he moved to withdraw the plea and vacate the judgment, the court would appoint counsel to assist him and provide him with a free transcript of the plea and sentencing hearing; rather, the court indicated that counsel would be appointed and transcripts provided only if defendant appealed. He therefore argues that this case must be remanded for proper admonishments and the chance to file a motion to withdraw the plea.

¶ 7 A defendant who wishes to appeal from a judgment entered on a guilty plea must follow the procedure set forth in Supreme Court Rule 604(d), which provides that:

> "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 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) (eff. Dec. 11, 2014).

¶ 8 Compliance with Rule 604(d) is a condition precedent to an appeal, and if the defendant fails to meet this requirement the appeal must be dismissed. *People ex rel. Alvarez v. Skryd*, 241 Ill. 2d 34, 40 (2011). In those cases, however, where a defendant files an appeal without first

complying with Rule 604(d), and the circuit court failed to give the proper admonishments set forth in Rule 605, the appeal is not dismissed but remanded to the circuit court "for strict compliance with Rule 604(d)." *People v. Flowers*, 208 Ill. 2d 291, 301 (2004).

¶ 9 In the case at bar, defendant entered a negotiated guilty plea. The trial court was therefore required to:

> "advise the defendant 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).

¶ 10 The trial court is not required to read Rule 605 "verbatim" to a defendant. *People v. Dominguez*, 2012 IL 111336, ¶ 11. Rather, the court must "substantially" advise the defendant in such a way that he is put on notice of what he must do in order to preserve his right to appeal his guilty plea or sentence. *Id.* ¶ 22. "[I]n a Rule 605(b) or (c) setting, where a trial court *has* substantially complied with the rule so as to impart to the defendant the *substance* of the rule, automatic remand is not necessary." (Emphasis in original.) *Id.* We review *de novo* the trial court's compliance with supreme court rules. *Id.* ¶ 13.

¶ 11 Here, the trial court told defendant that if he wanted to withdraw his guilty plea, he would have to file "something in writing" with the clerk of the court within 30 days setting out the reasons why he should be permitted to withdraw the plea and that anything that was not put in writing would be waived. The court further stated that if it granted the motion the case would be set for trial and that if the court denied the motion defendant would have 30 days to appeal that denial. The court finally stated if defendant was indigent, that a public defender could be appointed to represent defendant and defendant could be provided with a report of the proceedings. The court then reiterated that if defendant wanted to "change [his] mind" about the plea, defendant had to do it within 30 days by filing something in writing detailing the reasons why. We therefore find that the trial court substantially provided the admonishments required by Rule 605(c) when defendant was put on notice that he could challenge the guilty plea but that in order to do so an action on his part, *i.e.*, the filing of a motion within 30 days, was required. *Id.* ¶ 22 (a trial court has substantially complied with the rule when its "admonitions were sufficient to impart to a defendant the essence or substance of the rule"); see also *In re J.T.*, 221 Ill. 2d 338, 347-48 (2006) (while the trial court's admonishments did not strictly comply with Rule 605(c),

they were sufficient to put the minor on notice that he could challenge his guilty plea and that "some action" on his part was required within 30 days if he wished to appeal).

¶ 12 We are unpersuaded by defendant's arguments that the trial court must "strictly comply" with Rule 605(c) and that our supreme court's holding in *Dominguez* does not apply to this case.

¶ 13 In *Dominguez*, our supreme court addressed whether a trial court must strictly or substantially comply with Rule 605(c). In other words, "must a trial court read the rule verbatim to a defendant or is such a reading not necessary so long as the trial court 'substantially' complies with the rule's requirements." See *Dominguez*, 2012 IL 111336, ¶ 15.

¶ 14 In that case, the circuit court admonished a defendant of his " 'right to return to the courtroom within 30 days to file motions to vacate [his] plea of guilty and/or reconsider [his] sentence.' " *Id.* ¶ 5. The court further stated: " 'In the event the motions are denied, you have 30 days from denial to return to file a notice of appeal the Court's ruling. If you wish to do so and could not afford an attorney, we will give you an attorney free of charge, along with the transcripts necessary for those purposes.' " *Id.* Additionally, the court provided the defendant with a waiver form containing written admonitions that used language "almost verbatim" to the language of Rule 605(c). *Id.* ¶ ¶ 5-6.

¶ 15 On appeal, our supreme court rejected the defendant's arguments that the circuit court's admonitions were insufficient because they stated that he must "return to the courtroom" to file his postplea motions and implied that appointed counsel was available only after the conclusion of his postplea proceedings. *Id.* ¶¶ 42, 47. The court explained that "[s]imply because the circuit court used the phrase 'return to the courtroom' does not indicate [that the] defendant was not substantially put on notice of what he must do within 30 days to withdraw his guilty plea." *Id.* ¶

43. The court also determined that although the circuit court "arguably did not explicitly inform [the] defendant that he was entitled to have an attorney appointed to help him prepare the postplea motions ***, the admonitions reflect that a court-appointed attorney would be available for" him. *Id.* ¶ 51. Therefore, the court held that the circuit court's admonitions were sufficient to apprise the defendant of the substance of rule. *Id.* ¶¶ 43, 51.

¶ 16 Ultimately, the court concluded that although the circuit court must strictly comply with Rule 605(c) "in that the admonitions must be given to a defendant who has plead guilty," the court not required to use the exact language of Rule 605. *Id*. ¶ 11. Rather, the court must "substantially" advise the defendant in such a way that he is put on notice of what he must do in order to preserve his right to appeal his guilty plea or sentence. *Id*. ¶ 22.

¶ 17 Here, it is undisputed that the trial court strictly complied with Rule 605(c) in that it gave the admonishments to a defendant who had entered a guilty plea. We further conclude that the trial court's admonitions substantially complied with Rule 605(c). Although the trial court did not tell defendant that a motion to withdraw the plea was a condition precedent to an appeal, or where specifically to file the motion, the trial court repeatedly told defendant that in order to challenge his plea he must file something in writing within 30 days listing all the reasons that he wanted to withdraw the plea. Like the admonitions in *Dominguez*, while the court's admonitions were not a verbatim reading of Rule 605(c), we believe that they were sufficient to inform defendant that he could challenge his guilty plea and that a postplea motion was required within 30 days. *Dominguez*, 2012 IL 111336, ¶ 43. Also like the admonitions in *Dominguez*, the trial court's admonitions in the instant case could be construed to imply that defendant's right to appointed counsel was solely for an appeal rather than for the preparation and filing of a postplea

motion. Although the court's admonitions did not explicitly state that the defendant was entitled to counsel for assistance with his postplea motions, as in *Dominguez*, we find that the trial court's admonitions "reflect[ed] that a court-appointed attorney would be available for" defendant. *Id.* ¶ 51.

¶ 18 Defendant, however, argues that *Dominguez* is distinguishable because the defendant in that case was also given written admonishments that used language "almost verbatim" to the language of Rule 605(c), *i.e.*, essentially arguing that any omissions in the oral admonishments in that case were cured by the written admonishments.

¶ 19 We are unpersuaded by this argument because the supreme court in *Dominguez* cited two cases, *People v. Dunn*, 342 Ill. App. 3d 872 (2003), and *In re J.T.*, 221 Ill. 2d 338 (2006), that did not involve written admonitions. *Dominguez*, 2012 IL 111336, ¶¶ 48-51. Like the circuit court's admonitions in *Dominguez* and in this case, the admonitions in *Dunn* and *J.T.* did not clearly inform the defendants that they were entitled to the assistance of appointed counsel in the preparation of their postplea motions. The *Dominguez* court noted, however, that in those cases the oral admonitions sufficiently conveyed the substance of the rule. *Id*.

¶ 20 We are similarly unpersuaded by defendant's reliance on *People v. Anderson*, 309 Ill. App. 3d 417 (1999). In that case, the circuit court advised the defendant that he would be appointed counsel on appeal if he could not afford to pay. On appeal, the court found that the admonitions were insufficient under Rule 605(b) and remanded, *inter alia*, because they implied that the defendant "would not have the aid of appointed counsel in preparing and arguing [a postplea] motion." *Id.* at 422.

¶ 21 We believe that the supreme court's holding in *Dominguez* casts doubt upon the reasoning of *Anderson* because that case held that a circuit court must strictly comply with Rule 605. See *Anderson,* 309 Ill. App. 3d at 421. In *Dominguez,* which was decided after *Anderson*, our supreme court explained that although a circuit court is required to strictly comply with Rule 605(c) "in that the admonitions must be given to a defendant" who enters a guilty plea, the court has substantially complied with the rule when its "admonitions were sufficient to impart to the defendant the essence or substance of the rule." *Dominguez*, 2012 IL 111336, ¶¶ 11, 22. We therefore find *Anderson* unpersuasive.

¶ 22 For the foregoing reasons, we find that the trial court's admonishments substantially complied with Rule 605(c). Because we have found that defendant was substantially admonished in accordance with Rule 605(c), yet failed to comply with Rule 604(d) before filing a notice of appeal, we cannot consider this appeal on its merits; rather, we must dismiss it. See *Flowers*, 208 Ill. 2d at 301.

¶ 23 Appeal dismissed.