

No. 1-15-2172

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. 14 MC5 005757
)	
LOUIS R. FASULLO,)	The Honorable
)	Donald R. Havis,
Defendant-Appellant.)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Cobbs and Justice Lavin concurred in the judgment.

ORDER

HELD: Cause remanded to trial court to proceed in accordance with Rule 604(d) where defendant clearly evinced desire to withdraw guilty plea in *pro se* post-plea document.

¶ 1 Following the trial court's entry of judgment upon his guilty plea and its sentencing order as agreed to by the parties, defendant-appellant Louis R. Fasullo (defendant) was found guilty of criminal trespass and sentenced to 36 days' imprisonment, time served. He appeals, contending that the trial court erred in entering these orders because it failed to ask him if he desired

appointed counsel to assist in withdrawing his guilty plea, as required under Illinois Supreme Court Rule (Rule) 604(d). Ill. S.Ct. R. 604(d) (eff. Dec. 11, 2014). He asks that we remand his cause for post-plea proceedings, including the opportunity to have counsel appointed to assist in those proceedings. For the following reasons, we remand.

¶ 2

BACKGROUND

¶ 3 In November 2014, defendant was charged with criminal trespass to building following his violation of a written notice from Tinley Park police not to return to Cavallini's, a restaurant located in that city's train station. On the eve of trial, the court warned the parties to be present the following day, on time. The next morning, defendant was not in court when his case was called. The trial court conferred with defendant's counsel as to defendant's tardiness, but counsel did not know his whereabouts; the court then issued a bond forfeiture warrant. Defendant eventually arrived, approximately 40 minutes late, explaining that the bus he had planned on taking to get to court never arrived and that he tried to call and got to court as quickly as he could. The trial court executed the warrant and had defendant taken into custody and jailed.

¶ 4 At a subsequent hearing, defendant, without counsel present, asked the trial judge, who was substituting for the judge presiding in his cause, if he could make a "motion *instanter*"¹ and "give *** some background" about his case. The trial judge told him he had no authority over the presiding judge's call and he would have to wait to present his motion until his next scheduled hearing date.

¶ 5 On that date, July 7, 2015, defendant's counsel informed the trial court that defendant did

¹From the record, this appears to have been a motion to dismiss with prejudice.

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not wish to pursue his "motion" but, instead, wanted to withdraw it and accept a plea deal from the State, which consisted of defendant pleading guilty, receiving a sentence of 36 days in jail with time considered served (as he had been in jail for 18 days), and a no-contact order with the restaurant. The trial court went over each portion of the deal directly with defendant, confirming that he wanted to plead guilty, his right to do so, his right to a jury trial, his voluntary waiver of his rights, the significance of this, and the potential sentence he could receive. After verifying that defendant was choosing to plead guilty of his own volition, the parties stipulated to the facts of the complaint and the trial court accepted both his plea and the sentencing agreement of the parties, as outlined in the deal. At the conclusion of the hearing, the trial court admonished defendant about his right to appeal, and the following exchange took place:

"THE COURT: You have the right to appeal. However, before you appeal my decision, within 30 days of today's date, you must file with the Clerk of the Court a written motion to withdraw your guilty plea and vacate judgment.

Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: In that motion, you must state all of the reasons why you wish to withdraw your guilty plea. If I grant your motion, I will set aside your guilty plea, judgment, and sentence and set all matters for for [sic] trial. If I deny your motion, you have 30 days from the date of denial to file a written notice of appeal with the Appellate Court. If you're indigent, a copy of the transcript at the time you plead guilty, which is today, along with an attorney would be furnished

to you free of charge to prepare that motion.

Do you understand your appeal rights, sir?

THE DEFENDANT: Yeah, yes."

¶ 6 On July 28, 2015, defendant filed a *pro se* standard form Notice of Appeal, citing the July 7, 2015 date of his plea as the judgment being appealed and seeking as relief from the reviewing court:

"Reversal from the court's burden to the appellant because he was 15 minutes late, and b[o]nd was revoked. The mental anguish [*sic*] of being in the Department of Corrections made the defendant take a guilty plea to be released, ASAP. In a trial the defendant does have the 'Right of Way' and in good faith did not do a crime."

¶ 7 ANALYSIS

¶ 8 On appeal, defendant contends that the trial court erred by failing to ask him if he desired appointed counsel to assist him in seeking to withdraw his guilty plea, where he evinced a clear desire to undo his plea in his *pro se* notice of appeal. For its part, the State insists the defendant's cause should be dismissed for his failure to comply with the mandates of Rule 604(d), since he failed to file a written motion to withdraw his plea and instead filed a *pro se* notice of appeal, thereby divesting the trial court of any jurisdiction to even consider the appointment of counsel. Having considered both arguments, and upon our examination of the record before us, we remand this cause.

¶ 9 As a threshold matter, we note that the parties disagree as to the applicable standard of review, with defendant stating it is *de novo* as we are called to review a trial court's compliance

with a supreme court rule, and with the State countering that it is abuse of discretion because this is the standard to be applied when reviewing a trial court's decision whether to grant or deny a motion to withdraw guilty plea, when one is made. The issue in this cause is an issue precisely because no written motion to withdraw guilty plea was ever filed here; the State's statement as to the standard of review, then, is somewhat nonsensical. Rather, defendant is correct—we are being called upon to review whether the trial court here properly complied with Rule 604(d). It is well established that we review issues of compliance with supreme court rules *de novo*. See *People v. Hall*, 198 Ill. 2d 173, 177 (2001); *People v. Easton*, 2017 IL App (2d) 141180, ¶ 4, citing *People v. Dismuke*, 355 Ill. App. 3d 606, 608 (2005).

¶ 10 Turning to the merits of this appeal, there is also much that is well established when it comes to Rule 604(d). That Rule provides:

"No appeal from a judgment upon a plea of guilty shall be taken unless the defendant, within 30 days of the date with [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) (eff. Dec. 11, 2014).

¶ 11 As the State points out, the purpose of this rule is to ensure that, before an appeal can proceed from a guilty plea, the trial court that accepted the plea and imposed sentence on it has the opportunity to hear the allegations of impropriety with respect to the plea that may have occurred outside the record but went unacknowledged in court. See *People ex rel. Alvarez v. Skryd*, 241 Ill. 2d 34, 39 (2011). Moreover, the State is correct that the procedural requirements

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of this rule are a condition precedent for a defendant's appeal from a guilty plea. See *People v. Merriweather*, 2013 IL App (1st) 113789, ¶ 14. As our courts have held, 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; accord *Merriweather*, 2013 IL App (1st) 113789, ¶ 14 (dismissing the defendant's appeal where the defendant failed to comply with Rule 604(d) requirement of filing a motion to withdraw guilty plea and instead filed a notice of appeal).²

¶ 12 While we find absolutely no dispute with these rules and their application, what sets the instant cause apart is the contents of the document defendant (timely) filed after the trial court entered its judgment on his guilty plea.

¶ 13 Rule 604(d) continues:

"The motion shall be in writing and shall state the grounds therefor. *** The trial court shall then determine whether the defendant is represented by counsel, and if the defendant is indigent and desires counsel, the trial court shall appoint counsel." Ill. S.Ct. R. 604(d) (eff. Dec. 11, 2014)

²We wish to note that there is one technical exception to this rule, known as the "admonishment exception," which allows an appellate court to entertain an appeal despite the defendant's noncompliance with Rule 604(d) where the trial court fails to issue proper Rule 605 admonishments, including clearly notifying the defendant that he must file a written post-plea motion to withdraw his plea before he files a notice of appeal and that counsel may be appointed to assist him in doing so. See *Skryd*, 241 Ill. 2d at 41; *People v. Claudin*, 369 Ill. App. 3d 532, 533 (2006) (if not properly admonished, appeal is not dismissed but, rather, cause is remanded to trial court). However, in this cause, as the record demonstrates, there is no issue concerning the propriety of the trial court's Rule 605 admonishments and, in fact, defendant raises none.

Defendant's prime contention here is that, although labeled "Notice of Appeal," his *pro se* post-plea filing clearly revealed his intention to withdraw his guilty plea, thereby triggering a duty on the trial court pursuant to Rule 604(d) to determine if he was in need of counsel to assist him, which it did not do. Based on our review of defendant's filing, we agree.

¶ 14 Let there be no mistake: defendant admits, and the record is clear, that the document he timely filed *pro se* following the trial court's entry of judgment on his plea was a standard form, labeled "Notice of Appeal." However, upon reading its contents, it is our view that he did evince a clear desire to withdraw his guilty plea. First, in the space on the form listing the order appealed from, defendant entered "July 7, 2015"—the date on which he pled guilty before the trial court in accordance with the plea agreement and the date upon which the trial court entered judgment on that plea agreement. Additionally, and quite significant, in the section entitled "Relief Sought," he states that "[t]he mental anguish [*sic*] of being the Department of Corrections made [him] take a guilty plea to be released, ASAP." Now, while he also mentions that he "in good faith did not do a crime," which is essentially a sufficiency of the evidence argument not indicative of a desire to withdraw a guilty plea, the remainder—the portion we have just cited—does so indicate that desire.

¶ 15 This is even more clear once the facts leading up to that plea are considered here. Again, defendant was charged with misdemeanor criminal trespass. He was told to be bright and early to court, but he was not present when his case was called, and the trial court immediately issued a \$50,000 bond forfeiture warrant. Defendant arrived 40 minutes late and went before the trial court explaining what time he left his home, which bus he had planned to take, that he arrived at

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the stop on time, that the bus never showed up, and that he got to court as fast as he could, even calling before he finally arrived.³ After allowing him to finish his explanation, and after forcing him to verify that he was indeed 40 minutes late, the trial court, unmoved by his argument, abruptly executed the warrant for his arrest that it had only just issued less than an hour before. Defendant then spent the next 18 days in jail, until he was finally able to again appear before the same presiding judge, pursuant to his next scheduled court date. In the meantime, he was able to appear briefly, but without counsel, before a substitute judge, at which time he asked if he could file a "motion *instanter*" (presumably, a motion to dismiss of some sort) and explain the background of his case. That judge refused, and told him he had to wait for his scheduled hearing. It was at that hearing, again, after 18 days in jail, that defendant's counsel stepped up, told the court that defendant wished to abandon any "motion" he may have noticed earlier, and stated that defendant now wished to accept the State's plea deal wherein he would plead guilty in exchange for time served.

¶ 16 Based on all this, defendant's statement in his *pro se* written post-plea filing that "[t]he mental anguish [*sic*] of being the Department of Corrections made [him] take a guilty plea to be released, ASAP" clearly revealed his intention to withdraw his guilty plea. He was not seeking to directly appeal the order of judgment, and he was not simply attacking, for example, a lack of evidence to convict him or counsel's effectiveness or the propriety of his sentence—challenges to the underlying judgment that are, generally, grounds for appeal. Instead, he statement explains

³Even the substitute trial judge before whom defendant appeared to present his (unscheduled) *pro se* motion to dismiss surmised that he "[m]ay have a valid argument."

why he took the guilty plea and insists that the only reason why he did so was because he had already been in jail 18 days and he thought taking it would get him out of jail which it, in fact, did, and did so immediately. The issue defendant lists for "appeal" is really an allegation attacking the voluntariness of his plea. The plain language of this document demonstrates that defendant sought not to appeal the order of judgment entered in the trial court but, rather, his intention to withdraw his guilty plea. It was at this point, then, that the trial court's duty was triggered to inquire of defendant whether he wanted to withdraw his plea and whether he was in need of the assistance of counsel to proceed.

¶ 17 Having reviewed the cases cited by the State in its brief that it insists we should follow, particularly *Merriweather*, and those that it insists are distinguishable, including *People v. Griffin*, 305 Ill. App. 3d 326 (1999), and *People v. Barnes*, 291 Ill. App. 3d 545 (1997), we land on the side of the latter cases, under these particular circumstances. We find no dispute with the holding of *Merriweather*, wherein the court held strict to the mandates of Rule 604(d) requiring a defendant to file a written post-plea motion before filing a notice of appeal. Yet, in that case, the post-plea filing at issue (*i.e.*, the *pro se* "notice of appeal") clearly raised issues seeking to appeal the trial court's judgment, not issues indicative of a desire to withdraw a guilty plea. See *Merriweather*, 2013 IL App (1st) 113789, ¶¶ 11, 21 (examining "content of document" and noting that the defendant's *pro se* notice of appeal attacked sufficiency of evidence and defense counsel's effectiveness, and asked for counsel on appeal).

¶ 18 The instant cause, however, is more akin to *Griffin* and *Barnes*. In those cases, upon examinations of the contents of the post-plea documents filed, the reviewing courts remanded the

causes because they did not view those documents as notices of appeal but, rather, recognized that they triggered the trial court's affirmative duty under Rule 604(d) to inquire whether the defendant required counsel. See *Griffin*, 305 Ill. App 3d at 329 (where the defendant orally sought clarification of Rule 604(d) motion requirements from the trial court and asked whether he was entitled to the appointment of counsel); *Barnes*, 291 Ill. App. 3d at 547 (where the defendant submitted a handwritten letter addressed to trial judge requesting modification of sentence). We find further support in cases like *People v. Trussel*, 397 Ill. App. 3d 913 (2010), and *People v. Gonzalez*, 375 Ill. App. 3d 377 (2007), which saw reviewing courts remand causes back to the trial court with directions to proceed in accordance with Rule 604(d) following post-plea filings that, once their contents were examined, evinced an intention to withdraw guilty pleas rather than file true notices of appeal. See *Trussel*, 397 Ill. App. 3d at 914-15 (remand where the defendant sent a *pro se* post-plea letter to the trial court in which, though he asked to appeal, stated that his lawyer scared him into taking a plea even though he was not guilty); *Gonzalez*, 375 Ill. App. 3d at 378 (where the defendant filed both, post-plea, a *pro se* letter and a *pro se* notice of appeal asserting that she was threatened by her attorney if she did not plead guilty even though she did not want to, cause remanded for proceedings consistent with Rule 604(d), as these filings should have been treated as a motion to withdraw her guilty plea); see also, e.g., *People v. Gibson*, 96 Ill. 2d 544 (trial court should have treated post-plea *pro se* letter asserting psychological coercion by defense counsel to plead guilty as motion to withdraw guilty plea).

¶ 19 Although defendant in the instant cause filed a document, post-plea, labeled "Notice of

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Appeal," upon an examination of its contents, we find that he did not intend it to be such.

Rather, in describing that he only took the guilty plea offered to him because he wanted to be released from the "mental anguish [*sic*]" he was experiencing while in jail following the trial court's execution of its bond forfeiture warrant and that he was otherwise innocent, defendant's *pro se* filing clearly evinced his desire to withdraw his guilty plea. This triggered the trial court's duty to proceed with the mandates of Rule 604(d) to investigate this further and to inquire whether defendant needed the assistance of counsel. Because it did not do so then, it must do so now.

¶ 20

CONCLUSION

¶ 21 Accordingly, for the foregoing reasons, we remand this cause to the trial court for proceedings consistent with Rule 604(d).

¶ 22 Remanded.