2017 IL App (2d) 160575-U
No. 2-16-0575
Order filed August 15, 2017



IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS,<br><br>Plaintiff-Appellee,<br><br>v.<br><br>TRAVIS L. WILKS,<br><br>Defendant-Appellant. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Appeal from the Circuit Court of Du Page County.<br><br><br><br>No. 03-CF-2003<br><br>Honorable Daniel P. Guerin, Judge, Presiding. |

JUSTICE BURKE delivered the judgment of the court.
Justices Hutchinson and Spence concurred in the judgment.

**ORDER**

¶ 1 *Held*: Because defendant abandoned his motion to withdraw his guilty plea by failing to call it for a hearing, his conviction was finalized before *Whitfield* was decided and thus *Whitfield* did not apply, and the trial court lacked jurisdiction of his supplemental motion; we vacated the ruling on the motion and ordered the motion dismissed.

¶ 2 On May 26, 2005, defendant, Travis L. Wilks, entered a negotiated guilty plea to a single count of aggravated criminal sexual assault (720 ILCS 5/12-14(a)(2) (West 2002)). In exchange for his plea, defendant was sentenced to a 20-year prison term, and other charges were nol-prossed. By operation of law, defendant's sentence included a three-year term of mandatory

supervised release (MSR). 730 ILCS 5/5-8-1(d)(1) (West 2002). On June 10, 2005, defendant's attorney filed a motion to withdraw defendant's guilty plea. The motion did not identify any specific basis for the relief requested. Instead the motion merely stated that defendant believed that there were "good and sufficient bases that would entitle him to withdraw his plea of guilty." Defendant requested that the trial court defer ruling on the motion until he had the opportunity to supplement it. On September 10, 2014, defendant filed a *pro se* supplemental motion to withdraw his guilty plea. He alleged ineffective assistance of counsel in connection with the entry of his guilty plea, claiming that his attorney neglected to inform him that a term of MSR was part of his sentence. Defendant subsequently retained private counsel. On October 30, 2015, defendant's attorneys filed an amended supplemental motion to withdraw defendant's plea, claiming that defendant entered his plea without a proper admonishment that his negotiated 20-year prison term would be followed by a 3-year term of MSR.[1] According to the amended supplemental motion, under *People v. Whitfield*, 217 Ill. 2d 177 (2005), defendant was entitled to a three-year reduction in his prison term. The trial court ruled that, because defendant's conviction was final before *Whitfield* was decided, *Whitfield* did not apply. Defendant argues on appeal that, to the contrary, because *Whitfield* was decided before defendant's motion to withdraw his plea was decided, it does apply here. For the reasons set forth below, we vacate the trial court's order and we order the dismissal of the amended supplemental motion.

[1] Before accepting defendant's plea, the trial court admonished him that the minimum sentence for aggravated criminal sexual assault was six years' imprisonment and that "the maximum is 30, with three years [MSR] or parole." The court did not mention MSR in connection with the 20-year prison term defendant would serve under his plea agreement.

¶ 3 Before proceeding, we note that the State has moved to hold this appeal in abeyance until our supreme court issues its decision in *People v. Boykins*, 2016 IL App (1st) 142542-U, *appeal allowed*, No. 121365 (Ill. Nov. 23, 2016). Defendant has filed an objection to the motion, and the State has moved for leave to reply to defendant's objection. We took both motions with the case. It does not appear that our supreme court's decision in *Boykins* is likely to have any bearing on the dispositive issue in this case: whether defendant's conviction was final before *Whitfield* was decided. Thus, we deny the State's motions. We turn our attention to the merits of this appeal.

¶ 4 When a conviction is entered on a guilty plea, due process requires that the record "affirmatively show that the plea was entered intelligently and with full knowledge of its consequences." *Whitfield*, 217 Ill. 2d at 184 (citing *Boykin v. Alabama*, 395 U.S. 238 (1969)). To this end, Illinois Supreme Court Rule 402(a)(2) (eff. July 1, 2012) provides that a defendant must be admonished of "the minimum and maximum sentence prescribed by law" for an offense to which he or she is pleading guilty. Furthermore, as noted in *Whitfield*, the defendant must be admonished that, after completing a prison term, he or she will be required to serve a term of MSR. *Whitfield*, 217 Ill. 2d at 188 (citing *People v. Wills*, 61 Ill. 2d 105, 109 (1975)).

¶ 5 In *Whitfield*, our supreme court explained that a defendant who has not been properly admonished about MSR may either challenge the voluntariness of his or her plea or argue that, absent the proper admonishment, MSR is not part of the plea agreement. *Id.* at 183-84. Under the latter theory, imposing MSR along with the agreed prison term would deprive the defendant of the benefit of his bargain with the State. *Id.* However, because the defendant *must* serve a term of MSR even if he or she did not agree to do so, it might be possible only to *approximate*

the defendant's bargain with the State. In *Whitfield* the court did so by reducing the defendant's prison term by three years—the length of the MSR term. *Id.* at 205.

¶ 6 In *People v. Morris*, 236 Ill. 2d 345, 366 (2010), our supreme court held that *Whitfield* announced a new rule of criminal procedure that does not apply retroactively in proceedings for collateral review of convictions that were "finalized" prior to December 20, 2005, when *Whitfield* was announced. In this context, " '[a] state conviction and sentence become final *** when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied.' " *People v. Kizer*, 318 Ill. App. 3d 238, 246 (2000) (quoting *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994)). Here, the trial court reasoned that defendant's conviction was final when he entered his plea and was sentenced in May 2005. Defendant maintains, however, that because he filed a timely motion to withdraw his guilty plea, his conviction remained subject to being vacated by the trial court or reversed on direct appeal. Defendant argues, in essence, that so long as those contingencies remained, the conviction was not finalized for purposes of the *Morris* rule. The State responds that defendant's failure to take any steps to obtain a ruling on the motion from 2005 until 2014 represents abandonment of the motion. According to the State, the abandoned motion had no effect on the finality of defendant's conviction. We agree with the State.

¶ 7 Illinois Supreme Court Rule 604(d) (eff. July 1, 2017) provides, in pertinent part:

> "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.

No appeal shall be taken upon a negotiated plea of guilty challenging the sentence as excessive 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.

*** The motion shall be presented promptly to the trial judge by whom the defendant was sentenced, and if that judge is then not sitting in the court in which the judgment was entered, then to the chief judge of the circuit, or to such other judge as the chief judge shall designate. 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.

If the defendant is indigent, the trial court shall order a copy of the transcript as provided in Rule 402(e) be furnished the defendant without cost. The defendant's attorney shall file with the trial court a certificate stating that the attorney has consulted with the defendant either by phone, mail, electronic means or in person to ascertain defendant's contentions of error in the sentence and the entry of the plea of guilty, has examined the trial court file and both the report of proceedings of the plea of guilty and the report of proceedings in the sentencing hearing, and has made any amendments to the motion necessary for adequate presentation of any defects in those proceedings.

> The motion shall be heard promptly, and if allowed, the trial court shall modify the sentence or vacate the judgment and permit the defendant to withdraw the plea of guilty and plead anew. If the motion is denied, a notice of appeal from the judgment and sentence shall be filed within the time allowed in Rule 606, measured from the date of entry of the order denying the motion."

Illinois Supreme Court Rule 606(b) (eff. July1, 2017) provides that "[e]xcept as provided in Rule 604(d), the notice of appeal must be filed with the clerk of the circuit court within 30 days after the entry of the final judgment appealed from or if a motion directed against the judgment is timely filed, within 30 days after the entry of the order disposing of the motion."

¶ 8 Defendant's position, in essence, is that when *Morris* was announced his motion to withdraw was pending before the trial court such that a notice of appeal would be premature until the trial court decided the motion. Thus, in defendant's view, his conviction was not "finalized" in the relevant sense. See *Kizer*, 318 Ill. App. 3d at 246. In response, the State relies heavily on our decision in *People v. Van Hee*, 305 Ill. App. 3d 333 (1999). In *Van Hee*, the defendant pleaded guilty on January 23, 1995, to a single count of aggravated criminal sexual assault. On February 22, 1995, he filed a motion to reconsider the sentence. On March 18, 1998, the defendant filed a motion for an extension of time to file a petition for postconviction relief. The trial court denied the motion, and the defendant appealed. The State argued that, on March 18, 1998, the applicable limitations period for filing the petition—three years from the date of conviction (725 ILCS 5/122-1(c) (West 1996))—had already run. Relying on *People v. Izquierdo*, 262 Ill. App. 3d 558 (1994), the defendant argued that there was no final judgment in his case because the trial court had never ruled on the motion to reconsider his sentence. Thus,

according to the defendant, the three-year limitations period never began to run. We rejected the argument, reasoning as follows:

> "Contrary to defendant's assertion, in criminal cases, a judgment is considered final after defendant has been convicted and sentenced. [Citation.] Defendant's reliance on *Izquierdo* is misplaced. Unlike the motion to reconsider in this case, in *Izquierdo* the trial court ruled on defendant's motion to reconsider. [Citation.] Local Rule 2.01(m) (19th Judicial Cir. Ct. R. 2.01(m) (eff. January 2, 1997)) provides that '[t]he burden of calling for hearing any motion previously filed is on the party making the motion.' Thus, pursuant to Rule 2.01(m), defendant carried the burden to call for hearing his motion to reconsider.
>
> Additionally, as the State properly notes, when no ruling has been made on a motion, the motion is presumed to have been abandoned absent circumstances indicating otherwise. [Citation.] There is no evidence in the record establishing that the trial court ruled on the motion to reconsider. Absent evidence to the contrary, we may presume that defendant abandoned his motion. The failure to obtain a ruling on a motion does not transform a final order into a nonfinal order. Because the motion was not adjudicated, the January 23, 1995, order entering defendant's guilty plea and sentencing him was a final judgment and marked the beginning of the limitations period for filing a postconviction petition." *Van Hee*, 305 Ill. App 3d at 334-35.

The same reasoning applies here. It appears that defendant took no action on his motion for over nine years. The long-abandoned motion did not transform the conviction entered on defendant's guilty plea into a nonfinal order.

¶ 9 Defendant attempts to distinguish *Van Hee* on the basis that the circuit court of Du Page County has no local rule similar to the rule cited in *Van Hee*, which placed the burden of calling a motion for hearing on the party making the motion. However, there is authority recognizing the moving party's burden without reference to any local rule. See *People v. Kelley*, 237 Ill. App. 3d 829, 831 (1992). We thus conclude that the absence of a rule like the one in *Van Hee* did not relieve defendant of the burden of obtaining a ruling on his motion.

¶ 10 Defendant also relies on our decision in *People v. Willoughby*, 362 Ill. App. 3d 480 (2005). In that case, the defendant was found guilty, following a stipulated bench trial, of possession of marijuana with intent to deliver. The trial took place on April 22, 2004. The defendant moved for a new trial on May 19, 2004, but the motion was never heard. The defendant was sentenced on June 2, 2004, and on June 10, 2004, the defendant filed a notice of appeal. We dismissed the appeal on the basis that the notice of appeal was premature because there was no disposition of the motion for a new trial. We relied on Illinois Supreme Court Rule 606(b) (eff. Dec. 1, 1999), which provided, "When a timely post-trial or post-sentencing motion directed against the judgment has been filed by counsel or by defendant, if not represented by counsel, any notice of appeal filed before the entry of the order disposing of all pending post-judgment motions shall have no effect and shall be stricken by the trial court." The State argued, however, that the defendant abandoned his posttrial motion *by filing the notice of appeal*. We rejected the argument, reasoning as follows:

> "In *Chand v. Schlimme*, 138 Ill. 2d 469 (1990), the supreme court discussed abandonment of a posttrial motion in the context of the then-effective version of Supreme Court Rule 303(a)(2) [citation] which, in its relevant portions, was almost identical to the present version of Rule 606(b). Specifically, Rule 303(a)(2) stated:

> 'When a timely post-trial motion has been filed by any party *** a notice of appeal filed before the entry of the order disposing of the last pending post-trial motion shall have no effect and shall be withdrawn by the party who filed it ***. This is so whether the timely post-trial motion was filed before or after the date on which the notice of appeal was filed.' [Citation.]

In addressing the possible means of abandonment, the court stated:

> 'Rule 303 makes it clear that filing of a notice of appeal no longer acts as an abandonment by operation of law. That is, *** a notice of appeal that is filed during the pendency of a post-trial motion *** has no effect. A notice of appeal that has no effect, furthermore, cannot serve to abandon an otherwise effective post-trial motion ***.' [Citation.]

The court concluded: 'We are not saying that a party may not abandon its post-trial motion, but to do so there must be a more affirmative indication of abandonment than the mere filing of a notice of appeal before the disposition of the post-trial motion.' [Citation.]

Given the similarity between Rule 303(a)(2) and Rule 606(b), we consider the supreme court's comments in *Chand* to be equally applicable here. Under Rule 606(b), the filing of a notice of appeal does not abandon a timely posttrial motion directed against the judgment. Further, as abandonment requires 'a more affirmative indication *** than the mere filing of a notice of appeal' [citation] the failure to procure a hearing on the motion, which is not an affirmative indication at all, does not suffice either. Although we acknowledge the general presumption that a party filing a motion abandons the motion by

failing to request a hearing and obtain a ruling, it simply does not apply here." *Willoughby,* 362 Ill. App. 3d at 483-84.

¶ 11 Neither *Chand* nor *Willoughby* involved neglect of a motion for a period comparable to the roughly nine-year period that defendant neglected his motion to withdraw his guilty plea. In *Chand*, the plaintiff filed his notice of appeal on the same day as his posttrial motion. In light of those facts, the court reasoned that establishing the abandonment of the motion would require a more affirmative indication than merely filing the notice of appeal before the disposition of the motion. In *Willoughby*, the posttrial motion was pending for about three weeks before the defendant filed his notice of appeal. That the *Chand* and *Willoughby* courts were unwilling to find abandonment under these circumstances does not mean that the passage of time, in itself, can never be a sufficient indication that a party who has failed to obtain hearing on a motion has abandoned that motion. It is clear that Rule 604(d) was designed to achieve prompt resolution of disputes over the validity of guilty pleas. By its own terms, the rule provides that postplea motions shall be promptly presented and heard. Thus, a postplea motion may not be used—as it was here—to create a procedural limbo for convictions on guilty pleas. Defendant's failure, for roughly nine years, to take any action on his motion constitutes abandonment.[2]

¶ 12 Having determined that defendant abandoned his motion to withdraw, we conclude that, for purposes of *Morris*'s retroactivity analysis, defendant's conviction was finalized on May 26, 2005. Furthermore, because the abandoned motion did not extend the trial court's jurisdiction, the trial court lost jurisdiction of the case with the passage of time. See, *e.g.*, *People v. Bailey*,

[2] Defendant argues that he is not personally responsible for the failure to act on the motion. According to defendant, his attorney is to blame. However, "[a] defendant is bound by the acts or omissions of his counsel." *People v. Kliner*, 185 Ill. 2d 81, 118 (1998).

2014 IL 115459, ¶ 8 ("Under our usual rules, a trial court loses jurisdiction to hear a cause at the end of the 30-day window following the entry of a final judgment."). Lacking jurisdiction, the trial court should not have ruled on the merits of the motion, but rather should have stricken or dismissed it. Because the trial court lacked jurisdiction, we lack authority to address the merits of the trial court's ruling. *Id.* ¶ 29. Rather, we must vacate the trial court's ruling and order the motion dismissed. *Id.*

¶ 13 For the foregoing reasons, we vacate the denial of defendant's amended supplemental motion to withdraw his guilty plea and we order the dismissal of that motion. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 14 Order vacated and motion dismissed.