

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).

FILED

June 23, 2017
Carla Bender
4th District Appellate
Court, IL

2017 IL App (4th) 150040-U

NO. 4-15-0040

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
HECTOR U. ROSAS,)	No. 13CF1962
Defendant-Appellant.)	
)	Honorable
)	Thomas J. Difanis,
)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Harris and Appleton concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court dismissed the appeal because defendant failed to file a motion to withdraw his guilty plea within 30 days of sentencing.

¶ 2 The State charged defendant, Hector U. Rosas, with three counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2006)). In October 2014, defendant entered an open plea of guilty to one count of predatory criminal sexual assault of a child. In exchange, the State dismissed (1) the two remaining counts of predatory criminal sexual assault of a child and (2) Champaign County case No. 14-CF-128. Prior to sentencing, defendant filed a *pro se* motion to withdraw his plea of guilty. Ultimately, defendant received a sentence of 30 years' imprisonment. More than 30 days after sentencing, defendant, with the

assistance of new counsel, filed an amended motion to withdraw his guilty plea and reconsider the sentence, which the court denied.

¶ 3 On appeal, defendant concedes neither his *pro se* motion nor counsel's amended motion were timely to preserve his right to appeal. But defendant argues the trial court's erroneous instruction excuses his untimely motions and requests this court remand for proper admonishments. The State argues the court properly admonished defendant, and because defendant's motions were untimely, we should dismiss this appeal. We agree with the State.

¶ 4 I. BACKGROUND

¶ 5 As this appeal relates only to whether the trial court properly admonished defendant, we do not provide an in-depth factual background on the charges in this case.

¶ 6 The State charged defendant with three counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2006)).

¶ 7 On October 20, 2014, defendant entered an open plea of guilty to one count of predatory criminal sexual assault of a child. In exchange, the State dismissed (1) the remaining counts of predatory criminal sexual assault of a child and (2) Champaign County case No. 14-CF-128, which charged defendant with four counts of aggravated criminal sexual abuse.

¶ 8 Defendant filed a *pro se* motion to withdraw his guilty plea, arguing he did not understand the plea agreement and requesting a jury trial.

¶ 9 Before conducting defendant's December 1, 2014, sentencing hearing, the trial court acknowledged defendant's motion and stated, "I have a motion to withdraw guilty plea which will be taken up after the sentencing hearing."

¶ 10 After sentencing defendant to 30 years' imprisonment, the court admonished

defendant, in relevant part, as follows:

"You have the right to appeal the decision of this court. Prior to taking an appeal you must file in this court within 30 days of today's date a written motion asking to have this court either reconsider the sentence imposed *** or to have the judgment vacated and for leave to withdraw your guilty plea. You must set forth the grounds in the motion.

If the motion is allowed, the sentence will be modified or the plea of guilty will be vacated and a trial date will be set on this charge and all the other charges that were dismissed. Any issues not raised in the motion will be considered waived."

¶ 11 On January 9, 2015, defendant, with the assistance of counsel, filed an amended motion to withdraw his guilty plea and reconsider the sentence. In addition to adopting the reasons set forth in defendant's *pro se* motion, defendant further asserted (1) defense counsel intimidated him and forced him to plead guilty when he wanted to proceed to trial, (2) defense counsel promised he would not receive the maximum penalty, and (3) the sentence imposed was excessive.

¶ 12 On January 14, 2015, defense counsel filed a Rule 604(d) certificate (Ill. S. Ct. R. 604(d) (eff. Dec. 11, 2014)), and the trial court held a hearing on defendant's amended motion. After hearing arguments and the testimony of defendant and his prior counsel, the court denied the motion.

¶ 13 This appeal followed.

¶ 14

II. ANALYSIS

¶ 15 On appeal, defendant argues the trial court's erroneous instruction excuses his untimely motions and requires us to remand for proper admonishments. The State argues the court properly admonished defendant pursuant to Illinois Supreme Court Rule 605(b) (eff. Oct. 1, 2001); thus, dismissal is required because defendant failed to file, within 30 days of sentencing, his motion to withdraw his guilty plea. See Ill. S. Ct. R. 604(d) (eff. Dec. 11, 2014). We agree with the State.

¶ 16 Rule 604(d) requires a defendant who is appealing from an open plea to, *within 30 days of the day sentence is imposed*, file a motion challenging the sentence or plea of guilty. See Ill. S. Ct. R. 604(d) (eff. Dec. 11, 2014). The filing of a Rule 604(d) motion is a condition precedent when, on appeal, a defendant wishes to challenge his plea of guilty. *People v. Wilk*, 124 Ill. 2d 93, 105, 529 N.E.2d 218, 222 (1988). Usually, the failure to file a timely Rule 604(d) motion prevents us from considering a defendant's appeal on the merits. *People v. Flowers*, 208 Ill. 2d 291, 301, 802 N.E.2d 1174, 1180 (2003). Instead, dismissal is required, leaving the defendant to proceed under the Post-Conviction Hearing Act (725 ILCS 5/122-1 to 122-7 (West 2016)). *People v. Foster*, 171 Ill. 2d 469, 471, 665 N.E.2d 823, 824 (1996).

¶ 17 Rule 605(b) serves as a corollary to the requirements of Rule 604(d) and contains admonishments the trial court must give a defendant when he or she enters an open plea. Rule 605(b) says the trial court must advise the defendant "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 trial court reconsider the sentence or to have the judgment vacated and for leave to withdraw the plea of guilty, setting forth the grounds for the motion." (Emphasis

added.) Ill. S. Ct. R. 605(b) (eff. Oct. 1, 2001).

¶ 18 The failure of the trial court to admonish the defendant under Rule 605(b) excuses the untimely filing of a Rule 604(d) motion. *People v. Radunz*, 180 Ill. App. 3d 734, 739, 536 N.E.2d 189, 192 (1989). We review *de novo* whether the trial court complied with Rule 605. *People v. Young*, 387 Ill. App. 3d 1126, 1127, 903 N.E.2d 434, 435 (2009).

¶ 19 Here, defendant filed his *pro se* motion to withdraw his guilty plea *before* the trial court sentenced him. Counsel filed defendant's amended motion to withdraw the guilty plea a few days before the hearing on the amended motion, but beyond 30 days after sentencing. Defendant admits in his brief that both of these filings were untimely, but he argues the court's comment at his sentencing hearing that his *pro se* motion would be "taken up after the sentencing hearing" gave him the impression his motion preserved his appeal rights under Rule 604(d).

¶ 20 Defendant cites *People v. Ramage*, 229 Ill. App. 3d 1027, 595 N.E.2d 222 (1992), to support his contention. In *Ramage*, the defendant pleaded guilty to three counts of child pornography. *Ramage*, 229 Ill. App. 3d at 1028, 595 N.E.2d at 223. Before sentencing, the defendant filed a motion to withdraw his guilty pleas, raising the defense of entrapment. *Ramage*, 229 Ill. App. 3d at 1028, 595 N.E.2d at 223. The trial court denied the defendant's motion, accepted his guilty pleas, and sentenced him to 30 months' probation. *Ramage*, 229 Ill. App. 3d at 1028, 595 N.E.2d at 223. In admonishing defendant under Rule 604(d), the court stated: " 'In order to appeal, you must within 30 days file with the Court a written motion asking—no, you don't. You've already done that.' " *Ramage*, 229 Ill. App. 3d at 1029, 595 N.E.2d at 223.

¶ 21 The defendant appealed, arguing the trial court committed reversible error in

denying his motion to withdraw his guilty pleas without determining whether counsel filed a Rule 604(d) certificate. *Ramage*, 229 Ill. App. 3d at 1029, 595 N.E.2d at 223. The State argued that where defendant filed his motion before sentencing, the motion did not comply with Rule 604(d). *Ramage*, 229 Ill. App. 3d at 1029, 595 N.E.2d at 223. The Second District explained, "A premature motion filed prior to sentencing does not satisfy Rule 604(d) for purposes of an appeal. The language of the rule makes it clear defendant has only 30 days after the imposition of sentence to file such a motion. Since the filing of such a motion is MANDATORY for purposes of appeal, it cannot be waived by the trial court or by defendant." (Emphases in original.) *Ramage*, 229 Ill. App. 3d at 1031, 595 N.E.2d at 225. Yet, under the circumstances presented, the court held, "[the] defendant should not be penalized for failing to renew his Rule 604(d) motion where he may have been misled or prevented from filing his post-sentence motion." *Ramage*, 229 Ill. App. 3d at 1031, 595 N.E.2d at 225. The court thus addressed defendant's certificate argument despite the jurisdictional flaws. *Ramage*, 229 Ill. App. 3d at 1031, 595 N.E.2d at 225.

¶ 22 Unlike the trial court in *Ramage*, here, the court did not tell defendant his premature motion to withdraw his guilty plea satisfied Rule 604(d). Instead, after the court sentenced defendant, the court correctly advised him he was required to file a motion to withdraw his plea "within 30 days of today's date." The court gave no indication defendant's premature motion preserved his appeal rights, and the court had no obligation to advise defendant his premature motion did not preserve his right to appeal. The court's comment that defendant's motion would be "taken up after the sentencing hearing" simply addressed the status of defendant's pending motion. Even further disconnecting the court's statement from the

admonishment is the fact the court made the statement on the first day of the sentencing hearing, but admonished defendant the next day without any mention of his motion to withdraw his guilty plea. As such, defendant received a proper admonishment under Rule 605(b).

¶ 23 On January 9, 2015, defense counsel filed an amended motion to withdraw defendant's guilty plea. But this motion came too late. The trial court sentenced defendant on December 2, 2014, and the filing of the amended motion exceeded the 30-day filing deadline in Rule 604(d). See Ill. S. Ct. R. 604(d) (eff. Dec. 11, 2014) ("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." (Emphasis added.)).

¶ 24 In *People v. Potts*, 136 Ill. App. 3d 1059, 1064, 484 N.E.2d 306, 309 (1985), the Fifth District addressed a premature Rule 604(d) motion on appeal and held as follows:

"[W]here a defendant appeals from a judgment entered on a plea of guilty, although a premature Rule 604(d) motion may be considered by the court, the defendant must preserve his right to appeal by filing a motion to withdraw his guilty plea within 30 days following the imposition of the sentence and by then filing a timely notice of appeal from the disposition of that motion."

¶ 25 Because the trial court properly admonished defendant under Rule 605(b) and defendant failed to file a timely motion to withdraw his guilty plea pursuant to Rule 604(d), we dismiss this appeal.

¶ 26

III. CONCLUSION

¶ 27 For the above reasons, we dismiss this appeal. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 28 Dismissed.