2017 IL App (4th) 150957-U

NO. 4-15-0957

FILED
July 27, 2017
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
MISOOK NOWLIN,	)	No. 11CF800
Defendant-Appellant.	)	
	)	Honorable
	)	Robert L. Freitag,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Steigmann and Appleton concurred in the judgment.

ORDER

¶ 1 *Held*: (1) We dismiss for a lack of jurisdiction defendant's claim her guilty plea must be vacated because defendant failed to file a motion to withdraw her guilty plea.

(2) We vacate the clerk-imposed fines but continue to hold the State's Attorney automation assessment is a fee and affirm its imposition here, and we remand to the trial court to refund the vacated fines to defendant.

¶ 2 Defendant, Misook Nowlin, appeals her conviction for concealing a homicidal death (concealment) (720 ILCS 5/9-3.4(a) (West 2010)) and challenges several clerk-imposed assessments. On appeal, defendant argues her guilty plea to concealment must be vacated because the trial court did not admonish her sentences for concealment and first degree murder would run consecutively. We affirm in part, vacate in part, remand with directions, and dismiss.

¶ 3 I. BACKGROUND

¶ 4 The facts underlying defendant's convictions were outlined in *People v. Nowlin*, 2015 IL App (4th) 130387-U, ¶¶ 5-12. We limit our recitation of the facts here to those necessary to resolve the issues presented in this appeal.

¶ 5 At the start of her December 2012 jury trial, for first degree murder and concealment, defendant pleaded guilty to the concealment charge. Prior to accepting the guilty plea, the trial court admonished defendant of her rights and the consequences of pleading guilty. With respect to sentencing, the court stated, in relevant part:

> "Ms. Nowlin, as I said, that charge is a Class 3 felony. What that means is the law provides certain penalties for that offense. If you plead guilty to that charge, then the Court could impose a sentence to the Illinois Department of Corrections. If such a sentence were imposed on that charge, it would be for a minimum term of two years, could be for up to five years, and then any prison term on that charge would also be followed by a one-year term of mandatory supervised release, which is what some people still call parole."

Defendant indicated she understood these admonishments. The court accepted the factual basis of the concealment charge and defendant's guilty plea.

¶ 6 The jury trial proceeded, and defendant was found guilty of first degree murder. At the March 2013 sentencing hearing, the trial court admonished defendant was subject to consecutive sentencing based on her convictions for first degree murder and concealment and sentenced her to consecutive prison terms of 50 years for first degree murder and 5 years for concealment.

¶ 7 Following the sentencing hearing, defendant filed a motion to reconsider her sentence for concealment, arguing the sentence was excessive. She did not file a motion to withdraw her guilty plea or otherwise challenge the basis for her plea. The trial court denied defendant's motion, and she timely appealed, challenging her conviction for first degree murder and her sentence for concealment.

¶ 8 In *Nowlin*, 2015 IL App (4th) 130387-U, ¶¶ 35, 37, this court affirmed defendant's conviction for first degree murder but remanded the case to the trial court for the filing of an Illinois Supreme Court Rule 604(d) (eff. July 1, 2006) certificate with respect to defendant's guilty plea to concealment. On remand, defendant was given the opportunity to file a new motion to reconsider her sentence for concealment and/or a motion to withdraw her guilty plea. Defendant filed a new motion to reconsider her sentence for concealment, renewing her argument the sentence was excessive. Defendant did not file a motion to withdraw her guilty plea. The court denied defendant's motion to reconsider her sentence.

¶ 9 This appeal followed.

¶ 10 II. ANALYSIS

¶ 11 Defendant argues for the first time on appeal her guilty plea to concealment must be vacated because, prior to accepting her plea, the trial court did not admonish her sentences for first degree murder and concealment would run consecutively if she were convicted of first degree murder at the impending jury trial. See Ill. S. Ct. R. 402(a)(2) (eff. July 1, 1997) (requiring trial courts to inform defendants of "the minimum and maximum sentence prescribed by law, including, when applicable, the penalty to which the defendant may be subjected because

of prior convictions or consecutive sentences prior to accepting a guilty plea"). Defendant also asserts several clerk-imposed assessments are fines, which must be vacated.

¶ 12 A. Guilty Plea

¶ 13 Though the parties do not raise the issue, an appellate court has an independent duty to determine whether it has been conferred jurisdiction and to dismiss an appeal if jurisdiction is lacking. *People v. Jenkins*, 303 Ill. App. 3d 854, 856, 709 N.E.2d 265, 266 (1999).

> "[Rule 604(d)] was designed to eliminate needless trips to the appellate court and to give the circuit court an opportunity to consider the alleged errors and to make a record for the appellate court to consider on review in cases where a defendant's claim is disallowed. [Citation.] Accordingly[,] Rule 604(d) establishes a condition precedent for an appeal from a defendant's plea of guilty. [Citation.]. 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 must dismiss the appeal*." (Emphasis added and internal quotation marks omitted.) *People ex rel. Alvarez v. Skryd*, 241 Ill. 2d 34, 40, 944 N.E.2d 337, 341-42 (2011).

See also *People v. Flowers*, 208 Ill. 2d 291, 300-01, 802 N.E.2d 1174, 1180 (2003), *as modified on denial of reh'g* (Jan. 26, 2004); *People v. Jamison*, 181 Ill. 2d 24, 27-28, 690 N.E.2d 995, 996-97 (1998).

¶ 14 Illinois courts recognize an "admonition exception" to the Rule 604(d) requirement to file a motion to withdraw a guilty plea in the trial court prior to challenging the plea on appeal, *e.g.*, *Skryd*, 241 Ill. 2d at 41, 944 N.E.2d at 342.

> "Where a circuit court fails to give applicable [Illinois Supreme Court] Rule 605 [(eff. Oct. 1, 2001)] admonishments and the defendant attempts to appeal without first filing the motions required by Rule 604(d), the appeal is not dismissed. Rather, the appellate court must remand the cause to the circuit court for strict compliance with Rule 604(d)." *Skryd*, 241 Ill. 2d at 41, 944 N.E.2d at 342-43.

¶ 15 Defendant did not file a motion to withdraw her guilty plea. She instead filed motions to reconsider her sentence, claiming her sentence for concealment was excessive. Though she argues she was not properly admonished, her claim does not fall within the admonition exception because she does not claim error with respect to her Rule 605(b) admonishments, which the transcript indicates were properly given by the trial court on remand. Rather, defendant claims error with respect to her Rule 402(a)(2) admonishments. To assert such a claim, defendant was required to file a motion to withdraw her guilty plea, as she was admonished on remand. See *Skryd*, 241 Ill. 2d at 40, 944 N.E.2d at 341-42; Ill. S. Ct. Rule 605(b) (eff. Oct. 1, 2001). Because she did not do so, we lack jurisdiction to consider her claim.

¶ 16 Defendant argues we may consider her claim as plain error, citing *People v. Wigod*, 406 Ill. App. 3d 66, 72-73, 940 N.E.2d 202, 208 (2010), and *People v. Whitfield*, 217 Ill. 2d 177, 188, 840 N.E.2d 658, 665-66 (2005). We disagree. The failure to file a motion to withdraw a guilty plea not only results in procedural forfeiture, but it also prevents jurisdiction being conferred to a court of review. See *Skryd*, 241 Ill. 2d at 40, 944 N.E.2d at 341-42. The

plain-error doctrine may excuse forfeiture, but not the lack of jurisdiction. *In re Isaiah D.*, 2015 IL App (1st) 143507, ¶ 44 n.5, 35 N.E.3d 88 ("[W]e lack jurisdiction to review the claimed errors *** and thus the plain[-]error doctrine does not permit us to review the circumstances of the admonishments given ***.").

¶ 17 *Whitfield* is distinguishable because the proceedings there were in the procedural posture of a postconviction petition rather than a direct appeal. *Whitfield*, 217 Ill. 2d at 179, 840 N.E.2d at 660; see also 725 ILCS 5/122-1 *et seq*. (West 2016) (the Post-Conviction Hearing Act provides an avenue for a defendant to challenge his or her conviction or sentence on constitutional grounds in a collateral proceeding). Because the proceedings were brought under the Post-Conviction Hearing Act, the reviewing courts in *Whitfield* had jurisdiction to consider whether the plain-error doctrine excused the procedural forfeiture resulting from the failure to file a motion to withdraw the guilty plea.

¶ 18 With respect to *Wigod*, to extent the decision stands for the principle a defendant may challenge his or her guilty plea on direct appeal without first attempting to withdraw the plea in the trial court—as defendant claims—we decline to follow the decision as inconsistent with the plain language of Rule 604(d) and *Skryd*. We do note, however, the defendant in *Wigod* filed multiple *pro se* postplea motions, at least one of which challenged his guilty plea on the ground it was coerced. *Wigod*, 406 Ill. App. 3d at 72, 940 N.E.2d at 207. It is unclear whether this *pro se* motion was treated as a motion to withdraw the defendant's guilty plea, the denial of which would have conferred jurisdiction to the First District to consider the Rule 402 admonishments there.

¶ 19 Because we are without jurisdiction to consider defendant's claim, we must dismiss her claim. See *Skryd*, 241 Ill. 2d at 40, 944 N.E.2d at 341-42.

¶ 20 B. Fines and Fees

¶ 21 Clerk-imposed fines are void *ab initio*. *People v. Hible*, 2016 IL App (4th) 131096, ¶ 9, 53 N.E.3d 319; *People v. Larue*, 2014 IL App (4th) 120595, ¶ 56, 10 N.E.3d 959. Void judgments are those entered without jurisdiction and can be challenged " 'at any time or in any court, either directly or collaterally.' " *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 103, 776 N.E.2d 195, 201 (2002) (quoting *Barnard v. Michael*, 392 Ill. 130, 135, 63 N.E.2d 858, 862 (1945)). Whether an assessment is a fine or a fee is a question of statutory construction, which we review *de novo*. *People v. Warren*, 2016 IL App (4th) 120721-B, ¶ 99, 55 N.E.3d 117.

¶ 22 Defendant argues, and the State concedes, the circuit clerk improperly imposed the following fines: (1) a $70 lump sum surcharge, (2) a $28 Violent Crime Victim Fund charge, and (3) a $50 court system charge. We accept the State's concession and vacate these clerk-imposed fines. See *People v. Smith*, 2014 IL App (4th) 121118, ¶¶ 54, 63, 73, 18 N.E.3d 912.

¶ 23 Defendant explains, and the record reflects, these fines were paid by bond money she posted in an unrelated case, the remainder of which was refunded to her by the circuit clerk. As such, defendant requests we refund these fines to her. The State does not object. We therefore remand to the trial court and direct these fines to be refunded to defendant. See *People v. Molidor*, 2012 IL App (2d) 110006, ¶ 20, 970 N.E.2d 58.

¶ 24 Defendant also invites us to reconsider our conclusion the $2 State's Attorney automation assessment is a fee rather than a fine, citing *People v. Camacho*, 2016 IL App (1st)

140604, ¶ 56, 64 N.E.3d 647. We decline defendant's invitation and continue to hold the assessment is a fee. See *Warren*, 2016 IL App (4th) 120721-B, ¶ 116, 55 N.E.3d 117.

¶ 25 III. CONCLUSION

¶ 26 We affirm the imposition of the $2 State's Attorney's automation assessment; vacate the (1) $70 lump sum surcharge, (2) $28 Violent Crime Victim Fund charge, and (3) $50 court system charge; remand to the trial court with the direction to refund these fines to defendant; and dismiss the proceedings. We award the State its $50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002 (West 2016).

¶ 27 Affirmed in part and vacated in part; cause remanded with directions; and proceedings dismissed.