2018 IL App (1st) 152238-U

No. 1-15-2238

Order filed June 11, 2018

FIRST 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. 09 CR 5691
	)	
LAWRENCE LATHAM,	)	Honorable Judges
	)	Garritt E. Howard and
Defendant-Appellant.	)	Lauren Gottainer Edidin,
	)	Judges, presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Pierce and Justice Griffin concurred in the judgment.

ORDER

¶ 1 *Held*: Remanded to the trial court for compliance with Illinois Supreme Court Rule 605(b) admonitions requirement.

¶ 2 Defendant Lawrence Latham entered a non-negotiated plea of guilty to violation of bail bond and was sentenced to three years' imprisonment. On appeal, defendant contends that his

case should be remanded for further proceedings as (1) the trial court failed to properly admonish him in accordance with Illinois Supreme Court Rule 605(b) (eff. Oct. 1, 2001), (2) the court improperly advised him to file his motion to withdraw his plea prior to sentencing, and (3) trial counsel failed to comply with Illinois Supreme Court Rule 604(d). Defendant also contends that his mittimus should be corrected. We remand.

¶ 3 In March 2009, defendant was indicted on one count of violation of bail bond (720 ILCS 5/32-10 (West 2008)), alleging that he had been admitted to bail in connection with a felony theft in case No. 07 CR 9814, incurred a forfeiture of that bail on July 28, 2008, and failed to surrender himself within 30 days of the forfeiture.

¶ 4 On November 14, 2010, defendant appeared in court on an unrelated charge, where he was informed of two outstanding "no bail" warrants on him and detained. At defendant's arraignment on the violation of bail bond charge, he informed the court that he failed to appear in July 2008 because he had been "in a car accident and was paralyzed" and claimed he had medical documentation and police reports substantiating the accident. Then followed numerous continuances and hearings, wherein defendant went back and forth between being represented by a public defender, representing himself, and being represented by private counsel.

¶ 5 During a March 2011 hearing in which defendant represented himself, he informed the court that on July 28, 2008, the date he failed to appear in court on the theft charge, he was in a hit-and-run accident. Defendant claimed he was "hospitalized" until October 16, 2010, stating that he was in "the hospital rehab and back and forth from the hospital in Borgess Medical Center in Kalamazoo, Michigan at the rehab center there." Although the case was continued

many times in order to obtain medical records to substantiate defendant's assertions, no medical records were ever produced.

¶ 6 On October 23, 2013, the date set for defendant's jury trial, he requested a 402 conference for both the violation of bail bond and the felony theft cases. The court made defendant an offer: plead guilty to both charges in exchange for consecutive minimum sentences on both. Defendant rejected the court's offer and indicated his desire to enter a "blind" plea to only the violation of bail bond charge. Following the court's admonitions regarding the nature of the offense and possible penalties and the parties' stipulation to the facts underlying the violation of bail bond charge, the trial court accepted defendant's guilty plea. The court continued the case for sentencing pending receipt of a presentence investigation report.

¶ 7 On November 22, 2013, prior to sentencing, defendant asked to address the court. The following colloquy took place:

> "DEFENDANT: I was asking if the court, if I can withdraw the plea. I've contacted the hospital, and I have two physicians that can appear in court on my behalf. I wasn't able to contact –
>
> THE COURT: You want to withdraw your plea of guilty?
>
> DEFENDANT: Yes.
>
> THE COURT: Well, in order to request to withdraw a plea of guilty, you have to file a motion to withdraw the plea of guilty, and it has to be done in writing.
>
> DEFENDANT: Okay. Or I can do it verbally?
>
> THE COURT: You can't do it verbally. The Rules require it be done in writing. *** It also requires it be done within 30 days. We may be past that."

¶ 8 The court concluded that the 30th day was that day and informed defendant that, if he intended to file a motion to withdraw his plea, it had to be filed in writing that day. That same day, defendant filed a *pro se* motion titled motion "to vacate plea of guilty" stating he had "not been sentenced, yet" and "requesting an extension of time to withdraw his plea, once the transcript [was] ordered and reviewed." The court subsequently agreed to hold the motion in abeyance pending resolution of the felony theft case.[1]

¶ 9 On May 5, 2015, defendant informed the court that he did not want to withdraw his motion to withdraw his guilty plea and wanted his attorney "to proceed on it." Defense counsel told the court he had discussed the motion with defendant "more than a year ago and, you know, there's really no basis for it, and I've told [defendant] that on more than one occasion," and felt it would be inappropriate for him to argue the motion. The court informed defendant that because his attorney believed arguing the motion would go against his "duties," defendant would have to argue the motion himself. The court agreed to provide defendant with a copy of the transcript and set the motion for a hearing on the next day.

¶ 10 In the May 6, 2015 hearing, defendant argued that he was innocent of the offense due to his hit-and-run accident and subsequent 18-month hospitalization. Defendant presented the court with an accident report showing that he was taken to a hospital on July 28, 2008, but presented no other evidence. Records subpoenaed from the hospital by the State showed defendant was given ibuprofen at the hospital and released the same day. The court denied defendant's motion to withdraw his guilty plea, continued the case for sentencing, and set the theft case for trial.

[1] Judge Howard presided over the proceedings up until June 10, 2014. Judge Edidin presided over all subsequent hearings.

¶ 11 On June 23, 2015, following a bench trial, the court found defendant not guilty of felony theft.

¶ 12 On July 1, 2015, the court sentenced defendant to three years' imprisonment on his guilty plea for the Class 3 violation of bail bond and awarded him 1692 days for time served. The court admonished defendant that he had 30 days "to file a motion stating why you did not agree with my sentence or the sentencing," 30 days from a denial of that motion to file a written notice of appeal, and any issue or claim not raised in the motion would be waived on appeal. Defendant did not file a post-sentencing motion. This appeal followed.

¶ 13 On appeal, defendant contends his case should be remanded because the trial court failed to substantially comply with Rule 605(b) by not admonishing him of the need to file a motion to withdraw his guilty plea within 30 days of sentencing in order to preserve his right to appeal from the plea. Defendant also asserts remand is warranted because his trial counsel failed to strictly comply with Rule 604(d) by not filing a certificate of compliance regarding his *pro se* motion to withdraw. Defendant lastly argues that his mittimus should be corrected to eliminate the misstatement that his conviction is a Class 2 felony. The State agrees with defendant on all three assertions and that remand is warranted, but notes that correction of the mittimis is unnecessary if we remand.

¶ 14 Illinois Supreme Court Rule 604(d) (eff. Dec. 11, 2014) requires a defendant who wants to appeal from a judgment entered on a guilty plea to first file with the trial court, within 30 days of sentencing, a written motion to withdraw the guilty plea and vacate the judgment. The rule establishes a condition precedent for an appeal from a defendant's guilty plea and, if the

defendant fails to comply with this requirement, the appeal must be dismissed. *People ex rel. Alvarez v. Skryd*, 241 Ill. 2d 34, 40 (2011).

¶ 15 Here, at the trial court's incorrect direction, defendant filed a premature motion to withdraw his guilty plea that was heard and denied prior to sentencing. A motion to withdraw a guilty plea filed prior to sentencing is premature and does not satisfy Rule 604(d) for purposes of creating a right to appeal. *People v. Marquez*, 2012 IL App (2d) 110475, ¶ 4; *People v. Ramage*, 229 Ill. App. 3d 1027, 1031 (1992). Rule 604(d) requires that such a motion be filed within 30 days after imposition of sentence and this mandatory requirement cannot be waived by the trial court or by a defendant. *Marquez*, 2012 IL App (2d) 110475, ¶ 14 (defendant must renew the premature motion in order to preserve the right to appeal); *Ramage*, 229 Ill. App. 3d at 1031. Accordingly, as defendant did not renew his motion to vacate the judgment and withdraw his guilty plea within 30 days of sentencing, he did not preserve his right to appeal.

¶ 16 However, "[d]ismissal of an appeal based on a defendant's failure to file the requisite motions in the circuit court would violate due process if the defendant did not know that filing such motions was necessary." *Skryd*, 241 Ill. 2d at 41. Therefore, in all cases in which a judgment is entered on a plea of guilty, Illinois Supreme Court Rule 605 sets forth admonitions that a defendant must substantially receive "at the time of imposing sentence" (Ill. S. Ct. R. 605(b), (c) (eff. Oct. 1, 2001)). See *Skryd*, 241 Ill. 2d at 41 (in the context of Rule 605(c) regarding admonitions for negotiated pleas). Under the admonition exception to Rule 604(d), if the trial court fails to give applicable Rule 605 admonitions and the defendant attempts to appeal without first filing the motions required by Rule 604(d), then the appeal is not dismissed. *Id.*

Instead, we must remand the case to the trial court for proper Rule 605 admonitions and strict compliance with rule 604(d). *Id.* at 41; *People v. Jamison*, 181 Ill. 2d 24, 29-30 (1998).

¶ 17 Defendant entered a non-negotiated guilty plea. Thus, pursuant to Rule 605(b), the court was required to admonish him "at the time of sentencing" 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 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;
>
> (3) that if the motion is allowed, the sentence will be modified or 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 reconsider the sentence or to vacate the judgment and to withdraw the plea of guilty shall be deemed waived." Ill. S. Ct R. 605(b) (eff. Oct 1, 2001).

¶ 18 In order to substantially comply with Rule 605, the court is not required to use the exact language of the admonitions. *People v. Dominguez*, 2012 IL 111336, ¶ 11. Rather, the admonitions are insufficient where the court leaves out the "substance" of the rule by failing to properly inform defendant of what he must do in order to preserve his right to appeal his guilty plea. *Id.* ¶ 22. We review the trial court's compliance with supreme court rules as *de novo*. *Id.* ¶ 13.

¶ 19 We agree with the parties that the trial court did not admonish defendant in substantial compliance with Rule 605(b). "[A]t the time of imposing sentence" (Il S. Ct. R. 605(b) (eff. Oct. 1, 2001)) on July 1, 2015, the court informed defendant that he had 30 days in which to file a motion to reconsider his sentence, he had another 30 days from a denial of that motion to file a written notice of appeal, and any issues not raised in the motion were waived for purposes of appeal. It did not inform defendant that, if he planned to appeal his guilty plea, he had to file a written motion to vacate the judgment and withdraw his guilty plea within 30 days of sentencing (Rule 605(b)(2)). It did not inform him that, if indigent, he was entitled to transcripts of the plea and sentencing proceedings and counsel would be appointed to assist him with the motion (Rule 605(b)(5)). Accordingly, the trial court's post-sentencing admonitions did not inform defendant of the proper steps necessary to preserve his right to appeal from the guilty plea and thus failed to substantially comply with Rule 605(b). Therefore, we remand for proper Rule 605 admonitions and an opportunity for defendant to file a motion to withdraw his guilty plea. *Jamison*, 181 Ill. 2d at 30.

¶ 20 Given our determination that remand is warranted based on the court's failure to substantially comply with Rule 605(b), we do not address defendant's remaining arguments

regarding remand premised on the proceedings on his premature motion to withdraw and counsel's failure to comply with Rule 604(d).

¶ 21 Lastly, we do not find, as the parties claim, that the mittimis incorrectly states that the offense is both a Class 2 and a Class 3 offense. The mittimis sets forth the offense of which defendant was convicted as follows:

"720-5/32-10 VIO BAIL BOND/CLASS 2 CONVIC YRS. 3 [Class] 3"

Defendant was convicted of violation of bail bond for forfeiting bond and failing to appear in case No 97 CR 9814, a Class 2 felony theft case.[2] Because his bail was given in connection with a felony charge, he committed "a felony of the next lower Class" when he committed the violation of bail bond. 720 ILCS 5/32-10(a) (West 2008). Thus, since defendant failed to appear in a Class 2 felony case, he committed a Class 3 violation of bail bond. The mittimis correctly reflects that his conviction is for a Class 3 violation of bail bond that occurred in a "CLASS 2 CONVIC" case, *i.e*, in Class 2 felony theft case No. 97 CR 9814.

¶ 22 For the foregoing reasons, we remand the cause to the trial court.

¶ 23 Remanded.

[2] The parties agree the theft charge in case No. 97 CR 9814 was for a Class 2 felony.