2018 IL App (1st) 160669-U

No. 1-16-0669

Order filed June 28, 2018

Fourth 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. 14 MC5 001309
	)	
PAUL DONNELL TAYLOR,	)	Honorable
	)	Denise Kathleen Filan,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE ELLIS delivered the judgment of the court.
Presiding Justice Burke and Justice Gordon concurred in the judgment.

ORDER

¶ 1 *Held*: Appeal dismissed as untimely.

¶ 2 Defendant Paul Donnell Taylor pleaded guilty to misdemeanor retail theft and was sentenced to four months of conditional discharge. On appeal, defendant contends that, because the trial court denied his motion to withdraw his guilty plea without determining whether he was indigent and desired counsel, it failed to comply with Supreme Court Rule 604(d) (eff. Feb. 6,

2013), and he thus is entitled to a remand for proper admonishments and an opportunity to file a new motion to withdraw his guilty plea.

¶ 3 The State claims that we have no jurisdiction over this appeal, because after the trial court denied his motion to withdraw the guilty plea, defendant did not file his motion to reconsider within 30 days of that ruling, and thus his appeal is untimely. We agree with the State and dismiss this appeal.

¶ 4 On March 19, 2014, defendant, represented by counsel, pleaded guilty to misdemeanor retail theft in exchange for a sentence of four months of conditional discharge, three days of the Sheriff's Work Alternative Program, and $99 in court costs. On April 18, 2014, defendant filed a *pro se* motion to withdraw his guilty plea. The basis of his motion to withdraw was that the trial judge accepting the plea was biased against him from a previous case, and when he appeared before that judge on this case, he did not know it was the same judge because the court did not have a name plate on the bench.

¶ 5 When the case was called on July 9, 2014, a different judge listened to defendant's *pro se* arguments in favor of withdrawing his plea and indicated that, without a transcript, he could not determine what happened at the plea proceedings. The judge recommended that defendant order a transcript and then return to court. He did not inquire whether defendant had an attorney, could afford one, or wanted to have one appointed.

¶ 6 Defendant next appeared before the court on October 29, 2014, again proceeding *pro se*. When the judge asked defendant if he had been represented by a lawyer during the guilty plea proceedings, defendant responded as follows:

> "Well, I had a lawyer. I don't -- I didn't -- it happened so fast, I don't remember his name or where he's at. He had gave me a card, but due to the fact I'm in custody for a -- I -- the police stopped me on something totally different than this, uh, I don't have a card with me. I don't remember who represented me."

The judge did not advise defendant that he had a right to an attorney and did not ask him whether he could afford an attorney or wanted an attorney to be appointed. The prosecutor provided the judge with a transcript of the guilty plea proceedings, which the judge then reviewed and summarized. After further conversation with defendant, the judge denied his motion to withdraw his guilty plea on that date—October 29, 2014.

¶ 7 In November 2014, defendant drafted three *pro se* documents, none of which are notarized or file-stamped. In the first, titled "Notice: Motion for Reconsideration to Withdrawl [*sic*] Plea-Bargain," defendant indicated that he was "incarcerated at Cook County Department of Corrections" and set forth the reasons he was seeking reconsideration of the denial of his motion to withdraw his guilty plea. Toward the bottom of the last page, defendant made the following statement:

> "This day 24th of November, 2014 year. I hereby duly swear that the foregoing via legal mail, to: the Clerk of the Honorable Court one and two copies. One copy to the Assistant States Attorney 10220 So. 76 Ave. Bridgeview Courthouse; Bridgeview, Ill. 60455."

The second *pro se* document was titled "Notice: Motion for Reconsideration to Withdrawl [*sic*]." Its contents were the same as the first pleading, with some minor differences in wording. Just before signing this document, defendant wrote the following:

> "I hereby duly swear that the foregoing via legal mail to: the Clerk of the Honora[ble] Court by one original & two copies. On copy to the States Attorney 10220 S. 76 Ave. Bridgeview; Courthouse Bridgeview, Ill. 60455. Please send me my copy received back!!! Respectfully submitted this 24th day of November, 2014 year, 2014."

The content of the third *pro se* document, titled "Notice of Motion for Reconsideration," again tracked that of the first two pleadings, with minor differences in wording. At the end of this document, defendant included the following paragraph:

> "Respectfully submitted by this __ Day November 2014 year; by Paul Donnell Taylor 20140724284. I hereby duly swear that the foregoing via legal mail, one and two copies to the Clerk of the Honorable Court. One copy to: the Assistant States Attorney 10220 S. 76 Ave. Bridgeview Courthouse, Bridgeview, Ill. 60455."

¶ 8 A photocopy of an envelope hand-marked "LEGAL MAIL" is included in the record on appeal, addressed to "Clerk of the Honorable Court, Bridgeview Courthouse, 10220 So. 76 Ave., Bridgeview, Ill. 60455." The envelope bears a return address for defendant at the Cook County Department of Corrections and is postmarked November 26, 2014.

¶ 9 Defendant's case was next called on December 12, 2014. A prosecutor, but not defendant, was present when the judge indicated "this was motion to reconsider" and the case was continued. On January 28, 2015, defendant appeared, confirmed to the court that he was in court on a motion to reconsider, and requested a transcript of his guilty plea proceedings, which the judge said he would order for him free of charge.

¶ 10 On March 11, 2015, defendant appeared before a different judge. When defendant indicated he had not yet received a transcript of his guilty plea proceedings, the judge gave him a

copy. The judge also asked defendant, "And you are still asking the court to proceed *pro se*, correct?" Defendant answered affirmatively. The judge continued the case so defendant would have an opportunity to review the transcript.

¶ 11 When the case was next called on April 17, 2015, defendant was represented by the Cook County Public Defender. The court reviewed the history of the case, concluding, "On October 29th, 2014, the Honorable Judge Gallagher ruled on your motion to withdraw your plea and that was denied before him. And he ruled upon that. So that matter has already been taken care of and will stand." Defendant filed a notice of appeal.

¶ 12 As an initial matter, we consider our jurisdiction, which the State challenges. Under Supreme Court Rule 604(d) (eff. Feb. 6, 2013), defendants may not appeal from a judgment entered upon a guilty plea unless, within 30 days of sentencing, they move to withdraw their plea. Defendant did that here. He pleaded guilty and was sentenced on March 19, 2014, and he moved to withdraw the plea on April 18.

¶ 13 One might think that, having filed that motion to withdraw and lost, defendant would have thirty days from that denial to appeal—that a motion to reconsider would be a successive postjudgment motion that did not toll the time for appeal. But this court has held that, because a motion to withdraw a guilty plea is a prerequisite to an appeal challenging the guilty plea (see *id*.), it is the motion to withdraw that constitutes the final appealable judgment, and thus a motion to reconsider that judgment is not a "successive" postjudgment motion but, in fact, the first one. *People v. Feldman*, 409 Ill. App. 3d 1124, 1127 (2011).

¶ 14 So a defendant may file a motion to reconsider the denial of a motion to withdraw a guilty plea without running afoul of the general rule against successive postjudgment motions.

Id. For a trial court to have jurisdiction over such a motion to reconsider, it must be filed within 30 days of entry of judgment. *People v. Flowers*, 208 Ill. 2d 291, 303 (2003).

¶ 15 This is where the State's jurisdictional objection comes in. The State says that defendant's motion to reconsider was not timely—it was *not* filed within 30 days of the denial of the motion to withdraw. The motion to withdraw was denied on October 29, 2014. Because November 28, 2014, was a holiday, the filing deadline for defendant's motion to reconsider was thus December 1, 2014. See 5 ILCS 70/1.11 (West 2014) (excluding holidays and weekends from time computation).

¶ 16 As stated, the three copies of the motion to reconsider in the record contain no file stamps. Nor is there a half-sheet in the common law record that would help us determine the date the motion was actually received by the court clerk. We do, however, have in the record a copy of an envelope hand-marked "LEGAL MAIL," addressed to the proper courthouse, with a return address for the defendant where he was incarcerated. That envelope bears the postmark of November 26, 2014. Is that enough?

¶ 17 Under Supreme Court Rule 373 (eff. Sept. 19, 2014), motions directed against a judgment are generally deemed filed on the date they are actually received by the court clerk; however, if a document is received after the due date, the "time of mailing *** shall be deemed the time of filing." Ill. S. Ct. R. 373 (eff. Sept. 19, 2014). In that event, "[p]roof of mailing *shall* be as provided in Rule 12" of the supreme court rules. *Id*.

¶ 18 The State cites to Supreme Court Rule 12(b)(3) (eff. Jan. 4, 2013) for the proposition that defendant had to prove service by affidavit. But as defendant correctly notes, this rule changed several times in a short time span, and in fact the operative rule in November 2014 was Supreme

Court Rule 12(b)(4) (eff. Sept. 14, 2014), which provides that service of *pro se* documents mailed by inmates could be proved "by affidavit, or by certification as provided in section 1-109 of the Code of Civil Procedure (735 ILCS 5/1-109 (West 2012)) of the person who deposited the document in the institutional mail, stating the time and place of deposit and the complete address to which the document was to be delivered."[1]

¶ 19 There is no dispute that defendant did not file an affidavit attesting to proof of service. Nor does defendant claim that he filed a "certification" as to service. The only question is whether the postmark on that envelope is enough to prove service.

¶ 20 At least two courts have held that a postmark is insufficient proof of service. See *People v. Lugo*, 391 Ill. App. 3d 995, 998 (2009); *People v. Blalock*, 2012 IL App (4th) 110041, ¶ 11. These courts have reasoned that Supreme Court Rule 373 provides that proof of service "shall" be as provided in Rule 12(b), and thus an appellate court is mandated to consider *only* whether service was proven in the specific manner provided in the relevant portion of Rule 12.

¶ 21 In *Lugo*, interpreting the then-applicable Rule 12(b)(3) requiring proof of service by affidavit or certification, the court found a postmark insufficient. *Lugo*, 391 Ill. App. 3d at 998 ("if proof of mailing must be by certification or affidavit of mailing, then it cannot be by postmark, as a postmark is neither a certificate nor an affidavit of mailing."). As the court put it in *Blalock*, 2012 IL App (4th) 110041, ¶ 11, "the supreme court has chosen to require a certificate or affidavit of mailing, rather than a postmark date, as proof of mailing under Rule 12(b)(3)," and the appellate court was without authority to expand on that list. See also *People v. Tlatenchi*, 391 Ill. App. 3d 705, 720 (2009) (failure to submit necessary form of proof of mailing

[1] That rule was changed again in 2016, but that version of the rule is not before us. See Ill. S. Ct. R. 12(b)(4) (eff. Nov. 1, 2016).

cannot be chalked up to "defect" in proof of service "but instead to a failure to comply with Rule 12(b)(3) that cannot be excused as harmless error.").

¶ 22 But the court in *People v. Hansen*, 2011 IL App (2d) 081226, ¶¶ 12-15, rejected the holding in *Lugo* that a postmark is not sufficient proof of mailing under Rule 373. *Id*. ¶¶ 12-15. The court in *Hansen* reasoned that *Lugo* was too literal and narrow in its reading and interpretation of Rules 373 and 12(b)(3); that Rule 373 was not written to compel courts to disregard the clear evidence that a postmark provides of the timely mailing of a document; and that it is "axiomatic that, if there is a timely and legible postmark, an affidavit or a certification of mailing is a corroborative redundancy." *Id*. ¶¶ 13, 14. The court concluded:

> "Requiring a court to overlook a clearly legible postmark showing that a document was processed by a disinterested third party, such as the post office, on or before the date by which the document was required to be mailed is to disregard the best, most competent evidence of the latest date of mailing consistent with the 'pro-mailing policy of Rule 373.' " *Id*. ¶ 14 (quoting *Harrisburg-Raleigh Airport Authority v. Department of Revenue*, 126 Ill. 2d 326, 341-42 (1989)).

¶ 23 Dissenting, Justice Jorgensen noted that Supreme Court Rule 12(b)(3) "was deliberately changed to disallow a postmark as operative proof of mailing." *Id*. ¶ 32 (Jorgensen, P.J., dissenting). The fact that the change was made to *help* parties, because postmarks were not always legible, did not change the inescapable fact that the postmark was removed as a manner of proof. "It is not for this court to second-guess the supreme court's amendments or to express a preference for a prior version that was *abandoned* by the court." (Emphasis in original.) *Id*. (Jorgensen, P.J., dissenting). The dissent likewise noted that the very fact that postmarks are

sometimes legible and sometimes not could lead to the anomalous result of advantaging some parties over others based on something outside their control—whether the people handling their mail smeared or did not smear the postmark. *Id*. (Jorgensen, P.J., dissenting). Perhaps that was why, said the dissent, that rather than retaining the postmark-form-of-proof in addition to other forms of proof, the supreme court chose to eliminate it as a form of proof altogether. *Id*. (Jorgensen, P.J., dissenting).

¶ 24 We agree with *Lugo*, *Blalock*, and the dissent in *Hansen*. We have no authority to alter Rule 12(b)(4). We cannot excuse noncompliance as harmless. See *Secura Insurance Co. v. Illinois Farmers Insurance Co.*, 232 Ill. 2d 209, 217 (2009); *Blalock*, 2012 IL App (4th) 110041, ¶ 11; *Tlatenchi*, 391 Ill. App. 3d at 720. There is nothing remotely vague or ambiguous about the language of that rule. Our only duty is to apply it as written.

¶ 25 There is no dispute that Rule 12(b)(4) requires either an affidavit or a certification to prove the time of mailing, and it is likewise undisputed that defendant provided neither form of proof. That is where our analysis must begin and end.

¶ 26 The result here is harsh. There is every reason to believe, based on the legible postmark, that defendant filed his motion to reconsider in a timely manner. But he did not prove it in an acceptable manner. In the absence of a timely motion to reconsider, the time for filing the notice of appeal was not tolled, and thus this appeal itself was untimely. Ill. S. Ct. R. 604(d) (eff. Feb. 6, 2013); Ill. S. Ct. R. 606(b) (eff. Feb. 6, 2013). We have no choice but to dismiss the appeal.

¶ 27 Appeal dismissed.