

2018 IL App (1st) 161527-U

No. 1-16-1527

Order filed November 30, 2018

SIXTH DIVISION

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).

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. 16 CR 2450 |
| |) | |
| DAVID BARRERA, |) | Honorable |
| |) | Timothy J. Chambers, |
| Defendant-Appellant. |) | Judge, presiding. |

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Delort and Justice Connors concurred in the judgment.

ORDER

¶ 1 *Held:* Appeal dismissed, where defendant failed to move to withdraw his guilty plea after being substantially admonished regarding his appeal rights.

¶ 2 Pursuant to a negotiated guilty plea, defendant David Barrera was convicted of aggravated driving under the influence of alcohol (625 ILCS 5/11-501(a)(2), (d)(1)(H) (West 2016)) and sentenced to 24 months' probation and 43 days' confinement, time considered

served. On appeal, defendant acknowledges that he failed to move to withdraw his guilty plea as required by Illinois Supreme Court Rule 604(d) (eff. Mar. 8, 2016), and that ordinarily this would necessitate dismissal. However, he contends that the trial court erroneously admonished him regarding his appellate rights pursuant to Illinois Supreme Court Rule 605 (eff. Oct. 1, 2001), and that his case should be remanded for proper admonishments. For the reasons set forth herein, we dismiss defendant's appeal.

¶ 3 Defendant was charged by a single-count information with aggravated driving under the influence of alcohol (DUI). Defendant was also charged with several misdemeanor offenses which the State nol-prossed before proceeding on the felony charge. On March 31, 2016, after participating in a conference pursuant to Illinois Supreme Court Rule 402(d) (eff. July 1, 2012), defendant pled guilty to aggravated DUI in exchange for a sentence of 24 months' probation. As a factual basis for the plea, the State asserted that defendant was found slumped behind the wheel of a car, the car was running and in gear, and defendant's foot was on the brake pedal. Defendant smelled of alcohol, exhibited slow hand-motor skills, was unable to produce a drivers' license, and had never obtained an Illinois license. He exhibited numerous signs of impairment on the field sobriety tests and refused a Breathalyzer, and there was an open can of an alcoholic beverage in the car.

¶ 4 After accepting the guilty plea, the trial court admonished defendant, saying:

“Even though you pled guilty, you have the right to an appeal. In order to appeal, you must within 30 days file a motion asking this Court to reconsider sentence and withdraw your plea setting forth in writing grounds for that motion. If it's granted, the plea, judgment, and sentence will be vacated. We'll go to trial on these charges. If it's denied,

you have the right to an appeal, but anything not in the written motion is waived; is that clear?”

Defendant responded “yes.”

¶ 5 Defendant did not file a postplea motion. On April 29, 2016, defendant filed a *pro se* notice of appeal, which sought “Appeal of plea bargain.”

¶ 6 On appeal, defendant argues the trial court’s admonishments pursuant to Illinois Supreme Court Rule 605(c) were insufficient to advise him of his appellate rights. He asks this court to remand the case for proper admonishments so that he has an opportunity to file a proper postplea motion pursuant to Illinois Supreme Court Rule 604(d).

¶ 7 Illinois Supreme Court Rule 604(d) states that:

“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.” Ill. Sup. Ct. R. 604(d) (eff. Mar. 8, 2016).

¶ 8 Defendant concedes that he did not file a motion to withdraw his guilty plea. Generally, “[w]here a defendant has failed to file a motion to withdraw his guilty plea, we must dismiss the appeal.” *People v. Braden*, 2018 IL App (1st) 152295, ¶ 22 (citing *People v. Flowers*, 208 Ill. 2d 291, 301 (2003)). However, dismissing an appeal for failure to file the requisite posttrial motion would violate due process if the defendant did not know such a motion was required. *People ex*

rel. Alvarez v. Skyrd, 241 Ill. 2d 34, 41 (2011) (citing *Flowers*, 208 Ill. 2d at 301). Accordingly, Rule 605(c) mandates that, following a negotiated plea, the trial court admonish defendants regarding the requirements of Rule 604(d) of the steps necessary to preserve the right to appeal. *Braden*, 2018 IL App (1st) 152295, ¶ 23; Ill. Sup. Ct. R. 605(c) (eff. Oct. 1, 2001).

¶ 9 If the trial court fails to substantially give the admonishments set forth in Rule 605 and the defendant subsequently attempts to appeal without first filing the motions required by Rule 604(d), the appeal is not dismissed. See *Flowers*, 208 Ill. 2d at 301. Instead, the matter is remanded to the trial court for proper admonishments and a second opportunity for defendant to file a postplea motion. *Id.* Thus, we must determine whether the trial court properly admonished defendant pursuant to Rule 605. We review the trial court's compliance with a supreme court rule *de novo*. *People v. Dominguez*, 2012 IL 111336, ¶ 13.

¶ 10 Here, defendant's plea of guilty was the result of a negotiated plea bargain and the trial court, therefore, had to admonish him regarding his right to appeal pursuant to Illinois Supreme Court Rule 605(c). Rule 605(c) states:

“In all cases in which a judgment is entered upon a negotiated plea of guilty, at the time of imposing sentence, the trial court shall advise the defendant substantially 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 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 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 vacate the judgment and to withdraw the plea of guilty shall be deemed waived." Ill. Sup. Ct. R. 605(c) (eff. Oct. 1, 2001).

¶ 11 While our supreme court requires that trial courts strictly comply with the duty to give Rule 605 admonishments, the admonishments need only substantially convey the Rule's contents. *Dominguez*, 2012 IL 111336, ¶¶ 15-19. Thus, "[s]o long as the court's admonitions were sufficient to impart to a defendant the essence or substance of the rule, the court has substantially complied." *Id.* ¶ 22.

¶ 12 Here, the trial court admonished defendant that: (1) he had a right to appeal; (2) "[i]n order to appeal," he had to file a motion asking the trial court to reconsider sentence and withdraw his guilty plea within 30 days; (3) the motion had to be in writing and set forth the grounds for the motion; (4) if the motion was granted, the plea, judgment, and sentence would be vacated and the matter would proceed to trial "on these charges"; (5) if the motion was denied, defendant could appeal, but anything not in the motion would be waived. We find that these

admonishments substantially complied with Rule 605(c), because defendant was advised that before he could appeal, he first had to file a motion in the trial court within 30 days, the consequences of filing such a motion, and that any issue not identified in the motion would be waived. See *id.* Read together, the admonishments given were sufficient to inform defendant, or put him on notice of, the essential actions necessary to appeal from his guilty plea. *Id.*

¶ 13 Defendant argues that the trial court's admonishment failed to properly inform him of the type of motion he was required to file. Specifically, as defendant entered a negotiated plea of guilty, the court should have informed him he had to file a motion to vacate the judgment and withdraw the plea. Ill. S. Ct. R. 605(c)(2) (eff. October 1, 2001). Instead, the court told him he had to file a motion to reconsider sentence and withdraw the plea. However, there is no dispute that defendant was put on notice that in order to appeal he had to file a written postplea motion within 30 days. Yet, defendant did not file any postplea motion at all. Therefore the court's failure to give him the appropriate admonishments regarding the type of motion does not excuse his failure to comply with Rule 604(d). See *People v. Claudin*, 369 Ill. App. 3d 532, 534-35 (2006) (although defendant was incorrectly admonished that he could preserve his appeal rights by filing a motion to reconsider his sentence when he was obligated to move to withdraw his plea, defendant's failure to file any type of postplea motion was not excused by the admonition exception because the admonishments "were sufficient to put defendant on notice of the postplea action necessary to preserve his appeal.")

¶ 14 We recognize that the trial court failed to admonish defendant that, if indigent, he would be entitled to a free transcript and the appointment of counsel. However, defendant was clearly admonished that he had to file a postplea motion within 30 days in order to preserve his right to

appeal, but failed to file any type of postplea motion. Thus, we find the court's failure to advise defendant of his right to a free transcript and the appointment of counsel did not prevent substantial compliance with Rule 604(d).

¶ 15 In reaching this conclusion, we are unpersuaded by defendant's reliance on *People v. Lloyd*, 338 Ill. App. 3d 379 (2003). In *Lloyd*, the trial court admonished the defendant that he must file a written motion to withdraw his guilty plea within 30 days but did not admonish him that counsel would be appointed for postplea proceedings. *Id.* at 385. The court concluded that, even though the defendant was represented by private plea counsel, the trial court should have informed him of his right to appointed counsel and, thus, "there could not be substantial admonishment under Rule 605(c)." *Id.*

¶ 16 However, our supreme court has significantly clarified the scope of Rule 605 since *Lloyd* was decided and has more recently focused on whether a trial court's admonishments put a defendant "on notice" of the "substance of the rule," *i.e.*, of the steps he must take to perfect an appeal from a guilty plea. See *Dominguez*, 2012 IL 111336, ¶ 22.

¶ 17 For example, in *In re J.T.*, 221 Ill. 2d 338, 347-48 (2006), our supreme court found that the trial court's admonishments, although they did not strictly comply with Rule 605(c), were nonetheless sufficient to put the juvenile respondent on notice he could challenge his guilty plea and that "some action" on his part within 30 days was necessary if he wished to appeal. In that case, because the respondent took no action whatsoever to challenge the plea until years later, our supreme court concluded that the trial court's improper admonishments did not excuse him from taking the proper steps to appeal his plea. *Id.* at 348. Similarly here, defendant did not file a postplea motion within 30 days of the judgment despite the court's clear instruction in that

regard. The court's failure to admonish him regarding appointed counsel therefore does not excuse his failure to comply with this requirement to appeal his plea.

¶ 18 Ultimately, while the admonishments in this case did not use the exact language found in Rule 605(c), they were "sufficient to impart the essence or substance of the rule to defendant." *Dominguez*, 2012 IL 111336, ¶ 54. Therefore, defendant's failure to comply with Rule 604(d) is not excused by any deficiency in the admonitions, and we must dismiss this appeal. See *Flowers*, 208 Ill. 2d at 301.

¶ 19 Appeal dismissed.