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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

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|--------------------------------------|---|----------------------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from the Circuit Court of |
| |) | Cook County. |
| Plaintiff-Appellee, |) | |
| |) | No. 07 CR 14677 |
| v. |) | |
| |) | Honorable Michael Joseph Kane, |
| MALIK CROSBY, |) | Judge Presiding. |
| |) | |
| Defendant-Appellant. |) | |

JUSTICE GRIFFIN delivered the judgment of the court.
Justices Pierce and Walker concurred in the judgment.

ORDER

¶ 1 *Held:* We dismiss defendant's appeal where he did not file a motion to withdraw his negotiated guilty plea and vacate the judgment pursuant to Supreme Court Rule 604(d) prior to filing a *pro se* notice of appeal.

¶ 2 Defendant Malik Crosby entered a negotiated guilty plea to one count of aggravated unlawful use of a weapon (AUUW) (720 ILCS 5/24-1.6(a)(1), (a)(3)(E) (West 2006)) and was sentenced to 24 months' probation. On appeal, he argues the trial court erred in failing to ask him whether he wanted counsel appointed to assist him in withdrawing his guilty plea when, in his *pro se* notice of appeal, he demonstrated a clear desire to undo his plea. We dismiss the appeal.

¶ 3 Defendant was charged with six counts of AUUW stemming from events occurring on June 26, 2007, in Chicago. On September 6, 2008, defendant pleaded guilty to one count of AUUW and received a sentence of 24 months' probation. He filed a motion to withdraw his guilty plea, arguing, *inter alia*, that he was innocent of the charges, felt forced to plead guilty after being "yelled at" by an assistant public defender, and was improperly admonished. The circuit court denied the motion and defendant appealed. This court vacated the ruling and remanded the matter to the circuit court for the filing of a new motion to vacate the guilty plea, a new hearing on the motion, and full compliance with all the requirements of Illinois Supreme Court Rule 604(d) (eff. July 1, 2006). See *People v. Crosby*, No. 1-08-3644 (2010) (unpublished order under Illinois Supreme Court Rule 23(c)).

¶ 4 On remand, the circuit court granted defendant's motion to withdraw the guilty plea. The State filed a motion to reinstate the charges dismissed pursuant to the plea agreement, which the court granted. On April 19, 2016, prior to *voir dire*, defendant again entered into a negotiated guilty plea to one count of AUUW in exchange for 24 months' probation. The factual basis for the plea was that, after curbing defendant's car for running a stop sign, police recovered a loaded handgun from the center console of the vehicle and a loaded firearm magazine and bag of cannabis from defendant. Defendant admitted he carried the gun for protection.

¶ 5 The court accepted the plea. Because defendant had satisfactorily completed his 24 months' probation sentence on his original plea, the court ordered the new 24-month probation "terminated today." It then admonished defendant as follows:

"You also have a right to appeal the decision of this Court. In the event you change your mind within 30 days from today's date, you must file with the Clerk of the

Court a written motion to withdraw your plea of guilty and vacate judgment. In the motion, you must state all the reasons why you want to withdraw your plea of guilty.

Do you understand that, [defendant]?

THE DEFENDANT: Yes, Judge.

THE COURT: And if I grant the motion, I will set aside your guilty plea, sentence, and judgment, and set your case for trial. Any charges that were dismissed as part of the plea agreement would be reinstated at the State's request and also set for trial. If I denied your motion, you have 30 days from the date of that denial to file a written notice of appeal.

Any issue or claim of error not raised in the motion to withdraw your plea of guilty and vacate the judgment will be waived for appeal purposes. If you are indigent, a copy of the transcript of today's proceedings will be provided to you free of charge. We will also get you an attorney to assist you in preparation of the motion.

Do you understand your appeal rights?

THE DEFENDANT: Yes, Judge.

THE COURT: Do you have any questions, [defendant]?

THE DEFENDANT: No, Judge.”

¶ 6 Defendant did not file any post-plea motions. On May 18, 2016, he *pro se* filed a preprinted form labeled “Notice of Appeal” and “Appeal to the Appellate Court of Illinois from the Circuit Court of Cook County, Illinois.” On the form, defendant listed April 19, 2016, as the “date of judgment/order being appealed.” Under the section labeled “Relief sought from Reviewing Court,” he stated: “Void guilty plea and rule not guilty based on false reports and

statue [*sic*] of limitations violations as well as due process violations.” The circuit court appointed the Office of the State Appellate Defender to represent defendant on appeal, allowed him a free record on appeal, and directed the clerk of the circuit court to prepare the record on appeal and transmit the notice of appeal to the clerk of the appellate court.

¶ 7 On appeal, defendant argues the trial court erred in failing to ask him if he wanted “appointed counsel to assist in seeking to withdraw his guilty plea where he evinced a clear desire to undo his plea in his notice of appeal.” The State responds that, because defendant failed to follow the requirements of Rule 604(d) when he filed his notice of appeal without first filing a motion to withdraw his guilty plea and vacate the judgment, we must dismiss the appeal.

¶ 8 Pursuant to Supreme Court Rule 604(d) (eff. Mar. 8, 2016), a defendant who desires to appeal from a judgment entered upon a negotiated guilty plea must first file in the trial court a written postplea motion to vacate the judgment and withdraw his guilty plea within 30 days of the date on which sentence was imposed. Ill. S. Ct. R. 604(d) (eff. Mar. 8, 2016). Filing a timely Rule 604(d) motion is a condition precedent to appealing a judgment entered on a guilty plea, and failure to do so precludes the appellate court from addressing the merits of the appeal and the appeal must be dismissed. *People ex rel. Alvarez v. Skryd*, 241 Ill. 2d 34, 40 (2011).

¶ 9 Defendant here failed to comply with the requirements of Rule 604(d) when, instead of filing a postplea motion to withdraw his negotiated guilty plea and vacate the judgment, he filed a *pro se* notice of appeal. His appeal must therefore be dismissed. *Id.*; *People v. Flowers*, 208 Ill. 2d 291, 301 (2003).

¶ 10 Illinois Supreme Court Rule 605(c) (eff. Oct. 1, 2001) required the trial court to admonish defendant regarding the steps necessary to preserve his right to appeal, including that

he must file a postplea motion seeking to withdraw his plea and vacate the judgment within 30 days of sentencing. Ill. S. Ct. R. 605(c); *People v. Dominguez*, 2012 IL 111336, ¶ 13. If the trial court failed to properly admonish defendant in accordance with Rule 605(c), his failure to file a Rule 604(d) postplea motion is excused and we must remand for proper admonishments. *Dominguez*, 2012 IL 111336, ¶ 11; *Skryd*, 241 Ill. 2d at 41. However, defendant's failure to file the requisite postplea motion here cannot be excused on this basis because, not only does the record show the court fully admonished defendant in compliance with Rule 605(c), defendant does not argue that the trial court failed to properly admonish him pursuant to the Rule.

¶ 11 Instead, defendant claims that his *pro se* notice of appeal contained an indication of his desire to withdraw his plea. He asserts the trial court therefore should have recharacterized his "inadvertently mislabeled" notice of appeal as a motion to withdraw the plea and appointed counsel to assist him in withdrawing his guilty plea or asked defendant whether he wanted counsel appointed to assist him. We reject defendant's assertions.

¶ 12 Rule 604(d) provides:

"The motion [to withdraw the plea of guilty and vacate the judgment] shall be in writing and shall state the grounds therefore. When the motion is based on facts that do not appear of record it shall be supported by affidavit unless the defendant is filing the motion *pro se* from a correctional institution, in which case the defendant may submit, in lieu of an affidavit, a certification as provided in section 1-109 of the Code of Civil Procedure (735 ILCS 5/1-109)." Ill. S. Ct. R. 604(d).

Once the postplea motion is filed, it “shall be presented promptly” to the trial court, who “shall then determine whether the defendant is represented by counsel, and if the defendant is indigent and desires counsel, the trial court shall appoint counsel.” *Id.*

¶ 13 We find defendant’s postplea *pro se* notice of appeal did not trigger a duty by the trial court to determine whether he desired counsel to assist him in withdrawing his plea, because the document he filed was not a motion to withdraw his guilty plea and vacate his sentence. The preprinted document is titled “Notice of Appeal” and “Appeal to the Appellate Court of Illinois from the Circuit Court of Cook County, Illinois.” Defendant filled in the sections labeled “Date of the judgment/order being appealed” and “Relief sought from Reviewing Court.” The multiple references to “Appeal,” “Appellate Court,” and “Reviewing Court” demonstrate that he did not inadvertently mislabel the document as a notice of appeal rather than a motion to withdraw. The plain language on the face of the document clearly shows defendant’s intent to appeal the judgment entered on his guilty plea, not to withdraw his plea.

¶ 14 We reject defendant’s claim that the court should have recharacterized his notice of appeal as a motion to withdraw the plea and vacate judgment. Defendant asserts the relief he requested in the document “clearly evinced” his intent to “take back or undo” his guilty plea, and the trial court should have recognized this as an attempt to trigger proceedings to withdraw his plea. In his filing, he asked this “Reviewing Court” to “Void guilty plea and rule not guilty based on false reports and statue [*sic*] of limitations violations as well as due process violations.” But defendant’s filing did not allege that he did not voluntarily enter his guilty plea, for example that he was coerced or misled into taking the plea or did not understand the plea. Instead, he simply attacked the sufficiency of the evidence and asserted statute of limitations and due process

violations. Defendant's filing neither followed the requirements of Rule 604(d) that facts not appearing of record be supported by affidavit nor specifically requested withdrawal of his guilty plea. Nothing in the document demonstrates that defendant sought not to appeal the judgment but rather intended to withdraw his guilty plea.

¶ 15 Moreover, not only was defendant fully admonished that he must file a postplea motion prior to filing an appeal, he had experience with postplea motions and Rule 604(d), having successfully moved to withdraw his original guilty plea on remand from the trial court's denial of his first motion to withdraw that plea. In sum, we find defendant's notice of appeal does not evince a desire by defendant to withdraw his guilty plea, only that he wished to appeal the trial court's judgment. The trial court therefore properly treated his filing as a notice of appeal, not a motion to withdraw his plea. See *People v. Merriweather*, 2013 IL App (1st) 113789, ¶ 21 (rejecting fully admonished defendant's argument that trial court should have construed *pro se* notice of appeal filed within 30 days of judgment as motion to withdraw guilty plea because content "revealed his desire" to withdraw plea; court found document showed defendant desired to directly appeal judgment and no indication therein that defendant wished to withdraw plea but had mislabeled document).

¶ 16 A defendant has no automatic right during the 30-day period following a guilty plea to the assistance of counsel in filing a postplea motion to withdraw his guilty plea and vacate the judgment. *Id.* ¶ 26 (rejecting the defendant's contention that counsel should be appointed upon filing any *pro se* documents in the 30 days following judgment on a guilty plea). Rather, Rule 604(d) requires the appointment of counsel to assist an indigent defendant, if the defendant so chooses, "*after* he files a proper postplea motion." (Emphasis in original.) *Id.* ¶ 25. Defendant did

not file a postplea motion to withdraw his guilty plea and vacate the judgment and his notice of appeal cannot be characterized as such. Accordingly, as defendant did not file the requisite postplea motion, the trial court's Rule 604(d) duty to inquire whether defendant required the assistance of counsel to assist with such a motion was not triggered here and defendant's failure to comply with Rule 604(d) is not excused. See *id.*

¶ 17 We are not persuaded by defendant's reliance on *People v. Barnes*, 291 Ill. App. 3d 545 (1997), *People v. Griffin*, 305 Ill. App. 326 (1999), and *People v. Trussel*, 397 Ill. App. 3d 913 (2010). In *Barnes*, the court found the defendant's letter requesting a modification of her sentence, sent to the trial judge within 30 days of sentencing on the defendant's negotiated guilty plea, triggered the trial court's duty to inquire whether the defendant wanted appointed counsel. *Barnes*, 291 Ill. App. 3d at 550-51. In *Griffin*, the court found the defendant's verbal inquiry to the trial court regarding whether a motion to vacate the sentence was required to perfect an appeal and whether an attorney could be appointed to represent him in his appeal, made after he was admonished regarding his right to appeal, required the trial court to investigate whether he wanted counsel to assist. *Griffin*, 305 Ill. App. 3d at 329-30, 331-32. In *Trussel*, the court found the defendant's *pro se* letter to the trial court stating that he wished to appeal, that he was not guilty and his attorney scared him into pleading guilty, sent within 30 days after pleading guilty required the trial judge to investigate whether the defendant desired counsel to help with preparing a postplea motion. *Trussel*, 397 Ill. App. 3d at 913-15.

¶ 18 Here, unlike in *Barnes*, *Griffin*, and *Trussel*, defendant did not, prior to filing his notice of appeal, seek clarification of the requirements of Rule 604(d), inquire about the appointment of counsel to assist him, or submit any sort of postplea motion or letter to the trial court claiming he

was not guilty or his plea was involuntary such that the court's duty to inquire whether he wanted the assistance of counsel in preparing a postplea motion was triggered. We therefore reject defendant's reliance on these cases and find the trial court did not err in treating defendant's "Notice of Appeal" as it was labeled.

¶ 19 Defendant's citation to *People v. Brooks*, 377 Ill. App. 3d 836, 837 (2007), *aff'd on other grounds*, 233 Ill. 2d 146 (2009), is similarly unpersuasive. In *Brooks*, the properly admonished defendant had sent a postplea letter to the clerk of the circuit court stating "Also I want to appeal my sentencing" on the back. *Brooks*, 377 Ill. App. 3d at 837. The clerk filed the letter as a notice of appeal and, on direct appeal, the appellate court dismissed for defendant's failure to comply with Rule 604(d). *Id.* The trial court subsequently summarily dismissed the defendant's postconviction petition but the appellate court remanded for further proceedings, finding the letter should have been forwarded to the trial judge who then "is obliged to inquire whether [the defendant] seeks counsel." *Id.* at 838, 840-42.

¶ 20 However, in *People v. Brooks*, 233 Ill. 2d 146 (2009), our supreme court expressly disagreed with the appellate court's apparent determination that "once defendant sent the letter to the clerk of the circuit court, principles of due process required the circuit court to take further steps to ensure that the postjudgment motion requirement was met and defendant's right to appeal preserved." *Brooks*, 233 Ill. 2d at 155. The court stated it had previously rejected this reasoning, having held that, once a defendant has been properly admonished under Rule 605, "a defendant's right to due process is not violated if he is thereafter held to the consequences of failing to comply with Rule 604(d)." *Id.* (citing *People v. Foster*, 171 Ill. 2d 469, 472 (1996)). It reaffirmed its prior holding and determined, "[c]ontrary to the reasoning of the appellate court,"

that because the circuit court properly admonished the defendant under Rule 605 and no “unusual facts” accompanied the defendant’s failure to comply with Rule 604(d), “it was not a violation of defendant’s procedural due process rights to hold him ‘responsible for noncompliance with the strictures of Rule 604(d).’ ”¹ *Id.* at 156 (quoting *Foster*, 171 Ill. 2d at 473). The same conclusion is evident here.

¶ 21 For the reasons set forth above, the circuit court did not err by failing to inquire of defendant whether he wanted appointed counsel to assist in withdrawing his guilty plea or by not treating defendant’s *pro se* notice of appeal as a motion to withdraw his guilty plea. As defendant did not file a Rule 604(d) motion to withdraw his guilty plea and vacate the judgment prior to filing his notice of appeal, we must dismiss his appeal.

¶ 22 Appeal dismissed.

¹ We note that the Supreme Court ultimately affirmed the appellate court’s remand for further postconviction proceedings. However, it did so on the basis that the defendant presented the gist of an ineffective assistance of counsel claim where he asserted he relied on his attorney’s erroneous advice to send the letter to the clerk and thereby lost the right to his direct appeal. *Brooks*, 233 Ill. 2d at 156-57.