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2018 IL App (3d) 160452-U

Order filed December 4, 2018

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

2018

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-16-0452
	)	Circuit No. 07-CF-22
BRYCE KEITH LOWDER,	)	Honorable
Defendant-Appellant.	)	Albert L. Purham Jr., Judge, Presiding.

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JUSTICE WRIGHT delivered the judgment of the court.  
Justices McDade and O'Brien concurred in the judgment.

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**ORDER**

¶ 1 *Held:* Defendant's notice of appeal, which was filed more than 30 days after he entered a fully negotiated guilty plea, was a nullity. The postconviction court did not err by denying defendant's postconviction claim that the plea court failed to comply with Illinois Supreme Court Rule 605(c) (eff. Oct. 1, 2001).

¶ 2 Defendant, Bryce Keith Lowder, appeals the denial of his postconviction petition following an evidentiary hearing. Defendant argues the court erred by striking a notice of appeal filed more than 30 days after he entered a fully negotiated guilty plea. Defendant also argues the postconviction court erred by denying his postconviction petition following an evidentiary

hearing because he made a substantial showing that his right to due process was violated when the plea court failed to give all the admonishments required by Illinois Supreme Court Rule 605(c) (eff. Oct. 1, 2001). We affirm.

¶ 3

## I. BACKGROUND

¶ 4

Defendant was charged with two counts of first degree murder (720 ILCS 5/9-1(a)(1), (a)(2) (West 2006)) for causing the death of a victim by shooting him with a firearm. Defendant was also charged with attempted first degree murder (*id.* § 8-4(a), 9-1(a)(1)) and aggravated battery with a firearm (*id.* § 12-4.2(a)(1)) in that he discharged a firearm at a second victim. The court appointed counsel to represent defendant.

¶ 5

Defendant entered a fully negotiated guilty plea agreement. The State filed two additional charges: (1) first degree murder in that defendant performed acts which caused the death of the first victim and (2) aggravated battery in that defendant, in committing a battery, performed acts which caused bodily harm to the second victim while he was on or about a public way. Defendant agreed to plead guilty to the new charges in exchange for dismissal of the original charges and a sentence of 40 years' imprisonment for first degree murder and 5 years' imprisonment for aggravated battery, to be served concurrently.

¶ 6

The court accepted defendant's plea. The court then admonished defendant as follows:

“All right, [defendant], even though you've pled guilty you still have rights of appeal. Your [*sic*] must first file in this court within 30 days a motion to withdraw your plea. It must be in writing. It must set forth any claim of error you believe occurred or that will be waived for purposes of appeal.

If the motion is allowed, the plea will be set aside and the case will be reset for trial. All charges dismissed pursuant to the plea will be reinstated and set

for trial. If the motion is denied you would have 30 days to file a notice of appeal or ask the clerk to do so on your behalf. If you wish to appeal any aspect of the sentence, you must file a motion to reconsider the sentence within 30 days.”

¶ 7 More than two months later, defendant filed a *pro se* document requesting that the trial court “grant his notice of appeal.” The document stated defendant had not been able to file a notice of appeal sooner “due to the intake of Department of Corrections intake processes.” The document cited Illinois Supreme Court Rule 606(c) (eff. Sept. 1, 2006).

¶ 8 The State filed a motion to strike the notice of appeal on the basis that it did not comply with Illinois Supreme Court Rules 604(d) (eff. July 1, 2006) and 606(c) (eff. Sept. 1, 2006). The court granted the State’s motion to strike.

¶ 9 Defendant filed a *pro se* postconviction petition raising several claims. The trial court advanced the petition to the second stage of postconviction proceedings and appointed counsel to represent defendant. Counsel filed a “Supplemental Petition for Post-Conviction Relief.” The supplemental petition included several new claims, including the claim that defendant’s due process rights were violated where the court “admonished the Defendant in error and in contravention of [Illinois Supreme Court] Rule 605(c).” The State “enter[ed] a general denial of all factual allegations not directly supported by the record.” The court set the matter for an evidentiary hearing.

¶ 10 At the evidentiary hearing, defendant did not present evidence concerning his Rule 605(c) claim, but he did present evidence concerning some of his other claims. The court denied defendant’s petition for postconviction relief. Regarding the claim that the plea court failed to admonish defendant pursuant to Rule 605(c), the postconviction court reasoned that the plea court “cover[ed] the basics.”

¶ 11 Defendant appealed, and the Office of the State Appellate Defender (OSAD) was appointed to represent defendant on appeal. OSAD filed a motion to withdraw pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987). The motion alleged that the appeal presented no potentially meritorious issues for review, but requested that we vacate certain fines imposed by the circuit clerk.

¶ 12 We denied OSAD’s *Finley* motion and ordered the parties to brief the following issues: (1) whether the postconviction court erred by finding defendant failed to make a substantial showing of a violation of his due process rights based on the plea court’s alleged failure to properly admonish defendant pursuant to Illinois Supreme Court Rule 605(c) (eff. Oct. 1, 2001), (2) whether various monetary assessments imposed against defendant were void on the basis that they were improperly imposed by the circuit clerk, and (3) any other issue counsel deems fit.

¶ 13 II. ANALYSIS

¶ 14 A. Jurisdiction to Strike Notice of Appeal

¶ 15 Defendant argues for the first time on appeal that the trial court lacked jurisdiction to allow the State’s motion to strike the notice of appeal defendant filed after his guilty plea. Defendant argues: “While [the notice of appeal] may not have conferred proper jurisdiction on the appellate court [citation], the notice of appeal deprived the circuit court of any jurisdiction over the matter \*\*\*.” Accordingly, defendant contends the order striking the notice of appeal is void, and this matter should proceed on direct appeal.

¶ 16 Initially, we note claims not raised in an initial or amended postconviction petition are typically considered forfeited and may not be raised for the first time on appeal. *People v. Pendleton*, 223 Ill. 2d 458, 475 (2006). However, “[i]nvoking the principles that a claim that a judgment is void is not subject to waiver and may be raised at any time, either directly or

collaterally \*\*\*.” *People v. Brown*, 225 Ill. 2d 188, 195 (2007). Accordingly, we proceed to address the merits of defendant’s claim.

¶ 17 Even if we were to assume defendant is correct that his *pro se* filing constituted a notice of appeal and the court had no jurisdiction to strike it, the striking of the notice of appeal had no effect. The notice of appeal did not divest the trial court of jurisdiction over the matter because the court had already lost jurisdiction when defendant failed to file a postplea motion or notice of appeal within 30 days of the entry of judgment. *People v. Bailey*, 2014 IL 115459, ¶ 8 (“Under our usual rules, a trial court loses jurisdiction to hear a cause at the end of the 30-day window following the entry of a final judgment.”). The notice of appeal did not vest the appellate court with jurisdiction because it was untimely. See Ill. S. Ct. R. 606(b) (eff. Sept. 1, 2006); *People v. Kellerman*, 342 Ill. App. 3d 1019, 1023 (2003) (“The timely filing of a notice of appeal is necessary for an appellate court to have jurisdiction over a criminal matter.”); *People v. Hansen*, 2011 IL App (2d) 081226, ¶ 6 (“A timely filed notice of appeal is both jurisdictional and mandatory.”). Thus, the untimely notice of appeal was a nullity. See *People v. Terefenko*, 2014 IL App (3d) 120850, ¶ 27.

¶ 18 We reject defendant’s argument that “[h]ad the notice of appeal been properly filed, defendant could have filed a motion for leave to file a late notice of appeal with this Court in accordance with Rule 606(c).” Even without filing a notice of appeal in the trial court, defendant could have filed a motion for leave to file late notice of appeal with this court pursuant to Rule 606(c).

¶ 19 B. Rule 605(c) Claim

¶ 20 Defendant argues the court erred by denying his postconviction petition because he made a substantial showing that the plea court violated his right to due process by failing to properly

admonish him in compliance with Illinois Supreme Court Rule 605(c) (eff. Oct. 1, 2001). Specifically, defendant argues the court failed to convey the substance of Rule 605(c) when it failed to admonish defendant he had the right to counsel's representation in the preparation of postplea motions and the right to a free copy of the transcripts of the proceedings. The State argues defendant's claim regarding the improper admonishments is not a constitutional issue cognizable in a postconviction petition. We agree.

¶ 21 Rule 605(c) requires the court to admonish defendants who have entered negotiated guilty pleas of various appeal rights. Rule 605(c)(5) requires the court to admonish a defendant 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 [postplea] motions." Ill. S. Ct. R. 605(c)(5) (eff. Oct. 1, 2001). Strict compliance with Rule 605(c) is required "in that the admonitions must be given to a defendant who has pled guilty." *People v. Dominguez*, 2012 IL 111336, ¶ 11. "However, the plain meaning of the rule requires only that a defendant be 'substantially' advised of the actual content of Rule 605(c). A verbatim reading of the rule is not required." *Id.*

¶ 22 "The Post-Conviction Hearing Act [citation] provides a means by which a defendant may challenge his conviction or sentence for violations of federal or state constitutional rights." *Pendleton*, 223 Ill. 2d at 471. "A distinction is made between rights of a defendant which are conferred by statute and those which are predicated on constitutional doctrine." *People v. Brittain*, 19 Ill. App. 3d 616, 618 (1974). Where, as here, a postconviction petition has advanced to the third stage of postconviction proceedings, "the defendant bears the burden of making a substantial showing of a constitutional violation." *Pendleton*, 223 Ill. 2d at 473.

¶ 23 Our supreme court has stated “Rule 605 admonishments are ‘not constitutionally required as a matter of due process.’ ” *Id.* at 471 (quoting *People v. Breedlove*, 213 Ill. 2d 509, 519 (2004)). Similarly, in *People v. Covington*, 45 Ill. 2d 105, 108 (1970), the court held the failure to give Rule 605 admonitions “did not raise a question of constitutional dimension.” The court reasoned that Rule 605 “stems from the dictates of good practice rather than constitutional command.” *Id.*

¶ 24 In accordance with this authority, we hold the plea court’s failure to advise defendant that counsel would be appointed to assist him with preparation of his postplea motions and he would receive a free copy of the transcript of the proceedings was not a constitutional violation cognizable in a postconviction petition. This right was conferred by a Supreme Court rule, and it does not rise to the level of a constitutional claim.

¶ 25 In reaching our holding, we acknowledge our supreme court has held:

“Dismissal of an appeal based on a defendant’s failure to file the requisite motions in the trial court would violate due process if the defendant did not know that filing such motions was necessary. [Citation.] Accordingly, Supreme Court Rule 605 [citation] mandates that the trial court advise defendants, at the time sentence is imposed, of the procedural steps Rule 604(d) requires them to take in order to appeal. If the trial court fails to 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. Instead, the appropriate course is to remand the cause to the trial court for strict compliance with Rule 604(d).” *People v. Flowers*, 208 Ill. 2d 291, 301 (2003).

Similarly, in *Breedlove*, the court held: “[W]here the trial court fails to give the admonishments required by Rule 605(b), procedural due process prohibits the dismissal of a defendant’s appeal and the case must be remanded for proper admonishments.” *Breedlove*, 213 Ill. 2d at 521.

¶ 26 To reconcile the above authority with *Pendleton* and *Covington*, we interpret *Flowers* and *Breedlove* to stand for the proposition that it violates due process to dismiss a direct appeal for failure to comply with Rule 604(d) where a defendant who pled guilty did not receive proper Rule 605 admonishments. The failure to properly admonish a defendant in accordance with Rule 605 does not itself violate due process, as the Rule 605 admonishments themselves are not constitutionally required as a matter of due process. See *Pendleton*, 223 Ill. 2d at 471. Thus, defendant’s claim that the court failed to properly admonish him as to the substance of Rule 605 was not a constitutional issue cognizable as a postconviction claim, and the trial court properly denied this claim.

¶ 27 C. Monetary Assessments

¶ 28 The parties correctly note a claim that monetary assessments are void on the basis that they were improperly imposed by the circuit clerk is no longer viable in light of our supreme court’s recent holding in *People v. Vara*, 2018 IL 121823. Accordingly, we do not address this issue.

¶ 29 III. CONCLUSION

¶ 30 The judgment of the circuit court of Peoria County is affirmed.

¶ 31 Affirmed.