

2019 IL App (1st) 162110-U
Nos. 1-16-2110, 16-2114, & 16-2118 (cons.)
Order filed July 19, 2019

Fifth Division

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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. 13 CR 14552
)	14 CR 06376
)	14 CR 21879
)	
DEREK MONTGOMERY,)	Honorable
)	Thomas V. Gainer, Jr.,
Defendant-Appellant.)	Judge, presiding.

PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hoffman and Hall concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court's denials of defendant's motions to correct the mittimus are affirmed when defendant fails to challenge the denials on appeal. We dismiss defendant's appeal from the trial court's order denying his motion to withdraw his guilty plea because we lack jurisdiction.
- ¶ 2 In this consolidated appeal, defendant Derek Montgomery contends that he was denied the benefit of his bargain with the State when he entered into a negotiated guilty plea in

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exchange for, *inter alia*, presentence custody credit against his consecutive sentences and did not receive the credit. He argues that his sentences must be “restructured” to reflect an additional 156 days of presentence custody credit. We affirm in part and dismiss in part.

¶ 3 Following a bench trial in case number 13 CR 14552 (the 2013 case), defendant was found guilty of harassment of a witness and violation of an order of protection. He was sentenced to 12 years in prison for harassment of a witness and to a concurrent 3-year sentence for the violation of an order of protection. This judgment was affirmed on direct appeal. See *People v. Montgomery*, 2018 IL App (1st) 151781-U.

¶ 4 While the 2013 case was pending, defendant was found guilty of violating an order of protection in case number 14 CR 6376 and sentenced, on October 28, 2014, to 42 months in prison. We affirmed on appeal. See *People v. Montgomery*, 1-14-3582 (Summary Order) (Oct. 25, 2016). He was also charged, in case number 14 CR 21879, with threatening a public official based upon a letter that he sent to the prosecutor in case number 14 CR 6376.

¶ 5 On April 9, 2015, the trial court informed defendant that any sentence in case number 14 CR 21879 would be consecutive to the sentence imposed in the 2013 case. The State offered a two-year sentence, *i.e.*, the statutory minimum, in exchange for defendant’s guilty plea. Defendant asked whether the State would “credit me the time that I have in on the violation of the order of protection” case. The State and the trial court answered in the negative. Defendant then stated that he “was incarcerated” at the time that the offense at issue occurred. The court replied that the State was being “very very generous” and that “technically” defendant was “going to be getting double credit for a few months.” The State noted that defendant “can’t get

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credit until he's actually charged *** and placed in custody on this offense." Defendant asked to think about the offer.

¶ 6 On May 20, 2015, defendant entered a plea of guilty to the charge of threatening a public official in case number 14 CR 21879 in exchange for a two-year prison sentence. The State noted that, because defendant "was in custody on other matters," the sentence would be consecutive to the sentences in those cases. Specifically, the sentence in case number 14 CR 21879 would be consecutive to those imposed in the 2013 case and in case number 14 CR 6376. Defendant stated that he wanted to "Cop out."

¶ 7 After the trial court admonished defendant regarding the charge and potential sentences, the trial court asked defendant how he wished to plead. Defendant then stated that he "was only copping out" because he knew he had "no win in this courtroom." He then asked the trial court if there was a way "through the Appellate Court to get this plea taken back, if they find merit to my claims, even after the thirty days." The trial court admonished defendant that, even though he was entering a guilty plea, he still had the right to appeal and that in order to do so, defendant must file a written motion with the court asking to vacate or set aside the plea. The court further stated that the motion had to raise every reason why defendant thought he was entitled to an order setting aside his guilty plea and that, if the court vacated the plea, the case would be reinstated and set for trial. The court finally stated that if the motion to vacate the plea was denied, defendant would have 30 days to appeal that ruling. Defendant stated that he understood.

¶ 8 The trial court reiterated that "the key to what you are trying to accomplish is the thirty day part" and that if defendant did not file something within 30 days, the motion was untimely and would be denied "on that basis alone." The trial court heard the factual basis for the plea, and

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accepted the plea. The sentence would be consecutive to those imposed in the 2013 case and in case number 14 CR 6376. The court explained to defendant that he would not get “double credit.” In other words, the time that defendant was “getting credit for” would be against the 12-year sentence imposed in the 2013 case rather than the sentence imposed in connection with his guilty plea. The court once more reminded defendant that in order to appeal he had to file a written motion to withdraw his guilty plea within 30 days. Defendant did not file either a motion to withdraw his guilty plea or a notice of appeal within 30 days.

¶ 9 In May 2016, defendant filed *pro se* motions to correct the mittimus in the 2013 case and case number 14 CR 6376 seeking orders *nunc pro tunc* awarding “consecutive” credit on his sentences in case numbers 14 CR 6376 and 14 CR 21879.

¶ 10 In June 2016, defendant filed a *pro se* motion to withdraw the guilty plea and vacate the sentence in case number 14 CR 21879, alleging that he did not receive the benefit of his bargain with the State because he did not receive 156 days of presentence custody credit. He requested a new trial or that a corrected mittimus be forwarded to his correctional center.¹

¶ 11 On July 14, 2016, the trial court held a hearing on all three of defendant’s *pro se* motions. Defendant was present in court. The trial court explained that in case number 14 CR 6376 defendant was tried, convicted and sentenced to 42 months in prison. Next, defendant was tried, convicted and sentenced to 12 years in prison in the 2013 case. Finally, defendant entered a guilty plea in case number 14 CR 21879. The court noted that although the 2013 case was the

¹ As defendant notes in his motion, the initial mittimus issued in case number 14 CR 21879 did not include 156 days of presentence custody credit, but the trial court, on defendant’s own motion, corrected the mittimus to add this time credit. Defendant claims that the Department of Corrections never received this mittimus and it is this mittimus that he requests be sent to his correctional facility. However, on April 20, 2016, two months before defendant filed his motion, the trial court again corrected the mittimus to reflect that defendant was subject to consecutive sentences and no presentence custody credit.

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first case in which defendant was indicted, case number 14 CR 6376 went to trial first. Therefore, what the trial court “intended” was that defendant get “all of the time that [he] was entitled to” on the 2013 case and “no time” on the other cases. Defendant responded that the reason he “copped” out on the “last case” was so that he could “get credited.”

¶ 12 The trial court denied the two motions to correct the mittimus as defendant was in custody on the 2013 case first and all presentence custody credit was applied to that case. The trial court then denied defendant leave to withdraw his guilty plea, as the motion was untimely.

¶ 13 Defendant filed a *pro se* notice of appeal from the denial of his motion to withdraw the plea, which was assigned appeal number 16-2114. Defendant also filed *pro se* notices of appeal from the trial court’s denials of his motions to correct the mittimus in the 2013 case and case number 14 CR 6376, which were assigned appeal numbers 16-2110 and 16-2118 respectively. Defendant’s appeals were then consolidated for disposition.

¶ 14 On appeal, defendant contends that he was denied the benefit of his bargain with the State in case number 14 CR 21879, because he entered a guilty plea based upon his belief that he was going to be awarded presentence custody credit from the date of his indictment in the case until he entered his guilty plea. He therefore concludes that he is entitled to an additional 156 days of presentence custody credit that should be applied to his consecutive sentences.

¶ 15 The State responds that defendant’s appeal from the denial of his motion to withdraw the plea and vacate the judgment should be dismissed, as the motion was untimely. The State also notes that defendant was in custody for the 2013 case when he was indicted and subsequently entered a plea in case number 14 CR 21879, and is not entitled to double credit. In other words, he received presentence custody credit against the 2013 case and cannot receive credit for those

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same days against his sentence in case number 14 CR 21879. The State further contends that, as defendant makes no argument on appeal that the trial court erred in denying his motions to correct the mittimus in the 2013 case and case number 14 CR 6373, he has forfeited any potential arguments in those appeals.

¶ 16 In appeal numbers 16-2110 and 16-2118, defendant appeals from the trial court's denial of motions to correct the mittimus in the 2013 case and case number 14 CR 6379, respectively. Defendant makes no argument on appeal regarding those denials, and has therefore forfeited review thereof. See Ill. S. Ct. R. 341(h)(7) (eff. May 28, 2018) (“[p]oints not argued are forfeited”).

¶ 17 We turn now to appeal number 16-2114, defendant's appeal from the denial of his motion to withdraw the plea and vacate the judgment in case number 14 CR 21879. Before reaching the merits of the appeal, however, we first address the State's argument that this court must dismiss the appeal because defendant failed to file a timely postplea motion pursuant to Supreme Court Rule 604(d) (eff. Dec. 11, 2014).

¶ 18 Defendant responds that, “in effect,” his *pro se* motion to withdraw the guilty plea and vacate the sentence was a request to correct the mittimus and this court has jurisdiction to review the trial court's judgment pursuant to Supreme Court Rule 472(a)(3)-(4), (b) (eff. May 17, 2019). We are unpersuaded by defendant's argument, as he specifically filed motions to correct his mittimus in the 2013 case and case number 14 CR 6376 and, rather than filing such a motion in case number 14 CR 21879, he chose to file a motion to withdraw the plea.

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¶ 19 Although defendant argues the merits of his appeal, we must first address the jurisdictional issue. Generally, a trial court loses jurisdiction 30 days following the entry of a final judgment if a timely posttrial motion is not filed. *People v. Bailey*, 2014 IL 115459, ¶ 26.

¶ 20 Pursuant to Supreme Court Rule 606(b) (eff. Dec. 11, 2014), and subject to the requirements of Supreme Court Rule 604(d), a defendant's "notice of appeal must be filed with the clerk of the circuit court within 30 days after the entry of the final judgment appealed from or if a motion directed against the judgment is timely filed, within 30 days after the entry of the order disposing of the motion." The final judgment in a criminal case is the entry of the sentence. *People v. Salem*, 2016 IL 118693, ¶ 12.

¶ 21 In case number 14 CR 21879, the trial court accepted defendant's guilty plea and sentenced him on May 20, 2015. Defendant, therefore, had 30 days in which to file a motion to withdraw his guilty plea. See Ill. S. Ct. R. 604(d) (eff. Dec. 11, 2014) ("No appeal from a judgment entered upon a plea of guilty shall be taken unless the defendant, within 30 days of the date on which sentence is imposed, files in the trial court a motion to reconsider the sentence, if only the sentence is being challenged, or, if the plea is being challenged, a motion to withdraw the plea of guilty and vacate the judgment."). However, defendant failed to file anything, and the trial court thus was divested of jurisdiction 30 days after sentencing (*Bailey*, 2014 IL 115459, ¶ 26). Defendant did not move to "vacate" his guilty plea until June 2016, which was outside the trial court's 30-day jurisdictional window. See Ill. S. Ct. R. 606(b) (eff. Dec. 11, 2014).

¶ 22 Moreover, as defendant's postsentencing motion was untimely, we have no jurisdiction to consider his appeal from the denial of that motion. See *Salem*, 2016 IL 118693, ¶¶ 14-15, 25. Supreme Court Rule 606(b) requires that an appeal be filed within 30 days of the filing of a

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timely postsentencing motion, and this court has no discretion to forgive a defendant's failure to comply with the timing requirements of the rule. *Salem*, 2016 IL 118693, ¶ 19. Here, defendant filed neither a postsentencing motion nor a notice of appeal within 30 days of sentencing. Therefore, because defendant failed to file anything within 30 days after the entry of his guilty plea and sentence, we have no jurisdiction to consider the merits of his appeal and must dismiss it.

¶ 23 Appeal number 16-2110 affirmed.

¶ 24 Appeal number 16-2114 appeal dismissed.

¶ 25 Appeal number 16-2118 affirmed.