

2011 IL App (1st) 093416-U

FIRST DIVISION  
DATE: SEPTEMBER 12, 2011

No. 1-09-3416

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 08 CR 11605
	)	
JUAN MEDINA,	)	Honorable
	)	Mary Margaret Brosnahan,
Defendant-Appellant.	)	Judge Presiding.

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PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.

Justices Lampkin and Rochford concurred in the judgment.

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**ORDER**

¶ 1 *Held:* Order of circuit court of Cook County denying defendant's motion to withdraw his guilty plea affirmed where defendant failed to establish his entitlement to such relief pursuant to section 2-1401 of the Code of Civil Procedure.

¶ 2 Defendant Juan Medina appeals from an order of the circuit court of Cook County denying his motion to withdraw his guilty plea. He contends that he was prejudiced by the plea court's tardy admonishment of the potential immigration consequences of his guilty plea; and, citing *Padilla v. Kentucky*, 559 U.S. \_\_\_, 130 S. Ct. 1473 (2010), he claims that the distinction between direct and collateral consequences of guilty pleas should no longer be considered good law.

¶ 3 On August 18, 2008, defendant entered a negotiated plea of guilty to retail theft and was sentenced to the minimum term of one year of imprisonment. The court then admonished defendant as follows:

"I want you to understand that if you are not a citizen of the United States you are being advised that a conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission of the U.S., or denial naturalization under the laws of the United States."

The court also admonished defendant of his right to appeal and the steps required to perfect it pursuant to Illinois Supreme Court Rule 605(c) (eff. Oct. 1, 2001). At some point after defendant served his sentence and his term of mandatory supervised release (MSR), he was removed from the country.

¶ 4 On November 6, 2009, defendant, through counsel, filed a motion to withdraw his guilty plea pursuant to Supreme Court Rule 604(d) (eff. July 1, 2006) claiming that the plea was involuntary because he was not admonished of the immigration consequences of the guilty plea before the court accepted it. On December 1, 2009, counsel filed an amended motion to withdraw pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2008)), section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2008)),

and Rule 604(d). He asserted that defendant's plea was not voluntary or knowing because he was not advised of the deportation consequences of his plea until after the court accepted it, and that he was not asked whether he understood this admonishment. He also alleged ineffective assistance of plea counsel for counsel's failure to advise defendant of the direct or collateral consequences of the guilty plea and the failure to file a motion to withdraw the guilty plea. As to section 2-1401, he alleged that the court has the power to grant relief from judgment, and had the court known defendant's plea was neither voluntary or knowing, the court would not have accepted it.

¶ 5 The record does not include a report of the proceedings in which the circuit court denied defendant's motion or a copy of the order entered. However, the memorandum of orders shows that on December 3, 2009, the circuit court denied defendant's amended motion to withdraw the guilty plea and defendant filed a timely notice of appeal from that order.

¶ 6 On appeal, defendant contends that he was prejudiced by the tardy admonishment as to the potential immigration consequences of his guilty plea and that he should be allowed to withdraw his plea. The State responds that defendant's appeal must be dismissed because the circuit court lacked jurisdiction to consider defendant's amended motion to withdraw his plea because he failed to file a timely written post-plea motion in accordance with Rule 604(d).

¶ 7 We agree with the State. The jurisdiction of the circuit court to reconsider and modify its judgment is not indefinite; and, generally, the court loses jurisdiction to vacate or modify a judgment 30 days after the entry of that judgment. *People ex rel. Alvarez v. Skryd*, 241 Ill. 2d 34, 40 (2011); *People v. Flowers*, 208 Ill. 2d 291, 303 (2003). This 30-day limitation is incorporated into Rule 604(d), which governs postjudgment motions where defendant, as here, has pleaded guilty. *Skryd*, 241 Ill. 2d at 40-41; *Flowers*, 208 Ill. 2d at 303. Accordingly, since more than 30 days elapsed between the imposition of sentence and the filing of his motion to withdraw, and no

filing extension was granted, the circuit court did not have jurisdiction to entertain defendant's motion to vacate his plea pursuant to Rule 604(d), and, we, in turn, have no authority to consider defendant's appeal from the denial of his motion. *Flowers*, 208 Ill. 2d at 303, 307.

¶ 8 Defendant, nonetheless, seeks to avail himself of the admonishment exception under Rule 604(d) to avoid dismissal. He makes no argument regarding the Rule 605 admonishments, which were clearly given to him by the plea court, but maintains that the failure to admonish him of the potential immigration consequences of his plea pursuant to section 113-8 of the Code of Criminal Procedure (725 ILCS 5/113-8 (West 2008)), requires that he be allowed to withdraw his plea. Defendant acknowledges the supreme court's ruling that the failure to so admonish, standing alone, does not automatically establish grounds for reversing the judgment or vacating the plea, but he claims that the resulting prejudice requires reversal. *People v. Delvillar*, 235 Ill. 2d 507, 520, 522 (2009). We disagree. Defendant has failed to demonstrate that the sequence in which he was admonished called into question the voluntariness of his plea (*Delvillar*, 235 Ill. 2d at 321-22), to avoid the dismissal of his untimely motions under Rule 604(d) (*Flowers*, 208 Ill. 2d at 301).

¶ 9 Defendant's motion also fails under section 122-1 of the Act because he lacks standing to bring such a petition. Any person "imprisoned in the penitentiary" may file a petition under the Act (725 ILCS 5/122-1(a) (West 2008); *People v. Carrera*, 239 Ill. 2d 241, 246 (2010), including those serving a term of MSR (*People v. Rajagopal*, 381 Ill. App. 3d 326, 329-30 (2008)). Here, however, the record shows that defendant had already served his term of imprisonment and MSR when he filed his motion to withdraw, and, thus, was not eligible for relief under the Act. *Carrera*, 239 Ill. 2d 253.

¶ 10 Defendant argues, however, that his deportation from the country gives him standing because *Padilla* removed the distinction between the direct and collateral consequences of a plea.

The supreme court explicitly rejected defendant's argument in *Carrera*, finding that defendant's liberty was being curtailed by the federal government, not the state, and that defendant, who had completely served his sentence, did not have standing to seek relief under the Act. *Carrera*, 239 Ill. 2d at 253, 257.

¶ 11 Defendant's efforts to bring his motion under section 2-1401 of the Code also fail. A section 2-1401 petition is a collateral attack on a judgment, not a direct appeal; and, as a result, defendant's failure to comply with the requirements of Rule 604(d) did not prevent the circuit court from acquiring subject matter jurisdiction in this case. *People v. Mathis*, 357 Ill. App. 3d 45, 49 (2005). We, thus, find that the circuit court had jurisdiction to consider his timely-filed section 2-1401 petition. *Mathis*, 357 Ill. App. 3d at 49.

¶ 12 Nonetheless, in order to obtain relief under this section, defendant was required to affirmatively set forth specific factual allegations supporting the existence of a meritorious defense or claim; due diligence in presenting this defense or claim to the circuit court; and due diligence in filing his petition for relief. *People v. Pinkonsly*, 207 Ill. 2d 555, 565 (2003).

¶ 13 Here, defendant alleged that if the court had known that his plea was not knowing or voluntary, it would not have accepted it. In support, defendant cited the circuit court's sequential error in admonishing him of the deportation consequences under section 113-8. This, however, is not an error of fact, and since his petition is required to set forth specific facts or affidavits that were unknown to the circuit court at the time of the plea, it is insufficient to merit relief.

*Pinkonsly*, 207 Ill. 2d at 565, 566.

¶ 14 Defendant also alleged that he was entitled to relief based on ineffective assistance of counsel. The supreme court has long held that section 2-1401 proceedings are not an appropriate forum for ineffective assistance claims. *Pinkonsly*, 207 Ill. 2d at 257. Accordingly, we conclude that defendant did not establish his entitlement to relief under section 2-1401, and we, therefore

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affirm the order of the circuit court of Cook County denying his motion.

¶ 15 Affirmed.