

NOTICE

Decision filed 09/22/11. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2011 IL App (5th) 090415-U

NO. 5-09-0415

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	St. Clair County.
)	
v.)	No. 08-CF-698
)	
GARY SMITH,)	Honorable
)	John Baricevic,
Defendant-Appellant.)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Justices Spomer and Stewart concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err in failing to treat defendant's letter as a timely *pro se* motion to reconsider sentence where the letter specifically stated that he was writing the letter to ensure that an appeal was filed. However, we order that defendant's mittimus be amended to reflect sentence credit from May 14, 2008, through July 27, 2009.

¶ 2 Defendant, Gary Smith, was charged with two counts of attempted first-degree murder (720 ILCS 5/8-4(a) (West 2006)) and one count of unlawful restraint (720 ILCS 5/10-3 (West 2006)). After a jury trial, defendant was convicted on all counts. On July 27, 2009, a sentencing hearing was conducted after which defendant was sentenced to 10 years in the Department of Corrections on each attempted murder conviction, with the sentences to run concurrently. The trial court merged the unlawful restraint conviction with an attempted murder conviction. The trial court ordered defendant to receive credit for time served in both St. John's Hospital and the St. Clair County jail. The trial court also ordered three years' mandatory supervised release once defendant is released from jail.

¶ 3 The trial court admonished defendant that if he wanted to challenge his sentence, a motion to reconsider sentence must be filed prior to an appeal. The trial court further admonished defendant that a notice of appeal or motion to reconsider sentence must be filed within 30 days or he would lose his right to appeal and challenge his sentence. Finally, the trial court admonished defendant that if a motion to reconsider sentence was filed and denied, he would still have the right to appeal, but a notice of appeal must be filed within 30 days after the motion to reconsider was denied. The trial court then asked defendant whether he had any questions concerning his sentence, to which defendant replied, "I would like to go on record saying that I would like to file for an appeal." The trial court told defendant that his attorney would file a notice of appeal.

¶ 4 On July 30, 2009, defense counsel filed a timely notice of appeal. On August 25, 2009, the trial court received a letter from defendant, requesting a copy of his sentencing transcripts and a copy of the notice of appeal. Defendant stated he was having "trust issues" with his defense counsel. Defendant also complained that defense counsel did not give his family a chance to speak at the sentencing hearing and he believed defense counsel was "working against" him. Defendant closed the letter by stating, "Im [*sic*] writing this letter to you to insure [*sic*] my appeal gets filed (Trust Issues)." In this appeal, defendant contends that (1) the trial court erred in failing to treat his letter as a timely *pro se* motion to reconsider sentence and (2) his sentence must be amended to reflect sentence credit from May 14, 2008, through July 27, 2009. We affirm and remand with directions.

¶ 5 ANALYSIS

¶ 6 The main issue raised on appeal is whether the trial court erred in failing to treat defendant's letter as a timely *pro se* motion to reconsider sentence. While defendant admits he did not specifically ask for his sentence to be reconsidered, he contends his letter to the trial court was in essence a timely *pro se* motion to reconsider sentence. Defendant asks us

to strike his notice of appeal and remand the cause for a hearing on a motion to reconsider sentence. The State replies that the trial court properly disregarded defendant's postsentencing letter because defendant was represented by counsel at the time he wrote the letter and a notice of appeal had already been filed by defense counsel.

¶ 7 In support of his contention, defendant points to a variety of cases, including *People v. Giles*, 261 Ill. App. 3d 833, 635 N.E.2d 969 (1994), and *People v. Kellerman*, 342 Ill. App. 3d 1019, 804 N.E.2d 1067 (2003). In *Giles*, the defendant wrote a letter to the trial court prior to the sentencing hearing criticizing defense counsel's performance in five specific areas. Because of this, defense counsel requested appointment of other counsel in defendant's posttrial motion. At the sentencing hearing, defendant also specifically requested new counsel. The trial court denied defendant's request. The reviewing court found that "defendant essentially filed a *pro se* post-trial motion with the trial court alleging his counsel's incompetence." *Giles*, 261 Ill. App. 3d at 847, 635 N.E.2d at 979. In *People v. Kellerman*, 342 Ill. App. 3d 1019, 804 N.E.2d 1067 (2003), after sentencing, the defendant filed a *pro se* postconviction petition, which our colleagues in the Third District viewed as a notice of appeal because it "fairly and accurately advised the State of the nature of the appeal." *Kellerman*, 342 Ill. App. 3d at 1023-24, 804 N.E.2d at 1071-72. Had it not been construed as such, it would not have been filed within 30 days of the order dismissing defendant's postconviction petition, and, thus, there would not have been jurisdiction to hear the appeal. *Kellerman*, 342 Ill. App. 3d at 1024, 804 N.E.2d at 1072.

¶ 8 In each of the cases cited by defendant, the intent was manifested in the letters. In the instant case, defendant expressly stated his intent: "Im [*sic*] writing this letter to you to insure [*sic*] my appeal gets filed (Trust Issues)." Thus, we find the cases cited by defendant distinguishable. Our review of the record indicates defendant was properly admonished by the trial court, after which he quickly asserted that he wanted to appeal his convictions. He

then wrote a *pro se* letter to the trial court for the express purpose of ensuring that an appeal was filed. Under these circumstances, we do not agree with defendant that the trial court erred in not treating defendant's letter to the court as a timely *pro se* motion to reconsider.

¶ 9 Moreover, as the State points out, even assuming *arguendo* that defendant's letter should have been construed as a *pro se* motion to reconsider sentence, the trial court was justified in not ruling on the motion because the trial court lost jurisdiction once defendant's public defender filed an appeal on behalf of defendant. In *People v. Bounds*, 182 Ill. 2d 1, 694 N.E.2d 560 (1998), our Illinois Supreme Court held that the filing of a notice of appeal vested the appellate court with jurisdiction *instantly* and divested the circuit court of jurisdiction to hear a motion to reconsider which was filed at the same time. *Bounds*, 182 Ill. 2d at 3, 694 N.E.2d at 561. Applying the *Bounds* analysis here, this court was vested with jurisdiction when defense counsel filed a notice of appeal, and the circuit court was divested of power to consider a *pro se* motion to reconsider sentence.

¶ 10 In any event, we do not even need to reach the *Bounds* issue because here, it is clear to us why defendant wrote a letter to the trial court. Even though defendant explained that he was having "trust issues" with his public defender, he never stated that he did not want the public defender to act on his behalf. Defendant wrote the letter for the express purpose of making sure an appeal was filed, which had already been done. Under these circumstances, we are unconvinced by defendant's argument.

¶ 11 The next issue raised by defendant is that his mittimus must be amended to reflect sentence credit from May 14, 2008, through July 27, 2009. The State concedes this issue. Accordingly, we order the trial court to correct the mittimus to reflect the correct dates of credit for time served from May 14, 2008, to July 27, 2009.

¶ 12 For the foregoing reasons, the judgment of the circuit court of St. Clair County is affirmed. The cause is remanded with directions to correct the mittimus.

¶ 13 Affirmed and remanded with directions.