2011 IL App (1st) 101310-U

THIRD DIVISION
December 5, 2011

No. 1-10-1310

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	09 C6 61362
	)	09 C6 60879
	)	
CHARLES STANBACK,	)	The Honorable
	)	Brian K. Flaherty,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Steele and Justice Salone concurred in the judgment.

O R D E R

¶ 1 *HELD*: The appellate court remanded for proper admonishments under Illinois Supreme Court Rule 605 because the trial court failed to admonish defendant (1) that if he successfully moved to withdraw the guilty pleas, the court would vacate the judgments, and (2) that on the State's request, the court would reinstate any dismissed charges, set them for trial, and that any issues the defendant did not raise in the motion would be foreclosed.

¶ 2 Charles Stanback pled guilty to aggravated battery of a peace officer and delivery of a controlled substance. The trial court sentenced him to two consecutive three year prison terms. Stanback filed a notice of appeal, but he did not move to withdraw his guilty plea as required by Illinois Supreme Court Rule 604. Ill. S. Ct. R. 604 (eff. July 1, 2006). On appeal, we must decide whether the trial court substantially complied with Illinois Supreme Court Rule 605 (Ill. S. Ct. R. 605 (eff. October 1, 2001)), which requires the trial court to admonish the defendant of his right to an appeal, and the consequences of exercising that right. We remand for proper admonishments.

¶ 3 BACKGROUND

¶ 4 Police arrested Charles Stanback and charged him with aggravated battery of a peace officer in case number 06 C6 60978. While Stanback was out on bond, police again arrested Stanback and charged him with two counts of delivery of a controlled substance in case number 06 C6 6132. The judge held a conference, pursuant to Illinois Supreme Court Rule 402 (Ill. S. Ct. R. 402 (eff. July 1, 1997)), and the State offered to *nolle pros* two of the four counts against Stanback and also recommended that the court sentence Stanback to two consecutive three year prison terms. The court concurred in the proposed disposition, but Stanback rejected the recommended sentence. Therefore, the court withdrew its concurrence in the recommended sentence.

¶ 5 Stanback later asked the court to reinstate the Rule 402 conference recommendation. Although the court did not rule on the request, Stanback pled guilty to battery of a peace officer and one count of delivery of a controlled substance. Stanback waived his right to a presentence investigation report for each case, and the parties rested on the evidence presented at the Rule 402 conference for purposes of sentencing. The state *nolle prossed* the resisting arrest charge in case

number 06 C6 60879 and one count of delivery in case number 06 C6 61362. The court commented that Stanback was 25 years old and already had committed seven or nine felonies. The court then sentenced Stanback to two consecutive three-year prison terms, based on his criminal history and the facts of the case, but made no mention of the agreement reached during the 402 conference. The court then admonished Stanback as follows:

> "Sir, even though you pled guilty, you have a right to an appeal. In order to appeal, you must within thirty days file with the court a written motion asking the Court to allow you to withdraw your plea of guilty, or ask the Court to reconsider the sentence.
>
> If you can't afford an attorney at that time because you are poor, one will be provided for you free of charge as well [as] a transcript of today's proceedings. But, please understand if you fail or forget to put in your petition the reason why you want this Court to reconsider its sentence or why you want this Court to allow you to withdraw your plea of guilty, if you don't put those reasons in your motion, they will be waived or given up for all times. Do you understand that?
>
> THE DEFENDANT: Yes, your Honor."

¶ 6 Stanback filed a notice of appeal, but he did not file, as required by Rule 604(a), a motion to withdraw the guilty pleas and vacate the judgment. On appeal, Stanback points out that the court failed to admonish him pursuant to Illinois Supreme Court Rule 605(b)(3) (Ill. S. Ct. R. 605(b)(3) (eff. Oct. 1, 2001)), that if he successfully moved to withdraw the guilty pleas or to reconsider the

sentences, the court would vacate the judgment and set a trial date, or the court would modify the sentences. Stanback points out that the court also failed to admonish him in accordance with Rule 605(b)(4) (Ill. S. Ct. R. 605(b)(4) (eff. Oct. 1, 2001)) that on the State's request, the court could reinstate any dismissed charges and set them for trial. Stanback maintains that this court should remand the cause for proper Rule 605(b) admonishments, appointment of counsel, and the opportunity to file a Rule 604(d) (Ill. S. Ct. R. 604(d) (eff. July 1, 2006)) post-plea motion.

¶ 7 The State responds that the trial court properly admonished the defendant of the "core elements" of Rule 605(b) and (c), the missing admonishments were irrelevant and did not prejudice defendant, and Stanback's failure to file a post-plea or post-sentencing motion forecloses his right to direct appeal.

¶ 8 ANALYSIS

¶ 9 Because Stanback did not file a motion to withdraw his guilty pleas and vacate the judgment, pursuant to Rule 604(d) (Ill. S. Ct. R. 604 (eff. July 1, 2006)), we must dismiss this appeal. *People v. Foster*, 171 Ill. 2d 469,471 (1996). However, if the trial court failed to comply with Rule 605, which requires the court to admonish the defendant and explain the requirements of Rule 604, we do have the limited power to remand the case to the trial court for proper admonishments and for Stanback to make the motions necessary for this court to hear his appeal. *Foster*, 171 Ill. 2d at 473-74. We review *de novo* the trial court's compliance with a supreme court rule. *People v. Lloyd*, 338 Ill. App. 3d 379, 384 (2003).

¶ 10 The Illinois Supreme Court adopted Rule 605(b) and (c) because failure to comply with Rule 604(d) forecloses the defendant's right to appeal. *Foster*, 171 Ill. 2d at 472. Rule 605(b) and (c)

require the court to admonish the defendant and explain the requirements of Rule 604(d), and the consequences of exercising the right to appeal. Rule 605(b) applies in cases where the defendant has entered a non-negotiated plea of guilty. Ill. S. Ct. R. 605 (eff. Oct. 1, 2001). Where the State and the defendant have not reached an agreement, the defendant has entered a non-negotiated or open plea. *People v. Diaz*, 192 Ill. 2d 211, 218 (2000). Rule 605(c) applies where the defendant enters a negotiated plea of guilty. Ill. S. Ct. R. 605 (eff. Oct. 1, 2001). Where the State agrees to dismiss charges and recommends a specific sentence in exchange for the defendant's guilty plea, the defendant has entered a negotiated plea of guilty. *People v. Diaz*, 192 Ill. 2d at 219.

¶ 11 In the present case, Stanback entered into a negotiated plea agreement. The judge held a Rule 402 conference, and Stanback rejected the resulting recommended sentence. Although the court rescinded its concurrence with the proposed disposition, at sentencing Stanback requested that the court reinstate the prior recommended sentence, and the court thereafter imposed on Stanback the sentence recommended at the Rule 402 conference. Therefore, the court should have admonished Stanback in accordance with Rule 605(c). We must decide whether the court's admonishments substantially complied with Rule 605(c).

¶ 12 Rule 605(c) provides in pertinent part:

> "In all cases in which a judgment is entered upon a negotiated plea of guilty, at the time of imposing sentence, the trial court shall advise the defendant substantially as follows:
>
> 1) that the defendant has a right to appeal;

2) that prior to taking an appeal the defendant must file in the trial court, within 30 days of the date on which sentence is imposed, a written motion asking to have the judgment vacated and for leave to withdraw the plea of guilty, setting forth the grounds for the motion;

3) that if the motion is allowed, the plea of guilty, sentence and judgment will be vacated and a trial date will be set on the charges to which the plea of guilty was made;

4) that upon the request of the State any charges that may have been dismissed as a part of a plea agreement will be reinstated and will also be set for trial;

5) 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 motions; and

6) that in any appeal taken from the judgment on the plea of guilty any issue or claim of error not raised in the motion to vacate the judgment and to withdraw the plea of guilty shall be deemed waived." Ill. S. Ct. R. 605 (eff. Oct. 1, 2001).

¶ 13 Stanback correctly asserts that, pursuant to the admonition exception (*Foster*, 171 Ill. 2d at 473), he was excused from filing a post-plea motion under Supreme Court Rule 604(d) (Ill. S. Ct. R. 604(d) (eff. July 1, 2006)), because the trial court did not admonish him in accordance with Rule

605. See *People v. Lloyd*, 338 Ill. App. 3d 379, 385 (2003); (Ill. S. Ct. R. 605(c) (eff. Oct. 1, 2001)). We will consider admonitions insufficient where the trial court fails to convey the substance of the rule. *People v. Anderson*, 309 Ill. App. 3d 417, 421 (1999). Because the appellate court will strictly hold the defendant to the requirements of Rule 604(d), the trial court must admonish the defendant pursuant to Rule 605. *Foster*, 171 Ill. 2d at 473. Therefore, where admonitions have not been issued, it would violate the defendant's due process rights to hold him responsible for non-compliance with the requirements of Rule 604(d). *Foster*, 171 Ill. 2d at 473.

¶ 14 The State argues that the court's failure to admonish Stanback pursuant to 605(c)(3) and (4) did not prejudice him, because Stanback did not allege that he would have filed the post-sentencing motion had he been admonished that the one *nolle prossed* count would be reinstated. The State relies on *People v. Claudin*, 369 Ill. App. 3d 532 (2006), which held that the court need not use the exact language of Rule 605, and the reviewing court will hold admonishments to be insufficient only if the substance of the rule is omitted. *Claudin*, 369 Ill. App. 3d at 533.

¶ 15 The State relies on cases that contain minimal reasoning. The *Claudin* court relied on *People v. Crump*, 344 Ill. App. 3d 558 (2003), where the court substantially admonished the defendant pursuant to Rule 605(c) with the exception of Rule 605(c)(6). *Crump*, 344 Ill. App. 3d at 563. The court failed to disclose to the defendant that any issues not raised in his motion would be waived on appeal. *Crump*, 344 Ill. App. 3d at 563. The *Crump* court held that the defendant was not prejudiced by the missing verbiage, and therefore the court dismissed the appeal. *Crump*, 344 Ill. App. 3d at 563.

¶ 16 The *Crump* court relied on the decision in *People v. Wyatt*, 305 Ill. App. 3d 291 (1999),

which the State also relies on. *Wyatt* is distinguishable from *Crump* because in *Wyatt*, the defense attorney stated on the record, "I don't believe we'd be moving to withdraw the plea, but we are asking to review the sentence." *Wyatt*, 305 Ill. App. 3d at 296. This statement made it clear that the defendant had no intention of withdrawing his guilty plea. The court thereafter failed to admonish the defendant in accordance with Rule 605(b)(4) and (b)(6). *Wyatt*, 305 Ill. App. 3d at 295-96. Because the defendant did not thereafter file a motion to withdraw his guilty plea, the reviewing court ruled that the trial court's failure to admonish the defendant pursuant to Rule 605(b)(4) and (b)(6) did not prejudice the defendant. *Wyatt*, 305 Ill. App. 3d at 296. Therefore, the trial court substantially complied with Rule 605. *Wyatt*, 305 Ill. App. 3d at 295-96.

¶ 17 *Crump* on the other hand, involved a defendant who was not admonished in accord with Rule 605(c)(6), which requires the court to tell the defendant that any issues that he failed to raise as a part of his Rule 604(d) motion would be foreclosed. *Crump*, 344 Ill. App. 3d at 563. The defendant thereafter failed to comply with the requirements of Rule 604(d), and filed a *pro se* notice of appeal instead. *Crump*, 344 Ill. App. 3d at 561. The defense attorney in *Crump*, unlike the attorney in *Wyatt*, said nothing about whether the defendant intended to file a motion to withdraw his guilty plea, and appeal. Despite this critical distinction, the *Crump* court held that *Wyatt* demanded a finding that the defendant in *Crump* suffered no prejudice due to the trial court's failure to admonish him in accord with Rule 605(b)(6), and the defendant was not prejudiced by the trial court's failure to admonish him in accordance with rule 605(c)(6). *Crump*, 344 Ill. App. 3d at 563. The *Claudin* court then made a further leap from *Crump* to hold that the defendant in *Claudin* was not prejudiced although the trial court failed to admonish the defendant in accordance with Rule 605(c)(3) and

(c)(4), not Rule 605(c)(6), and the defense attorney said nothing about whether the defendant intended to file a motion to withdraw his guilty plea. *Claudin*, 369 Ill. App. 3d at 534.

¶ 18 The current case is also unlike *Wyatt*, in that the public defender said nothing about whether Stanback intended to file a motion to withdraw the guilty pleas. The present case does not concern a harmless omission, but rather the complete absence of an admonition concerning the consequences of a successful post-plea motion and the reinstatement of the dismissed charges at the State's request. In addition, the record in the present case contains a two-page handwritten letter in which Stanback expressed his dissatisfaction with defense counsel and the outcome of his plea proceedings. This suggests that he would have filed a motion to withdraw his guilty pleas and vacate the judgments, if the court informed him of the consequences of such a motion.

¶ 19 The trial court in this case only admonished Stanback pursuant to Rule 605(c)(1), (c)(2), (c)(5) and (c)(6), but failed altogether to admonish Stanback in accordance with Rule 605(c)(3) and (c)(4). Moreover, the State *nolle prossed* one count for delivery of narcotics and one count for resisting arrest. The possibility that the court might reinstate those two counts and enhance the sentence on the drug case can hardly be considered irrelevant or harmless to Stanback.

¶ 20 CONCLUSION

¶ 21 We find that the court did not admonish Stanback pursuant to Rule 605(c) and therefore the admonishment exception should be applied in this case. We remand the cause to the trial court for proper admonishments in accordance with Rule 605(c) so that Stanback will have the opportunity to file a post-plea motion if he so chooses. If the trial court finds the defendant is indigent, the court shall appoint counsel to assist him. If defendant files a post-sentencing motion which the trial court

denies, defendant may appeal the denial of that motion. Accordingly, this cause is remanded with directions.

¶ 22 Remanded with directions.