

No. 09-1401

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).

FOURTH DIVISION
January 27, 2011

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.)	No. 09 CR 6373
)	
ALBERT KINKLE,)	Honorable
)	Nicholas R. Ford,
Defendant-Appellant.)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Gallagher and Justice Pucinski concurred
in the judgment.

O R D E R

HELD: Defendant's failure to file a Supreme Court Rule 604(d) motion to vacate his negotiated guilty plea was not excused where the trial court properly admonished him under Supreme Court Rule 605(c); defendant's appeal dismissed.

Defendant Albert Kinkle pleaded guilty to a charge of forgery and was sentenced to two years' probation. Defendant did not file a motion to withdraw, or otherwise contest, the judgment

entered on his plea conviction. Instead, defendant filed a direct appeal and now claims that he should be given a new opportunity to challenge his plea in the circuit court because that court failed to properly admonish him pursuant to Supreme Court Rule 605(b) (eff. Oct. 1, 2001) or Rule 605(c) (eff. Oct. 1, 2001).

The record shows that defendant was charged in an eight-count indictment with, *inter alia*, five counts of forgery. When he appeared for arraignment on April 20, 2009, the court advised defendant of this fact and appointed counsel to represent him. Defendant then waived formal reading of the charges, and indicated that he wished to participate in a conference. The parties and the court held a Supreme Court Rule 402 (eff. July 1, 1997) conference off the record, and when the case was recalled, the court stated:

"[i]n exchange for a plea of guilty, I will give you two years probation. I was told there's no restitution in the case but there will be fees, fines, and costs associated with that.

I've been told you wanted to accept that?"

Defendant responded that he did.

The court then admonished defendant, in relevant part, that the offense to which he was pleading guilty was a Class 3 felony with a sentencing range of two to five years' imprisonment, one year of mandatory supervised release, and fines up to \$25,000. The court explained that in this type of case, defendant has the right to a presentence investigation report, but that it was not necessary here because he was pleading guilty.

The court then inquired if there was a stipulation to the facts it heard during the Rule 402 conference and whether the arrest reports were sufficient to prove defendant guilty beyond a reasonable doubt. The State and defense counsel responded, "[s]o stipulated." The court then found that there was a factual basis for the plea, and that the evidence was sufficient to prove defendant's guilt, that defendant was entering his plea freely and voluntarily, and sentenced him to two years of probation.

Following that, the court admonished defendant as follows:

"Even though you've pled guilty in this case, you have an absolute right to appeal. In order to appeal you must first within 30 days file in this court a written motion asking me to vacate and for leave to withdraw your plea of guilty. That written motion must set forth the grounds and reasons you feel

it should be granted in writing filed in 30 days.

If it is granted, the plea of guilty, the sentence of judgment will be vacated and a trial date will be set on all the charges that were originally pending against you.

If you were denied you have 30 days to appeal. You have to file a notice of that appeal in court. In that circumstance, it would get you a free attorney and a free transcript but any issue or claim of error that you got that you didn't first raise in the motion to vacate the judgment and to withdraw a plea of guilty will be waived or given up on appeal."

Defendant indicated that he understood these admonishments, and the State nol-prossed counts two through eight. Defendant did not file a post-plea motion, and instead, filed a notice of appeal.

In order to perfect an appeal from either an open or negotiated guilty plea, defendant must file a written post-plea motion with the trial court within 30 days of the sentencing

date. Ill. S. Ct. R. 604(d) (eff. July 1, 2006). Where, as here, defendant failed to file such a motion, this court is precluded from considering the appeal on the merits, and must dismiss it. *People v. Flowers*, 208 Ill. 2d 291, 301 (2003). Under the admonition exception to the rule, if the court failed to properly admonish defendant regarding the dictates of Rule 604(d), the appeal is not dismissed and the cause is remanded to the circuit court for strict compliance with Rule 604(d). *Flowers*, 208 Ill. 2d at 301; *People v. Foster*, 171 Ill. 2d 469, 473-74 (1996).

In order to determine whether the court properly admonished defendant, we must first decide whether defendant entered an open plea which is governed by Rule 605(b), or if he entered a negotiated plea which is governed by Rule 605(c). *People v. Dunn*, 342 Ill. App. 3d 872, 878-79 (2003). Defendant claims that he entered an open plea, while the State, relying on *Dunn*, responds that the record shows that it was a negotiated plea.

A negotiated plea is defined in Rule 605(c) as one in which the State has bound itself to recommend a specific sentence or range of sentence, or where the State has made concessions relating to the sentence imposed. In this case, the record shows that the court and the parties held a Rule 402 conference off the record, and when the case was recalled, the court confirmed the terms of the agreement that had been reached during that

conference on the record, *i.e.*, two years' probation in exchange for the plea to a single count, and the State then nol-prossed counts II through VIII.

In *Dunn*, this court held that a negotiated plea was evident from the record where there was a Rule 402 conference, and the trial court confirmed the terms of the agreement in open court. *Dunn*, 342 Ill. App. 3d at 880. This court also observed that the fact that the sentence imposed on defendant was closer to the minimum available under the law further showed that the sentence was negotiated as it demonstrated that the State was foreclosed from arguing for a sentence from the full sentencing range of penalties available. *Dunn*, 342 Ill. App. 3d at 880. We find this case on point, and, accordingly, conclude that defendant entered a negotiated plea.

Defendant maintains, however, that the Second District appellate court has since rejected *Dunn* in *People v. Garibay*, 366 Ill. App. 3d 1103 (2006), and that *Garibay* supports his contention that he entered an open plea. For the reasons that follow, we find this court's reasoning in *Dunn* sound, and *Garibay* distinguishable.

In *Garibay*, there was a Rule 402 conference, but the reviewing court found that the conference was "misused" where the court brokered the agreement instead of the conference being used by the parties to present a tentative agreement to the court.

Garibay, 366 Ill. App. 3d at 1107-08. The record also showed that counsel stated, without contradiction, that defendant was entering an open plea. *Garibay*, 366 Ill. App. 3d at 1105, 1108.

Here, and in *Dunn*, there was no indication that the Rule 402 conference was misused, and counsel did not state that the plea was open. Rather, a conference was held at defendant's request, and the court confirmed the agreement on the record, after which the court stated,

"I was told there's no restitution in the case but there will be fees, fines, and costs associated with that.

I've been told you wanted to accept that?" (Emphasis added).

This comment and question indicate that the parties told the court the terms of the agreement, and that, unlike *Garibay*, it was not brokered by the court.

In addition, the record further demonstrates, as in *People v. Gougisha*, 347 Ill. App. 3d 158, 161-62 (2004), that defendant entered a negotiated plea where the State's *nolle prosequi* of the remaining charges precluded it from arguing for a sentence from the full sentencing range. We also observe that the State was precluded from arguing such where the agreed-upon sentence was closer to the minimum sentence (*Dunn*, 342 Ill. App. 3d at 880).

Under these circumstances, we conclude, in line with *Dunn* and *Gougisha*, that defendant entered a negotiated plea.

Having so found, we address whether the trial court properly admonished defendant pursuant to Rule 605(c). Trial courts are held to strict compliance with the admonishment requirements of Rule 605(c). *Dunn*, 342 Ill. App. 3d at 881. In performing this duty, the trial court is not required to use the exact language of the rule, and compliance will be found insufficient only where the court fails to convey the substance of the rule. *Dunn*, 342 Ill. App. 3d at 881. Our review of the court's compliance with the rule is *de novo*. *People v. Breedlove*, 213 Ill. 2d 509, 512 (2004).

Defendant particularly claims that the court failed to properly admonish him regarding subsections (3) and (4). These subsections provide, respectively, that the court shall advise defendant that if his 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, and that, upon request of the State, any charges that may have been dismissed as part of the plea agreement will be reinstated and set for trial.

In this case, the court admonished defendant that if the post-plea motion was granted,

"the plea of guilty, the sentence of judgment will be vacated and a trial date will be set on all the charges that were originally pending against you."

Defendant claims that this was wholly insufficient and facially incorrect because the court misinformed him that all the charges would be reinstated if his motion was granted instead of advising him that a trial date will be set on the charges to which he pleaded guilty and upon the State's request, any charges dismissed as part of the plea will be reinstated and set for trial.

We observe, however, that the trial court is only required to convey the substance of the rule, and is not required to recite it verbatim. *People v. Tlatenchi*, 391 Ill. App. 3d 705, 721 (2009). In this case, the court informed defendant that the charges against him could be reinstated and set for trial along with the charge he pleaded guilty to if his motion to vacate was allowed. Although the court did not specify that it was the State that had the discretion to reinstate the charges that had been dismissed, we find that the admonition conveyed to defendant the substance of the contested subsections (Ill. S. Ct. R. 605(c)(3) and (4) (eff. Oct. 1, 2001)), and that defendant was not prejudiced by the missing verbiage (*People v. Claudin*, 369 Ill. App. 3d 532, 534 (2006)). This same conclusion was reached

in *Claudin*, where the trial court did not admonish defendant on those subsections, and this court found that defendant was not prejudiced by the missing verbiage where he was substantially admonished of his appeal rights following his guilty plea.

Claudin, 369 Ill. App. 3d at 534.

Defendant, nonetheless, claims that the court failed to comply with the language and purpose of Rule 605(c)(3) and (4) where the record as a whole shows that the court never told him the actual charges against him or that to which he pled guilty. He further claims that the information the court provided on his charges was incorrect, and that the court never told him the facts or elements of the charge he was alleged to have committed.

We initially observe that defendant waived formal reading of the charges; and that there is no requirement in Rule 605(c) that the court admonish defendant of the charges against him or the facts for the charge to which he was pleading guilty after a plea proceeding. These matters are consistent with Rule 402 and are of no consequence here.

Defendant also claims that he was not properly admonished pursuant to Rule 605(c)(5). That rule provides that the trial court must advise defendant that if he is indigent, a free copy of the transcript of the guilty plea and sentencing proceedings will be provided to him and counsel will be appointed to assist

him with the preparation of his post-plea motions free of charge. Ill. S. Ct. R. 605(c)(5) (eff. Oct 1, 2001).

In this case, the trial court admonished defendant that if his post-plea motion was denied, he would,

"have to file a notice of that appeal in court. In that circumstance, it would get you a free attorney and a free transcript[.]"

Defendant claims that the court informed him that an attorney and transcript would only be provided to him free of charge if he filed an appeal, and failed to advise him of his right to have counsel assist him in the preparation of a post-plea motion. A similar claim was raised and rejected in *Dunn*. In that case, defendant was advised that prior to appealing he must file a written motion to withdraw his guilty plea within 30 days, that any reasons not set forth in the motion would be waived for appeal, that if he could not afford an attorney or transcript, those would be provided free of charge, and that the charges would be reinstated if the motion was successful. *Dunn*, 342 Ill. App. 3d at 882. Defendant, as here, claimed that the trial court failed to admonish him that he had the right to an attorney to assist him with his post-plea motions. *Dunn*, 342 Ill. App. 3d at 881. This court found that the admonitions given by the trial court reflected the availability of court-appointed counsel for

defendant, and although the court did not use the exact language of the rule, it conveyed its substance thereby complying with the rule. *Dunn*, 342 Ill. App. 3d at 882. We reach the same conclusion here, where the court's admonition regarding counsel conveyed the substance of the rule in compliance with Rule 605(c)(5).

More importantly, we observe the trial court's specific admonishment to defendant that in order to appeal, he must first file a post-plea motion to withdraw his plea within 30 days, and defendant's indication to the court that he understood this admonition. Nevertheless, defendant failed to file any type of post-plea motion, and, consequently, waived his right to a direct appeal. *Claudin*, 369 Ill. App. 3d at 534-35; *People v. Crump*, 344 Ill. App. 3d 558, 563 (2003).

In light of the foregoing, we find that the trial court complied with Rule 605(c) where its admonishments conveyed the substance of the rule (*Dunn*, 342 Ill. App. 3d at 881), and that defendant's failure to file a Rule 604(d) motion is not cured by the admonition exception (*Claudin*, 369 Ill. App. 3d at 534-35). We, therefore, dismiss the appeal.

Appeal dismissed.