

No. 1-09-3590

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
May 12, 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 4769
)	
DERRICK ROBERSON,)	Honorable
)	Victoria A. Stewart,
Defendant-Appellant.)	Judge Presiding.

JUSTICE STERBA delivered the judgment of the court.
Presiding Justice Lavin and Justice Pucinski concurred in
the judgment.

O R D E R

HELD: The trial court's admonitions to defendant following his negotiated plea of guilty failed to substantially comply with Supreme Court Rule 605(c), requiring remand to the trial court for strict compliance with the rule.

Following a negotiated guilty plea, defendant Derrick Roberson was convicted of resisting or obstructing a peace

officer and sentenced to one year in prison. On appeal, defendant contends this cause must be remanded for proper admonitions where the trial court failed to comply strictly with Illinois Supreme Court Rule 605(c) (eff. October 1, 2001) following his negotiated guilty plea. We remand.

Defendant was originally charged in a three-count indictment with two counts of aggravated battery and one count of resisting or obstructing a peace officer. Pursuant to a negotiated plea agreement, defendant pleaded guilty to the resisting charge, the State dismissed the remaining two counts, and defendant was sentenced to one year in prison. The trial court then admonished defendant as follows:

"And lastly, sir, your appeal rights.

If you disagree with any order I entered, sit in the penitentiary, reflect, want to change your mind, you have only 30 days from today's date to start the appeal process.

You start the process by coming back before me and you would be filing a written motion to vacate your plea of guilty, written motion to vacate. In your motion to vacate your plea of guilt[y] you would tell me where I erred

in accepting your guilty plea. You could also choose to file a motion for new trial. In the motion for new trial, you give me reasons why you think I should grant you a new trial.

Lastly, should you choose to appeal, you must file a formal written notice of appeal within 30 days of today's date. Should you choose to file a written motion to vacate the plea of guilty or motion for new trial, you must file a formal written notice of appeal. You must do it within 30 days of today's date.

If you cannot afford an attorney, I will appoint one free of charge to represent you. If you cannot afford a transcript, I will provide them to you free of charge.

Good luck."

Defendant did not file a motion to withdraw his plea and vacate judgment, but instead filed a *pro se* notice of appeal.

On appeal, defendant contends the trial court failed to comply strictly with Supreme Court Rule 605(c) following his

negotiated plea of guilty, and that he is entitled to have his case remanded in order that he may be properly admonished and given the opportunity to file a post-plea motion. The State responds that this court lacks jurisdiction to hear defendant's appeal because he failed within 30 days of the judgment to file a motion to withdraw his plea and vacate the judgment.

Illinois Supreme Court Rule 604(d) (eff. July 1, 2006) mandates that a defendant who chooses to appeal from a judgment entered upon a plea of guilty must first file with the trial court a written motion to withdraw the guilty plea and vacate the judgment. Compliance with Rule 604(d) is a condition precedent to an appeal, and a defendant's failure to meet this requirement mandates that the appellate court dismiss his appeal. *People v. Claudin*, 369 Ill. App. 3d 532, 533 (2006). There is an "admonition exception" to the motion requirement, under which a reviewing court may consider an appeal despite the defendant's failure to comply with Rule 604(d). That exception applies in cases where the trial court has failed to give sufficient admonitions under Illinois Supreme Court Rule 605 (eff. October 1, 2001). Where, as here, a defendant has pleaded guilty pursuant to a negotiated plea agreement, the court must admonish him pursuant to Rule 605(c). However, if the trial court fails to admonish the defendant under that rule and the defendant attempts to appeal without first filing the requisite motion to

withdraw, the appeal is not dismissed; rather, the cause is remanded to the trial court for strict compliance with Rule 605(c). See *People v. Lloyd*, 338 Ill. App. 3d 379, 385-86 (2003). Our review of the trial court's compliance with the supreme court rules is *de novo*. *People v. Gougisha*, 347 Ill. App. 3d 158, 162 (2004).

Rule 605(c) provides that when the trial court enters judgment pursuant to a negotiated guilty plea, it shall advise the defendant of the following:

"(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 guilty plea 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."

Here, the trial court's admonitions failed to comply with the requirements of Rule 605(c). The court failed to mention the admonitions in subsections (3), (4) and (6) of the rule. More significantly, however, the court's admonition as to the procedure for instituting an appeal was confusing. Initially,

the court correctly informed defendant of the need to first file in the trial court a written motion to vacate his plea of guilty, stating the basis for the court's error in accepting the plea. After then inappropriately advising defendant of alternately filing a motion for new trial, the court stated: "Should you choose to file a written motion to vacate the plea of guilty ***, you must file a formal written notice of appeal *** within 30 days of today's date." This admonition appears to require that the notice of appeal must be filed as a prerequisite to filing the motion to withdraw guilty plea and vacate judgment, contradicting the court's previous admonition that a motion to withdraw plea must be filed first.

The State recommends that we follow the conclusion reached in other cases where Rule 605(c) admonitions similar to those given here were deemed incomplete but substantially in compliance with Rule 605(c). In *People v. Crump*, 344 Ill. App. 3d 558 (2003), the court's admonitions to the defendant following his negotiated plea agreement were incomplete. However, the court did clearly admonish the defendant that, before he filed his notice of appeal, he was required to file in the trial court within 30 days a motion to withdraw plea and vacate judgment. We concluded that defendant was substantially advised of his appeal rights and that his failure to file a motion to withdraw guilty plea required dismissal of his appeal. In the instant case, the

court's initial admonition on the proper sequence of filing was correct but its subsequent admonition appeared to contradict it and could have confused defendant as to whether the motion was to be filed before or after the notice of appeal.

Claudin is also inapposite. There, the trial court adequately put the defendant on notice of the necessity of first filing a motion in the trial court within 30 days. Moreover, in *Claudin*, we noted that "defendant indicated his understanding of this requisite." *Claudin*, 369 Ill. App. 3d at 534. In the case at bar, defendant was not asked, and did not indicate, whether he understood the court's admonitions, including the requirement to first file the motion to withdraw plea and vacate judgment before filing a notice of appeal.

As the trial court failed to substantially admonish defendant pursuant to Rule 605(c), his failure to file a motion to vacate is excused. We remand this cause to the trial court with directions to properly admonish defendant in accordance with Rule 605(c) within 30 days of the date our mandate is filed in the trial court, to give defendant the opportunity to file a motion to withdraw his guilty plea pursuant to Rule 604(d) if he so desires. See *Gougisha*, 347 Ill. App. 3d at 163.

Remanded with directions.