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No. 3--09--0633

Order filed March 2, 2011

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2011

| | | |
|-------------------------|---|-------------------------------|
| THE PEOPLE OF THE STATE |) | Appeal from the Circuit Court |
| OF ILLINOIS, |) | of the 14th Judicial Circuit, |
| |) | Henry County, Illinois, |
| Plaintiff-Appellee, |) | |
| |) | |
| v. |) | No. 03--CF--328 |
| |) | |
| DANIEL H. MARTINEZ, |) | Honorable |
| |) | Charles H. Stengel, |
| Defendant-Appellant. |) | Judge, Presiding. |

JUSTICE LYTTON delivered the judgment of the court.
Justices Holdridge and Schmidt concurred in the judgment.

ORDER

Held: Where a defendant filed a motion to withdraw his guilty plea more than four years after sentencing, the trial court lacked jurisdiction to consider the merits of the motion. The defendant's appeal from the trial court's dismissal of his motion is dismissed.

In 2004, the defendant, Daniel H. Martinez, pled guilty to having committed two counts of aggravated criminal sexual abuse in 2003 (720 ILCS 5/12--16(d) (West 2002)). Also in 2004, the court sentenced the defendant to 24 months of probation and 6 months of

incarceration in the county jail, the latter being stayed pending completion of probation. The defendant did not file either a postsentencing motion or a notice of appeal within 30 days of sentencing.

In 2009, the defendant filed a motion to withdraw his guilty plea. The State filed a motion to dismiss the defendant's motion, arguing, among other things, that the defendant's motion was untimely filed. The trial court granted the State's motion to dismiss, not on the basis of untimeliness, but based on one of the substantive issues raised in the defendant's motion. On appeal, the defendant argues that the trial court erred by dismissing his motion to withdraw the guilty plea. We dismiss the appeal for lack of appellate jurisdiction.

FACTS

Pursuant to an open plea agreement, the defendant pled guilty to the two offenses for which he had been charged. The record shows that the defendant is not a citizen of the United States, but rather is a citizen of Mexico. At the plea hearing, the trial court did not give the defendant the statutorily required admonishments concerning the possible immigration consequences of his guilty plea (725 ILCS 5/113--8 (West 2004)). The court accepted the defendant's plea and imposed the sentence. Following sentencing, the court said the following to the defendant regarding his right to appeal:

"You have a right to appeal if you think something went wrong. You have 30 days from today's date to do something about it. It must be in writing and must set forth all your reasons. I'll appoint you a free lawyer and give you a free transcript, if you don't have money for the lawyer or the transcript. But it has to be a motion asking the Court to withdraw your plea of guilty and to vacate this sentence. It has to be done within 30 days. Do you have any questions?"

The defendant replied, "No, Your Honor."

The defendant successfully completed his probation on December 3, 2006. On March 31, 2009, the federal government began deportation proceedings against the defendant because he had been convicted of an aggravated felony. On April 17, 2009, the defendant filed a motion to withdraw his guilty plea based, in part, on the trial court's failure to properly admonish him under both section 113--8 and Illinois Supreme Court Rule 605(b) (eff. Oct. 1, 2001), which concerned the steps necessary to perfect an appeal.

On April 17, 2009, the defendant also filed a postconviction petition, in which he made similar arguments to those in his motion to withdraw the guilty plea. The trial court dismissed the petition at the second stage. On appeal, the defendant concedes that his postconviction petition was untimely filed because such

petitions only apply to defendants who are in custody and he had completed his sentence at the time he filed the petition.

The State filed a motion to dismiss the defendant's motion to withdraw the guilty plea, arguing, among other things, that: (1) the defendant's motion was untimely filed; (2) section 113--8 admonishments are directory rather than mandatory; and (3) the court's admonishments substantially complied with Rule 605(b). In its oral pronouncement granting the State's motion, the court based its ruling solely on section 113--8 admonishments being directory rather than mandatory. The court's written order only stated that it had granted the State's motion to dismiss. The defendant appealed.

ANALYSIS

The defendant contends that the trial court erred by granting the State's motion to dismiss. The State submits that we lack jurisdiction to consider this appeal because the defendant's motion to withdraw the guilty plea was untimely filed.

The filing of a timely written Supreme Court Rule 604(d) motion (Ill. S. Ct. R. 604(d) (eff. Feb. 1, 2005)) is a condition precedent for a guilty-pleading defendant to file an appeal. *People v. Flowers*, 208 Ill. 2d 291 (2003); *People v. Wilk*, 124 Ill. 2d 93 (1988). Such a motion must be filed in the trial court within 30 days of sentencing. Ill. S. Ct. R. 604(d) (eff. Feb. 1, 2005); *Flowers*, 208 Ill. 2d 291. Whether the defendant must file

a motion to withdraw the guilty plea or a motion to reconsider the sentence depends on whether the plea or sentence is being attacked and whether the plea was negotiated. Ill. S. Ct. R. 604(d) (eff. Feb. 1, 2005); *Flowers*, 208 Ill. 2d 291. In any event, if such a defendant fails to file a timely Rule 604(d) motion, the trial court loses jurisdiction over the matter 30 days after sentencing, and the appellate court must dismiss any ensuing appeal. *Flowers*, 208 Ill. 2d 291. Under such circumstances, a defendant's possible remedy lies in filing a postconviction petition. *Flowers*, 208 Ill. 2d 291; *Wilk*, 124 Ill. 2d 93. However, as the present defendant concedes, a postconviction petition was not a remedy available to him because he had completed his sentence at the time he filed his petition.

An exception to strict compliance with Rule 604(d) occurs when a trial court fails to give a guilty-pleading defendant proper Rule 605 admonishments concerning the steps necessary to perfect an appeal, and the defendant does not strictly comply with the written motion requirements of Rule 604(d). *Flowers*, 208 Ill. 2d 291; *In re William M.*, 206 Ill. 2d 595 (2003); *People v. Jamison*, 181 Ill. 2d 24 (1998); *People v. Foster*, 171 Ill. 2d 469 (1996). Which subsection of Rule 605 applies to a defendant depends upon whether his plea was negotiated. See Ill. S. Ct. R. 605 (eff. Oct. 1, 2001). Under the Rule 605 admonition exception, if such a defendant filed, within 30 days of sentencing, either an

inappropriate Rule 604(d) motion followed by a timely notice of appeal, or simply a notice of appeal, the appellate court must remand the matter to the trial court for proper Rule 605 admonishments followed by the defendant's strict compliance with the written motion requirements of Rule 604(d). *Flowers*, 208 Ill. 2d 291; *William M.*, 206 Ill. 2d 595; *Jamison*, 181 Ill. 2d 24; *Foster*, 171 Ill. 2d 469.

Nonetheless, the Rule 605 admonition exception does not apply to a defendant who did not comply with the 30-day time limitation for filing either a notice of appeal or a Rule 604(d) motion. *Flowers*, 208 Ill. 2d 291; *In re J.T.*, 221 Ill. 2d 338 (2006). In such cases, the trial court lacks jurisdiction to consider the merits of an untimely filed Rule 604(d) motion. *Flowers*, 208 Ill. 2d 291; *J.T.*, 221 Ill. 2d 338. An appellate court lacks jurisdiction to consider an appeal from the dismissal of an untimely filed Rule 604(d) motion and must dismiss the appeal, especially where the defendant was advised that he was required to file a motion within 30 days of sentencing in order to preserve his right to appeal. *J.T.*, 221 Ill. 2d 338. In such cases, the appellate court must dismiss the appeal for lack of jurisdiction and may not consider whether the trial court gave proper Rule 605 admonishments to the defendant. *J.T.*, 221 Ill. 2d 338. Whether the court gave proper Rule 605 admonishments is not an issue that may be raised by a defendant at any time. *J.T.*, 221 Ill. 2d 338.

Neither a trial court nor an appellate court may even consider a void order when a defendant filed an untimely Rule 604(d) motion because the matter was not properly before either the trial court or the appellate court. *Flowers*, 208 Ill. 2d 291.

In this case, the defendant filed his Rule 604(d) motion to withdraw the guilty plea more than four years after he was sentenced, even though he was advised that he must file a motion within 30 days of sentencing in order to preserve his right to appeal. Under these circumstances, the trial court lacked jurisdiction to consider the defendant's motion on its merits. Similarly, we lack jurisdiction to consider the defendant's appeal from the dismissal of his motion and may not consider whether the trial court gave either proper section 113--8 or Rule 605 admonishments. See *J.T.*, 221 Ill. 2d 338. Because the defendant filed an untimely motion to withdraw the guilty plea, we must dismiss the appeal. *Flowers*, 208 Ill. 2d 291; *J.T.*, 221 Ill. 2d 338.

For the foregoing reasons, we dismiss the defendant's appeal from the Henry County circuit court's dismissal of his motion to withdraw the guilty plea.

Appeal dismissed.