

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).

NO. 4-09-0940

Order Filed 4/18/11

IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Coles County
ANTHONY REALE,)	No. 08CF168
Defendant-Appellant.)	
)	Honorable
)	Teresa K. Righter,
)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Presiding Justice Knecht and Justice Appleton concurred
in the judgment.

ORDER

Held: Pursuant to *Anders v. California*, no meritorious issue can be raised on appeal. Accordingly, OSAD's motion to withdraw as counsel on appeal is allowed, and the trial court's judgment is affirmed as modified and remanded with directions to amend the judgment order to grant defendant a credit against the DNA-analysis fee and any other applicable fines and fees.

This case comes to us on the motion of the office of the State Appellate Defender (OSAD) to withdraw as counsel on appeal on the ground no meritorious issues can be raised in this case. For the following reasons, we agree and affirm the trial court's judgment as modified and remand with directions.

I. BACKGROUND

On April 24, 2008, the State charged defendant, Anthony Reale, with criminal sexual assault (720 ILCS 5/12-13(a)(1) (West 2008)), a Class 1 felony. Additionally, in the same case, on

June 4, 2008, the State charged defendant with solicitation of murder for hire (720 ILCS 5/8-1.2(a) (West 2008)), a Class X felony; and on March 27, 2009, conspiracy to commit first degree murder (720 ILCS 5/8-2(a), 9-1(a)(1) (West 2008)), a Class 1 felony.

On March 27, 2009, defendant as part of a fully negotiated guilty plea, pleaded guilty to the criminal-sexual-assault charge and the conspiracy-to-commit-first-degree-murder charge. In return, the State agreed to dismiss the remaining count of solicitation of murder for hire. The trial court heard the factual basis, admonished defendant, and accepted the guilty plea.

The trial court sentenced defendant, consistent with the terms of the plea agreement, to nine years' imprisonment for the criminal-sexual-assault conviction and ordered him to pay \$1,000 in fines and court costs and a \$500 sex-offender fine. He was given credit for 339 days previously served, ordered to submit to a deoxyribonucleic acid (DNA) sample and pay the applicable fee, and ordered to serve 85% of the sentence, which was also consistent with the plea agreement. Further, consistent with the terms of the plea agreement, the court sentenced defendant to 14 years' imprisonment for conspiracy to commit first degree murder to run consecutive to the criminal-sexual-assault sentence. He was also ordered to pay \$1,000 in fines and court

costs, to pay a \$500 public-defender fee, and to submit to a DNA sample and pay the applicable fee. Also, the court noted defendant did not have any credit for the conspiracy-to-commit-first-degree-murder conviction.

After announcing the sentence, the trial court advised defendant of his right to appeal. In particular, the court informed defendant:

"[Y]ou must first file a motion to withdraw your guilty plea and vacate the judgment. That motion must be in writing. It must be on file within 30 days of [March 27, 2009], and it must set forth all of your reasons for asking the [c]ourt to allow you to withdraw your guilty plea and vacate the judgment. Any reason not stated in that motion would be deemed waived for purposes of appeal.

If I grant your motion, I would vacate the judgment of conviction and the sentence and allow you to withdraw your guilty plea and the counts would be set over for trial. Count II, which was dismissed as part of this plea agreement, could be reinstated at the request of the State and also set for trial.

If I deny your motion, you would have 30 days thereafter in which to file a notice of appeal in the circuit clerk's office. If you cannot afford an attorney to assist you with either of these matters or to purchase a copy of the transcript of these proceedings, those would be provided to you free of charge."

On April 30, 2009, defendant filed a *pro se* motion for reduction of sentence, arguing the sentence imposed was too harsh for a first-time offender, and he was coerced and "entrapped" with regard to the conspiracy charge. Attached to defendant's *pro se* motion was an affidavit of service dated April 24, 2009, 28 days after the trial court orally pronounced sentence.

On May 26, 2009, defendant's counsel informed the trial court he had communicated with defendant, and it appeared defendant was contemplating withdrawing his *pro se* motion for reduction of sentence.

On June 15, 2009, defendant filed an affidavit stating he had reviewed his case and believed his guilty plea was the result of a negotiated guilty plea. He also stated he had reviewed Illinois Supreme Court Rule 604(d) (eff. July 1, 2006) and noted he was required to file a motion to withdraw his guilty plea before a sentence reduction could be addressed. Further, defendant stated he did not "find any grounds to move [the] court

to withdraw [his] plea of guilty." Therefore, he stated he "would like to withdraw [his] motion [for reduction of sentence] and not file a motion to withdraw [his] guilty plea."

On July 6, 2009, the trial court granted defendant's request to withdraw the June 15, 2008, affidavit and gave defendant 45 days to file "additional pleadings with regards to withdrawing the guilty plea." On September 28, 2009, defendant filed a motion to withdraw guilty plea, arguing he was forced to accept a plea of guilty because the court incorrectly denied his motion requesting severance of the criminal-sexual-assault charge and the solicitation-of-murder-for-hire charge. In his motion to withdraw his guilty plea, defendant further argued his guilty plea was the result of "coercion and other inducements which make the guilty plea not knowingly, intelligently or voluntarily entered." Additionally, defendant's counsel filed a Rule 604(d) certificate, stating he consulted with defendant, examined the court file and report of proceedings of the sentencing hearing, and determined a motion to withdraw guilty plea needed to be filed to adequately present the alleged defects in the proceedings.

On October 23, 2009, the State filed a motion to dismiss defendant's motion to withdraw guilty plea, arguing defendant's motion was untimely and failed to sufficiently state the grounds for withdrawal of the plea. On November 13, 2009,

the trial court granted the State's motion to dismiss, stating the motion was untimely because the filing of the motion for reduction of sentence did not toll the 30-day limitation period allowed for filing a motion for leave to withdraw guilty plea.

In December 2009, defendant filed a notice of appeal, and the trial court appointed OSAD to serve as his attorney. In January 2011, OSAD moved to withdraw, attaching to its motion a brief in conformity with the requirements of *Anders v. California*, 386 U.S. 738 (1967). The record shows service of the motion on defendant. On its own motion, this court granted defendant leave to file additional points and authorities by February 18, 2011, but defendant has not done so. After examining the record and executing our duties in accordance with *Anders*, we grant OSAD's motion and affirm the trial court's judgment as modified and remand with directions.

II. ANALYSIS

OSAD contends no colorable argument can be made the trial court erred in granting the State's motion to dismiss defendant's motion to withdraw guilty plea. Specifically, OSAD contends defendant is unable to appeal his convictions and sentences because (1) he failed to file a timely motion to withdraw his guilty plea, and (2) his failure to file a timely motion to withdraw his guilty plea is not excused because (i) his *pro se* motion for reduction of sentence was ineffective to extend

the time to file a motion to withdraw his guilty plea, (ii) the court's order granting defendant an extension of time to file a motion to withdraw guilty plea was ineffective, and (iii) he was properly admonished as required under Illinois Supreme Court Rule 605(c) (eff. Oct. 1, 2001). Additionally, we note the court gave defendant credit for 339 days previously served but failed to grant the \$5-per-day credit against some of his fines and fees.

A. Timeliness of Motion To Withdraw Guilty Plea

First, OSAD argues defendant failed to file a motion to withdraw guilty plea within 30 days of sentencing as required under Illinois Supreme Court Rule 604(d) (eff. July 1, 2006).

Rule 604(d) states, in pertinent parts, as follows:

"No appeal from a judgment entered upon a plea of guilty shall be taken unless the defendant, within 30 days of the date on which sentence is imposed, files in the trial court a motion to reconsider the sentence, if only the sentence is being challenged, or, if the plea is being challenged, a motion to withdraw the plea of guilty and vacate the judgment. No appeal shall be taken upon a negotiated plea of guilty challenging the sentence as excessive unless the defendant, within 30 days of the imposition of sentence,

files a motion to withdraw the plea of guilty and vacate the judgment." Ill. S. Ct. R. 604(d) (eff. July 1, 2006).

Here, defendant was sentenced on March 27, 2009, after entering a fully negotiated guilty plea. On April 30, 2009, defendant filed a *pro se* motion for reduction of sentence, arguing he was coerced and "entrapped" with regard to the conspiracy charge, and his sentence was too harsh for a first-time offender. Attached to defendant's *pro se* motion was an affidavit of service dated April 24, 2009, 28 days after the trial court orally pronounced sentence. On September 28, 2009, approximately six months after sentencing, defendant filed a motion to withdraw his guilty plea.

Although defendant's *pro se* motion for reduction of sentence was filed within the 30-day deadline, defendant failed to file the correct motion to challenge his sentence under Rule 604(d). If a defendant wishes to challenge a sentence imposed pursuant to a fully negotiated guilty plea, he must file a motion to withdraw guilty plea and vacate the trial court's judgment. *People v. Linder*, 186 Ill. 2d 67, 74, 708 N.E.2d 1169, 1172-73 (1999). "Where a defendant fails to comply with the motion requirements of Rule 604(d), *** the appellate court must dismiss the appeal." *Linder*, 186 Ill. 2d at 74, 708 N.E.2d 1173.

Because defendant failed to file a motion to withdraw his

guilty plea prior to the filing of his motion for reduction of sentence, he has failed to comply with the requirements set forth in Rule 604(d). Therefore, the trial court correctly denied defendant's motion to withdraw guilty plea as untimely.

B. Excuse for Untimely Motion To Withdraw Guilty Plea

Next, OSAD argues defendant's failure to file a timely motion to withdraw his guilty plea is not excused because (1) defendant's *pro se* motion for reduction of sentence was ineffective to extend the time to file a motion to withdraw guilty plea, (2) the trial court's order granting defendant an extension of time to file a motion to withdraw guilty plea was ineffective, and (3) defendant was properly admonished as required under Illinois Supreme Court Rule 605(c) (eff. Oct. 1, 2001).

1. *Pro Se Motion for Reduction of Sentence*

OSAD first argues defendant's failure to file a timely motion to withdraw his guilty plea is not excused because his *pro se* motion for reduction of sentence was ineffective to extend the time to file a motion to withdraw guilty plea.

In *People v. Woods*, 134 Ill. App. 3d 294, 298-99, 480 N.E.2d 179, 182-83 (1985), this court held a timely filed motion to reconsider sentence clearly manifesting an intent to withdraw a guilty plea was sufficient for the trial court to consider a motion to withdraw guilty plea filed after the 30-day filing deadline.

Here, defendant's *pro se* motion for reduction of sentence was the only motion filed within the 30-day limitation period. Therefore, in order for defendant to be able to challenge his sentence under Rule 604(d), his *pro se* motion for reduction of sentence must manifest an intention to withdraw his guilty plea.

Defendant's *pro se* motion for reduction of sentence stated defendant was coerced and "entrapped" with regard to the conspiracy charge, and his sentence was too harsh for a first-time offender. Additionally, in defendant's June 15, 2009, affidavit, he stated he would like to withdraw his motion for reduction of sentence and not file a motion to withdraw his guilty plea. Although defendant subsequently filed a motion to withdraw guilty plea, his *pro se* motion for reduction of sentence did not state he had any intention of withdrawing his guilty plea. Thus, because defendant's *pro se* motion for reduction of sentence failed to state defendant intended to file a motion to withdraw guilty plea, his *pro se* motion was ineffective to extend the limitation period to file a motion to withdraw guilty plea.

2. Trial Court's Order

OSAD next argues defendant's failure to file a timely motion to withdraw guilty plea is not excused because the trial court's order granting defendant an extension of time to file a motion to withdraw his guilty plea was ineffective.

If a postjudgment motion filed pursuant to Rule 604(d) is not timely filed within 30 days of sentencing and the trial court has failed to extend the filing deadline during the 30-day limitation period, the trial court is divested of jurisdiction to entertain the postjudgment motion. *People v. Flowers*, 208 Ill. 2d 291, 303, 802 N.E.2d 1174, 1181 (2003).

Here, defendant failed to file a motion requesting an extension of time to file his motion to withdraw guilty plea within the 30-day limitation period. On July 6, 2009, after the 30-day limitation period had expired, the trial court granted defendant 45 days to file additional pleadings with regard to withdrawing his guilty plea. Additionally, defendant did not file his motion to withdraw guilty plea until September 28, 2009, approximately six months after sentencing. Because defendant failed to file a motion requesting additional time to file his motion to withdraw guilty plea within 30 days of sentencing, the court was divested of jurisdiction to entertain his September 28, 2009, motion.

3. *Admonishments*

Last, OSAD argues defendant's failure to file a timely motion to withdraw his guilty plea is not excused because defendant was properly admonished as required under Illinois Supreme Court Rule 605(c) (eff. Oct. 1, 2001).

Pursuant to Rule 605(c), following the entry of a

negotiated plea of guilty, the trial court must administer the following admonishments to defendant:

"(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(c) (eff. Oct. 1, 2001).

Here, the trial court's admonishment to defendant was in substantial compliance with Rule 605(c). In particular, the court advised (1) defendant must file a motion to withdraw his guilty plea and vacate the judgment setting forth his reasons for the request within 30 days of sentencing; (2) any reasons not stated in the motion would be deemed waived for purposes of appeal; (3) if the motion was granted, the court would vacate the conviction and sentence and allow defendant to withdraw his guilty plea, and the charges would be set for trial; (4) the solicitation-of-murder-for-hire charge could be reinstated and set for trial at the State's request; (5) if the court denied the motion, defendant would have 30 days from the date of denial to file a notice of appeal; and (6) if defendant was indigent, counsel would be appointed, and defendant would be provided with a copy of the transcripts without costs.

The trial court substantially complied with Rule 605(c) when it admonished defendant of his rights following the entry of a negotiated guilty plea. Accordingly, because the court complied with Rule 605(c), defendant's failure to file a timely motion to withdraw his guilty plea is not excused.

C. \$5-Per-Day Credit

Further, we note defendant is entitled to \$5-per-day credit under section 110-14(a) of the Code of Criminal Procedure of 1963 (725 ILCS 5/110-14(a) (West 2008)) against some of the fines and fees imposed. Defendant is entitled to a credit up to \$1,695 applicable against the DNA-analysis assessment imposed under section 5-4-3(j) of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5-4-3(j) (West 2008)). See *People v. Long*, 398 Ill. App. 3d 1028, 1032, 924 N.E.2d 511, 515 (2010). However, under section 5-9-1.15(b) of the Unified Code (730 ILCS 5/5-9-1.15(b) (West 2008)), defendant is not entitled to a \$5-per-day credit against the \$500 sex-offender fine. Accordingly, we remand this case directing the trial court to amend the judgment order to grant defendant a credit against the DNA-analysis fee and any other applicable fines and fees.

III. CONCLUSION

For the reasons stated, we grant OSAD's motion to withdraw and affirm the trial court's judgment as modified and remand with directions.

Affirmed as modified and remanded with directions.