

NOTICE
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2011 IL App (4th) 110274-U

Filed 8/8/11

NO. 4-11-0274

IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Morgan County
STACEY A. DAVIS,)	No. 09CF206
Defendant-Appellant.)	
)	Honorable
)	Richard T. Mitchell,
)	Judge Presiding.

JUSTICE McCULLOUGH delivered the judgment of the court.
Presiding Justice Knecht and Justice Steigmann concurred in the judgment.

ORDER

¶ 1 *Held:* Where the trial court did not admonish defendant pursuant to Illinois Supreme Court Rule 605(b) (eff. Oct. 1, 2001), remand for further proceedings was necessary.

¶ 2 This appeal comes to us on the motion of defendant Stacey A. Davis's counsel, the office of the State Appellate Defender (OSAD), for remand for strict compliance with Illinois Supreme Court Rule 605(b) (eff. Oct. 1, 2001).

¶ 3 On August 9, 2010, defendant pleaded guilty to two counts of unlawful delivery of a controlled substance (720 ILCS 570/401(d) (West 2010)), pursuant to an open plea.

On October 5, 2010, the trial court sentenced her to two concurrent five-year prison terms. After announcing defendant's sentence, the court admonished defendant regarding her appeal rights as follows:

"I need to advise you, you do have a right of appeal. Within 30 days you must file in writing with this Court any post-trial motions asking the Court to vacate or set aside your guilty pleas. If the Court granted that motion, the matters would be placed back on the docket for trial. At the request of the State, any matters that may have been dismissed, they would be reinstated and you would be tried on those also. Or, you could file a motion asking the Court to reconsider its sentence. If the Court granted that, I could modify or amend my sentence. If you cannot afford a transcript of these proceedings, one will be supplied to you. If you cannot afford counsel, counsel would be appointed to assist you in the preparation of any post-trial motions. In the eventual event of an appeal, any issues not raised in your post-trial motions would be waived for purposes of appeal."

¶ 4 Subsequently, on three separate occasions, defendant *pro se* filed letters informing the trial court that she is "trying to get back in court for a lesser sentence." The letters were dated October 28, 2010, November 19, 2010, and December 17, 2010. The "proof/certificate of service" attached to the first letter showed defendant mailed the letter to the Morgan County circuit clerk's office on November 3, 2010, but the "proof/certificate of service" was not notarized until November 10, 2010. On December 29, 2010, the circuit clerk responded to defendant's letters and informed her that her letters were being forwarded to her trial attorney and the "motions" would be set for hearing as soon as her attorney filed the appropriate paperwork.

¶ 5 On January 3, 2011, defendant's trial counsel filed a motion to modify sentence, arguing defendant's sentence was "substantially longer than anticipated" because she was denied participation in the Department of Correction's impact-incarceration program, which resulted in her sentence being approximately "two and a half years in general population" rather than "nine months in boot camp."

¶ 6 The timeliness of defense counsel's motion to modify sentence was addressed at the January 4, 2011, hearing. At the hearing, the trial court stated as follows:

"Counsel has filed a motion to modify sentence on behalf of Miss Davis, and it was timely filed. I know she just filed a motion, but there was a request from Miss Davis to the Court. I had put it into someone's file and apparently it got lost. So she did file it timely. I know that for a fact, because I remember checking the time."

¶ 7 On March 22, 2001, the trial court denied defendant's motion, stating it advised defendant at sentencing that it could recommend impact incarceration but it had no control over whether she was accepted into the program. Additionally, the court noted defendant entered into an open plea, and she was sentenced to five years' imprisonment.

¶ 8 On March 31, 2011, defendant filed a notice of appeal, and OSAD was subsequently appointed to serve as her attorney.

¶ 9 OSAD asserts this case should be remanded for further proceedings in accordance with Rule 605(b) because the trial court failed to correctly admonish defendant regarding the procedure for appealing a sentence following the entry of an open guilty plea. The State filed an objection to OSAD's motion for remand requesting this court dismiss defendant's appeal because

(1) she failed to file a timely motion pursuant to Illinois Supreme Court Rule 604(d) (eff. July 1, 2006), and (2) the trial court properly admonished her regarding the procedure to appeal following a guilty plea.

¶ 10 Illinois Supreme Court Rule 604(d) (eff. July 1, 2006) states, in pertinent part, 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."

A defendant's failure to comply with Rule 604(d) will result in the dismissal of the appeal. *People v. Foster*, 171 Ill. 2d 469, 471, 665 N.E.2d 823, 824 (1996).

¶ 11 In this case, defendant was sentenced on October 5, 2010. Therefore, she had until November 4, 2010, to file a motion to withdraw her guilty plea or a motion to reconsider sentence. Defendant's first *pro se* letter was filed-stamped by the clerk of the court on November 22, 2010, which was outside the 30-day deadline.

¶ 12 However, defendant's "motion" could still be considered timely filed if it was mailed within the 30-day period. A postplea motion filed by an incarcerated defendant is "considered timely filed if it is placed in the prison mail system within the 30-day period, regardless of the date on which the motion is received or file-stamped." *People v. Tlatenchi*, 391 Ill. App. 3d 705, 710, 909 N.E.2d 198, 204 (2009). Although the "proof/certificate of service"

attached to defendant's letter is dated November 3, 2010, it was notarized on November 10, 2010, after the 30-day period. The trial judge determined the *pro se* letter was a timely motion to reconsider sentence despite it being notarized after the 30-day time period. OSAD contends the "record is murky as to whether [defendant's] letter was timely filed as a motion to reconsider sentence." According to OSAD, if the motion to modify filed by defendant's trial counsel is considered an amended motion, defendant's "previous attempts at filing call into question its jurisdictional value." However, OSAD argues defendant's failure to file a timely motion is due to the trial court's failure to correctly admonish her pursuant to Rule 605(b).

¶ 13 The State counters that it "respectfully disagrees with the trial judge's finding that the *pro se* letter request was timely" because the proof of service (1) failed to satisfy the requirements of Illinois Supreme Court Rule 12(b)(3) (eff. Dec. 29, 2009) and (2) was not complete until it was notarized on November 10, 2010. Additionally, the State argues the trial court's admonishments were sufficient to inform defendant about the proper procedure for appealing her sentence following the entry of the guilty plea.

¶ 14 In *Tlatenchi*, 391 Ill. App. 3d at 713, 909 N.E.2d at 207, the court determined that "when a defendant's motion to withdraw a guilty plea is received by the circuit court after the 30-day time period, and the defendant is thereafter relying upon the date of mailing as the date of filing, proof of mailing shall be as provided by Rule 12(b)(3)." Rule 12(b)(3) sets forth the following requirements for how service by mail is proved:

"[I]n case of service by mail or by delivery to a third-party commercial carrier, by certificate of the attorney, or *affidavit of a person other than the attorney*, who deposited the paper in the mail or delivered the paper to a

third-party commercial carrier, stating the time and place of mailing or delivery, the complete address which appeared on the envelope or package, and the fact that proper postage or the delivery charge was prepaid[.]"

(Emphasis added.)

The affidavit under Rule 12(b)(3) must be a writing that has been "sworn to before an authorized person." *Tlatenchi*, 391 Ill. App. 3d at 714, 909 N.E.2d at 208.

¶ 15 *Tlatenchi*, 391 Ill. App. 3d at 709-710, 909 N.E.2d at 203-04, involved an incarcerated defendant who filed an untimely motion to withdraw guilty plea with an attached proof of service stating the motion was placed in the prison mail system on a date prior to the expiration of the 30-day period. The court determined that although the defendant's proof of service tracked the language of Rule 12(b)(3), "the proof of service [was] not 'sworn to by a party before some person who has authority under the law to administer oaths.'" *Tlatenchi*, 391 Ill. App. 3d at 715, 909 N.E.2d at 208 (quoting *Roth v. Illinois Farmers Insurance Co.*, 202 Ill. 2d 490, 493, 782 N.E.2d 212, 214 (2002)). Accordingly, the court held the "proof of service [did] not constitute an 'affidavit' as required by Rule 12(b)(3)." *Tlatenchi*, 391 Ill. App. 3d at 715, 909 N.E.2d at 208.

¶ 16 Here, defendant's "proof/certificate of service" stated the attached letter was placed in the prison mail system on November 3, 2010, within the 30-day deadline. However, the "proof/certificate of service" was not notarized until November 10, 2010, six days after the 30-day time period expired. Therefore, defendant's "proof/certificate of service" did not constitute an "affidavit" under Rule 12(b)(3) until November 10, 2010, when it was "sworn to by a party before some person who has authority under the law to administer oaths." Accordingly,

the trial court erred in determining defendant filed a timely motion to reconsider sentence.

¶ 17 Generally, "a defendant may not appeal his guilty plea unless he strictly complies" with the provisions of Illinois Supreme Court Rule 604(d) (eff. July 1, 2006). *People v. Anderson*, 309 Ill. App. 3d 417, 421, 722 N.E.2d 244, 247 (1999). However, a trial court's failure to strictly comply with Illinois Supreme Court Rule 605(b) (eff. Oct. 1, 2001) "can relax the requirement that the defendant strictly comply with Rule 604(d)." *Anderson*, 309 Ill. App. 3d at 421, 722 N.E.2d at 247.

¶ 18 Rule 605(b) requires the trial court, after entering judgment upon a defendant's plea of guilty, to advise the defendant of the conditions that must be satisfied before an appeal may be taken. See Ill. S. Ct. R. 605(b) (eff. Oct. 1, 2001) (setting forth the required admonishments). Specifically, Rule 605(b) requires the court admonish the defendant that a motion to reconsider sentence or a motion to withdraw guilty plea must be filed within 30 days of sentencing prior to taking an appeal. Ill. S. Ct. R. 605(b) (eff. Oct. 1, 2001). A trial court is not required to use the exact language of Rule 605(b); however, "the court's admonishments cannot leave out or misrepresent any of the rule's substance." *People v. Harper*, 315 Ill. App. 3d 760, 764, 734 N.E.2d 1033, 1038 (2000). "Proper admonishments under Rule 605(b) ensure a defendant understands the proper procedure for appealing a sentence imposed on a guilty plea." *Harper*, 315 Ill. App. 3d at 764, 734 N.E.2d at 1038.

¶ 19 In this case, the trial court's admonishments were insufficient because the court failed to clearly set forth the requirement that defendant's motion to reconsider sentence must be filed within the same deadline as a motion to withdraw guilty plea. The court admonished defendant that she must file "any post-trial motions asking the Court to vacate or set aside [her]

guilty pleas" within 30 days of sentencing. After advising defendant of the consequences of a motion to withdraw guilty plea being granted, the court then added, "Or, you could file a motion asking the Court to reconsider its sentence." Because it was not clear whether the deadline for the motion to withdraw guilty plea also applied to the motion to reconsider sentence, the court's admonishments were inadequate. Although defendant's postplea motion was deficient because it was not timely filed, the deficiencies in defendant's motion are excused as she was not properly admonished pursuant to Rule 605(b).

¶ 20 Accordingly, we remand with directions that the trial court properly admonish defendant in strict compliance with Rule 605(b) and allow her the opportunity to file an appropriate postplea motion. See *People v. Young*, 387 Ill. App. 3d 1126, 1129, 903 N.E.2d 434, 437 (2009).

¶ 21 Remanded with directions.