

¶ 4 On October 14, 2009, the defendant wrote a letter to the trial court. His letter was handwritten and addressed to Judge Kimmel. The text of his letter is as follows:

"I AM CURRENTLY IN RECEIVING AT MENARD AND AM NOT SURE HOW TO START AN APPEAL. THIS IS WHAT I CAME UP WITH BASED ON MY RESOURCES. I WAS TOLD THAT I HAD 30 DAYS TO START AN APPEAL AND I HAVE HAD NO HELP HERE DESPITE TRYING THE FOLLOWING:

- 1) REQUESTS TO COUNSELOR AND LEGAL
- 2) CONVERSATIONS WITH OTHER INMATES, GUARDS AND STAFF.

I DON'T WANT TO RUN OUT OF TIME SO I HOPE THIS DOCUMENT WILL GET THINGS STARTED PLEASE HAVE THE CLERK FORWARD ME ALL REQUIRED AND RELATED PAPERWORK. THANK YOU VERY MUCH JUDGE KIMMEL."

¶ 5 Thereafter on October 20, 2009, the defendant filed a *pro se* document with the circuit court that was in the framework of a pleading and was titled "Formal Appeal in Regards to Above Case." In the introduction of this pleading, the defendant seeks to appeal his sentence and requests the appointment of an attorney to represent him. He alleged four different due process violations in connection with his appointed trial attorney. The defendant alleges that his attorney told him that if he went to trial she would not call his four witnesses, that seeking a speedy trial was irrelevant to his case, and that she would not seek a change of venue on the basis that the defendant's family was well known as being involved in criminal activities. The defendant also complained that on more than one occasion, his attorney spoke to him about his codefendant's disposition and plea even though the cases were severed. The defendant also alleged that his attorney coerced and pressured him into accepting the guilty

plea. The defendant alleged that his attorney told him that if he did not plead guilty that he would be convicted, that he would receive a 30-year sentence, that additional charges would be filed against him, and that he would have to register as a sex offender which could impact his ability to see his son. Finally, the defendant alleged that the sentence was excessive in light of his minimal criminal history.

¶ 6 The Jackson County circuit clerk treated the defendant's *pro se* motion as an indication that he wanted to appeal, and filed a notice of appeal with this court on October 23, 2009. On November 10, 2009, the defendant's trial-appointed attorney filed a motion to withdraw plea of guilty in the trial court, noting that this motion had not been previously filed by the defendant on a *pro se* basis or by the Jackson County circuit clerk. The defendant's attorney argued that in order to perfect his appeal, the defendant must first file a motion to withdraw his guilty plea and that motion must be denied by the trial court. The defendant's attorney asked the court to consider the defendant's *pro se* appeal as a motion to withdraw his guilty plea. If the trial court did not treat the defendant's October 20, 2009, "Formal Appeal" as a motion to withdraw his guilty plea, then the defendant's 30-day statutory time limit would have expired.

¶ 7 At the hearing on the defendant's motion, his attorney argued that his intent to ask to withdraw his guilty plea was clear from his *pro se* notice. The State argued that the defendant's motion was untimely. The trial court denied the defendant's motion to withdraw his plea on December 21, 2009.

¶ 8 On December 28, 2009, this court entered its order *sua sponte* directing the defendant to show cause why his appeal should not be dismissed for lack of jurisdiction because the appeal was interlocutory rather than from a final judgment. On February 18, 2010, this court dismissed the defendant's first appeal.

¶ 9 On January 12, 2010, while his first appeal was pending in this court, the defendant

filed his notice of appeal of the trial court's December 21, 2009, order denying his motion to withdraw his guilty plea.

¶ 10 The only issue raised by the defendant in this appeal is whether or not the court should have treated his *pro se* notice as a motion to withdraw his guilty plea, rather than as a notice of appeal. If the *pro se* document is construed as a motion to withdraw the defendant's guilty plea, the motion was timely.

¶ 11 The State argues that we lack jurisdiction to hear this appeal because the trial court was effectively divested of jurisdiction because of the defendant's initial appeal to this court. The State contends that the trial court's order of December 21, 2009, was void and cannot be the foundation of this appeal. Because of the dispositive nature of this argument, we address the jurisdictional issue first.

¶ 12 Illinois Supreme Court Rule 604(d) provides the procedure that must be followed by a defendant seeking to challenge his sentence. Ill. S. Ct. R. 604(d) (eff. July 1, 2006). The rule provides:

"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. *** The motion shall be in writing and shall state the grounds therefor. *** If the motion is denied, a notice of appeal from the judgment and sentence shall be filed within the time allowed in Rule 606, measured from the date of entry of the order denying the motion. Upon appeal any issue not raised by the defendant in the motion to reconsider the sentence or withdraw the plea of guilty and vacate the judgment shall be deemed waived." Ill. S. Ct. R. 604(d) (eff. July 1, 2006).

¶ 13 The defendant did not file a motion to withdraw his guilty plea as mandated by Supreme Court Rule 604(d). Instead he filed a pleading that was labeled and construed as

an appeal.

¶ 14 After a notice of appeal is filed in the court of appeals, appellate jurisdiction automatically attaches. *People v. Stevenson*, 2011 IL App (1st) 093413, ¶ 43 (citing *People v. Henry*, 329 Ill. App. 3d 397, 402, 769 N.E.2d 34, 39 (2001)); see also *People v. Shukovsky*, 128 Ill. 2d 210, 227, 538 N.E.2d 444, 451 (1988); *People v. Mabry*, 398 Ill. App. 3d 745, 757, 926 N.E.2d 732, 743 (2010); *People v. Jackson*, 239 Ill. App. 3d 165, 166, 606 N.E.2d 809, 810 (1992). Once the appellate court is vested with jurisdiction, the trial court loses jurisdiction. *Id.* Because the trial court lacks jurisdiction, any actions taken by the trial court are null and void. *Stevenson*, 2011 IL App (1st) 093413, ¶ 43. The lack of subject matter jurisdiction over a case cannot be waived by the parties. *Id.* Once jurisdiction is properly in the appellate court, "[t]he parties cannot, by agreement, acquiescence, or otherwise, reconstitute jurisdiction in the trial court when jurisdiction lies in the appellate court." *Id.* (quoting *Henry*, 329 Ill. App. 3d at 403, 769 N.E.2d at 39).

¶ 15 Despite the fact that an appellate court discovers that the defendant did not file a motion to withdraw his guilty plea pursuant to Supreme Court Rule 604(d), the appellate court is not deprived of jurisdiction in that appeal. *People v. Flowers*, 208 Ill. 2d 291, 301, 802 N.E.2d 1174, 1180 (2003). While the appellate court maintains jurisdiction, the appellate court is not allowed to consider the appeal on its merits because of the defendant's failure to timely file a Rule 604(d) motion. *Flowers*, 208 Ill. 2d at 301, 802 N.E.2d at 1180.

¶ 16 In this case, the defendant filed his *pro se* pleading in the trial court seeking to appeal. Regardless of whether or not that pleading could have been construed as a motion to withdraw his guilty plea, the case was filed in this court as an appeal. At that point, this court acquired jurisdiction *instanter* and the trial court simultaneously lost jurisdiction. While this court could have remanded the case back to the circuit court rather than dismissing the appeal, the defendant's appointed appellate public defender agreed to the dismissal on

January 20, 2010. Until this court's dismissal and termination of appellate jurisdiction on February 18, 2010, the trial court lacked the jurisdictional ability to address the matter of withdrawal of his guilty plea. Therefore, the trial court's order of December 21, 2009, which serves as the foundation of this appeal, was void. Although the defendant's trial attorney and the State's Attorney's office both participated in the hearing of the defendant's late-filed motion seeking to withdraw his guilty plea, the trial court was not revested with jurisdiction. Because a void order is the subject matter of this appeal, we do not have jurisdiction to hear this matter.

¶ 17 Because the December 21, 2009, order from which the defendant appeals was void for lack of jurisdiction, we vacate that order and dismiss this appeal.

¶ 18 Order vacated and appeal dismissed.