



"Since you've entered into a voluntary plea agreement today, before you could actually file a notice of appeal, you would first have to file a motion to withdraw your voluntary plea, and that motion would have to be in writing and it would have to state each and every reason why you would want to withdraw your plea. It would have to be filed within 30 days of today's date, and it would be filed with our clerk right here in Edwardsville. You could file that motion yourself, you could hire a private attorney to do that for you, or if you could not afford to hire a private attorney, an attorney could be appointed to file that motion for you.

If your motion to withdraw your voluntary plea were granted, sir, then these negotiations would be cancelled, this case would be set for jury trial, and certainly the People could move to reinstate all the other charges that they agreed to dismiss as a part of this plea.

If your motion to withdraw your voluntary plea were denied, sir, you would then have 30 days from the date of that denial to file your Notice of Appeal."

Defendant answered in the affirmative that he understood his appeal rights.

On April 20, 2009, defendant filed a motion to withdraw his guilty plea, arguing that he was not adequately represented and that his guilty plea was involuntary and coerced. On November 5, 2009, a hearing was held on the motion to withdraw the guilty plea. On November 6, 2009, defendant's motion to withdraw the guilty plea was denied. Defendant filed this timely appeal.

#### ANALYSIS

On appeal, defendant argues (1) that he was not properly admonished under Supreme Court Rule 605(c) (eff. Oct. 1, 2001), (2) that he had a defense worthy of consideration, (3) that the sentence he received was more onerous than the sentence he negotiated, and (4) that he did not receive effective assistance of counsel during the preparation and presentation of

his motion to withdraw his guilty plea. Defendant prays that this court will reverse the circuit court's order denying the motion to withdraw guilty plea and remand this case for proper admonishments, the appointment of new counsel, and an opportunity to file a new motion to withdraw the guilty plea.

In response, the State argues that defendant was substantially admonished under Rule 605(c). It also argues that defendant's motion was properly denied because he knowingly made the decision to plead guilty and forego his opportunity to put forth his alleged defense worthy of consideration. Moreover, the State argues that defendant's sentence is not more onerous than he negotiated for because he knew he had to serve at least 85% of his sentence. Lastly, the State argues that postplea counsel was not ineffective because (1) an affidavit is not required when the witness testifies at the motion hearing and (2) counsel did not urge defendant to plead guilty before obtaining discovery.

#### I. Proper Admonishments Under Rule 605(c)

We will address each of defendant's contentions in turn. First, we turn to defendant's argument that he was not properly admonished under Rule 605(c). Questions regarding the application of supreme court rules are reviewed *de novo*. *People v. Stewart*, 365 Ill. App. 3d 744, 751 (2006). Supreme Court Rule 605(c) requires the following:

"In all cases in which a judgment is entered upon a negotiated plea of guilty, at the time of imposing sentence, the trial court shall advise the defendant substantially as follows:

- (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).

"However, the trial court is not required to use the exact language of the rule and the admonishments will be deemed insufficient only where the court fails to convey the substance of the rule." *People v. Tlatenchi*, 391 Ill. App. 3d 705, 721 (2009).

In the instant case, defendant claims that the circuit court failed to admonish him that any claim not raised in the motion would be deemed forfeited on appeal. However, the circuit court specifically advised defendant that the motion "would have to state each and every reason why you would want to withdraw your plea." Thus, defendant was admonished that all his reasons had to be included in order to be able to raise them on appeal. Moreover, when the court asked defendant if he understood the admonishment, he answered in the affirmative. Although the court did not use the exact language of Rule 605(c), we conclude that the admonishments given by the court substantially conveyed the substance of the rule.

## II. Defense Worthy of Consideration

We next address defendant's argument that his motion to withdraw his guilty plea should not have been denied because he had a defense worthy of consideration. "A defendant does not have an absolute right to withdraw a guilty plea and bears the burden of demonstrating to the trial court the necessity of withdrawing the plea." *People v. Dougherty*, 394 Ill. App. 3d 134, 140 (2009). A reviewing court will not disturb a circuit court's denial of a motion to withdraw a guilty plea absent an abuse of discretion. *Id.* The court should allow a defendant to withdraw his guilty plea if "(1) the plea was entered on a misapprehension of the facts or the law, (2) there is doubt as to the guilt of the accused, (3) the accused has a meritorious defense, or (4) the ends of justice will be better served by submitting the case to a jury." *Id.*

Here, defendant alleges that there was enough evidence that he could have established the affirmative defense of justifiable use of force and that, therefore, the court should not have denied his motion to withdraw guilty plea. However, defendant knew that he would be choosing to abandon any affirmative defenses if he pled guilty, and he knowingly decided to take the negotiated plea agreement. It was defendant's burden to provide objective evidence to the trial court that he should be allowed to withdraw his guilty plea, and we do not find that the circuit court abused its discretion in denying the motion.

## III. More Onerous Sentence Than Negotiated Sentence

Next, we will address defendant's argument that the sentence he is serving is more onerous than his negotiated sentence. He argues that he will have to serve three days more than 85% of his sentence and that he was only admonished that he would have to serve 85% of his sentence and not "at least 85%".

However, Illinois Supreme Court Rule 605(c) (eff. Oct. 1, 2001) and section 3-6-3 of the Unified Code of Corrections (730 ILCS 5/3-6-3 (West 2008)) do not require the court

to admonish defendant regarding the rules and regulations of early release. A defendant must be advised of the direct consequences of a guilty plea for the plea to be voluntary, but the defendant does not have to be informed of collateral consequences. *People v. Castano*, 392 Ill. App. 3d 956, 959 (2009). "Although any amount of good-conduct credit ultimately impacts the amount of time that a prisoner actually spends in prison, the application of the statute does not have a definite, immediate[,] or automatic effect on the sentence imposed," and thus, it is not a direct consequence of a guilty plea. *Id.* Therefore, the 85% rule is governed by statute and is not a part of a negotiated plea agreement. We conclude that it is defendant's behavior which controls whether he serves more than 85% of his sentence and not the court or the negotiated agreement.

#### IV. Ineffective Assistance of Counsel

Lastly, we turn to defendant's argument that he received ineffective assistance of counsel during the preparation and presentation of the motion to withdraw the guilty plea.

We review claims of ineffective assistance under the test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To determine whether a defendant has been given ineffective assistance of counsel, defendant must show (1) that counsel's representation fell below an objective standard of reasonableness and (2) that it is reasonably probable that the case was prejudiced by counsel's unprofessional error and that the outcome would have been different absent counsel's errors. *Id.* at 687.

Defendant claims two errors made by postplea counsel. First, defendant alleges that postplea counsel did not attach supporting affidavits to the motion to withdraw the guilty plea in accordance with Supreme Court Rule 604(d) (eff. July 1, 2006). Supreme Court Rule 604(d) requires that a supporting affidavit be attached to the motion to withdraw the guilty plea if the motion is based on facts outside of the record. *Id.*

In the instant case, the motion alleged that defendant had been coerced by his

girlfriend to plead guilty and take the negotiated agreement. While these facts were outside the record at the time the motion was filed, defendant's girlfriend testified to these facts at the hearing on the motion. Therefore, even if postplea counsel was in error for not attaching the affidavit, the error would not meet the second prong of the *Strickland* test in that the outcome would not have been different because of the error. The testimony of defendant's girlfriend at the hearing cured any possible error that could have arisen from the failure to attach the affidavit.

Next, defendant alleges that he received ineffective assistance of counsel because, at the hearing, postplea counsel failed to argue that plea counsel was ineffective for advising defendant to plead guilty before all the discovery materials were received. The Illinois Supreme Court rules do not require that all discovery is to be received before a defendant is allowed to accept a negotiated plea. Moreover, the record shows that defendant stated that he went over the discovery materials with his first attorney, who later withdrew, so the argument that the discovery materials were not received by the time he was appointed counsel fails. Therefore, plea counsel would have had a majority of the discovery when he advised defendant to accept the plea offer.

We conclude that advising defendant to accept a plea offer for 8 years instead of continuing to a trial on charges carried a minimum sentence of 25 years of imprisonment upon conviction was reasonable in this case. In light of this decision, we do not think that there was an error on the part of postplea counsel in failing to argue ineffective assistance of plea counsel.

## CONCLUSION

For the foregoing reasons, we conclude that the circuit court did not abuse its discretion in denying defendant's motion to withdraw the guilty plea, and the judgment is affirmed.

Affirmed.