

NOTICE

Decision filed 10/25/11. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2011 IL App (5th) 100163-U
NO. 5-10-0163
IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

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).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Clinton County.
)	
v.)	No. 09-CF-20
)	
JAMIL RYAN JABER,)	Honorable
)	William J. Becker,
Defendant-Appellant.)	Judge, presiding.

JUSTICE WEXSTTEN delivered the judgment of the court.
Justices Donovan and Spomer concurred in the judgment.

ORDER

¶ 1 *Held:* Remand required where defense counsel failed to certify compliance with Supreme Court Rule 604 and the defendant was improperly admonished pursuant to Supreme Court Rule 605.

¶ 2 On appeal from the trial court's denial of his postplea motion to reduce sentence, the defendant, Jamil Ryan Jaber, argues that his cause must be remanded because his attorney failed to file a certificate stating that he had complied with the requirements of Supreme Court Rule 604(d) (eff. July 1, 2006). We agree, and we further find that the defendant's cause must also be remanded for compliance with Supreme Court Rule 605(c) (eff. Oct. 1, 2001).

¶ 3 **BACKGROUND**

¶ 4 On February 13, 2009, the State filed an information charging the defendant with one count of criminal sexual assault (count I) (720 ILCS 5/12-13(a)(1) (West 2008)) and one count of aggravated criminal sexual assault (count II) (720 ILCS 5/12-14(a)(2) (West 2008)).

On August 26, 2009, pursuant to negotiations with the State, the defendant entered a plea of guilty to count II. In exchange for the defendant's plea, the State dismissed count I and agreed that "he would be sentenced in the range of 6 to 17 years rather than 6 to 30." When accepting the defendant's plea, the trial court stated that it would honor the negotiated 17-year "cap."

¶ 5 On December 2, 2009, the trial court sentenced the defendant to a 15-year term of imprisonment on count II, followed by a 3-year term of mandatory supervised release. When advising the defendant of his right to appeal, the trial court referred to his guilty plea as an "open" plea and then admonished him as follows:

"If you think that there's been something wrong that's happened during the course of the plea or this sentencing[,] you can file a motion to withdraw your plea or a motion to challenge the sentence. It has to be in writing. If you need a lawyer or a transcript[,] one would be provided at no cost. You have to file that motion to challenge the sentence or to withdraw your plea within 30 days. If you don't, you lose your right to appeal those issues. If the motion to withdraw your plea is granted[,] we go back to the beginning. Anything that was dismissed can be reinstated. If the motion to challenge your sentence, if you elect just to do that, is granted, you would get a new sentence. If you didn't like that sentence you would have to appeal that within 30 days." See Ill. S. Ct. R. 605(b) (eff. Oct. 1, 2001).

¶ 6 On December 31, 2009, the defendant filed a motion to reduce sentence, in which he raised several arguments in support of his request that the 15-year sentence he received be reduced "preferably to the minimum of six (6) years." In paragraph 3 of the motion, the defendant asked that the trial court "allow him to withdraw his plea of guilt contingent upon the limited purpose of procedurally allowing this motion to reduce sentence to be considered and granted if such motion to withdraw [his plea of guilt] is found necessary." The motion

also adopted by reference arguments raised in *pro se* pleadings the defendant purportedly mailed from prison on December 23, 2009.

¶ 7 On March 5, 2010, the cause proceeded to a hearing on the defendant's motion to reduce sentence. At the commencement of the hearing, without objection, the trial court granted defense counsel's request that the defendant's *pro se* pleadings be incorporated into the motion to reduce sentence. Noting that one of the *pro se* pleadings was a motion to withdraw guilty plea, the trial court then inquired whether the defendant intended to "pursue that." Referring to paragraph 3 of the motion to reduce sentence, counsel explained that although he believed that the defendant did not have to move to withdraw his guilty plea before the court could consider his motion to reconsider sentence, the defendant was nevertheless moving to withdraw his guilty plea as a "procedural matter" in the event that counsel's belief was mistaken. Counsel thus suggested that the trial court "procedurally deny" the motion to withdraw guilty plea so as to eliminate any "procedural question mark" that might later arise. After stating that it was also under the impression that the defendant was not required to "move to withdraw the guilty plea if he only want[ed] to challenge the sentence," the trial court denied the motion to withdraw guilty plea, even though it believed that doing so was not "necessary." After hearing arguments on the defendant's motion to reduce sentence, the trial court denied it, and the present appeal followed.

¶ 8

ANALYSIS

¶ 9 As previously indicated, the defendant maintains that his cause must be remanded because his trial attorney failed to strictly comply with Rule 604(d)'s certification requirement. In response, the State argues that the defendant's appeal should be dismissed because he failed to strictly comply with Rule 604(d)'s motion requirement. It is undisputed that the defendant's guilty plea was a "negotiated plea." See *People v. Edmonson*, 408 Ill. App. 3d 880, 881 (2011).

¶ 10 "Rule 604(d) contains two provisions that are relevant here. First, the rule provides as follows:

'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. For purposes of this rule, a negotiated plea of guilty is one in which the prosecution has bound itself to recommend a specific sentence, or a specific range of sentence, or where the prosecution has made concessions relating to the sentence to be imposed and not merely to the charge or charges then pending.' [Citation.]

This is generally known as the 'motion requirement.' By its express terms, it is applicable only to negotiated pleas, not to open pleas. The premise underlying this requirement is that when a defendant pleads guilty in exchange for a limit on the sentence that can be imposed, allowing the defendant to challenge that sentence without withdrawing his guilty plea 'unfairly binds the State to the terms of the plea agreement while giving the defendant the opportunity to avoid or modify those terms.' [Citation.]

Rule 604(d) further provides as follows:

'The defendant's attorney shall file with the trial court a certificate stating that the attorney has consulted with the defendant either by mail or in person to ascertain [the] defendant's contentions of error in the sentence or the entry of the plea of guilty, has examined the trial court file and report of proceedings of the plea of guilty, and has made any amendments to the motion necessary for adequate presentation of any defects in those proceedings.' [Citation.]

This is known as the 'certification requirement' of Rule 604, and it is applicable to any

postplea motion. The purpose of this requirement is to ensure that defense counsel considers all the possible grounds for either withdrawing the guilty plea or (in the case of an open plea) challenging the sentence. [Citation.]

Courts treat the failure to comply with these requirements differently. As the defendant correctly notes, the remedy for a failure to comply with the certification requirement is to remand to the trial court for a new motion and a hearing in compliance with the rule. [Citation.] However, where a defendant has failed to comply with the motion requirement, the appellate court generally cannot reach the merits of his arguments and must instead dismiss the appeal. [Citation.]" *People v. DeRosa*, 396 Ill. App. 3d 769, 773-74 (2009).

¶ 11 Here, noting that the defendant's motion to withdraw guilty plea was nothing more than a "hollow" procedural vehicle, the State contends, *inter alia*, that the defendant "failed to file a good-faith motion to withdraw the plea and vacate the judgment that strictly complied with the letter, spirit, and purpose of Rule 604(d)." The State faults the defendant for filing a "sham" motion to withdraw guilty plea that was intended solely "for the purpose of preserving [his] appellate rights and for the purpose of allowing the judge to proceed to the sentencing issue." While we tend to agree with the State's characterization of the defendant's motion to withdraw guilty plea, the State's argument ignores that in light of the Rule 605 admonishments that the defendant received, to hold that the defendant failed to comply with Rule 604(d)'s motion requirement would result in a violation of due process.

¶ 12 As previously indicated, pursuant to Rule 604(d), to perfect an appeal from a judgment entered on a negotiated plea, a defendant must file a written motion to withdraw his plea and vacate the judgment. Ill. S. Ct. R. 604(d) (eff. July 1, 2006). "Compliance with Rule 604(d) is a condition precedent to a defendant's appeal" (*People v. Jamison*, 181 Ill. 2d 24, 28 (1998)), and Supreme Court Rule 605 "mandates that trial judges admonish defendants

regarding the requirements of Rule 604(d), thus ensuring that the ramifications of noncompliance comport with due process" (*People v. Foster*, 171 Ill. 2d 469, 472 (1996)). "Rule 605 is a necessary corollary to Rule 604(d)" (*People ex rel. Alvarez v. Skryd*, 241 Ill. 2d 34, 41 (2011)), and the two rules "are meant to work together" (*Jamison*, 181 Ill. 2d at 29).

¶ 13 Here, when imposing sentence, the trial court admonished the defendant that he could file a motion to withdraw his guilty plea *or* a motion to challenge his sentence. The court further indicated that the defendant could "elect" to only challenge his sentence without first moving to withdraw his plea. While the admonishments that the defendant received were therefore consistent with Rule 605(b), which governs open pleas, they failed to comply with Rule 605(c), which governs negotiated pleas. Moreover, at the hearing on the defendant's motion to reduce sentence, when defense counsel indicated uncertainty as to whether the defendant was required to move to withdraw his guilty plea before the trial court could consider his motion to reduce sentence, the court again indicated that the defendant was not required to "move to withdraw the guilty plea if he only want[ed] to challenge the sentence." Without objection, the court then granted counsel's request that the defendant's motion to withdraw guilty plea be denied as a "procedural matter."

¶ 14 "Dismissal of an appeal based on a defendant's failure to file the requisite motions in the trial court would violate due process if the defendant did not know that filing such motions was necessary." *People v. Flowers*, 208 Ill. 2d 291, 301 (2003). Applying this principle here, to hold that the defendant's *pro forma* motion to withdraw his guilty plea failed to satisfy Rule 604(d)'s motion requirement would violate due process given that he was consistently led to believe that he was not required to file a motion to withdraw his plea at all if he only wished to challenge his sentence. Accordingly, we will not dismiss the defendant's appeal on the ground that his motion to withdraw guilty plea was disingenuous.

Given the State's insistence that the proceedings on the defendant's motion to withdraw guilty plea failed to strictly comply with Rule 604(d)'s motion requirement, we will, however, assume, *arguendo*, that the defendant failed to satisfactorily follow Rule 604(d). See *People v. Haley*, 315 Ill. App. 3d 717, 720 (2000) (holding that "a defendant dissatisfied with his negotiated or capped sentence must not only (1) file a motion to withdraw his guilty plea, but (2) convince the trial court that the motion should be granted to correct a manifest injustice").

¶ 15 "When the trial court fails to properly admonish a defendant how to perfect an appeal from a negotiated guilty plea, and [the] defendant fails to follow Rule 604(d), it is appropriate to remand the cause to the trial court for proceedings consistent with Rule 605(c)." *People v. Pressey*, 357 Ill. App. 3d 887, 890 (2005). The State does not dispute that defense counsel failed to file a Rule 604(d) certificate, and we accordingly remand for compliance with that rule as well. *Id.* at 890-91; see also *People v. Neal*, 403 Ill. App. 3d 757, 760-61 (2010). On remand, the defendant "shall be allowed to file a new motion to withdraw guilty plea and shall be allowed a new hearing on that motion." *Pressey*, 357 Ill. App. 3d at 891.

¶ 15 CONCLUSION

¶ 16 For the foregoing reasons, we reverse the trial court's judgment denying the defendant's motion to reduce sentence and remand this cause for compliance with Supreme Court Rules 604(d) and 605(c).

¶ 17 Reversed and remanded with directions.