

No. 1-11-0146

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 09 CR 2754
)	
JOSEPH CALIENDO,)	Honorable
)	Carol A. Kipperman,
Defendant-Appellant.)	Judge Presiding.

JUSTICE TAYLOR delivered the judgment of the court.
Presiding Justice McBride and Justice Palmer concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly summarily dismissed defendant's *pro se* postconviction petition when its claims were rebutted by the record.

¶ 2 Defendant Joseph Caliendo appeals from the summary dismissal of his *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). On appeal, defendant contends that he was not properly admonished pursuant to Supreme Court Rule 605(c) (eff. Oct. 1, 2001), when the trial court failed to inform him that he had the right to

appeal, provided him with incorrectly labeled admonishments, and neglected to notify him of the consequences of actually vacating his plea. We affirm.

¶ 3 At a plea hearing in March 2009, the trial court explained to defendant that he was pleading guilty to aggravated driving under the influence of alcohol and driving while his driver's license was revoked or suspended. After informing defendant, pursuant to Supreme Court Rule 402 (eff. July 1, 1997), of the possible penalties associated with each charge, questioning defendant to ensure that the pleas were made voluntarily, and hearing the factual bases for the pleas, the court asked defendant how he wished to plead. When defendant "guess[ed]" that he wished to plead guilty, the court inquired further. Defendant then indicated that his attorney did not want to do anything for him and asked that a motion to "squash the arrest" be filed. However, after further discussion with the court, defendant indicated his desire to plead guilty. After sentencing defendant to two concurrent terms of three years in prison, the court then admonished defendant of his:

"right to appeal this sentence. Since you made an agreed-upon plea, you can appeal it by filing a motion to vacate your plea, which you would have to do in this court, in writing, within 30 days and state all grounds; otherwise they're considered waived.

If you couldn't afford an attorney, one would be provided.
If you couldn't afford a transcript, one would be provided.

If you were successful in your motion to vacate your plea, your case would be reinstated and set down for trial as if you never plead. If you couldn't afford an attorney for trial, one would be provided.

If you were found not guilty after trial, there would be no further sentence. If you were found guilty you'd be resentenced."

The record also contains a written acknowledgment of appeal rights signed by defendant.¹

¶ 4 Defendant did not file a postplea motion; rather, in July 2009, he filed a motion for leave to file a late notice of appeal. Although defendant was granted leave to appeal, the Office of the Public Defender filed a motion to dismiss the appeal because defendant had not first filed a motion to withdraw his guilty plea, despite having been "admonished before and after his plea, pursuant to Rule 604(d) and 605(c)." This court granted that motion. See *People v. Caliendo*, No. 1-09-1775 (2009) (Dispositional Order).

¶ 5 In October 2010, defendant filed a handwritten *pro se* petition for postconviction relief, alleging in its entirety:

"Plea was involuntary and result [of] coercion and was not admonished as the rights I were [*sic*] surrendering in pleading was inadequate representation by counsel. I which there is no evidence. actually [*sic*] Innocence. Abuse and beaten to death in which I proof negated pictures—Beaten and split my forehead multiple times this been going.

No evedence [*sic*].

case SOL"

¶ 6 Defendant also filed a *pro se* motion to withdraw his guilty pleas and to vacate his sentences. The trial court summarily dismissed the petition as frivolous and patently without merit. It is from this judgment that defendant appeals.

¹The document is labeled as Rule 605(b) admonishments, although the content is that of Rule 605(c), which are the proper admonishments for a negotiated guilty plea.

¶ 7 A petition should be summarily dismissed as frivolous or patently without merit only when it has no arguable basis in either fact or law. *People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009). When a *pro se* postconviction petition contains allegations rebutted by the record, it is properly dismissed as frivolous and patently without merit. See *People v. Wilborn*, 2011 IL App (1st) 092802, ¶ 58. Any issue not raised in the postconviction petition may not be raised for the first time on appeal. *People v. Jones*, 213 Ill. 2d 498, 508 (2005). This court conducts *de novo* review of both the summary dismissal of a postconviction petition (*People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998)), and the trial court's compliance with supreme court rules (*People v. Thompson*, 238 Ill. 2d 598, 606 (2010)).

¶ 8 Initially, the State argues that defendant is raising the sufficiency of the postplea admonishments for the first time on appeal, which he may not do. The State correctly notes that the claim in defendant's *pro se* petition that he was not admonished of the rights he was surrendering in pleading guilty appears to refer to the Rule 402 guilty plea admonishments, not the Rule 605 appeal rights admonishments he challenges in this court. Having failed to raise the instant admonishments claim in his postconviction petition, he is precluded from raising it for the first time on appeal.

¶ 9 Even if we were to apply the liberal construction suggested by defendant and find that he raised this issue in his petition, he would fare no better because the record shows he was adequately admonished of his appeal rights.

¶ 10 Because defendant entered into a negotiated guilty plea the trial court was required to admonish him pursuant to Rule 605(c) that he: (1) had the right to appeal; (2) that before appealing, he must file within 30 days in the trial court a written motion that explained his grounds for vacating the judgment and withdrawing the guilty plea; (3) that if the court granted the motion the sentence and judgment would be vacated and a trial date set upon those charges;

(4) that the State may request that charges dismissed as part of the plea be reinstated and set for trial; (5) that an indigent defendant will be provided with a transcript of the plea hearing and counsel will be appointed to assist in the preparation of the motions; and (6) any claim not raised in the motion to vacate the judgment and withdraw the plea is waived on appeal. See Rule 605(c) (eff. Oct. 1, 2001).

¶ 11 To comply with this rule, the trial court must substantially advise a defendant of the rule's content "in such a way that the defendant is properly informed, or put on notice, of what he must do in order to preserve his right to appeal his guilty plea or sentence." *People v. Dominguez*, 2012 IL 111336, ¶ 22. In the case at bar, the record reveals that the trial court substantially complied with Rule 605(c) when it informed defendant that he had the right to appeal, and that in order to appeal he must file a motion to vacate his pleas in the trial court within 30 days and that any grounds not stated in that motion would be waived. The court also told defendant that a free transcript and attorney would be provided to him and that if he was successful in his motion to vacate the pleas, the case would be reinstated and set for trial as if he had never entered the pleas. These admonishments show substantial compliance with Rule 605(c). *People v. Claudin*, 369 Ill. App. 3d 532, 533-34 (2006). Furthermore, in *Dominguez*, the supreme court stated that written admonishments "can serve to supplement or complement the oral admonishments required under the rule" where the defendant argues that the oral admonishments were inadequate. *Dominguez*, 2012 IL 111336, ¶ 27. Accordingly, as the *pro se* postconviction petition's allegations were rebutted by the record, it was properly dismissed as frivolous and patently without merit. See *Wilborn*, 2011 IL App (1st) 092802, ¶ 58.

¶ 12 Finally, we note that the admonishments exception is intended to preserve a defendant's right to take a direct appeal from his conviction despite the fact that he did not comply with Rule 604(d) by filing the requisite motion to withdraw his plea. However, Rule 604(d) does not apply

1-11-0146

to postconviction proceedings (*People v. Miranda*, 329 Ill. App. 3d 837, 841 (2002); *People v. Parker*, 57 Ill. App. 3d 697, 700-01 (1978), citing *People v. Rose*, 43 Ill. 2d 273, 279 (1969)).

The fact that defendant did not file a motion to withdraw his pleas and pursue a direct appeal did not prevent him from challenging the voluntariness of his pleas in a postconviction petition. In fact, defendant's petition does allege that his pleas were coerced and involuntary. However, defendant does not argue on appeal that this allegation was sufficient to withstand summary dismissal, so we need not discuss it. See Supreme Court Rule 341(h)(7) (eff. July 1, 2008) (points not argued in appellant's brief are waived).

¶ 13 Accordingly, the judgment of the circuit court of Cook County is affirmed.

¶ 14 Affirmed.