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2012 IL App (4th) 100335-U

Filed 4/16/12

NOS. 4-10-0335, 4-10-0336, 4-10-0337 cons.

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.    (No. 4-10-0335)	)	McLean County
AMY JEAN SELLNER,	)	No. 09CF186
Defendant-Appellant.	)	
-----	)	
THE PEOPLE OF THE STATE OF ILLINOIS	)	No. 09CF418
Plaintiff-Appellee,	)	
v.    (No. 4-10-0336)	)	
AMY JEAN SELLNER,	)	
Defendant-Appellant.	)	
-----	)	
THE PEOPLE OF THE STATE OF ILLINOIS	)	No. 09CF1146
Plaintiff-Appellant,	)	
v.    (No. 4-10-0337)	)	Honorable
AMY JEAN SELLNER,	)	Paul G. Lawrence,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE KNECHT delivered the judgment of the court.  
Presiding Justice Turner and Justice Pope concurred in the judgment.

**ORDER**

¶ 1     *Held:* Defendant, who entered a partially negotiated guilty plea and whose sentence fell within the agreed-upon range, may not challenge the severity of her sentence on appeal after abandoning her attempt to have her guilty plea withdrawn.

¶ 2             In November 2009, the trial court sentenced defendant, Amy Sellner, on multiple convictions resulting from two plea agreements. Defendant pleaded guilty to the charged offenses in exchange for caps on her sentences. The 9-year prison term imposed for these offenses was less than the total agreed-upon sentencing cap of 12 years. Defendant later moved

to withdraw her guilty plea, arguing she was confused over the terms "concurrent" and "consecutive." Defendant also asked the court to reconsider her sentence. In March 2010, the court denied her motions.

¶ 3 Defendant appeals arguing her sentence is excessive. The State maintains defendant cannot challenge the severity of a sentence within the agreed-upon sentencing range without first making a successful challenge to her guilty plea. We agree defendant may not challenge the severity of her sentence on appeal, but not for the reason urged by the State, and dismiss defendant's appeal.

¶ 4 I. BACKGROUND

¶ 5 On March 5, 2009, in No. 09-CF-186, defendant was charged with retail theft, subsequent offense (720 ILCS 5/16A-3(a) (West 2008)), a Class 4 felony. That day, defendant was released on a recognizance bond. In May 2009, defendant, in No. 09-CF-418, was indicted for credit card fraud (720 ILCS 250/8 (West 2008)), which allegedly occurred on March 28, 2009.

¶ 6 In November 2009, defendant entered partially negotiated guilty pleas to the retail-theft and credit-card-fraud offenses. At the same hearing, defendant also admitted the allegations in a petition to revoke her probation for retail theft over \$150. In that petition, the State alleged defendant, in No. 06-CF-1048, had been placed on 30 months' probation for retail theft over \$150 but violated her probation by committing the March 2009 credit-card-fraud offense. In exchange for defendant's admissions and guilty pleas, the State agreed to a maximum sentence of seven years' imprisonment.

¶ 7 On February 9, 2010, defendant, in another case (No. 09-CF-1146), entered

partially negotiated pleas of guilty to two counts of burglary, occurring on separate days in December 2009. Defendant also pled guilty, in No. 09-CM-2156, to the violation of an order of protection, a misdemeanor. The trial court admonished defendant under the terms of the plea agreement she could be sentenced up to five years' imprisonment on each count, to be served concurrently, and those sentences would be served consecutively to the sentences imposed in Nos. 09-CF-418 and 09-CF-186.

¶ 8 On February 10, 2010, the trial court held a consolidated sentencing hearing on all of defendant's convictions. At the close of the evidence, the court observed defendant was only 22 years old, endured "a very difficult childhood" as both her parents were in prison, had four children to which she had surrendered her parental rights, previously suffered mental-health issues, and obtained her general educational development certificate. The court further noted defendant had not yet served a prison sentence.

¶ 9 The trial court observed it was restricted to sentencing defendant to, at most, a 12-year sentence. In Nos. 06-CF-1048 and 09-CF-186, the retail-theft convictions, defendant was sentenced to the minimum terms of two years' imprisonment. The sentence for the former retail-theft conviction was to be served concurrently with defendant's other sentences. In No. 09-CF-418, the credit-card-fraud conviction, defendant was sentenced to three years' imprisonment, to run consecutively to the No. 09-CF-186 retail-theft sentence. For the two burglary offenses (No. 09-CF-1146), the trial court sentenced defendant to concurrent prison terms of four years, to be served consecutively to the sentences for credit-card fraud and retail theft. Defendant thus faced 9 years in prison—3 years under the 12-year cap.

¶ 10 In February 2010, defendant moved to reconsider the sentences, arguing they were

excessive. In March 2010, defendant filed a motion to withdraw her plea or, in the alternative to reconsider sentence. The trial court denied her motions.

¶ 11 The consolidated appeals followed.

¶ 12 II. ANALYSIS

¶ 13 Defendant's sole argument on appeal is her sentence is excessive. Defendant does not argue the trial court improperly refused to withdraw her guilty plea. The State maintains, under *People v. Haley*, 315 Ill. App. 3d 717, 734 N.E.2d 473 (2000), and *People v. Spriggle*, 358 Ill. App. 3d 447, 831 N.E.2d 696 (2005), defendant cannot challenge the severity of her sentence because she did not prevail on her motion to withdraw her guilty plea in the trial court. Defendant responds by arguing Supreme Court Rule 604(d) (Ill. S. Ct. R. 604(d) (eff. July 1, 2006)) allows her to appeal her sentence because she did file a motion to withdraw her guilty plea in the trial court.

¶ 14 We begin with the State's argument defendant's appeal is improperly brought. The State's main cases in support of its argument, *Haley* and *Spriggle*, rely heavily on two supreme-court cases involving plea agreements and Rule 604(d): *People v. Evans*, 174 Ill. 2d 320, 673 N.E.2d 244 (1996), and *People v. Linder*, 186 Ill. 2d 67, 708 N.E.2d 1169 (1999). A review of those two cases, *Evans* and *Linder*, provides a backdrop for our consideration of the State's claim.

¶ 15 In *Evans*, 174 Ill. 2d at 324-25, 673 N.E.2d at 246-47, the defendants, who entered into a negotiated plea agreement under which the State recommended specific sentences and dismissed charges, asked the Supreme Court to find Rule 604(d) permitted a challenge to the excessiveness of their agreed-upon sentences after their negotiated pleas without their filing

motions to withdraw the guilty plea and vacate sentence. The State argued it would be fundamentally unfair to permit the defendants to agree to a negotiated plea agreement, receive the benefits of the bargain, and then seek the reduction of the negotiated sentences. The State maintained to allow what defendants sought would violate contract-law principles and argued, if a defendant seeks a reduction in sentence, that defendant should be required to withdraw his guilty plea and return "the parties to the *status quo*." *Evans*, 174 Ill. 2d at 324-25, 673 N.E.2d at 246.

¶ 16 The *Evans* court agreed with the State. See *Evans*, 174 Ill. 2d at 324-25, 673 N.E.2d at 246-47. The *Evans* court observed plea agreements "are governed to some extent by contract[-]law principles," which may need to be tempered in certain instances given a defendant's right to enter plea agreements is constitutionally based. *Evans*, 174 Ill. 2d at 326-27, 673 N.E.2d at 247. In the cases before it, the *Evans* court determined the application of contract-law principles to prohibit defendants from unilaterally seeking to "reduce their sentences while holding the State to its part of the bargain" was both appropriate and consistent with fundamental-fairness concerns. *Evans*, 174 Ill. 2d at 327, 673 N.E.2d at 248. The *Evans* court concluded a contrary finding would " 'encourage gamesmanship of a most offensive nature.' " *Evans*, 174 Ill. 2d at 327, 673 N.E.2d at 248, quoting *United States ex rel. Williams v. McMann*, 436 F.2d 103, 106 (2d Cir. 1970).

¶ 17 The *Evans* court further found Rule 604(d) did not apply, because, at that time, it did not apply to *negotiated* guilty pleas. See *Evans*, 174 Ill. 2d at 328-29, 673 N.E.2d at 248-49. The version of Rule 604(d) applicable when *Evans* was decided stated in part the following:

" 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 his plea of guilty and vacate the judgment.' " (Emphasis omitted.) *Evans*, 174 Ill. 2d at 328, 673 N.E.2d at 248 (quoting Ill. S. Ct. R. 604(d) (eff. Aug. 1, 1992)).

¶ 18 In summarizing its opinion, the court concluded to prevail on a challenge to a sentence entered under a negotiated plea agreement, a defendant must not only move to withdraw the guilty plea and vacate judgment, but also show the motion should be granted to correct a manifest injustice. *Evans*, 174 Ill. 2d at 332, 673 N.E.2d at 250.

¶ 19 In *Linder*, our supreme court followed *Evans* when considering whether a defendant who pled guilty in exchange for the dismissal of charges and a recommendation of a sentencing cap could challenge a sentence below that cap as excessive without seeking to withdraw the guilty plea. See *Linder*, 186 Ill. 2d at 74, 708 N.E.2d at 1172-73. The *Linder* court found the defendant could not do so. *Linder*, 186 Ill. 2d at 74, 708 N.E.2d at 1172-73. The *Linder* court also found "[b]y agreeing to plead guilty in exchange for a recommended sentencing cap, a defendant is, in effect, agreeing not to challenge any sentence imposed below that cap on the grounds that it is excessive." *Linder*, 186 Ill. 2d at 74, 708 N.E.2d at 1172.

¶ 20 In 2000, in *Haley*, the Third District Appellate Court decided a defendant may not appeal a sentence imposed under a plea agreement after an unsuccessful attempt to withdraw his guilty plea. See *Haley*, 315 Ill. App. 3d at 718-19, 734 N.E.2d at 474. In *Haley*, the defendant

agreed to plead guilty to aggravated battery with a firearm in exchange for the dismissal of an armed-violence charge and the State's recommendation of a maximum prison sentence of 24 years. *Haley*, 315 Ill. App. 3d at 718, 734 N.E.2d at 473. The trial court sentenced defendant to 24 years. *Haley*, 315 Ill. App. 3d at 718, 734 N.E.2d at 473-74. The defendant then moved to vacate his guilty plea and reconsider sentence but, at the hearing on the motions, withdrew his motion to vacate. *Haley*, 315 Ill. App. 3d at 718, 734 N.E.2d at 474. After the court denied his motions, the defendant appealed, arguing only his sentence was excessive. *Haley*, 315 Ill. App. 3d at 718, 734 N.E.2d at 474.

¶ 21 On appeal, the defendant argued he complied with *Evans* and *Linder*, because he filed a motion to vacate his guilty plea in challenging his sentence, while the defendants in those cases did not. *Haley*, 315 Ill. App. 3d at 719, 734 N.E.2d at 475. In rejecting this argument, the *Haley* majority concluded the defendant's approach "would do nothing to encourage plea bargaining and is steeped in potential for abuse." *Haley*, 315 Ill. App. 3d at 720, 734 N.E.2d at 475. The majority further reasoned if the simple act of filing a motion to withdraw was sufficient to repudiate a plea agreement in order "to obtain review of the severity of a negotiated sentence, the supreme court would have accomplished very little in deterring the kind of 'heads-I-win-tails-you-lose' gamesmanship decried by the court in *Evans*." *Haley*, 315 Ill. App. 3d at 720, 734 N.E.2d at 475, citing *Evans*, 174 Ill. 2d at 327-28, 673 N.E.2d at 248. The *Haley* majority cited *Evans* and determined a defendant unsatisfied with the negotiated or capped sentence must file a motion to withdraw the guilty plea and convince the trial court to grant the motion to correct a manifest injustice. *Haley*, 315 Ill. App. 3d at 720, 734 N.E.2d at 475. If the defendant's motion to withdraw the plea is denied, the defendant may appeal the denial of that motion but not the

severity of the sentence. *Haley*, 315 Ill. App. 3d at 720, 734 N.E.2d at 475. If the defendant succeeds in having his plea vacated, the parties return to the *status quo*. *Haley*, 315 Ill. App. 3d at 720, 734 N.E.2d at 475. Because the *Haley* defendant did not pursue his motion to withdraw his guilty plea, the majority dismissed the defendant's appeal. *Haley*, 315 Ill. App. 3d at 718-19, 734 N.E.2d at 474.

¶ 22 In 2005, the Second District Appellate Court reached a similar conclusion as the Third District reached in *Haley*. See *Spriggle*, 358 Ill. App. 3d at 454-55, 831 N.E.2d at 703-04. The *Spriggle* defendant pled guilty to first-degree murder, home invasion, and residential burglary, in exchange for the State's agreement not to seek the death penalty. *Spriggle*, 358 Ill. App. 3d at 448-49, 831 N.E.2d at 698. The trial court sentenced him to a total of 66 years' imprisonment, and the defendant moved to withdraw his guilty plea. *Spriggle*, 358 Ill. App. 3d at 449, 831 N.E.2d at 698. On appeal, the defendant argued he should have been permitted to withdraw his guilty plea because the 60-year sentence was excessive. *Spriggle*, 358 Ill. App. 3d at 450, 831 N.E.2d at 699.

¶ 23 The *Spriggle* court found it could not consider defendant's excessive-sentence claim because defendant had not prevailed on his motion to withdraw his plea in the trial court. *Spriggle*, 358 Ill. App. 3d at 455, 831 N.E.2d at 703-04. The *Spriggle* court then held the following:

"[M]erely filing a proper motion to withdraw his partially negotiated guilty plea pursuant to Rule 604(d) and *Linder* does not automatically allow a defendant review of the severity of his sentence. The defendant must file a motion to withdraw his guilty

plea and \*\*\* convince the trial court that the motion should be granted to correct a manifest injustice."

*Spriggle*, 358 Ill. App. 3d at 455, 831 N.E.2d at 703. The *Spriggle* court found while the defendant filed the motion to withdraw his guilty plea, he did not convince the trial court his motion should be granted. *Spriggle*, 358 Ill. App. 3d at 455, 831 N.E.2d at 703-04.

¶ 24 Defendant responds to these cases by arguing Rule 604(d) allows a criminal defendant to appeal his or her sentence after a guilty plea and had the supreme court intended a defendant to lose this right, it would have so stated. We turn to Rule 604(d).

¶ 25 Rule 604(d) does not continue to exist in the same form as it existed at the time of the *Evans*, *Linder*, and *Haley* decisions. In October 2000, the supreme court modified Rule 604(d) to, in part, add language regarding *negotiated* pleas:

"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 \*\*\*." 188 Ill. 2d R. 604(d) (eff. Nov. 1, 2000).

¶ 26 Defendant thus interprets Rule 604(d) to permit her to challenge the severity of her sentence, simply by filing a motion to withdraw her guilty plea and vacate judgment. Defendant's position then seems to be Rule 604(d) does not require her to prevail on the motion to withdraw her guilty plea and vacate judgment in the trial court before she can have this court

review her excessive-sentence claim.

¶ 27 We agree with defendant Rule 604(d) does not require her to *prevail* on the motion to withdraw her guilty plea in the *trial court* in order to challenge the excessiveness of her sentence on appeal as the State contends and as *Spriggle* seems to hold. If any defendant prevails on this motion in the trial court, the conviction and sentence are vacated—leaving no sentence to review for excessiveness on appeal.

¶ 28 We do find, however, Rule 604(d) can fairly be interpreted as establishing the motion to withdraw the plea of guilty and vacate judgment as the only means by which a defendant dissatisfied with his sentence can seek relief from that sentence: "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." Ill. S. Ct. R. 604(d) (eff. July 1, 2006). There is no provision for a motion to reconsider sentence.

¶ 29 This court, when interpreting a supreme court rule, is to apply the same rules of construction we would apply when interpreting a statute in order "to ascertain and give effect to the intention of the drafters of the rule." *In re Estate of Rennick*, 181 Ill. 2d 395, 404, 692 N.E.2d 1150, 1155 (1998). The best indicator of the drafters' intent is the language used; when that language is unambiguous and clear, we must apply it as written. *Rennick*, 181 Ill. 2d at 405, 692 N.E.2d at 1155. In this case, we do not find the language in Rule 604(d) unambiguously resolves this problem. We, therefore, "may look to additional sources to determine the drafters' intent, including the purposes of the rule, the evils sought to be remedied, and the goals to be achieved." *People v. Santiago*, 384 Ill. App. 3d 784, 787, 895 N.E.2d 989, 992 (2008).

¶ 30 We believe the language in *Evans*, which preceded the change to Rule 604(d), best indicates the drafters' intent. In absence of any language in Rule 604(d) concerning excessiveness challenges to sentences following negotiated pleas, the supreme court plainly set forth the means by which a defendant dissatisfied with his sentence following a negotiated plea could challenge that sentence: "[F]or a defendant to prevail in a challenge to a sentence entered pursuant to a negotiated plea agreement, the defendant must (1) move to withdraw the guilty plea and vacate the judgment, and (2) show that the granting of the motion is necessary to correct a manifest injustice." *Evans*, 174 Ill. 2d at 332, 673 N.E.2d at 250. Rule 604(d) was modified within a relatively short time later.

¶ 31 We find Rule 604(d) thus establishes a motion to withdraw the guilty plea and vacate the judgment provides the only means by which a defendant dissatisfied with his or her sentence imposed following a negotiated plea may have that sentence reduced on appeal. If the defendant is able to prevail on the motion to withdraw his guilty plea in the trial court, the plea and sentence are vacated and the parties may renegotiate. If the defendant does not prevail, the defendant may appeal the *denial* of his motion to withdraw guilty plea and vacate judgment and attempt to show the trial court wrongly denied the motion. Rule 604(d) does not allow this court to review the severity of a sentence imposed within the agreed-upon cap following a negotiated sentence.

¶ 32 In this case, defendant did file a motion to withdraw her guilty plea and to reconsider sentence within the trial court. On appeal she abandoned her efforts to prove withdrawal of her plea should have been granted. By abandoning her arguments to withdraw her plea, defendant has abandoned the only means by which she can challenge the severity of her

sentence. Her appeal must be dismissed.

¶ 33

### III. CONCLUSION

¶ 34 For the reasons stated, we dismiss defendant's appeal. We grant the State its statutory assessment of \$50 as costs of this appeal.

¶ 35 Appeal dismissed.