

2013 IL App (1st) 120033-U

FOURTH DIVISION
May 2, 2013

No. 1-12-0033

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. 10 CR 9038
)	
JAMES LARRY,)	Honorable
)	James B. Linn,
Defendant-Appellant.)	Judge Presiding.

JUSTICE EPSTEIN delivered the judgment of the court.
Justices Fitzgerald Smith and Pucinski concurred in the judgment.

ORDER

¶ 1 *Held:* Where defendant was sufficiently admonished under Supreme Court Rule 605(b), his failure to file a timely Rule 604(d) motion cannot be excused by the admonition exception, and his appeal is dismissed.

¶ 2 Defendant James Larry entered an open guilty plea to five counts of first degree murder, three counts of attempted murder, and two counts of intentional homicide of an unborn child, and was sentenced to life imprisonment. On appeal, defendant contends that he is entitled to a remand for new post-plea proceedings because the trial court failed to properly admonish him in accordance with Supreme Court Rule 605(b) (eff. Oct. 1, 2001).

¶ 3 On April 5, 2011, defendant indicated that he wanted to plead guilty. The trial court admonished defendant as to the consequences of his plea and the rights he would be giving up by pleading guilty. The court explained that because defendant was pleading guilty to multiple homicides, the only possible sentence he could receive was natural life in prison without parole. Defendant stated that he understood and still wished to plead guilty.

¶ 4 The parties stipulated to the following factual basis. At approximately 4:25 a.m., on April 14, 2010, at a residence in Chicago, defendant shot and killed his mother, his wife, his 16-year-old niece, his three-year-old niece,¹ and his seven-month-old son. Both defendant's wife and his 16-year-old niece were pregnant, he was aware of their pregnancies, and both unborn children died as a result of their mother's injuries.

¶ 5 In addition, defendant shot his 13-year-old nephew causing great bodily harm, and shot at his 12-year-old niece who was able to escape and alert a local convenience store clerk to call the police. Before leaving the scene, defendant encountered another man who lived in the residence. Defendant pointed his gun at the man and pulled the trigger, but defendant either missed or his gun did not fire. Defendant fled the murder scene and dropped the murder weapon in a nearby vacant lot.

¶ 6 The Chicago Police Department immediately responded and a description of defendant was broadcast based on defendant's niece's account. Chicago police officers spotted and approached defendant blocks from the murder scene. Defendant immediately confessed to the crimes, advised the officers of the gun's location, and led the officers to the vacant lot where the gun was recovered. After defendant was arrested, he freely and voluntarily admitted to shooting

¹ In their briefs, attorneys for both parties refer to the three-year old victim as defendant's daughter, however, defense counsel clarified during the stipulations that she was defendant's niece.

all of the victims, and made a videotaped statement in which he admitted to all of the foregoing acts.

¶ 7 The parties further stipulated that gunshot residue tests conducted on defendant yielded positive results, fingerprint evidence linked defendant to the crime, and ballistics tests on the recovered gun and bullets from the victims' bodies established that defendant's gun was the murder weapon.

¶ 8 Both a forensic psychiatrist and a clinical psychologist examined defendant and each concluded, to a reasonable degree of medical and psychiatric certainty, that defendant was fit to stand trial with medication; that he was able to understand, and freely and voluntarily waive, his *Miranda* rights; and that he was legally sane at the time of the offenses.

¶ 9 The trial court accepted the factual basis and found defendant guilty of five counts of first degree murder, three counts of attempted murder, and two counts of intentional homicide of an unborn child.

¶ 10 On May 4, 2011, the trial court sentenced defendant to natural life in prison on the homicide counts, to concurrent 30-year terms on the attempted murder counts, and to 45-year terms on the intentional homicide of an unborn child counts. After sentencing defendant, the trial court admonished him as follows:

¶ 11 "Mr. Larry, though you pled guilty and have been sentenced, now you have the right to appeal everything that happened on your case. To do that, you have to file motions to withdraw your pleas. You may also file motions to modify your sentences. Whatever you file would have to be filed within 30 days. Anything not stated in the filings would be waived for purposes of appeal. If

you can't afford lawyers or transcripts, they would be provided free of charge."

¶ 12 Defendant acknowledged that he understood the court's admonitions. During the following 30 days, defendant did not file a motion to withdraw his plea, a motion to modify his sentence, or a notice of appeal.

¶ 13 On July 11, 2011, defendant, with the help of a "jailhouse attorney," filed a document entitled "notice of appeal" with the circuit court requesting the court vacate his conviction and alleging that he was not competent when he pled guilty. On August 5, 2011, the circuit court issued an order stating that defendant's notice of appeal was filed late, and would therefore not be transmitted to the appellate court. It instructed defendant that he could seek a late notice of appeal in the appellate court. At some later date, defendant sent a "notice of appeal" to the appellate court. On September 2, 2011, this court's Appellate Attorney sent defendant a letter informing him that the clerk's office had received the notice of appeal, but that notices of appeal are not properly filed in the appellate court, and therefore the notice would be forwarded to the circuit court.

¶ 14 On December 28, 2011, defendant sent a late notice of appeal to the appellate court, attaching the letter from this court's clerk's office, and a certificate of service, filed July 11, 2011, showing that defendant had placed a "notice of plea vacate withdraw plea" [*sic*] in institutional corrections mail on June 20, 2011, to be sent to the circuit court. In an accompanying affidavit, defendant stated that he did not timely file his notice of appeal because of a mental disability, and because he lacked the requisite legal knowledge. On January 11, 2012, this court issued an order accepting defendant's previously filed "notice of appeal" dated July 11, 2011, and appointing the State Appellate Defender as counsel for defendant.

¶ 15 As a preliminary matter, the State argues that defendant's appeal must be dismissed due to lack of jurisdiction because we erred in accepting defendant's July 11, 2011, notice of appeal. It argues that defendant did not file a proper late notice of appeal until December 28, 2011, after the time had expired for our court to exercise jurisdiction. Illinois Supreme Court Rule 606(c) (eff. Mar. 20, 2009) limits the exercise of our authority to grant a late notice of appeal to motions which are filed within six months of the expiration of the time for filing a notice of appeal. In this case, a notice of appeal was due in the circuit court by June 3, 2011, and defendant was entitled to seek late notice of appeal from this court until December 3, 2011.

¶ 16 Here, we find that defendant sought a late notice of appeal in this court by the deadline; the letter by this court's Appellate Attorney shows that he submitted his notice of appeal—previously filed on July 11, 2011, in circuit court—in this court sometime before September 2, 2011. The State argues that we erred in subsequently accepting this as a proper late notice of appeal because it did not contain the "required information" for a notice of appeal under Rule 606(d). However, the State does not specify what information is missing. Although defendant's notice of appeal is not in the form indicated by Rule 606(d), we decline to dismiss defendant's appeal based on improper form. Where a deficiency in the notice of appeal in a criminal matter is one of form rather than substance, an appellate court has jurisdiction if: (1) the notice fairly and accurately advises the appellee of the nature of the appeal, and (2) the appellee is not prejudiced by the deficiency in form. *People v. Kellerman*, 342 Ill. App. 3d 1019, 1024 (2003). See also *People v. Capoldi*, 37 Ill. 2d 11, 17 (1967) (Defendant's hand-written communication seeking review of conviction was sufficient, even though communication was inaptly drawn and was not a technically correct notice of appeal.) Here, defendant's notice substantially advised the State of the nature of defendant's appeal, and any alleged deficiency

was not prejudicial to the State. We therefore decline to dismiss this appeal for lack of jurisdiction.

¶ 17 The State next asserts a second ground supporting dismissal of this appeal. It argues that dismissal is necessary because defendant failed to file a post-plea motion to withdraw the plea or reconsider the sentence as required by Supreme Court Rule 604(d). Defendant responds that although his notice of appeal and motion to withdraw his guilty plea were untimely filed, this court must excuse his procedural default because the trial court failed to properly admonish him of his appeal rights under Rule 605(b).

¶ 18 Rule 604(d) provides, in pertinent part, that "[n]o 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 the plea of guilty and vacate the judgment." Ordinarily, a defendant's compliance with Rule 604(d) is a condition precedent to an appeal from a plea of guilty (*People v. Wilk*, 124 Ill. 2d 93, 105 (1988)), and his failure to file a post-plea motion can result in the loss of his right to direct appeal (*People v. Flowers*, 208 Ill. 2d 291, 301 (2004)). Our supreme court, however, has adopted an admonishment exception to this written-motion requirement. *People v. Foster*, 171 Ill. 2d 469, 473 (1996). In creating this exception, the court observed that Rule 605(b), which contains admonishments that must be provided to a defendant regarding his appeal rights following a judgment entered on his guilty plea, is a necessary corollary to the requirements set forth in Rule 604(d), and held that if those admonishments are not provided to the defendant, the cause will be remanded for proper admonishments. *People v. Dominguez*, 2012 IL 111336, ¶ 11.

¶ 19 Defendant and the State agree that defendant entered an open plea and the trial court was therefore required to admonish defendant pursuant to Supreme Court Rule 605(b) (eff. Oct. 1,

2001). Rule 605(b) requires the trial court, after entering judgment upon a defendant's guilty plea, to advise the defendant of the conditions that must be satisfied before an appeal may be taken. The trial court is required to substantially advise the defendant that he has a right to appeal; that in order to appeal, he must file a written motion in the trial court asking the court either to vacate the judgment and for leave to withdraw the guilty plea, or to reconsider his sentence; that if defendant's motion is allowed, the court will modify his sentence or vacate the guilty plea, sentence and judgment, and a trial date will be set; that upon the State's request, any charges that may have been dismissed will be reinstated; that if defendant is indigent, defendant will be provided with free transcripts and an attorney to assist with the preparation of the motions; and that any issue or claim not raised in the motions shall be deemed waived. The remedy for the trial court's noncompliance with Rule 605(b) is to remand the cause to the trial court for further proceedings to allow the defendant an opportunity to strictly comply with Rule 604(d). *Jamison*, 181 Ill. 2d 24, 29-30 (1998). We review the trial court's compliance with the rule *de novo*. *People v. Breedlove*, 213 Ill. 2d 509, 512 (2004).

¶ 20 Our Supreme Court recently addressed the admonition requirements of Rule 605 in *People v. Dominguez*, 2012 IL 111336. While the Court determined that the failure to give Rule 605(b) admonitions to a defendant who has pled guilty requires remand, the court affirmed that the plain meaning of the rule requires only that a defendant be *substantially* advised of the actual content of the rule. *Dominguez*, ¶11. The Court stated that a trial court must "impart to a defendant largely that which is specified in the rule, or the rule's 'essence,' as opposed to 'wholly' what is specified in the rule[.]" and where it does so, automatic remand is not necessary. *Dominguez*, ¶¶ 19, 22. So long as a 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, the admonitions were sufficient to impart to defendant the essence or substance of the rule and the court has

substantially complied with Rule 605. *Dominguez*, ¶ 22. Thus, the question we must answer in this case is whether the trial court's admonitions were sufficient to impart such notice to defendant.

¶ 21 Defendant first contends that the admonishments were insufficient because he was not properly admonished of his right to an attorney and to a transcript. Rule 605(b)(5) provides that a defendant must be told "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[.]" Defendant claims that the court mentioned his rights to an attorney and to free transcripts in relation to defendant's appeal, but that the court failed to make clear that he was also entitled to these rights to assist him in the preparation of a motion to withdraw his guilty plea. We disagree. Before advising defendant of his rights to an attorney and to free transcripts, the trial court informed defendant that he was required to file a motion to withdraw his plea or to modify his sentence, that these motions had to be filed within 30 days, and anything not stated therein would be waived for purposes of appeal. These admonishments relate to the filings necessary to appeal, and, thus, it is logical to interpret court's next admonishment, regarding his rights to an attorney and transcripts, as similarly relating to the preparation of those filings. Further, our court has held that a trial court can sufficiently admonish a defendant regarding his rights to an attorney and transcripts, even if it does not explicitly state that the attorney could assist him with post-plea motions. See *People v. Dominguez*, ¶ 51; *People v. Dunn*, 342 Ill. App. 3d 872, 882 (2003). Here, the court's admonition conveyed the substance of the rule to defendant and complied with Rule 605(b).

¶ 22 Defendant also argues that he was not informed of the consequences of a successful motion to withdraw the guilty pleas under Rule 605(b)(3)—that if defendant's "motion is

allowed, the sentence will be modified or 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." We find that this case is factually similar to *People v. Claudin*, 369 Ill. App. 3d 532, 534 (2006), in which the trial court failed to give the same admonishment omitted here. The defendant in *Claudin* similarly argued that the trial court's failure to do so necessitated remand for proper admonishments. *Claudin*, 369 Ill. App. 3d at 534. This court rejected defendant's argument, holding that the trial court had substantially admonished defendant as required by Rule 605, reasoning that the missing verbiage did not prejudice defendant or render the admonishments insufficient. *Claudin*, 369 Ill. App. 3d at 534; see also *People v. Crump*, 344 Ill. App. 3d 558, 563 (2003) (finding substantial compliance although the trial court did not inform the defendant that any claims of error not raised in a post-plea motion would be waived on appeal or that the State could reinstate certain charges if the motion to withdraw was granted). We therefore hold that the trial court conveyed the substance of Rule 605(b) to defendant by telling him that he had certain appellate rights, but that he had to file a motion challenging the plea within 30 days in order to exercise them. See *Claudin*, 369 Ill. App. 3d at 534. Defendant was put on notice that he could challenge the guilty pleas but that in order to do so an action on his part, *i.e.*, the filing of a motion to withdraw the plea or for reconsideration of the sentence within 30 days, was required. See *In re J.T.*, 221 Ill. 2d 338, 347-48 (2006) (while the trial court's admonishments did not strictly comply with Rule 605(c), they were sufficient to put the minor on notice that "some action" on his part was required within 30 days if he wished to appeal). Although defendant told the trial court that he understood this requirement, he did not file a post-plea motion.

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¶ 23 Accordingly, because defendant was admonished pursuant Rule 605(b), his failure to file a Rule 604(d) motion to vacate the judgments and withdraw the guilty pleas before filing a notice of appeal cannot be excused by the admonition exception.

¶ 24 Appeal dismissed.