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2013 IL App (3d) 120146-U

Order filed October 21, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 10th Judicial Circuit,
Plaintiff-Appellee,)	Peoria County, Illinois,
)	
v.)	Appeal No. 3-12-0146
)	Circuit No. 12-CF-13
)	
DEMETRIUS FERGUSON,)	Honorable
)	David A. Brown,
Defendant-Appellant.)	Judge, Presiding.

PRESIDING JUSTICE WRIGHT delivered the judgment of the court.
Justices Holdridge and McDade concurred in the judgment.

ORDER

¶ 1 *Held:* Appeal dismissed where defendant failed to file a timely motion to withdraw guilty plea and vacate judgment prior to filing a notice of appeal.

¶ 2 Defendant, Demetrius Ferguson, entered a negotiated plea of guilty to aggravated battery (720 ILCS 5/12-3.05(c) (West 2012)) and domestic battery (720 ILCS 5/12-3.2(a)(1) (West 2012)) in exchange for 30 months of probation and 90 days in jail. Defendant filed a *pro se* notice of appeal without first filing a motion to withdraw the guilty plea.

¶ 3 On appeal, defendant argues the circuit clerk or the court itself should have treated the *pro se* notice of appeal as a motion to withdraw guilty plea and seeks remand. Due to the absence of a timely motion to withdraw the guilty plea and vacate the judgment in the trial court, the appeal is dismissed.

¶ 4 **FACTS**

¶ 5 The State charged defendant with aggravated battery (Class 3 felony) and misdemeanor domestic battery (Class A) and the court appointed the public defender's office to represent defendant. On January 23, 2012, pursuant to a negotiated plea agreement, defendant pled guilty to both charges. The trial court accepted defendant's guilty plea and, in accordance with the negotiated plea agreement, sentenced defendant to 30 months of probation with conditions that included 90 days in the Peoria County jail.

¶ 6 After imposing the sentence, the circuit court admonished defendant of his right to an appeal as follows:

"Prior to taking an appeal, you must first file in the trial court within 30 days of the date upon which the 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.

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. Upon the request of the State and the charges which have been dismissed as part of the plea agreement will be reinstated and will also be set for trial.

If you are indigent, a copy of the transcript of the proceedings at the time of your

plea of guilty and sentence will be provided at no cost to you, and counsel will be appointed to assist you with the preparation of any motions.

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."

In addition, during these proceedings, the trial judge asked defendant's attorney, "if the defendant were to change his mind at this time, would you still provide representation to him in this case."

Defendant's attorney replied, "Yes, your Honor."

¶ 7 Thirty days later, defendant personally submitted a form entitled "Notice of Appeal," prepared *pro se*. The document indicated, "An appeal is taken from the order or judgment described below," to "APPELLATE COURT THIRD DISTRICT OTTAWA, ILLINOIS," identified defendant as the "appellant," and identified defendant's attorney during the plea hearing as the "appellant's attorney on appeal." In a section entitled "sentence" defendant indicated that he had pled guilty but "want[ed] to prove innocence that I meant no harm to her and that I wasn't in the right state of mind at the time of the crime."

¶ 8 Following the receipt of the notice of appeal, the court appointed the Office of the State Appellate Defender (OSAD) to represent defendant. On appeal, OSAD filed a motion to remand this cause to the circuit court for proceedings under Illinois Supreme Court Rule 604(d) (eff. July 1, 2006), which this court denied.

¶ 9 Now in this appeal, appellate counsel seeks remand and argues the notice of appeal signaled defendant's interest in appealing and the court should have appointed trial counsel, not appellate counsel, to assist defendant.

¶ 10

ANALYSIS

¶ 11 In spite of proper Rule 605 admonishments, appellate counsel argues the circuit clerk should have presented the notice of appeal to the attention of the circuit court judge "so that *either* (1) it could be treated as a motion to withdraw (requiring trial counsel to be appointed), *or* (2) the trial court could ask [defendant] if he wanted counsel to help him perfect an appeal." It is significant to the outcome of this appeal that defendant does not argue that the trial court's Rule 605 admonishments were incomplete. Consequently, it cannot be properly asserted that defendant was unaware that Rule 604(d), required defendant to file a motion to withdraw the plea of guilty and vacate the judgment in the trial court within 30 days of sentencing or that counsel could be appointed to assist him with the preparation of a motion to withdraw his guilty plea.

¶ 12 In an abundance of caution, we have elected *sua sponte* to review whether the trial court complied with Supreme Court Rule 605. After carefully reviewing the record, we note that not only did the trial judge comply with Rule 605, he went beyond the requirements of the rule by asking defense counsel, on the record and with defendant present, whether defense counsel would be willing to assist defendant should he decide to change his mind regarding the decision to enter a guilty plea.

¶ 13 Where a defendant has failed to file a timely Rule 604(d) motion in the trial court, as in the case at bar, the appellate court must dismiss the appeal, leaving the Post-Conviction Hearing Act as defendant's remaining source of recourse. *People v. Flowers*, 208 Ill. 2d 291 (2004) (although a defendant's failure to file a timely Rule 604(d) motion in the circuit court does not deprive the appellate court of jurisdiction, the failure to do so precludes the appellate court from considering the appeal on the merits).

¶ 14 The record reveals defendant's *pro se* notice of appeal was clearly entitled "Notice of Appeal." Consequently, the circuit clerk was not required to treat defendant's clearly expressed *pro se* notice of appeal as a motion to withdraw guilty plea. Instead, the clerk acted properly by treating defendant's *pro se* "Notice of Appeal," as a notice of appeal and thereafter, taking the steps necessary to make sure defendant received the appointment of appellate counsel for purposes of that appeal. See *People v. Brooks*, 233 Ill. 2d 146 (2009) (holding that a defendant's right to due process is not violated if he is properly admonished under Rule 605 and held to the consequences of failing to comply with Rule 604(d)).

¶ 15 In this case, we see no reason to excuse this defendant's non-compliance with Rule 604(d) when the trial court properly and carefully admonished defendant as required by the Supreme Court Rules. To do so, renders the court's careful instructions, which fully complied with Rule 605, a meaningless exercise of judicial vigilance with respect to the requirements of our supreme court's rules.

¶ 16 CONCLUSION

¶ 17 For the foregoing reasons, we dismiss the appeal.

¶ 18 Appeal dismissed.