

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).

2013 IL App (4th) 110483-U

NO. 4-11-0483

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
April 26, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
ANDRE L. TINSLEY,)	No. 10CF1658
Defendant-Appellant.)	
)	Honorable
)	Heidi N. Ladd,
)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices Appleton and Pope concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court erred by denying defendant's motion to reconsider his sentence on the ground that defendant must file a motion to withdraw his guilty plea in order to proceed.

¶ 2 In November 2010, defendant, Andre L. Tinsley, pleaded guilty to aggravated battery on a public way, and the trial court sentenced him to probation. In April 2011, the State filed an amended petition to revoke probation and the court later revoked defendant's probation. In June 2011, the court resentenced him to five years in prison. Defendant filed a motion to reconsider his sentence, which the court denied on the ground that defendant must move to withdraw his guilty plea in order to proceed with his claims.

¶ 3 Defendant appeals, arguing that the trial court erred by denying his motion to reconsider his sentence. We reverse the denial of defendant's motion to reconsider his sentence and remand with directions.

¶ 4

I. BACKGROUND

¶ 5 In September 2010, the State charged defendant with two counts of aggravated domestic battery ("Class X Sentencing & Mandatory Consecutive to 2010-CF-1502") (720 ILCS 5/12-3.3(a) (West 2010)) (counts I and II), and in November 2010, the State charged defendant with an additional count of aggravated battery ("Extended Term Eligible") (720 ILCS 5/12-4(b)(8) (West 2010)) (count III). On November 15, 2010, defendant pleaded guilty to aggravated battery on a public way (count III) in exchange for a sentence of 24 months' probation and the dismissal of counts I and II.

¶ 6 In April 2011, the State filed an amended petition to revoke defendant's probation, stating that defendant (1) drove while under the influence of alcohol and under the combined influence of alcohol and drugs (625 ILCS 5/11-501(a)(2), (5) (West 2010)), (2) consumed alcohol, and (3) had contact with the victim of the aggravated battery on a public way offense. Defendant stipulated to the allegations contained in the amended petition to revoke probation in exchange for a sentencing cap of five years in prison.

¶ 7 Before resentencing on June 1, 2011, the trial court admonished defendant of the following:

"Mr. Tinsley, you do have the right to appeal. You have the right to request that our circuit clerk prepare and file a notice of appeal on your behalf.

Sir, if you do want to appeal, you must file the notice of appeal within 30 days of today's date.

If you cannot afford an attorney to assist you on appeal, one

will be appointed for you free of charge.

And if you cannot afford a transcript of the proceedings on your case, a transcript will be prepared and provided to you free of charge.

The record should reflect that the defendant has been advised of his appellate rights pursuant to Supreme Court Rule 605(a)."

The trial court then resentenced defendant to five years in prison.

¶ 8 The following day, defendant placed in the mail a *pro se* motion to reconsider his sentence and a notice of appeal. In his motion to reconsider his sentence, defendant alleged (1) the trial court considered, "as an aggravated factor[] for the sentencing[,], a DUI charge that had been dropped," and (2) his sentence was excessive. On June 7, 2011, the court entered a docket entry stating:

"Court notes the defendant's *pro se* filing of a Notice of Appeal and Motion to Reconsider Sentence. The defendant ple[]d guilty pursuant to a negotiated plea and may only proceed by filing a motion to withdraw guilty plea.

Accordingly, the defendant's *pro se* Motion to Reconsider Sentence is denied. The appointment of the Public Defender is continued for the purpose of representing the defendant on any motion to withdraw guilty plea. Defendant given leave to file a Motion to withdraw guilty plea on or before July 11, 2011, cour-

tesy copy to the Court and Counsel."

¶ 9 In an electronic mailing on July 27, 2011, appointed counsel stated: "I was finally able to speak with [defendant] today via phone call from DOC. I will not be filing any additional matters on behalf of [defendant] in this matter."

¶ 10 On August 4, 2011, the trial court entered the following docket entry:
"Counsel for the Defendant has represented by electronic mail that after consultation, the Defendant does not want to file a motion to withdraw his guilty plea. The scheduling order entered for post-plea motion is vacated. The file indicates that the State Appellate Defender was already appointed and a docketing order was entered on appeal by the Clerk of the Appellate Court while the cause was continued at the trial level for filing of motion to withdraw guilty plea. Accordingly, no further action is taken on the pro se notice of appeal which was filed June 3, 2011 contemporaneous with the Pro Se Motion to Reconsider Sentence."

¶ 11 This appeal followed.

¶ 12 II. ANALYSIS

¶ 13 On appeal, defendant argues that he was not required to file a motion to withdraw his guilty plea and is entitled to a hearing on his motion to reconsider his sentence. The State admits the trial court erred in admonishing defendant that he must file a motion to withdraw his guilty plea in order to proceed, but argues remand is not required because defendant's *pro se* motion to reconsider his sentence was not properly before the court.

¶ 14 Before considering an appeal, we have a duty to insure that jurisdiction is proper. See *People v. Lewis*, 234 Ill. 2d 32, 36-37, 912 N.E.2d 1220, 1223 (2009); *Secura Insurance Co. v. Illinois Farmers Insurance Co.*, 232 Ill. 2d 209, 213, 902 N.E.2d 662, 664 (2009); *People v. Smith*, 228 Ill. 2d 95, 106, 885 N.E.2d 1053, 1059 (2008). "The timely filing of a notice of appeal is both jurisdictional and mandatory." *Secura Insurance*, 232 Ill. 2d at 213, 902 N.E.2d at 664. If the notice of appeal is not properly filed, then the reviewing court has no jurisdiction over the appeal and must dismiss it. *Smith*, 228 Ill. 2d at 104, 885 N.E.2d at 1058.

¶ 15 On August 10, 2011, the office of the State Appellate Defender (OSAD) filed a motion for leave to file a late notice of appeal pursuant to Illinois Supreme Court Rule 606(c) (eff. Mar. 20, 2009) on the ground that defendant's June 3, 2011, *pro se* notice of appeal "failed to include the correct dates of judgment and natures of appeal" and inserted in the proposed notice of appeal the June 7, 2011, order denying defendant's motion to reconsider his sentence.

¶ 16 On August 12, 2011, this court granted defendant's motion for leave to file a late notice of appeal from the orders issued on June 1, 2011, and June 7, 2011.

¶ 17 Illinois Supreme Court Rule 606(c) (eff. Mar. 20, 2009) provides for the filing of a late notice of appeal. Under Rule 606(c), "the appellate court can allow a defendant to file a late notice of appeal within 30 days of the expiration of the appeal period, if the defendant shows a reasonable excuse, or within six months of the expiration of the appeal period, if the defendant shows a meritorious issue and a lack of culpable negligence." *People v. Ross*, 229 Ill. 2d 255, 264, 891 N.E.2d 865, 871 (2008).

¶ 18 We find that defendant filed a timely notice of appeal in sufficient compliance with Rule 606(c). Accordingly, this court has jurisdiction over defendant's appeal pursuant to

Illinois Supreme Court Rule 603 (eff. Oct.1, 2010).

¶ 19 Turning to the merits, when a defendant's probation is revoked, Illinois Supreme Court Rule 605(a) (eff. Oct. 1, 2001) requires the trial court to advise the defendant that, if the defendant seeks to challenge the correctness of the sentence, or any aspect of the sentencing hearing, the defendant must file within 30 days of the date on which sentence is imposed a written motion asking the court to reconsider the sentence. *People v. Dowding*, 388 Ill. App. 3d 936, 942, 904 N.E.2d 1022, 1028 (2009). The trial court here did not advise defendant that he needed to file a motion to reconsider his sentence in order to preserve any sentencing issues.

¶ 20 However, on June 3, 2011, defendant filed a *pro se* motion to reconsider his sentence and a notice of appeal. The trial court denied the motion to reconsider his sentence and advised defendant that because he "ple[]d guilty pursuant to a negotiated plea[, he] may only proceed by filing a motion to withdraw guilty plea."

¶ 21 The trial court did not advise defendant in accordance with Supreme Court Rule 605(a). To be sure, when a defendant is sentenced on a negotiated guilty plea, he may appeal only after moving to withdraw his guilty plea. See Illinois Supreme Court Rule 605(c) (eff. Oct. 1, 2001). The sentence here, however, was imposed on an admission to a probation violation, which triggered the admonishments under Rule 605(a). See generally *People v. Tufte*, 165 Ill. 2d 66, 649 N.E.2d 374 (1995).

¶ 22 Defendant requests that this court "reverse and remand for re-appointment of counsel and further proceedings" on defendant's motion to reconsider his sentence. In response, the State asserts defendant had no right to file a *pro se* postsentencing motion because he was represented by counsel, and this court may affirm the trial court's order on any basis established

by the record (see *People v. Williams*, 193 Ill. 2d 306, 349, 739 N.E.2d 455, 478 (2000)).

¶ 23 We agree that "a defendant possesses 'no right to some sort of hybrid representation, whereby he would receive the services of counsel and still be permitted to file *pro se* motions.' " *People v. James*, 362 Ill. App. 3d 1202, 1205, 841 N.E.2d 1109, 1113 (2006) (quoting *People v. Handy*, 278 Ill. App. 3d 829, 836, 664 N.E.2d 1042, 1046 (1996)). However, neither the State nor defendant cites any authority to support their competing assertions concerning whether defendant was represented by counsel when he filed his *pro se* motion to reconsider his sentence on June 3, 2011. Further, under the facts of this case, where the trial court denied defendant's motion to reconsider his sentence on the erroneous ground that he must file a motion to withdraw his guilty plea, defendant is entitled to a hearing on his motion to reconsider his sentence.

¶ 24 Accordingly, when a defendant's probation is revoked, Rule 605(a) requires the trial court to advise the defendant that, if the defendant seeks to challenge the correctness of the sentence, or any aspect of the sentencing hearing, the defendant must file a written motion asking the court to reconsider the sentence. Thus, in this case, the trial court erred by denying defendant's motion to reconsider his sentence on the ground that defendant must file a motion to withdraw his guilty plea in order to proceed.

¶ 25 III. CONCLUSION

¶ 26 For the reasons stated, we reverse the Champaign County circuit court's denial of defendant's *pro se* motion to reconsider his sentence and remand to give defendant the opportunity to replead his motion with the assistance of appointed counsel.

¶ 27 Reversed and remanded with directions.