

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) 120831-U

NO. 4-12-0831

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
December 4, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Logan County
KEVIN J. McCARTHY,)	No. 12CM276
Defendant-Appellant.)	
)	Honorable
)	Thomas W. Funk,
)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Presiding Justice Appleton and Justice Harris concurred in the judgment.

ORDER

- ¶ 1 *Held:* The appellate court remanded for strict compliance with Illinois Supreme Court Rule 605 (eff. Oct. 1, 2001) admonishments.
- ¶ 2 In August 2012, defendant, Kevin J. McCarthy, *pro se*, pleaded guilty to domestic battery (720 ILCS 5/12-3.2(a)(2) (West 2012)) pursuant to a negotiated plea agreement. The same day, the trial court sentenced defendant to 24 months' conditional discharge.
- ¶ 3 Defendant asserts his case must be remanded because (1) the trial court did not strictly comply with Illinois Supreme Court Rule 605 (eff. Oct. 1, 2001); or in the alternative (2) his waiver of counsel was ineffective because there is no verbatim transcript of the waiver as required by Illinois Supreme Court Rule 401(b) (eff. July 1, 1984). The State concedes remand is necessary because the Rule 605(c) admonishments were inadequate. We agree and remand for further proceedings.

¶ 4

I. BACKGROUND

¶ 5 On August 1, 2012, the State charged defendant with domestic battery (720 ILCS 5/12-3.2(a)(2) (West 2012)).

¶ 6 On August 14, 2012, the trial court held a guilty plea hearing. The same day, the court sentenced defendant as stated. The record does not contain a verbatim transcript of the proceedings. The record contains two docket entries dated August 14, 2012. The first states:

"State appears by ASA Mangold. Deft appears. Guilty plea tendered. Deft duly admonished re: Nature of charge & min/max penalty; Not guilty/proof beyond a reasonable doubt; Right to attorney, appointed if indigent; Right to jury/confront witnesses, testify. COURT FINDS: understanding & voluntary waivers, factual basis. Deft found guilty. Fined \$300 plus costs, placed on 24 months CONDITIONAL DISCHARGE. Bond to be applied to payment of fines & costs. Deft admonished re: Appellate Rights."

The second docket entry states a "Fully Negotiated Plea Agreement, Waiver and Entry of Plea of Guilty and/or Admission of Petition to Revoke" was filed with the clerk. This document is signed by defendant and the assistant State's Attorney. It includes a paragraph containing language similar to Rule 605(c).

¶ 7 The bystander's report (see Ill. S. Ct. R. 323(c) (eff. Dec. 13, 2005)) states the trial court "does not have any specific recollections or memory of the above described events other than that which is contained in its docket entry of that date." It states the court admonished

defendant as reflected in the docket entry. The report states the court has the "habit" of admonishing defendants "that they have the right to appeal the judgment and sentence of the court and that they must first file a Motion to Withdraw their plea if they intend to exercise that right within 30 days of their sentencing which states all of the alleged errors after the Court approves the plea agreement presented and sentences the Defendant."

¶ 8 On August 31, 2012, defendant filed a notice of appeal. Defendant did not file any posttrial motions.

¶ 9 This appeal followed.

¶ 10 II. ANALYSIS

¶ 11 On appeal, defendant asserts his case must be remanded because (1) the trial court did not strictly comply with Rule 605; or in the alternative (2) his waiver of counsel was ineffective because the record contains no verbatim transcript of the waiver as required by Rule 401(b).

¶ 12 A. Rule 605(c) Admonishments

¶ 13 Defendant argues the trial court failed to strictly comply with Illinois Supreme Court Rule 605(c) (eff. Oct. 1, 2001). He contends he was affirmatively misled as to how to appeal his conviction when the court admonished him he needed to file a notice of appeal within 30 days from the date of the sentencing, but not that he needed to file a motion to withdraw his guilty plea. Defendant argues we must remand this case to the trial court so the court can comply with Rule 605(c). Rule 605(c) states:

"(c) On Judgment and Sentence Entered on a Negotiated
Plea of Guilty. In all cases in which a judgment is entered upon a

negotiated plea of guilty, at the time of imposing sentence, the trial court shall advise the defendant substantially as follows:

(1) that the defendant has a right to appeal;

(2) that prior to taking an appeal the defendant must file in the trial court, within 30 days of the date on which 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;

(3) that 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;

(4) that upon the request of the State any charges that may have been dismissed as a part of a plea agreement will be reinstated and will also be set for trial;

(5) 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; and

(6) that 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." Ill. S. Ct. R. 605(c) (eff. Oct. 1, 2001).

¶ 14 In *People v. Dominguez*, 2012 IL 111336, ¶ 11, 976 N.E.2d 983, our supreme court held Rule 605(c) must be strictly complied with and failure to do so requires remand for proper admonishment. The court explained, "[a] verbatim reading of the rule is not required" but the defendant must be "'substantially' advised of the actual content of Rule 605(c)." *Id.* This means the court must admonish the defendant "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." *Id.* ¶ 22, 976 N.E.2d 983. The supreme court added written admonishments alone are not adequate to comply with Rule 605(c), but may be used to "supplement or complement the oral admonishments required under the rule." *Id.* ¶ 27, 976 N.E.2d 983.

¶ 15 In *People v. Jones*, 2013 IL App (4th) 120300, 992 N.E.2d 198, this court examined whether the trial court substantially complied with Rule 605(c). There, the record did not contain a verbatim transcript of the plea hearing. In the certified report of proceedings, the court acknowledged it orally admonished the defendant she would need to file a notice of appeal within 30 days. *Id.* ¶ 6. It acknowledged it did not address the contents of the written plea agreement, which contained the admonishments required by Rule 605(c), or ask if she understood the contents of the agreement. *Id.* ¶¶ 13-14, 992 N.E.2d 198. As the written plea

agreement was not reviewed with the defendant, this court did not use it to determine whether the trial court substantially advised the defendant in accordance with Rule 605. *Id.* ¶ 14. Further, the record did not show the trial court verbally admonished the defendant she would need to file a motion to withdraw her guilty plea within 30 days if she wanted to preserve her right to appeal. *Id.* ¶ 16.

¶ 16 Here, defendant, who was proceeding *pro se*, contends the trial court (1) told him he would need to file a notice of appeal within 30 days, (2) did not tell him he would need to file a motion to withdraw his plea within 30 days if he chose to appeal, and (3) did not address the contents of the written plea agreement with him. In this case, the certified report states the court has no "specific recollections or memory" about the hearing other than what is contained in the docket entry, which states defendant was admonished about his appellate rights. Nothing in the record indicates (1) the court discussed the plea agreement with defendant, (2) the court ascertained defendant was aware of the rights contained in the agreement, (3) what "appellate rights" the court discussed with defendant, or (4) the court asked whether defendant understood his appellate rights. We cannot determine if the court substantially complied with Rule 605(c). Thus, remand is required.

¶ 17 Further, as in *Jones*, defendant did not file a motion to withdraw his plea but filed a notice of appeal within 30 days. Assuming *arguendo* the trial court admonished defendant he needed to file a notice of appeal within 30 days and admonished defendant, as the court was in the habit of doing, that defendant must file a motion to withdraw his plea within 30 days, the court provided defendant with explicitly contradictory admonitions. Remand for proper admonishments would be required. See *Jones*, 2013 IL App (4th) 120300, ¶¶ 17-18, 992 N.E.2d

198.

¶ 18 B. Waiver of Counsel

¶ 19 Because we have determined remand is necessary for compliance with Rule
605(c), we need not address whether the trial court failed to substantially comply with Rule 401
in allowing defendant to proceed *pro se*. See *Jones*, 2013 IL App (4th) 120300, ¶ 21, 992 N.E.2d

198.

¶ 20 III. CONCLUSION

¶ 21 We remand this case for further proceedings consistent with this order.

¶ 22 Remanded.