

error or potential grounds for appeal. For the following reasons, we now grant the State Appellate Defender's motion to withdraw as counsel, and we dismiss the appeal.

¶ 3 On November 19, 2010, defendant was charged by amended information with two counts of domestic battery pursuant to section 12-3.2(a)(1) of the Criminal Code of 1961. (720 ILCS 5/12-3.2(a)(1) (West 2010)). One count alleged that he shook his wife causing bodily harm, and the other count alleged that he struck his daughter causing bodily harm. Defendant, who was represented by counsel, pleaded guilty to the count involving his wife in exchange for the State agreeing to drop the other count¹ and for a sentence of two years' imprisonment followed by four years of mandatory supervised release pursuant to section 5-8-1(d)(6) of the Unified Code of Corrections (730 ILCS 5/5-8-1(d)(6) (West 2010)).² The court imposed its sentence in accordance with the plea agreement on December 10, 2010.

¶ 4 On January 20, 2011, defendant filed *pro se* a motion to reduce sentence and a *pro se* motion to withdraw guilty plea and vacate judgment. The State filed a notice to dismiss defendant's *pro se* motions, arguing that they were untimely. Defendant filed a response to the State's motion to dismiss, arguing that immediately after sentencing, he requested that counsel file a motion to withdraw his plea. He also argued that his motions were timely filed

¹Defendant indicated to the court that he wished to plead guilty to the charge involving his wife and not the charge involving his daughter because he did not want his daughter taken away from him. There seemed to be some confusion regarding to which count the defendant was actually pleading guilty; however, defendant ultimately pleaded guilty to the count involving his wife as was his wish stated on the record.

²Public Act 96-282 (eff. Jan. 1, 2010) increased the mandatory-supervised-release term for domestic battery from one year to four years. The offense to which defendant pleaded guilty occurred in November 2010. The circuit court clearly admonished defendant that he would be subjected to the increased term.

because he placed them in the prison mailing system on January 10, 2011. The circuit court granted the State's motion to dismiss defendant's motions.

¶ 5 The State Appellate Defender argues that there is no meritorious, nonfrivolous argument to be made on defendant's behalf. Based upon the following, we agree.

¶ 6 Illinois Supreme Court Rule 604(d) (eff. July 1, 2006) provides 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. 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."

Rule 604 is mandatory (*People v. Stevens*, 297 Ill. App. 3d 408, 412 (1998)), and " 'the appellate and circuit courts of this state *must* enforce and abide by' " it. (Emphasis in original.) *People ex rel. Alvarez v. Skryd*, 241 Ill. 2d 34, 41-43 (2011) (quoting *People v. Lyles*, 217 Ill. 2d 210, 216 (2005)). When a defendant fails to file the motion in a timely manner, the circuit court may not address the motion on the merits because it no longer has jurisdiction. *Id.* at 43. In the absence of a timely filed Rule 604(d) motion, the appeal must be dismissed. *Id.* at 40.

¶ 7 With regard to the time of filing, Illinois Supreme Court Rule 373 (eff. Dec. 29, 2009) provides as follows:

"Unless received after the due date, the time of filing records, briefs or other papers required to be filed within a specified time will be the date on which they are actually received by the clerk of the reviewing court. If received after the due date, the time of mailing, or the time of delivery to a third-party commercial carrier for

delivery to the clerk within three business days, shall be deemed the time of filing." Rule 373 further provides that "[p]roof of mailing or delivery to a third-party commercial carrier shall be as provided in Rule 12(b)(3)." Rule 12(b)(3) provides the following:

"(b) Manner of Proof. Service is proved:

* * *

(3) in case of service by mail or by delivery to a third-party commercial carrier, by certificate of the attorney, or affidavit of a person other than the attorney, who deposited the paper in the mail or delivered the paper to a third-party commercial carrier, stating the time and place of mailing or delivery, the complete address which appeared on the envelope or package, and the fact that proper postage or the delivery charge was prepaid[.]" Ill. S. Ct. R. 12(b)(3) (eff. Dec. 29, 2009).

¶ 8 In *People v. Tlatenchi*, the First District required strict compliance with Rule 12(b)(3)'s affidavit requirement when a *pro se* defendant relied on the mailbox rule for timely filing. *People v. Tlatenchi*, 391 Ill. App. 3d 705, 715 (2009). The defendant argued that the verification she signed under section 1-109 of the Code of Civil Procedure (735 ILCS 5/1-109 (West 2006)) was the equivalent of an affidavit. *Id.* The court disagreed because of Rule 12(b)(3)'s specific requirement of an affidavit in the case of service by mail, and found the defendant's filing to be untimely based on the date it was file-stamped by the clerk. *Id.* at 715-16. The Fourth District, in *People v. Smith*, followed the reasoning of the First District in holding that the defendant's verification was not sufficient to satisfy the affidavit requirement of Rule 12(b)(3). *People v. Smith*, 2011 IL App (4th) 100430, ¶¶ 5-7.

¶ 9 The Second District disagreed with the reasoning of the First and Fourth Districts in *People v. Hansen*, 2011 IL App (2d) 081226, ¶ 14. The Second District held that the defendant's postmarked envelope was sufficient to establish the time of mailing and that an

affidavit or certification of mailing would be "a corroborative redundancy." *Id.* ¶¶ 13-15. The court determined that a strict and literal reading of Rule 12(b)(3) "would make service by mail an impossibility for *pro se* incarcerated defendants" and that such a reading would therefore be unreasonable. *Id.* ¶ 15.

¶ 10 In the present case, we cannot locate any envelope in the record, and therefore, we need not address the issue of whether a *pro se* incarcerated defendant may escape the affidavit requirement of Rule 12(b)(3) by a postmarked envelope. Because the proof of service accompanying defendant's *pro se* motion did not include an affidavit, the date of filing must be January 20, 2011, which is the date it was file-stamped by the clerk. We note that even if we applied the mailbox rule while excusing the affidavit requirement, defendant's motion would still be untimely. As the State Appellate Defender points out, even if the motion were deemed filed as of January 10, which is the date noted in defendant's "Verification by Certification," it would have been untimely because January 10 was 31 days after December 10, when judgment was entered. The circuit court did not err in dismissing defendant's motion as untimely. Because defendant failed to file a timely motion to withdraw his guilty plea and vacate the judgment, we must dismiss the appeal.

¶ 11 CONCLUSION

¶ 12 The motion of the State Appellate Defender is granted, and the appeal is dismissed.

¶ 13 Motion granted; appeal dismissed.