

No. 1-12-1625

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 09 CR 3669
	)	
JOHNATHAN L. FRANKLIN,	)	Honorable
	)	Nicholas R. Ford,
Defendant-Appellant.	)	Judge Presiding.

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PRESIDING JUSTICE HARRIS delivered the judgment of the court.  
Justices Simon and Pierce concurred in the judgment.

**O R D E R**

¶ 1 *Held:* Where defendant was substantially admonished of his appellate rights under Supreme Court Rule 605(c), his failure to file a timely motion to withdraw his negotiated guilty plea pursuant to Rule 604(d) cannot be excused by the admonition exception, and the appeal is dismissed.

¶ 2 Defendant, Johnathan Franklin, entered a negotiated plea of guilty to one count of attempted first-degree murder, and was sentenced to 30 years' imprisonment. Defendant did not

file a motion to withdraw that plea as required under Supreme Court Rule 604(d) (Ill. S. Ct. R. 604(d) (eff. July. 1, 2006)), but instead filed a notice of appeal. He now contends that the trial court failed to properly admonish him of his appellate rights pursuant to Illinois Supreme Court Rule 605(c) (Ill. S. Ct. R. 605(c) (eff. October 1, 2001)), and, as a result, this court should remand his cause for compliance with the rule and the opportunity to file a motion to withdraw his guilty plea. Defendant also contends that this court should construe Illinois Supreme Court Rules 604(d) and 606(a) (Ill. S. Ct. R. 606(a) (eff. March 20, 2009)) to require the appointment of counsel during post-plea proceedings.

¶ 3 The record shows that defendant was charged with first-degree murder, attempted first-degree murder, and aggravated discharge of a firearm in connection with a November 13, 1995, shooting. At a hearing on March 23, 2012, the court announced that the State was recommending a 30-year sentence and dismissal of the remainder of the charges, in exchange for defendant's plea of guilty on the attempted first-degree murder charge. The court advised defendant that he would be eligible for day-for-day credit on that sentence, as the offense occurred in 1995, and that the sentence would run concurrently with his incarceration in Wisconsin on a separate conviction for felony murder.

¶ 4 The court admonished defendant of the rights he was giving up by pleading guilty, and defendant indicated his understanding of them. The court continued:

"COURT: Did anyone threaten you or promise you anything to make you plead guilty today?

DEFENDANT: No.

COURT: You're pleading guilty of your own free will?

DEFENDANT: I feel like I don't have a choice.

COURT: You can do it because you want to do it because you feel like—

DEFENDANT: I don't want to have natural-life.

COURT: You can do it to avoid natural-life, but are you doing it of your own free will?

DEFENDANT: Yes."

¶ 5 The Court then admonished defendant of the sentencing range applicable to the attempted first-degree murder conviction, and indicated that there would be no presentence investigation report (PSI) because defendant was pleading guilty.

¶ 6 After the State proffered a factual basis for the plea, the court accepted the factual basis, and announced that defendant would be sentenced to the agreed term of 30 years' imprisonment.

The court continued:

"COURT: All right. So even though you've now pled guilty, now that you've been sentenced you still enjoy an absolute right to appeal. In order to appeal you must first within 30 days file in this court a written motion asking to have the judgment vacated and for leave to withdraw your plea of guilty.

You must set forth the grounds or reasons you feel [the motion] should be granted in writing to be followed up in 30 days. If it is granted, the plea of guilty, the sentence and the judgment will be vacated and a trial date will be set on all the charges that were once pending against you. If it were denied you would have 30 days to appeal that denial. You would have to file a notice of that appeal with the Clerk of the Court. In that circumstance you would receive a free attorney, free transcript of today's plea but any issue or claim or error that you got that you didn't first raise in the motion to vacate the

judgment and to withdraw the plea of guilt will be deemed waived or given up on appeal.

Do you understand that?

DEFENDANT: Kind of fast.

COURT: Do you want me to do it again? Even though you plead [sic] guilty, you still have the right to appeal. In order to appeal you must first within 30 days file in this court a written motion asking to have the judgment vacated or for leave to withdraw your plea of guilt. That written motion must set forth all the grounds and reasons you feel [the motion] should be granted in writing to be followed up in 30 days. If it is granted, the plea of guilty, the sentence and judgment will be vacated and a trial date will be set on all the charges that were once pending against you.

If it were denied you would have 30 days to appeal that denial. You would have to file a notice of that appeal with the Clerk of the Court. If [sic] that circumstance it will get you a free attorney, a free transcript of today's plea but any issue or claim of error that you've got that you didn't first raise in the motion to vacate the judgment and to withdraw the plea of guilty will be waived or given up on appeal. Do you understand that?

DEFENDANT: Yes."

¶ 7 Defendant did not attempt to file a motion to withdraw his guilty plea within 30 days, but instead filed a *pro se* "notice of intent to appeal" on April 24, 2012, 32 days after the judgment was entered on his plea. Defendant filed a motion for supervisory relief in the supreme court, requesting that the notice of appeal be treated as timely filed. The supreme court granted the motion, and entered an order directing this court to "treat the notice of appeal file stamped April 24, 2012 \*\*\* as a validly filed notice of appeal."

¶ 8 In this court, defendant invokes the admonition exception to the motion requirement of Rule 604(d), contending that the trial court failed to properly admonish him of his appellate rights following the negotiated plea, thus requiring a remand for compliance and an opportunity to file a motion to withdraw his guilty plea. The State initially responds that the court substantially complied with Rule 605(c), and, as such, we should dismiss defendant's appeal because he failed to file a timely motion to withdraw his plea under Rule 604(d).

¶ 9 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 withdraw the plea of guilty and vacate the judgment." Generally, when a defendant fails to file a timely motion to withdraw his guilty plea under Rule 604(d), the appellate court is precluded from considering the appeal on the merits, and must dismiss it. *People v. Flowers*, 208 Ill. 2d 291, 301 (2003).

¶ 10 Under the admonition exception to this rule, however, defendant's noncompliance with the requirements of Rule 604(d) will not result in dismissal of the appeal if the court failed to advise defendant of the procedural steps necessary to perfect his appeal as set forth in Rule 605. *Flowers*, 208 Ill. 2d at 301; *People v. Foster*, 171 Ill. 2d 469, 473 (1996). In that situation, the proper course is to remand the cause for proper admonishments. *People v. Dominguez*, 2012 IL 111336, ¶ 11; *Flowers*, 208 Ill. 2d at 301.

¶ 11 The parties agree that defendant entered a negotiated guilty plea and, therefore, the trial court was required to admonish defendant pursuant to Supreme Court Rule 605(c). Ill Sup Ct. R. 605(c) (eff. Oct. 1, 2001). Rule 605(c) requires the trial court, after entering judgment upon defendant's guilty plea, to advise defendant of the conditions that must be satisfied before an appeal may be taken. The trial court must *substantially* advise defendant of the content of the

rule, *i.e.*, it 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." *Dominguez*, 2012 IL 111336, at ¶ 19. Where 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 are sufficient to impart to defendant the essence or substance of the rule and the court has substantially complied with Rule 605. *Dominguez*, 2012 IL 111336, at ¶ 22. We review the trial court's compliance with the rule *de novo*. *People v. Breedlove*, 213 Ill. 2d 509, 512 (2004).

¶ 12 Defendant specifically contends that the admonishments were insufficient because the court failed to inform him that he had the right to counsel and a copy of the transcript to assist him in the preparation of his post-plea motion, instead informing him that he was entitled to such assistance only in the event that his post-plea motion was denied and he appealed. This contention is similar to the one addressed by the supreme court in *Dominguez*, 2012 IL 111336.

¶ 13 In that case, defendant challenged the court's Rule 605 admonishments based on, *inter alia*, the court's failure to inform him that he had the right to the assistance of counsel in preparing his post-plea motions, alleging that the court, instead, implied that counsel was only available after post-plea proceedings. *Dominguez*, 2012 IL 111336, at ¶ 47. The court admonished defendant in *Dominguez* that, "even though you have pled guilty and been found guilty, you have certain rights. Those rights include your right to return to the courtroom within 30 days to file motions to vacate your plea of guilty and/or reconsider your sentence. The motions must be in writing and contain all the reasons to support them. \* \* \* In the event the motions are denied, you have 30 days from denial to return to file a notice of appeal the Court's ruling. If you wish to do so and could not afford an attorney, we will give you an attorney free of charge, along with the transcripts necessary for those purposes." *Dominguez*, 2012 IL 111336, at

¶¶ 41, 46. The supreme court concluded that this admonishment, while imperfect, was sufficient to comply with Rule 605, as it reflected that a court-appointed attorney would be available for defendant. *Dominguez*, 2012 IL 111336, at ¶ 51.

¶ 14 In the case at bar, defendant was twice informed by the court that "even though you've now pled guilty, now that you've been sentenced you still enjoy an absolute right to appeal. In order to appeal you must first within 30 days file in this court a written motion asking to have the judgment vacated and for leave to withdraw your plea of guilty. \* \* \* If [the motion] were denied you would have 30 days to appeal that denial. You would have to file a notice of that appeal with the Clerk of the Court. In that circumstance you would receive a free attorney, [and] free transcript of today's plea[.]" We find no meaningful difference in the admonishment given in *Dominguez* and the admonishment at issue here, and we likewise conclude that defendant was substantially admonished pursuant to Rule 605(c), and that his failure to file a Rule 604(d) motion is not cured by the admonition exception. *Dominguez*, 2012 IL 111336, at ¶ 51.

¶ 15 Defendant disagrees, and contends that *Dominguez* is distinguishable because defendant in that case was given both oral and written admonishments of his rights. We observe, however, that in finding the admonishment sufficient, the court in *Dominguez* relied on *In re J.T.*, 221 Ill. 2d 338 (2006), and *People v. Dunn*, 342 Ill. App. 3d 872 (2003), neither of which involved written admonishments. The supreme court noted that in those cases, the trial court also "arguably did not inform defendant that he was entitled to have an attorney appointed to help him prepare the post-plea motions[.]" but despite the imperfection of the oral admonishments, they were sufficient to convey the substance of the rule to defendant and thus complied with Rule 605. *Dominguez*, 2012 IL 111336, ¶ 51.

¶ 16 In this case, the court explained to defendant that he had the right to appeal, but in order to do so, he was required to file a written motion to withdraw his guilty plea with the court within 30 days. By informing 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, the trial court properly imparted the essence of the rule and therefore substantially advised defendant under Rule 605(c). *People v. Claudin*, 369 Ill. App. 3d 532, 534 (2006). Defendant told the trial court that he understood this requirement, but did not file a motion to withdraw his plea, and instead filed a notice of appeal. Under these circumstances, defendant's failure to file a Rule 604(d) motion to vacate the judgment and withdraw the guilty plea is not excused under the admonition exception, and he has thus waived his right to a direct appeal. *Claudin*, 369 Ill. App. 3d at 534-35.

¶ 17 Defendant additionally asserts that "there are strong indications that [he] should have been entitled to withdraw his guilty plea if he so wished[,]" contending that the trial court failed to make a finding on the record about his criminal history in violation of section 5-3-1 of the Unified Code of Corrections (730 ILCS 5/5-3-1 (West 2010)), and that he felt pressured to plead guilty to avoid a natural-life sentence, which, in light of *Miller v. Alabama*, 567 U.S. \_\_\_, 132 S. Ct. 2455, 2469 (2012), decided three months after defendant's plea, would have been unconstitutional because defendant was under 18 years old at the time of the offense. In response, the State contends that we cannot reach the merits of these issues due to defendant's noncompliance with Supreme Court Rule 604(d), as discussed above, and, alternatively, that defendant's claims are meritless.

¶ 18 The failure of a defendant convicted on a plea of guilty to file a Rule 604(d) motion precludes the appellate court from considering the appeal on the merits, and it must dismiss the appeal unless defendant had not been properly admonished pursuant to Supreme Court Rule 605.

*Flowers*, 208 Ill. 2d at 301. Because we have previously found that defendant was substantially admonished under Rule 605(c) and failed to file a written motion to withdraw his plea of guilty before filing his notice of appeal, we may not consider the merits of the issues raised, but must dismiss his appeal. *Flowers*, 208 Ill. 2d at 301.

¶ 19 Defendant alternatively requests this court to construe Illinois Supreme Court Rules 604(d) and 606(a) to require the automatic appointment of counsel during the post-plea stage when a defendant files any document with the trial court or a *pro se* notice of appeal. He contends that the time for filing a post-plea motion is a "critical stage" in proceedings, in which a right to counsel is required. By filing a notice of appeal, defendant asserts that it is apparent that he wished to vacate his guilty plea, and that it would be "fundamentally unfair[.]" "a denial of due process and a deprivation of the right to counsel at a critical stage of criminal proceedings" to hold that he waived his right to appellate review by filing the wrong document. He thus asks this court to remand the matter for the appointment of counsel and for an opportunity to file a post-plea motion with the assistance of counsel.

¶ 20 The sixth amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right \*\*\* to have the Assistance of Counsel for his defence." U.S. Const. amend VI. This provision, "safeguards to an accused who faces incarceration the right to counsel at all critical stages of the criminal process." *Iowa v. Tovar*, 541 U.S. 77, 80 (2004). This sixth amendment right to counsel attaches at the commencement of criminal proceedings (*Kirby v. Illinois*, 406 U.S. 682, 688-89 (1972)), and continues during the direct appeal process (*McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 436 (1988)). Where defendant pleads guilty and does not move to withdraw that plea, however, he waives his right to appeal. *Claudin*, 369 Ill. App. 3d at 535.

¶ 21 Defendant attempts to circumvent the above principles by asserting that he demonstrated a desire to withdraw his guilty plea when he filed notice of appeal. Accordingly, he contends that he merely filed the wrong document to formalize his intent to withdraw his waiver of his appeal right. We disagree.

¶ 22 In *People v. Brooks*, 233 Ill. 2d 146, 155-56 (2009), the supreme court reiterated its position that defendant must comply with Rule 604(d) in order to file an appeal following a guilty plea even if he files notice of appeal indicating an intent to challenge the guilty plea. The supreme court thus indicated that it does not view the difference between a notice of appeal and a Rule 604(d) motion as a mere formality, holding that Rule 604(d) must be followed even if defendant evinces a desire to appeal by filing a notice of appeal. *Brooks*, 233 Ill. 2d at 155-56. In accordance with *Brooks*, we reject defendant's argument that, under the sixth amendment, a defendant who pleads guilty must be provided counsel following his guilty plea if he files a *pro se* notice of appeal from that plea.

¶ 23 Defendant additionally argues that Supreme Court Rule 606(a), which describes how defendant may perfect an appeal, can be deemed constitutional only if we interpret it to require the appointment of counsel to help a defendant who files a *pro se* notice of appeal after a guilty plea. However, for the reasons explained above, we disagree with defendant's position that the constitution requires the appointment of counsel to a defendant who files a notice of appeal without first moving to withdraw his guilty plea. For the same reasons, we reject defendant's argument that Rule 606(a) should be interpreted to require the appointment of counsel in his situation.

¶ 24 Defendant finally contends, the State concedes, and we agree that his mittimus should be amended to reflect that his 30-year sentence for attempted murder runs concurrently with the 50-

year sentence he is currently serving in Wisconsin on a separate felony murder conviction under case number 1996 CR 001903. Pursuant to our authority under Supreme Court Rule 615(b) (Ill. S. Ct. R. 615(b)(1) (eff. Aug. 27, 1999)), we direct the clerk of the circuit court to amend the mittimus to so reflect. *People v. McCray*, 273 Ill. App. 3d 396, 403 (1995)).

¶ 25 For the foregoing reasons, we dismiss defendant's appeal.

¶ 26 Dismissed; mittimus corrected.