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2014 IL App (3d) 120078-U

Order filed March 20, 2014

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of the 12th Judicial Circuit,
	)	Will County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-12-0078
v.	)	Circuit No. 10-CF-203
	)	
ALFRED DOWNING,	)	Honorable
	)	Daniel J. Rozak,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE HOLDRIDGE delivered the judgment of the court.  
Presiding Justice Lytton and Justice Schmidt concurred in the judgment.

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**ORDER**

- ¶ 1 *Held:* The trial court lacked subject matter jurisdiction to rule on defendant's motion to withdraw guilty plea because it was filed more than 30 days following the imposition of his sentence. We vacate the trial court's void order and dismiss this appeal.
- ¶ 2 Defendant, Alfred Downing, entered into a negotiated plea of guilty to unlawful possession of a controlled substance with intent to deliver (720 ILCS 570/401(a)(1)(A) (West 2010)), and was sentenced to 88 months of imprisonment. Defendant filed a motion to withdraw guilty plea, which was denied. Defendant appeals, arguing that he was denied counsel during the

preparation and presentation of his motion to withdraw guilty plea. We vacate the trial court's order and dismiss this appeal.

¶ 3

### FACTS

¶ 4 Defendant was charged with unlawful possession of a controlled substance with intent to deliver (count I) and unlawful possession of a controlled substance (count II). On December 14, 2010, defendant entered a guilty plea to the charges, pursuant to a negotiated plea agreement. In accordance with the plea agreement, the State dismissed count II, and defendant was sentenced to 88 months of imprisonment. Defendant was admonished of his right to an appeal pursuant to Illinois Supreme Court Rule 605(c) (eff. Oct. 1, 2001), during which he was advised that he must withdraw his guilty plea within 30 days of sentencing prior to filing an appeal. Specifically, the court indicated:

"[I]f you wish to appeal, you must first file a motion here in the trial Court asking to withdraw your plea of guilty and vacate the judgment and sentence of the Court. That motion must be in writing. It must set forth the reasons you wish to withdraw your plea, and it must be made within 30 days. If it is not been made within 30 days, you are going to lose your right to an appeal."

¶ 5 On January 18, 2011, defendant's counsel filed an untimely motion to withdraw guilty plea. Defendant additionally filed a *pro se* motion to withdraw guilty plea, which was file-stamped on January 25, 2011. The proof of service attached to the *pro se* motion indicated that defendant had placed the motion in the prison's mailing system on December 30, 2010. Defendant's signature on the proof of service was not notarized. On June 6, 2011, defendant's appointed postplea counsel was granted leave to withdraw as counsel because he believed there was no basis to proceed with a motion to withdraw guilty plea. On January 6, 2012, defendant amended his petition to withdraw guilty plea and vacate sentence.

¶ 6 On January 17, 2012, a hearing on defendant's amended motion to withdraw guilty plea took place. The trial court asked whether the motion had been "filed within 30 days." Both parties represented to the court that the original motion had been timely filed. Following arguments on the motion, the trial court denied defendant's motion to withdraw guilty plea. Defendant appealed.

¶ 7 ANALYSIS

¶ 8 The State argues that defendant's appeal should be dismissed because his motion to withdraw guilty plea was untimely.

¶ 9 I. Rule 604(d)

¶ 10 Illinois Supreme Court Rule 604(d) (eff. July 1, 2006) provides, in pertinent part, that a defendant may not file an appeal challenging his guilty plea unless defendant, within 30 days of the sentence, files in the trial court a motion to withdraw his guilty plea and vacate judgment. A trial court is divested of jurisdiction to entertain a Rule 604(d) postplea motion 30 days after the imposition of the sentence. *People v. Flowers*, 208 Ill. 2d 291 (2003). A trial court's ruling made without subject matter jurisdiction is void. *Id.* Lack of subject matter jurisdiction cannot be waived and cannot be cured through consent of the parties. *Id.* When a trial court lacks jurisdiction to entertain a postplea motion, the appellate court lacks authority to consider the merits of an appeal from a ruling on that motion. *Id.*

¶ 11 For an incarcerated defendant, a court will consider a postplea motion timely filed if the defendant placed the motion in the prison mail system within the 30-day period after the judgment, regardless of the date on which the clerk's office received or filed-stamped the motion. *People v. Tlatenchi*, 391 Ill. App. 3d 705 (2009); *People v. Smith*, 2011 IL App (4th) 100430. When a defendant relies on the date of mailing as the date of filing for a postplea motion, proof

of mailing must be provided as indicated in Illinois Supreme Court Rule 12(b)(3) (eff. Dec. 29, 2009). Rule 12(b)(3) provides that service is proved by:

"[I]n 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).

¶ 12 As indicated, under Rule 12(b)(3), the date of mailing is proven by an affidavit of the person who deposited the paper in the mail. An affidavit must be sworn to, and statements that are not sworn to before an authorized person cannot be considered affidavits. *Roth v. Illinois Farmers Insurance Co.*, 202 Ill. 2d 490 (2002).

¶ 13 Here, the proof of service attached to the motion to withdraw was not notarized. Therefore, there is insufficient proof that the motion was timely mailed. Consequently, we consider defendant's motion to withdraw to have been filed on the date that the circuit court clerk's office file-stamped it on January 25, 2011, which was untimely. Thus, the trial court did not have jurisdiction over the motion and, in turn, this court has no authority to consider the merits of this appeal. Consequently, we vacate the trial court's denial of the motion and order that defendant's motion be dismissed.

¶ 14 II. Revestment Doctrine

¶ 15 Defendant argues that the parties revested the trial court with jurisdiction when both parties agreed that the motion to withdraw was timely filed and argued their respective positions. Our supreme court has recently clarified the narrow parameters of the revestment doctrine, which provides an exception to the general rule that a trial court loses jurisdiction over a cause 30 days

following the entry of a final judgment. The three requirements for a court to be revested with jurisdiction are that "*both* parties must: (1) actively participate in the proceedings; (2) fail to object to the untimeliness of the late filing; *and* (3) assert positions that make the proceedings inconsistent with the merits of the prior judgment and support the setting aside of at least part of that judgment." (Emphases in original.) *People v. Bailey*, 2014 IL 115459, ¶ 25.

¶ 16 Here, the State argued against the trial court allowing defendant to withdraw his guilty plea. Consequently, both parties did not assert positions inconsistent with the merits of the prior judgment, as is required for the revestment doctrine to apply. Therefore, jurisdiction was not revested with the trial court.

¶ 17 The trial court did not have jurisdiction to rule on defendant's motion to withdraw. We, therefore, vacate the trial court's order denying defendant's motion to withdraw guilty plea and dismiss the appeal.

¶ 18 **CONCLUSION**

¶ 19 For the foregoing reasons, the judgment of the circuit court of Will County is vacated, and the appeal is dismissed for lack of jurisdiction.

¶ 20 Order vacated; appeal dismissed.