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2014 IL App (3d) 120844-U

Order filed November 12, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 10th Judicial Circuit
)	Peoria County, Illinois
Plaintiff-Appellee,)	
)	Appeal No. 3-12-0844
v.)	Circuit No. 11-CF-182
)	
TYSHONTIS CAMPBELL,)	Honorable
)	Stephen Kouri,
Defendant-Appellant.)	Judge, Presiding

JUSTICE O'BRIEN delivered the judgment of the court.
Presiding Justice Lytton and Justice Schmidt concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant did not waive his appeal rights and cause must be remanded for postplea counsel's failure to file a Rule 604(d) certificate.

¶ 2 Defendant Tyshontis Campbell pleaded guilty to two counts of aggravated battery with a firearm and was sentenced to consecutive terms of 30 and 21 years. The trial court denied Campbell's motion to reconsider his sentence and he appealed. We reverse and remand based on postplea counsel's failure to file a Rule 604(d) certificate.

¶ 3 **FACTS**

¶ 4 Defendant Tyshontis Campbell and co-defendant, John Carter, were charged with four

counts of armed robbery (720 ILCS 5/18-2(a)(2), (4) (West 2010)) and two counts of aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2010) (repealed by Pub. Act 96-1551, Art. 5, §§ 5-6, eff. 7-1-11)) for an armed robbery at a Peoria restaurant where two employees were shot. Campbell's case proceeded to a jury trial. Following jury selection, the State presented a plea to the trial court. According to the plea, Campbell would testify truthfully against Carter and, in exchange, the State would drop the armed robbery charges. Per the plea agreement, Campbell would plead guilty to two counts of aggravated battery with a firearm and be sentenced to a minimum floor of 12.5 years per count. The plea did not include a cap as to the maximum sentence and the sentences were statutorily mandated to run consecutively. The plea also required Campbell to waive "all appeal rights including the right to attack the sentence that is imposed."

¶ 5 Prior to accepting the plea, the trial court questioned Campbell, eliciting that Campbell was 21 years old, could read and write English, and had a 10th grade education. The trial court advised Campbell of the charges against him and the potential penalties. Campbell confirmed for the court that he wanted to plead guilty to two counts of aggravated battery with a firearm. The trial court admonished Campbell per Illinois Supreme Court Rule 402 (Ill. S. Ct. R. 402 (eff. July 1, 1997)) regarding his trial and other constitutional rights and verified that Campbell wanted to waive those rights by entering a plea of guilty.

¶ 6 The State presented a factual basis for the plea, which the trial court accepted. The trial court reconfirmed with Campbell that he wished to plead guilty and then accepted Campbell's plea, finding it was made voluntarily and knowingly. The cause was set for sentencing and the following discussion took place.

[State]: And, Judge, I realize in most cases you
wouldn't inform the defendant of their appeal rights yet,

you would be informing him of those rights after sentencing, but because the defendant is going to waive those rights today or is waiving them, I think that it would be prudent for the Court to at least admonish the defendant what he is waiving, the right to attack anything up to this point[,] including his attorney, the motion to suppress, any other thing that he felt was improperly handled or not handled or whatever but then also he is waiving whatever the sentence is. He cannot then attack that either.

[Trial court]: Mr. Campbell, normally, at the end of a sentencing hearing[,] even though you voluntarily pled guilty, you would still have the right to appeal, and you would have to exercise that right and I would go through with you at the end of the sentencing hearing how you go ahead and exercise those rights. But my understanding of the terms of this agreement is you're not going to appeal. You're giving up your right to appeal either that there was something improperly done in the way you were presented the deal and that you didn't voluntarily plead guilty, you would be giving up your right to appeal those issues as well as appealing any issues that might relate to the sentencing part of this meaning if[,] and I wouldn't assume that you are going to get the high end. I wouldn't assume you would get the low end. I don't know what you're going to

get. But at the end of that sentencing hearing, if you are unsatisfied with what that number is, you're giving up right now your right to appeal on that number. Do you understand that?

[Campbell]: Yes, sir.

[Trial court]: Okay. All right.”

¶ 7 A sentencing hearing took place on March 2, 2012, and the trial court sentenced Campbell to consecutive terms of 30 and 21 years' imprisonment. The trial court admonished Campbell that he had a right to appeal and that to exercise his appeal right he had to first file a postplea motion within 30 days. The State objected to the admonishment, arguing that the plea agreement included a waiver of Campbell's rights to appeal. The trial court stated, "I'm still giving him his appeal rights." On March 16, 2012, the trial court received a letter from Campbell in which he alleged that his trial attorney was ineffective and asked the court to vacate his plea. Campbell filed a *pro se* motion to vacate his plea and reconsider his sentence in May 2012. The following month, the trial court appointed a postplea attorney to represent Campbell. The court stated Campbell had "sent one or two or more letters or pleadings into the file that may be motions to reconsider or motions to withdraw guilty pleas."

¶ 8 Newly appointed counsel filed an amended motion to vacate plea and reconsider sentence in September 2012. The State argued that the court lacked jurisdiction to hear the motion based on Campbell's waiver of his appeal rights in the plea agreement. Campbell informed the court that he wished to proceed only on his motion to reconsider his sentence, which the State considered appropriate. The State informed the trial court that it would waive any timeliness issues concerning Campbell's motion based on his claim that he asked his attorney to timely file the motion and his attorney did not file it. Campbell's motion was heard and denied. Campbell

sought an appeal through the trial court, which issued an order directing that a notice of appeal be filed and appellate counsel be appointed.

¶ 9

ANALYSIS

¶ 10

The issue on appeal is whether this case should be remanded due to postplea counsel's failure to file a Supreme Court Rule 604(d) certificate. Campbell argues that the failure of his postplea attorney to file a Rule 604(d) certificate requires remand for filing of the mandated certificate and a new postplea motion. The State argues that the lack of a Rule 604(d) certificate is irrelevant because Campbell knowingly and voluntarily waived his appeal rights in the plea agreement. The State also argues that Campbell cannot appeal his sentence because he failed to timely file a postplea motion to withdraw his guilty plea.

¶ 11

We first address the State's waiver arguments. A defendant who pleaded guilty but wants to challenge the sentence must file a motion to reconsider the sentence or, if the plea is challenged, a motion to withdraw the plea and vacate the judgment within 30 days of when the sentence is imposed. Ill. S. Ct. R. 604(d) (eff. July 1, 1975). The filing of the motion is a condition precedent to appealing a judgment entered on a guilty plea, and when a defendant fails to file a Rule 604(d) motion, the appeal must be dismissed. *People v. Flowers*, 208 Ill. 2d 291, 300-01 (2003).

¶ 12

All defendants, including those who plead guilty, are afforded a fundamental right to appeal. Ill. Const. 1970, art. VI, sec. 6; *People v. Ross*, 229 Ill. 2d 255, 268 (2008). A defendant may waive his right to appeal if done knowingly and voluntarily. *People v. Houle*, 257 Ill. App. 3d 721, 726 (1994). A defendant who enters into a negotiated plea must be admonished that (1) he has the right to appeal; (2) that prior to the appeal, the defendant must file a motion to vacate and withdraw within 30 days of sentencing; (3) if the motion is allowed, the cause will proceed to trial; (4) any dismissed charges may be reinstated by the State if the plea is withdrawn; (5) he

is entitled to transcripts of the plea hearing; and (6) issues not raised in the motion will be waived. Ill. S. Ct. R. 605(c) (eff. July 1, 1975); *People v. Gougisha*, 347 Ill. App. 3d 158, 162 (2004).

¶ 13 Because Campbell entered into a negotiated plea, he was required to move to withdraw his guilty plea and vacate the judgment within 30 days of the denial of his motion to consider. See Ill. S. Ct. R. 604(d) (eff. July 1, 1975). Campbell timely wrote the trial court, claiming ineffective assistance of counsel and seeking to withdraw his plea and vacate the sentence. However, a motion to withdraw and vacate was not filed until May 2012, beyond the 30-day limit. At the hearing on Campbell's motion, the State expressly waived any objection on timeliness grounds. It cannot now complain the motion was untimely. *People v. Liekis*, 2012 IL App (2d) 100774, ¶ 24 (under the invited error doctrine, "a party may not request the court to proceed in one manner and then argue on appeal that the requested action was error"). The State's argument that Campbell's decision to abandon his motion to withdraw his plea is similarly unavailing. Rule 604(d) requires the defendant to file a motion. It is undisputed that Campbell filed both *pro se* and amended motions to withdraw and vacate. We do not consider that his subsequent decision not to proceed forward on the motion to withdraw constituted an abandonment of Campbell's appeal rights.

¶ 14 The State also maintains that Campbell waived any right to appeal based on the plea agreement. We disagree. At the plea presentation hearing, the trial court provided Rule 402 admonishments to Campbell, found Campbell's waiver was knowing and voluntary, and accepted his plea. On the State's suggestion, the trial court then admonished Campbell that because Campbell was waiving his appeal rights pursuant to the plea agreement, he would not be informed of the right to appeal after sentencing. The trial court did not admonish Campbell regarding his appeal rights waiver until after it had accepted his guilty plea.

¶ 15 Rule 402 requires the trial court to inform a defendant in open court and determine that he understands he is waiving certain constitutional rights before accepting a guilty plea. See Ill. S. Ct. R. 402 (eff. June 1, 1994). At the sentencing hearing, Campbell was admonished pursuant to Rule 605 that he had the right to appeal. See Ill. S. Ct. R. 605 (eff. July 1, 1975). Campbell was admonished both that he could, and could not appeal, with the final admonishment informing Campbell of his appeal rights. On these circumstances Campbell cannot be considered to have knowingly and voluntarily waived his appeal rights and we will not find the appeal rights waiver per the plea agreement binding.

¶ 16 Because we determine that Campbell did not waive his appeal rights, we turn to his argument that remand is required based on the failure of his attorney to file a Rule 604(d) certificate.

¶ 17 Rule 604(d) requires that when a defendant appeals from a judgment entered on a guilty plea, his attorney:

“shall file with the trial court a certificate stating that the attorney has consulted with the defendant either by mail or in person to ascertain defendant’s contentions of error in the sentence or the entry of the plea of guilty, has examined the trial court file and report of proceedings of the plea of guilty, and has made any amendments to the motion necessary for adequate presentation of any defects in those proceedings.” Ill. S. Ct. R. 615(c) (eff. July 1, 1975).

¶ 18 A Rule 604(d) certificate must be filed before a hearing can be held on the postplea motion. *People v. Strawder*, 374 Ill. App. 3d 338, 340 (2007). If defense counsel fails to file a

Rule 604(d) certificate, the proper remedy is remand for (1) the filing of a Rule 604(d) certificate; (2) the opportunity to file a new motion to withdraw the guilty plea and/or to reconsider the sentence, if counsel determines a new motion is required; and (3) a new hearing on the motion. *People v. Lindsay*, 239 Ill. 2d 522, 531 (2011). Strict compliance with Rule 604(d) is required. *People v. Gabrys*, 2013 IL App (3d) 110912, ¶ 26.

¶ 19 Campbell's trial counsel did not file a Rule 604(d) certificate when he filed the amended motion to withdraw and vacate. The appropriate remedy is remand. Accordingly, we remand for compliance with Rule 604(d) and the opportunity for Campbell to file a new postplea motion.

¶ 20 For the foregoing reasons, the judgment of the circuit court of Peoria County is reversed and the cause remanded.

¶ 21 Reversed and remanded.