

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).

2014 IL App (3d) 130490-U

Order filed December 10, 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 21st Judicial Circuit, Iroquois County, Illinois,
Plaintiff-Appellant and Cross-Appellee,)	
v.)	Appeal No. 3-13-0490
NEIL McCLANAHAN,)	Circuit Nos. 07-CF-152 and 07-CF-210
Defendant-Appellee and Cross-Appellant)	Honorable James B. Kinzer, Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justice O'Brien concurred in the judgment.
Justice Wright dissented.

ORDER

- ¶ 1 *Held:* This appeal is dismissed because the notices of appeal and cross-appeal were filed prior to the entry of an order disposing of defendant's pending postjudgment motion.
- ¶ 2 Pursuant to a negotiated plea agreement, defendant, Neil McClanahan, pled guilty to escape in case No. 07-CF-210, aggravated driving under the influence (DUI) in case No. 07-CF-

152, and domestic battery in case No. 08-CM-160. In exchange for his guilty plea, defendant received concurrent terms of imprisonment of seven years, two years, and 364 days, respectively. In addition, the State agreed not to prosecute the remaining charges.

¶ 3 Defendant filed a notice of appeal. The appeal was dismissed for lack of appellate court jurisdiction due to defendant's failure to file the prerequisite postplea motion in accordance with Illinois Supreme Court Rule 604(d) (eff. July 1, 2006) before appealing from his guilty plea. *People v. McClanahan*, No 3-09-0765 (Nov. 16, 2009) (dispositional order).

¶ 4 Defendant filed a third-amended postconviction petition, which proceeded to a third-stage evidentiary hearing. The trial court found defendant's counsel was ineffective for allowing defendant to plead guilty to escape even though he could not have been guilty of the charge. The trial court granted postconviction relief and allowed defendant to withdraw his guilty plea. The original charges against defendant were reinstated. The State filed a notice of appeal. Defendant filed a motion to reconsider the postconviction relief, arguing the escape charge should have been vacated as void. Defendant filed a cross-appeal.

¶ 5 **FACTS**

¶ 6 On January 3, 2008, defendant was charged with escape in violation of section 31-6(a) of the Criminal Code of 1961 (Code) (720 ILCS 5/31-6(a) (West 2006)) in case No. 07-CF-210. The indictment alleged that defendant committed a Class 2 felony offense of escape in that "defendant, having been furloughed for a physician's appointment, intentionally failed to return to the Iroquois County Jail on December 21, 2007 at 8:30 a.m. as previously ordered by the court."

¶ 7 Section 31-6(a) of the Code defines the offense of escape as follows:

"A person convicted of a felony or charged with the commission of a felony who intentionally escapes from any penal institution or from the custody of an employee of that institution commits a Class 2 felony; however, a person convicted of a felony who *** knowingly fails to return from furlough *** is guilty of a Class 3 felony."
720 ILCS 5/31-6(a) (West 2006).

¶ 8 On June 9, 2009, the parties informed the court they had reached a plea agreement. The prosecutor indicated defendant was going to "plead guilty to escape as charged" in exchange for seven years of imprisonment, a concurrent two-year sentence for aggravated DUI in case No. 07-CF-152, and a concurrent 364-day sentence for domestic battery in case No. 08-CM-160. Defendant was to serve the escape sentence consecutively to a sentence he received in another case (No. 07-CF-109). In addition, the State agreed to *nolle prosequi* additional charges that were pending against defendant.

¶ 9 During the plea hearing, the trial judge indicated the allegations in the indictment appeared to be of the Class 3 felony version of escape although the indictment stated that it was a Class 2 felony. The trial court admonished defendant that a Class 3 felony, with an extended-term sentence, was punishable by 5 to 10 years in prison followed by 1 year of mandatory supervised release. In addressing the factual basis for the plea, the parties stipulated that the State's witness would testify consistent to the testimony given at the grand jury proceeding. The court accepted defendant's guilty plea and sentenced him in accordance with the plea agreement. The trial court's written sentencing order indicated that defendant was convicted of the Class 3 felony of escape.

¶ 10 On August 10, 2010, defendant filed a postconviction petition and, thereafter, amended the petition multiple times. On June 14, 2012, the State filed a motion to dismiss defendant's

third amended postconviction petition.

¶ 11 On July 25, 2012, the circuit court denied the State's motion to dismiss in light of the holding in *People v. Bowden*, 313 Ill. App. 3d 666 (2000). In *Bowden*, the Fourth District Appellate Court held that a defendant in the custody of a penal institution charged with a felony—but not convicted—who fails to return from a work release is not properly chargeable with escape as defined in section 31-6(a) of the Code. *Id.*

¶ 12 The circuit court noted that if defendant had been convicted of a felony and failed to return from a furlough he would be guilty of violating section 31-6(a) of the Code but he could not be guilty based upon the facts alleged in the indictment. The trial judge stated, "It's not up to me to rewrite the statute to provide that somebody who's in lawful custody not convicted of a felony who fails to return from the furlough is guilty under [section 31-6(a)]."

¶ 13 According to a docket entry, on May 23, 2013, the trial court allowed the State's motion to dismiss defendant's postconviction petition except for, *inter alia*, the issues of "[t]he '*Boden*' [sic] argument that the defendant is not guilty because the facts do not fit within the statute" and "related claims of ineffective assistance of counsel, but only as they relate to the '*Boden*' [sic] issue and not otherwise."

¶ 14 On July 1, 2013, the matter proceeded to a third-stage evidentiary hearing. Defendant indicated that he was not seeking postconviction relief to withdraw his guilty plea but to have the convictions vacated as being void. The trial judge stated, "the post-conviction proceedings as I understand them are entirely based on your desire to withdraw your guilty plea." The trial court found that "it was ineffective assistance of counsel for [defendant's] lawyer to allow him to plead guilty of something which he could not be guilty under the *Bowden* case." The trial court granted postconviction relief and allowed defendant to withdraw his guilty plea. The trial court

vacated defendant's guilty plea and sentence. The trial judge stated:

"Any cases that were dismissed by the State as part of the plea agreement are reinstated and that means [defendant] comes back into custody technically on [the escape] case because that hasn't been dismissed. I've simply allowed him to withdraw his plea of guilty."

¶ 15 The State filed a motion for leave to appeal, which the trial court denied. The State filed a motion to reconsider, which the trial court denied.

¶ 16 On July 3, 2013, defendant filed a motion to reconsider, arguing that the escape charge should have been vacated as being void. The trial court characterized the motion as a motion to dismiss the reinstated escape charge and continued that matter for a hearing.

¶ 17 On July 9, 2013, the State filed a notice of appeal. On July 11, 2013, defendant filed a motion to clarify the postconviction ruling or reconsider postconviction relief. On July 12, 2013, the trial court noted the State had filed a notice of appeal and indicated that "the case is on appeal." On July 15, 2013, defendant filed a motion to reconsider his postconviction petition.

¶ 18 On July 26, 2013, defendant filed correspondence with this court indicating he wished to file an "appeal notice" from the trial court's order of July 1, 2013. This court treated the correspondence as defendant's late notice of cross-appeal.

¶ 19 ANALYSIS

¶ 20 On appeal, the State argues that the trial court erred in granting defendant postconviction relief. The State acknowledges that defendant could not have been convicted of escape under section 31-6(a) of the Code as charged in the indictment and agrees that the performance of defendant's counsel was deficient when he allowed defendant to plead guilty. However, the State argues defendant was not prejudiced by his counsel's deficient performance. In his cross-

appeal, defendant requests that we remand for a hearing on his pending postjudgment motion because he believes the charge was void and could not be reinstated. The State agrees that defendant's cross-appeal should be dismissed and the matter remanded for a trial court ruling on defendant's pending postjudgment motion. Both parties claim that regardless of whether defendant's cross-appeal is dismissed, this court should rule on the issue raised by the State.

¶ 21 Before we address the merits of this appeal, we have a *sua sponte* duty to examine our jurisdiction and to dismiss the appeal if jurisdiction is lacking. *People v. Maclin*, 2014 IL App (1st) 110342. In granting defendant postconviction relief in this case, the trial court did not dismiss the escape charge but, rather, allowed defendant to withdraw his guilty plea and have the charges reinstated. Generally, in criminal cases, the State cannot appeal from an interlocutory ruling which does not effectively result in the dismissal of charges. See Ill. S. Ct. R. 604(a) (eff. Feb. 6, 2013). However, although the *procedure* for appealing a postconviction ruling is to be accomplished in accordance with the rules governing criminal appeals (see Ill. S. Ct. R. 651 (eff. Feb. 6, 2013)), the granting of postconviction relief is *substantively* a final judgment on a civil matter. *People v. Andretich*, 244 Ill. App. 3d 558 (1993). Therefore, Supreme Court Rule 604(a) prohibiting the State from appealing interlocutory rulings in criminal cases does not affect the State's substantive right to appeal the trial court's granting of postconviction relief.

¶ 22 Nonetheless, the appeal in this case must be dismissed. Pursuant to Illinois Supreme Court Rule 606(b) (eff. Feb. 6, 2013), "[w]hen a timely posttrial or postsentencing motion directed against the judgment has been filed *** any notice of appeal filed before the entry of the order disposing of all pending postjudgment motions shall have no effect and shall be stricken by the trial court." (Emphasis added.) The rule is applicable regardless of whether the motion was filed before or after the date on which the notice of appeal was filed. *Id.*

¶ 23 In this case, both the State and defendant's notices of appeal from the circuit court order granting postconviction relief on July 1, 2013, should have been stricken because both notices were filed prior to the trial court disposing of defendant's postjudgment motion. Therefore, appeal No. 3-13-0490 is premature and must be dismissed.

¶ 24 CONCLUSION

¶ 25 For the foregoing reasons, appeal No. 3-13-0490 is dismissed.

¶ 26 Appeal dismissed.

¶ 27 JUSTICE WRIGHT, dissenting.

¶ 28 The State filed its notice of appeal on July 9, 2013. Defendant filed his notice of appeal on July 26, 2013. Both notices were timely with respect to the court's order allowing postconviction relief on July 1, 2013, and the court's subsequent order denying the State's request for reconsideration of that ruling on July 3, 2013. I conclude there is no basis to nullify these timely notices of appeal.

¶ 29 First, I conclude there were no postjudgment motions, filed by either party, which remained pending at the time the State filed its July 9, 2013, timely notice of appeal. Further, the *pro se* defense motions filed after July 9, 2013, merely reiterated the same issues substantively decided by the court on July 1, 2013. In my view, the redundant *pro se* defense motions do not qualify as motions directed against the judgment for purposes of tolling the 30-day window contemplated by Illinois Supreme Court Rule 303 (eff. June 4, 2008); *R & G, Inc. v. Midwest Region Foundation for Fair Contracting, Inc.*, 351 Ill. App. 3d 318, 323-24 (2004) (motion to clarify is not directed against the judgment for purposes of Rule 303). Therefore, I agree with the trial court's view that it had been divested of jurisdiction to consider defendant's duplicative *pro se* motions, which were filed after the State's July 9, 2013, notice of appeal. On this basis, I

respectfully dissent and conclude this court has jurisdiction to consider the issues raised by the parties.