

No. 1-13-1559

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 11 CR 19155
)	
ROBERT GAYOL,)	Honorable
)	Stanley Sacks,
Defendant-Appellant.)	Judge Presiding.

JUSTICE LIU delivered the judgment of the court.
Presiding Justice Simon and Justice Pierce concurred in the judgment.

O R D E R

- ¶ 1 **Held:** Judgment entered on defendant's guilty plea to burglary affirmed over his challenge to the sufficiency of the trial court's admonitions.
- ¶ 2 Defendant Robert Gayol pleaded guilty to a charge of burglary and was sentenced to 18 years' imprisonment. He contends that his cause should be remanded for proper admonishments and the opportunity to file a motion to withdraw his guilty plea because the circuit court failed to substantially admonish him pursuant to Supreme Court Rule 605(b). Ill. S. Ct. R. 605(b) (eff. Oct. 1, 2001).

¶ 3 The record shows that on October 19, 2011, defendant was charged with burglary. When the case was called on April 5, 2013, defendant requested a Rule 402 conference. S. Ct. R. 402(d) (eff. July 1, 2012). Immediately after the conference, defense counsel stated: "Pursuant to the 402 conference, my client would like to accept the 18-year sentence that Your Honor offered." Defendant stated that he understood the charge against him, and that, because of his criminal record, he was subject to the Class X sentencing range. He also acknowledged his understanding that he would plead guilty, and be sentenced to, 18 years' imprisonment to be served concurrently with the 18 years he was already serving on his prior jury conviction of burglary (No. 11 CR 19158).

¶ 4 The court then admonished defendant of the consequences of pleading guilty and the rights he was waiving. The court accepted his written jury waiver, and defendant indicated that he understood he was giving up his right to a trial of any kind. Defendant confirmed that he was entering his guilty plea freely and voluntarily, with no force or threats.

¶ 5 The State then provided a factual basis for the plea stating that Tiana Dahir would testify that on October 9, 2011, she awoke to find that several items had been stolen from her garage. Defendant was captured on a security camera committing the burglary and was later arrested attempting to sell the stolen items at a store on the northwest side of the city. Defendant stipulated to the facts and the court accepted defendant's plea, finding that he understood the nature of the charge, the consequences of his plea, and that there was a factual basis for it.

¶ 6 The State then reviewed defendant's prior convictions as set forth in the prior presentence report. Following that, the court advised defendant of his right to a written presentence report,

but stated that no purpose would be accomplished in doing so because they had a 402 conference on the 18-year sentence. Defendant agreed, and then acknowledged his signature on the waiver of his right to a presentence report. The court sentenced defendant to 18 years' imprisonment, concurrent with the sentence imposed in 11 CR 19158, credited him with 526 days of time served, as indicated by his counsel, and advised him that he would serve three years of mandatory supervised release after his release from prison.

¶ 7 Following that, the trial court admonished defendant of his appeal rights pursuant to Illinois Supreme Court Rule 605(c). Ill. S. Ct. R. 605(c) (eff. Oct. 1, 2001). The court informed defendant that before he could file an appeal, he had 30 days to file a written motion asking that his plea be vacated. If his motion were granted, his guilty plea would be withdrawn, and the case would be set for trial. The court also informed defendant that if he were indigent, he could obtain both a transcript of the proceedings and a lawyer free of charge for any motion he wanted to file. The court finally told defendant that any claim of error he had with his plea must be put into the motion, or it would be waived.

¶ 8 Defendant acknowledged his understanding of these admonitions, but instead of filing a post-plea motion, he filed a notice of appeal. In this court, defendant acknowledges his failure to file the requisite 604(d) motion (Ill. S. Ct. R. 604(d) (eff. Dec. 11, 2014)) to withdraw his plea, but contends that he should be afforded the opportunity to do so under the admonition exception to the rule because the trial court failed to substantially admonish him under Rule 605(b). He maintains that the admonishment under Rule 605(c) (Ill. S. Ct. R. 605(c) (eff. Oct. 1, 2001)), was improper because he entered an open plea, not a negotiated one.

¶ 9 The State responds that defendant entered a negotiated plea and was properly admonished under Rule 605(c). The State thus maintains that defendant waived his right to a direct appeal by failing to file a motion to withdraw his guilty plea pursuant to Rule 604(d), and that his appeal should be dismissed.

¶ 10 Rule 604(d) provides in pertinent part that "no 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." Ill. S. Ct. R. 604(d) (eff. Dec. 11, 2014). Where, as here, defendant fails to file a motion to withdraw his guilty plea, this court is prohibited from considering the appeal on the merits and must dismiss the appeal. Ill. S. Ct. R. 604(d) (eff. Dec. 11, 2014); *People v. Flowers*, 208 Ill. 2d 291, 300-01 (2004). However, under the "admonition exception" to this rule (*People v. Jamison*, 181 Ill. 2d 24, 28-30 (1998)), the appeal is not dismissed, and the case will be remanded for strict compliance with Rule 604(d) (*Flowers*, 208 Ill. 3d at 301).

¶ 11 The record in this case shows that the trial court admonished defendant under Rule 605(c), which applies to negotiated pleas. Defendant asserts that the trial court's admonitions were improper because he did not enter a negotiated plea, and therefore, he should have been admonished under Rule 605(b). Unlike Rule 605(c), sub-sections (b)(2) and (3) of Rule 605 provide defendant the option of filing a motion to reconsider his sentence or to withdraw his plea within 30 days, and, if allowed, the sentence may be modified or plea of guilty vacated, and a trial date set. Ill. S. Ct. R. 605(b)(2), (3) (eff. Oct. 1, 2001); *People v. Dunn*, 342 Ill. App. 3d 872, 879 (2003).

¶ 12 A negotiated plea is "one in which the prosecution has bound itself to recommend a specific sentence, or a specific range of sentence, or where the prosecution has made concessions relating to the sentence to be imposed and not merely the charge or charges then pending." Ill. S. Ct. R. 604(d) (eff. Dec. 11, 2014); R. 605(c) (eff. Oct. 1, 2001); *People v. Gougisha*, 347 Ill. App. 3d 158, 161 (2004). A plea agreement that limits or forecloses the State from arguing for a sentence in the full range of penalties available is a negotiated plea. *Dunn*, 342 Ill. App. 3d at 880.

¶ 13 Defendant contends that he entered an open plea subject to 605(b) admonishments because the sentencing decision came from the court and not the prosecutor. He argues that the prosecutor's only participation in sentencing was stating the factual basis, and the prosecutor made no concessions relating to the sentence imposed. The State responds that the 402 conference that took place immediately prior to defendant's guilty plea and the State's failure to object to the sentencing decision, clearly indicate that defendant entered a negotiated plea. We agree.

¶ 14 The record shows that defense counsel requested a Rule 402 conference. The court then advised defendant that counsel, the court, and the State would participate in a conference and discuss the sentence that the court would impose if defendant pled guilty. Defendant agreed, and immediately following the conference, defense counsel stated that, pursuant to the conference, defendant would accept the 18-year sentence "Your Honor" offered. After further colloquy, defendant acknowledged that he wished to plead guilty and be sentenced to the concurrent 18-year term. The court affirmed the terms of the plea agreement and indicated that it would act in

accordance with the agreement reached during the previously held 402 conference, in which both defense counsel and the State participated. *Dunn*, 342 Ill. App. 3d at 880. These facts and circumstances clearly show that defendant entered a negotiated, rather than an open, guilty plea (*Gougisha*, 347 Ill. App. 3d at 160-61), as asserted by defendant.

¶ 15 This conclusion is not called into question by counsel's on-the-record announcement to the court that defendant would like to accept the 18-year sentence offered by "Your Honor." Although defendant correctly notes that Rule 402(d) provides that plea decisions cannot be initiated by the trial court, and that agreements are between the parties, the record here, as in *Gougisha*, 347 Ill. App. 3d at 162, shows that the parties agreed to the 18-year sentence in exchange for defendant's guilty plea, and that the court concurred with the terms of the agreement. See also, *Dunn*, 342 Ill. App. 3d at 880. We, therefore, find defendant's contrary claim without merit.

¶ 16 Defendant contends, nonetheless, that his plea should not be considered negotiated merely because he pleaded guilty following a 402 conference. In support of this contention, defendant cites *People v. Meza*, 376 Ill. App. 3d 787, 789-91 (2007), suggesting that an open plea can be the result of a 402 conference if the trial court makes a recommendation for a sentence during the conference, and only the defendant agrees with the recommendation. We find defendant's reliance on *Meza* misplaced.

¶ 17 In *Meza*, following the 402 conference, the trial court indicated that defendant was entering a "blind plea," which defendant understood to mean that there was no agreement between defendant and the State. *Id.* at 788. The State presented evidence in aggravation and the

trial court acknowledged the 15-year sentence agreed to during the 402 conference, but stated that it did not feel bound by those terms. *Id.* The trial court then sentenced defendant to 22 years' imprisonment after considering the evidence presented in aggravation. On appeal, the appellate court found that this was not a negotiated plea because the trial court never acknowledged the existence of one, and informed defendant he was entering a blind plea, which meant that defendant and the State did not reach a plea agreement. *Id.*

¶ 18 In the instant case, there was no indication that the parties did not agree to the 18-year sentence, or that the trial court was not in accord with that agreement. After the factual basis for the plea was stated, the court asked the State if there was any prior record, and the State outlined defendant's prior convictions in the presentence report for the other case. After further clarification, the court sentenced defendant as set forth in the plea agreement. The State did not present any evidence in aggravation or object to the sentence announced by the court, and defendant waived the preparation of a presentence report, further indicating that the parties agreed to the 18-year concurrent sentence in exchange for the guilty plea, and that the court concurred with the terms of the plea agreement. *Gougisha*, 347 Ill. App. 3d at 161.

¶ 19 For the reasons stated, we find that defendant entered a negotiated plea, and was properly admonished in accordance with Rule 605(c). It therefore follows that defendant's failure to comply with Rule 604(d) requires that his appeal be dismissed. *People v. Flowers*, 208 Ill. 2d at 301; *People v. McGee*, 314 Ill. App. 3d 1037, 1038 (2000).

¶ 20 Appeal dismissed.