

FOURTH DIVISION
October 22, 2015

No. 1-13-3516

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 C6 60771 |
| |) | |
| JOHNNY LESAIN, |) | Honorable |
| |) | Michele M. Simmons, |
| Defendant-Appellant. |) | Judge Presiding. |

JUSTICE COBBS delivered the judgment of the court.
Presiding Justice McBride and Justice Howse concurred in the judgment.

O R D E R

- ¶ 1 *Held:* Defendant's appeal is dismissed because he did not file a postplea motion after the trial court provided sufficient admonishments.
- ¶ 2 Defendant Johnny Lesain entered an open plea of guilty to robbery and was sentenced to two years of gang probation. On appeal, defendant contends that the trial court failed to provide proper postplea admonishments pursuant to Supreme Court Rule 605(b) (eff. Oct. 1, 2001). We dismiss this appeal.

¶ 3 Defendant was charged with one count of Class 2 felony robbery. Following a plea conference, the court, contrary to the State's position, recommended that defendant be evaluated for the gang probation program. The court later revoked the offer of probation after defense counsel indicated that defendant wished to proceed to trial. On October 1, 2013, the court reinstated the offer and defendant told the court that he wished to plead guilty and be placed on gang probation. After preplea admonishments, the State presented the factual basis showing that the victim was delivering two packages of cell phones to a home in Hazel Crest on December 9, 2010, when defendant struck him, took one of the packages, and fled with a woman who took the other package. The court accepted defendant's guilty plea. Defendant waived a presentence investigation report and the State presented factors in aggravation, including a conviction for resisting a police officer and a juvenile conviction for residential burglary. Afterwards, the court sentenced defendant to two years of gang probation.

¶ 4 Next, the court admonished defendant as follows:

"THE COURT: You have a right to appeal the sentencing order that I just entered. In order to perfect that right, you must file within 30 days of today's date a written motion asking leave to withdraw your plea of guilty and asking that I vacate the judgment that I entered against you. Your motion must set forth your grounds or your basis for seeking to withdraw your plea of guilty. Any grounds or basis not set forth in your motion cannot be used on appeal if your motion is denied. If only your sentence is being challenged, then you must—you must file a motion to withdraw your guilty plea, and your plea will be vacated, and a trial date would then be set. If only your sentence is being challenged, then you must file a written motion for me to reconsider your sentence within 30 days of

today's date. If the motion to reconsider your sentence is allowed, your sentence could then be modified. After a ruling on your motion to reconsider sentence, you could then appeal the sentencing order. If you are indigent, a copy of the transcript of these proceedings will be provided to you without cost. Counsel will also be appointed to assist you in preparing your motion for appeal.

Do you understand your appeal rights, Mr. Lesain?

THE DEFENDANT: Yes, ma'am."

¶ 5 Defendant did not file any postplea motion.

¶ 6 On appeal, defendant contends that the trial court failed to provide proper postplea admonitions pursuant to Rule 605(b) by not substantially informing him that he must move to withdraw his open plea of guilty or move to reconsider his sentence in order to perfect an appeal, but instead delivered admonitions that were confusing and inadequate. Defendant argues the court failed to inform him that counsel would be appointed to assist with postplea motions, but rather, explained his right to counsel only as it pertained to appeal. Additionally, defendant claims the court did not inform him that a successful motion to withdraw his plea would result in a trial on the charged offense. Finally, defendant urges that the admonitions conflicted where the court stated, incorrectly, that he could perfect his right to appeal his sentence through a motion to withdraw his plea but later stated that he must file a motion to reconsider sentence.¹

¹ In response to these alleged errors, the State's brief contends the trial court "substantially admonished defendant pursuant to Rule 605(b)." We note, however, that the State cites throughout to Rule 605(c) (eff. Oct. 1, 2001), which provides admonitions for negotiated guilty pleas. Nonetheless, the State presents no argument that defendant's plea was negotiated and not open. Because the difference in the admonitions under Rules 605(b) and 605(c) is not relevant to the issues that defendant raises on appeal, our analysis proceeds under Rule 605(b).

¶ 7 Illinois Supreme Court Rule 604(d) (eff. Feb. 6, 2013) requires a defendant who wishes to appeal from a judgment entered on an open plea of guilty to first file a written motion with the trial court to either reconsider sentence or to withdraw the plea and vacate the judgment. Compliance with Rule 604(d) is a condition precedent to an appeal, and if the defendant fails to meet this requirement the appeal must be dismissed. *People ex rel. Alvarez v. Skryd*, 241 Ill. 2d 34, 40 (2011). However, under the admonishment exception to this rule, if the defendant appeals without first filing a postplea motion and the trial court failed to give the proper admonitions set forth in Rule 605, the appeal is not dismissed but remanded to the trial court for strict compliance with Rule 604(d). *Id.* at 41.

¶ 8 Here, defendant entered an open plea of guilty and, thus, the court was required to admonish defendant in accordance with Rule 605(b), which provides, in relevant part, as follows:

"(2) that prior to taking an appeal the defendant must file in the trial court, within 30 days of the date on which sentence is imposed, a written motion asking to have the trial court reconsider the sentence or to have the judgment vacated and for leave to withdraw the plea of guilty, setting forth the grounds for the motion;

(3) that if the motion is allowed, the sentence will be modified or the plea of guilty, sentence and judgment will be vacated and a trial date will be set on the charges to which the plea of guilty was made;

(5) that if the defendant is indigent, a copy of the transcript of the proceedings at the time of the defendant's plea of guilty and sentence will be provided without cost to

the defendant and counsel will be appointed to assist the defendant with the preparation of the motions[.]"

¶ 9 The trial court is not required to use the exact language of Rule 605. *People v. Dominguez*, 2012 IL 111336, ¶ 11. Rather, the admonition is insufficient only where the court omits the substance of the rule by failing to inform the defendant of what he must do in order to preserve his right to appeal his guilty plea. *Id.* ¶ 22; *In re J.T.*, 221 Ill. 2d 338, 348 (2006). So long as the court's admonitions impart the essence or substance of the rule, the court has substantially complied with the rule. *Dominguez*, 2012 IL 111336, ¶ 22. We review *de novo* the trial court's compliance with supreme court rules. *Id.* ¶ 13.

¶ 10 We find that the trial court substantially provided the admonishments required by Rule 605(b). Defendant first argues that the court failed to inform him that counsel would be appointed to assist with postplea motions, but rather, explained his right to counsel only as it pertained to appeal. According to Rule 605(b)(5), the court must admonish a defendant that "if the defendant is indigent *** counsel will be appointed to assist the defendant with the preparation of the motions." Here, the court stated:

"After a ruling on your motion to reconsider sentence, you could then appeal the sentencing order. If you are indigent, a copy of the transcript of these proceedings will be provided to you without cost. Counsel will also be appointed to assist you in preparing your motion for appeal."

Here, the court did not suggest that appointed counsel only could assist with an appeal, but rather, that counsel was available throughout postplea proceedings including appeal. *Dominguez*, 2012 IL 111336, ¶¶ 46, 51 (where admonition described right to counsel only in reference to

appeal, court did not imply that defendant lacked right to counsel in preparing postplea motions). While the court did not mention defendant's right to counsel specifically in reference to postplea motions, the court conveyed the substance of the rule by explaining that appointed counsel was available. *People v. Dunn*, 342 Ill. App. 3d 872, 881-82 (2003) (admonition adequate where court informed defendant of right to counsel but did not state that counsel would prepare postplea motions). As the court conveyed the substance of Rule 605(b)(5), we find that defendant was adequately advised of his right to appointed counsel.

¶ 11 Second, defendant argues that the court failed to inform him that if a motion to withdraw his plea was granted and the judgment was vacated, a trial date would be set on the charged offense. According to Rule 605(b)(3), the court must advise the defendant that, following a successful motion to withdraw a plea, the conviction "will be vacated and a trial date will be set on the charges to which the plea of guilty was made." Here, the court told defendant that if he prevails on a motion to withdraw his plea, "your plea will be vacated, and a trial date would then be set." The court did not state the charge that defendant would face at trial, but in this case, defendant was charged with only one count of robbery.² Consequently, this admonition conveyed to defendant the substance of the rule, namely, that the charge would be set for trial if

² In his reply brief, defendant also contends that the trial court failed to admonish him pursuant to Rule 605(b)(4) (eff. Oct. 1, 2001), which states that "upon the request of the State any charges that may have been dismissed as a part of a plea agreement will be reinstated and will also be set for trial[.]" As this issue was not raised in the opening brief, it is waived. *People v. Polk*, 2014 IL App (1st) 122017, ¶ 49 (citing *BAC Home Loans Servicing, LP v. Mitchell*, 2014 IL 116311, ¶ 23). Moreover, no charges were dismissed under defendant's open plea agreement. *People v. Crump*, 344 Ill. App. 3d 558, 563 (2003) (no remand where defendant "was not prejudiced by the missing verbiage" from admonition).

defendant's motion to withdraw his plea was granted. Moreover, this court has refrained from remanding even where the trial court omitted this admonition altogether. *People v. Claudin*, 369 Ill. App. 3d 532, 534 (2006) (no remand where omission not prejudicial); *People v. Wyatt*, 305 Ill. App. 3d 291, 295-96 (1999) (no remand where defendant did not allege charges were unexpectedly reinstated). Under these circumstances, defendant was substantially admonished in accordance with Rule 605(b)(3).

¶ 12 Finally, defendant urges that the admonitions were conflicting where the court stated, incorrectly, that he could perfect his right to appeal his sentence through a motion to withdraw his plea but later stated that he must file a motion to reconsider sentence. According to Rule 605(b)(2), the court must admonish a defendant that in order to perfect the right to appeal, the defendant has 30 days to file a written motion stating the grounds to reconsider sentence or to vacate the judgment and withdraw the plea of guilty. Here, the court stated:

"You have a right to appeal the sentencing order that I just entered. In order to perfect that right, you must file within 30 days of today's date a written motion asking leave to withdraw your plea of guilty and asking that I vacate the judgment that I entered against you. Your motion must set forth your grounds or your basis for seeking to withdraw your plea of guilty. Any grounds or basis not set forth in your motion cannot be used on appeal if your motion is denied. If only your sentence is being challenged, then you must—you must file a motion to withdraw your guilty plea, and your plea will be vacated, and a trial date would then be set. If only your sentence is being challenged, then you must file a written motion for me to reconsider your sentence within 30 days of today's date. If the motion to reconsider your sentence is allowed, your sentence could then be modified.

After a ruling on your motion to reconsider sentence, you could then appeal the sentencing order."

This admonition was imperfect, as only a motion to reconsider sentence would preserve defendant's right to appeal his sentence. However, while the instructions pertaining to a motion to withdraw the plea were extraneous to a sentencing challenge, the admonition still conveyed that a motion to reconsider sentence was needed. The court further explained that a written motion must be filed within 30 days and that omitted grounds would be waived. Admonitions may substantially comply with Rule 605 where, as here, parts of the admonition are "extraneous and incorrect." *Claudin*, 369 Ill. App. 3d at 534 (trial court admonished defendant to file inapplicable postplea motion, but no remand where defendant indicated understanding and failed to file any motion). Further, our supreme court has held that a defendant may be substantially admonished of the requirements for postplea motions even where the admonition contains superfluous statements. *Dominguez*, 2012 IL 111336, ¶ 43 (court substantially notified defendant how to perfect right to appeal despite erroneously suggesting postplea motion must be filed in person). Here, defendant indicated that he understood the court's instructions regarding the necessity of filing a postplea motion but did not file any motion before appealing. Because defendant was substantially admonished pursuant to Rule 605(b), his failure to file a Rule 604(d) motion to reconsider sentence or withdraw his plea cannot be excused by the admonition exception.

¶ 13 For the foregoing reasons, we dismiss the appeal.

¶ 14 Dismissed.