

No. 1-13-3583

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. 13 CR 16108
)	
KENDALL ROSADO,)	Honorable
)	Joan Margaret O'Brien,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE PIERCE delivered the judgment of the court.
Justices Neville and Simon concurred in the judgment.

O R D E R

¶ 1 *Held:* Appeal dismissed where trial court substantially complied with Illinois Supreme Court Rule 605(c) admonishments and defendant failed to comply with Rule 604(d) requirement to file a post-plea motion prior to filing his notice of appeal.

¶ 2 Defendant Kendall Rosado entered a negotiated plea of guilty to possession of a firearm with defaced identification marks (720 ILCS 5/24-5(b) (West 2012)), in exchange for the State's recommendation of 24 months' probation and 30 days of community service. Defendant did not attempt to vacate the judgment entered on his plea (Supreme Court Rule 604(d) (eff. Dec. 11, 2014)), but instead filed a notice of appeal. In this court, defendant contends that the trial court

failed to substantially comply with Supreme Court Rule 605(c) when it admonished him regarding his right to appeal from his negotiated guilty plea, and that his case should be remanded for proper admonishments and further proceedings pursuant to Rule 604(d). In the alternative, defendant contends that when he filed his *pro se* notice of appeal, the trial court had a duty to ascertain whether he wanted the assistance of appointed counsel to prepare post-plea motions, and to avoid a violation of his constitutional rights to counsel, this court should remand his case for the appointment of post-plea counsel and further proceedings.

¶ 3 The record shows that defendant was charged with possession of a handgun on which the importer's or manufacturer's serial number had been changed, altered, removed or obliterated. On September 16, 2013, he agreed to plead guilty in exchange for a sentence of 24 months' probation and 30 days of community service. The parties stipulated to the factual basis for the plea, which revealed that on August 11, 2013, defendant, the driver of his car, and an unknown passenger, fled from a traffic violation stop near 242 East 115th Street in Chicago. Defendant was arrested following a brief foot chase, and was unable to produce a driver's license or insurance. Inside his car, police recovered a handgun with a scratched-off serial number, and defendant made an inculpatory statement regarding the gun after he was advised of his rights per *Miranda*. The trial court found that defendant's plea was made freely and voluntarily, accepted his plea and the factual basis for it, and sentenced him in accordance with the plea agreement. The trial court then admonished defendant of his appeal rights as follows:

"Even though you have pled guilty, you still do have a right to appeal. First you have to file a motion asking to withdraw the plea of guilty. In the motion, you have to tell me the reasons why you wanted to withdraw the plea of guilty.

If I granted that motion, I would set aside your plea, the sentence and the judgment and set your case for trial. That motion has to be in writing and filed with the Clerk's Office within 30 days of today's date.

However, if I deny that motion to withdraw your plea of guilty, then you would have 30 days from the date of that denial in which to file a written notice of appeal. That also has to be filed in the Clerk's Office.

Any issue or claim of error that you did not put in the motion to withdraw your plea would be waived for purposes of the appeal.

Also if you are indigent, you would be entitled to a free attorney and a free transcript to assist you in your appeal. Do you understand your appeal rights?"

¶ 4 Defendant stated that he understood, but on October 16, 2013, he filed a *pro se*, standard form, Notice of Appeal with the clerk of the circuit court of Cook County. In that notice, defendant indicated that he was appealing from the September 16, 2013, order of the circuit court, and in the "Relief sought from Reviewing Court" section, he indicated: "I am asking the court to overturn a wrongful conviction for Possession of a Defaced Firearm." Defendant did not sign the notice, but also filed a signed Request for Preparation of the Record on Appeal with the clerk's office on the same day.

¶ 5 On appeal, defendant seeks a remand of his cause for proper admonishments and an opportunity to file an assisted motion to withdraw his plea. He contends that the trial court did

not substantially comply with Supreme Court Rule 605(c) by failing to inform him that he was entitled to the assistance of counsel in the preparation of his post-plea motion. The State responds that this appeal must be dismissed, because the trial court substantially complied with Rule 605(c), and defendant failed to file the requisite 604(d) motion to withdraw his guilty plea.

¶ 6 It is settled that when defendant wishes to appeal a judgment entered on a guilty plea, he must first file a written post-plea motion pursuant to Supreme Court Rule 604(d) as a condition precedent to any appeal. *People v. Dunn*, 342 Ill. App. 3d 872, 876 (2003). A defendant who fails to do so may not pursue a direct appeal (*People v. Crump*, 344 Ill. App. 3d 558, 561-62 (2003)), and in the absence of such a motion, the reviewing court must dismiss the appeal, leaving the Post-Conviction Hearing Act as defendant's only recourse (*People v. Foster*, 171 Ill. 2d 469, 471 (1996)). However, under the "admonition exception" to this rule, an appellate court may entertain an appeal despite defendant's noncompliance with Rule 604(d) where the trial court has failed to issue proper Rule 605(c) admonishments. *Foster*, 171 Ill. 2d at 473.

¶ 7 In order to comply with Rule 605(c), the trial court must "substantially" advise defendant in such a way that the defendant is properly informed, or put on notice, of what he must do in order to preserve his right to appeal his guilty plea or sentence, including an admonition that "if [he] is indigent, a copy of the transcript of the proceedings at the time of the [his] plea of guilty and sentence will be provided without cost to [him] and counsel will be appointed to assist [him] with the preparation of the motions." Supreme Court Rule 605(c)(5) (eff. Oct. 1, 2001); *People v. Dominguez*, 2012 IL 111336, ¶¶ 22, 45. Our review of the trial court's compliance with this rule is *de novo*. *People v. Lloyd*, 338 Ill. App. 3d 379, 384 (2003).

¶ 8 As indicated above, the trial court admonished defendant that he had the right to appeal his guilty plea, and that in order to do so, he must first file a written motion asking to withdraw

the plea of guilty with the Clerk's Office within 30 days. The court further notified defendant that if the motion was denied, he would have 30 days from that date to file a written notice of appeal, and that "if [he was] indigent, [he] would be entitled to a free attorney and a free transcript to assist [him] in [his] appeal."

¶ 9 Defendant contends that the trial court did not substantially comply with the rule because it "never advised [defendant] that counsel and transcripts would be provided free of charge to assist him in the preparation of his post-plea motions." The State points out that the supreme court rejected a similar argument in *Dominguez*, 2012 IL 111336, ¶ 51, where the trial court informed defendant that "[s]hould your motion to reconsider sentence be granted, you will be resentenced. In the event the motions are denied, you have 30 days from denial to return to file a notice of appeal the Court's ruling. If you wish to do so and could not afford an attorney, we will give you an attorney free of charge, along with the transcripts necessary for those purposes." *Id.* ¶ 46. The supreme court found that the admonition "reflected that a court-appointed attorney would be available for defendant," and thus the trial court conveyed the substance of the rule to him. *Id.* ¶ 51.

¶ 10 Similarly, in this case, we find that the trial court did not explicitly inform defendant that he was entitled to have an attorney appointed to help him prepare the post-plea motions, but that the trial court's admonishments did convey the substance of the rule to defendant and complied with Rule 605(c). *People v. Dominguez*, 2012 IL 111336, ¶ 51.

¶ 11 Defendant argues, nevertheless, that *Dominguez* is distinguishable, because there, the admonishments gave defendant general notice that appointed counsel would be available to him, whereas here, the court "explicitly stated that an attorney and transcripts would be provided free of charge only for an appeal." We disagree. In *Dominguez*, the court informed defendant that if

his post-plea motions were denied, he could file a notice of appeal, and if he wished to do so, an attorney and free transcripts would be provided "for those purposes." *Dominguez*, 2012 IL 111336, ¶ 46. Taken as a whole, we find no meaningful distinction between this statement and the one at bar, which also reflected that a court appointed attorney would be available for defendant, thereby conveying the substance of the rule to defendant. *Dominguez*, 2012 IL 111336, ¶ 51.

¶ 12 Defendant further attempts to distinguish *Dominguez* by pointing out that defendant in that case received written admonishments in addition to the oral ones, whereas here, the court failed to provide admonishments in writing. However, as the State correctly points out, the written admonishments in *Dominguez* were not dispositive of the supreme court's holding that the trial court had substantially complied with Rule 605(c)(5). To the contrary, the supreme court focused on the prior holdings in *In re J.T.*, 221 Ill. 2d 338 (2006) and *People v. Dunn*, 342 Ill. App. 3d 872 (2003), neither of which contained supplemental written admonishments, to reach its conclusion that the written admonishments in *Dominguez* were a supplement to the oral admonishments, and not, as defendant argues, "crucial" to the court's evaluation of defendant's argument. *Dominguez*, 2012 IL 111336, ¶ 54. Accordingly, we find that the trial court substantially complied with Rule 605(c), and that defendant is not excused for failing to file the requisite post-plea motion to withdraw his guilty plea. *Dunn*, 342 Ill. App. 3d at 883.

¶ 13 In reaching this conclusion, we find defendant's reliance on *People v. Anderson*, 309 Ill. App. 3d 417 (1999) and *People v. Lloyd*, 338 Ill. App. 3d 379 (2003) misplaced. In *Anderson*, 309 Ill. App. 3d at 422, defendant was admonished incorrectly on multiple issues, and he only filed a motion to reconsider sentence. The Fourth District of this court concluded that "[t]aken as a whole, the admonishments provided in this case could have misled defendant into believing

that no good reason existed to file a motion to withdraw his plea." *Id.* By contrast, defendant in this case was correctly admonished and substantially informed that he was required to file a post-plea motion prior to filing a notice of appeal, and that he was entitled to the assistance of counsel in order to do so.

¶ 14 Similarly, in *Lloyd*, 338 Ill. App. 3d at 385, where the trial court completely failed to inform defendant about his right to appointed counsel, this court found that the trial court failed to substantially comply with Rule 605(c), which, in turn, excused defendant's failure to file a proper post-plea motion. *Id.* No such error is present in the case at bar.

¶ 15 In the alternative, defendant contends that his *pro se* notice of appeal, was "similar to a motion to withdraw his plea," and that once he filed the notice of appeal, the trial court had a duty to ascertain whether he wanted the assistance of appointed counsel to prepare post-plea motions and perfect his appeal. He further asserts that Rule 604(d) should be construed as requiring the appointment of post-plea counsel once a defendant expresses a desire to appeal his guilty plea, and that the 30 days following the entry of a guilty plea is a critical stage of proceedings during which defendant has the right to counsel.

¶ 16 We observe that the arguments raised by defendant were addressed in, and decided adversely to him in *People v. Merriweather*, 2013 IL App (1st) 113789. In *Merriweather*, this court held that the duty to inquire whether defendant requires the assistance of appointed counsel to prepare post-plea motions and perfect an appeal is triggered when defendant either makes an oral inquiry of the trial court during sentencing proceedings, or files a post-plea motion pursuant to Rule 604(d). *Merriweather*, 2013 IL App (1st) 113789, ¶ 27. As noted, neither of those conditions is met here.

¶ 17 Contrary to defendant's assertion that his *pro se* notice of appeal was "similar to a motion

to withdraw his plea," and its content reveals his "desire to challenge the judgment against him," the record clearly shows that on October 16, 2013, defendant filed a form notice of appeal with an accompanying request for preparation of the record on appeal. Defendant indicated in the notice of appeal that he was appealing from the September 16, 2013 order of the circuit court, and that he was asking the reviewing court to "overturn a wrongful conviction for Possession of a Defaced Firearm." He did not inform the trial court that he wished to withdraw his plea or file a motion to that effect. As such, we find no indication in the record or defendant's *pro se* notice of appeal that he desired to withdraw his guilty plea, but instead, that he sought to directly appeal the circuit court's judgment. See *Merriweather*, 2013 IL App (1st) 113789, ¶ 28.

¶ 18 We also rejected the proposition that the court must appoint counsel when a defendant expresses a desire to seek relief from judgment or to appeal in *Merriweather*, 2013 IL App (1st) 113789, ¶ 26, and found *People v. Griffin*, 305 Ill. App. 3d 326 (1999), and *People v. Barnes*, 291 Ill. App. 3d 545 (1997), cited by defendant, distinguishable. In contrast to the case at bar, defendants in those cases did not file a notice of appeal prior to filing a post-plea motion under Rule 604(d), and made verbal inquiries to the court to trigger its duty to inquire further. *Merriweather*, 2013 IL App (1st) 113789, ¶ 27.

¶ 19 Defendant acknowledges our decision in *Merriweather*, but claims that it was wrongly decided, and that we should apply the reasoning in *Mempa v. Rhay*, 389 U.S. 128 (1967), *Evitts v. Lucey*, 469 U.S. 387 (1985), and *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), as well as *People v. Ross*, 229 Ill. 2d 255 (2008), for the proposition that the 30-day period following the entry of a guilty plea is a critical stage of proceedings during which defendant has the right to counsel. However, those decisions are factually distinguishable. In stark contrast to the instant case, defendant in *Mempa*, 389 U.S. at 130-31, was not represented by counsel during the

sentencing stage of the proceedings, and similarly, *Evitts*, 469 U.S. at 387, *Flores-Ortega*, 528 U.S. at 470, and *Ross*, 229 Ill. 2d at 258, are inapposite because they involved collateral challenges to defendants' convictions. *Merriweather*, 2013 IL App (1st) 113789, ¶¶ 28-34.

¶ 20 We therefore decline defendant's request to depart from our well-reasoned opinion in *Merriweather*, and find that it precludes defendant's alternative argument regarding the trial court's duty to ascertain whether he wanted the assistance of appointed counsel to prepare post-plea motions and perfect his appeal. Since defendant failed to file the requisite Rule 604(d) written post-plea motion prior to filing his notice of appeal, and we have found that his failure is not excused by the "admonition exception", we conclude that he has waived his right to appeal the circuit court's judgment (*Dunn*, 342 Ill. App. 3d at 877-78, 883), and we must dismiss his appeal.

¶ 21 Appeal dismissed.