

No. 1-14-0440

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 1775
)	
JESSY ZUNO,)	Honorable
)	Noreen Love,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE LIU delivered the judgment of the court.
Justice Connors and Justice Harris concurred in the judgment.

O R D E R

¶ 1 **Held:** Appeal dismissed where defendant, after being sufficiently admonished under Rule 605(c), failed to file a Rule 604(d) motion to withdraw his negotiated guilty plea.

¶ 2 **BACKGROUND**

¶ 3 Defendant Jessy Zuno entered a negotiated plea of guilty to a charge of attempted murder with a firearm and was sentenced to 31 years' imprisonment. On appeal, defendant contends that his cause should be remanded for proper admonishments and the opportunity to file a motion to withdraw his guilty plea. He contends that the trial court failed to advise him of his right to counsel to assist him the preparation of post-plea motions and that he needed to file a motion to

withdraw his guilty plea as a prerequisite to filing an appeal. In the alternative, he contends that his cause should be remanded for the appointment of post-plea counsel.

¶ 4 The record shows that defendant was charged in a 14-count indictment with, *inter alia*, attempted first degree murder. When the case was called on August 19, 2013, defendant, through counsel, requested a Rule 402 conference. Ill. S. Ct. R. 402(d) (eff. July 1, 2012). Immediately after the conference, the trial court advised defendant of his right to a trial, and defendant indicated that he wished to plead guilty to the offense of attempted murder with a firearm in exchange for the State's agreement to *nolle prosequi* on the other charges. The court then admonished defendant of the consequences of pleading guilty and the rights he was waiving by entering a guilty plea. The court accepted his signed jury waiver, and defendant indicated that he understood that 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, threats, or promises.

¶ 5 The State then presented a factual basis for the plea, stating that the evidence at trial would show that at 5 a.m. on September 25, 2011, the victim, Frank Cournoyer, and defendant were at Hangers Club on 3600 West North Avenue in Stone Park, Illinois. Cournoyer would testify that as he was leaving the club, he was shot in his left leg and the bullet passed through to his right leg. He was subsequently transported to Loyola Hospital for surgery. Doctor Franklin Wright of Loyola Hospital would testify that on September 25, 2011, he performed surgery on Cournoyer that was necessary to save his life and limb.

¶ 6 Stone Park police officer Kirk would testify that he was at Hangers Club at 5 a.m. on September 25, 2011, when he heard gunshots and observed them coming from behind a mesh fence. He returned fire and saw defendant, the only person in the area, running toward a vehicle on the other side of the fence. Officer Kirk ordered defendant out of the vehicle and defendant

complied. After exiting the vehicle, defendant dropped a gun, which Officer Kirk recovered. Stone Park police officer Copp would testify that he took a gunshot residue kit from defendant and submitted it to the Illinois State Police Crime Lab for testing. Robert Burke of the Illinois State Police Crime Lab, an expert in gunshot residue, would testify that defendant either discharged a firearm or was in the area of a discharged firearm, based on residue collected from his right hand. The State would also present evidence that shell casings recovered from the scene were sent to the Illinois State Police Crime Lab, and that John Flaskamp, an expert in ballistics, would testify that all the casings had been fired from the weapon that Officer Kirk recovered after defendant threw it on the ground.

¶ 7 After defendant stipulated to those facts, the trial court accepted his guilty plea, finding that he understood the nature of the charges against him, and the consequences of his plea, and that there was a factual basis for the plea. The State then informed the court of defendant's prior convictions. In mitigation, defense counsel informed the court of defendant's family, his employment and educational background, and his history of substance abuse. The court sentenced defendant to 31 years' imprisonment, and then admonished him as follows:

"Sir, even though you have pled guilty, you still have the right to an appeal. You would have to do it within 30 days of today's date. It must be done in writing. You would have to ask this court to allow you to withdraw or take back your plea of guilty and to vacate the judgment that I entered here today.

If I deny it, you can appeal my decision to a higher court; but if I allow you to withdraw your plea, then this matter will be set for trial. If you could not afford an attorney at that time, one would be appointed for

you. You'd also get a free transcript— a transcript of today's proceedings.

But the charges that were dismissed today, the State would reinstate those against you. And anything you failed to put in your motion or include there, that would forever be waived. A higher court would not hear those issues. Do you understand your right under appeal?"

Defendant then acknowledged his understanding of the court's admonishments.

¶ 8 The record shows that defendant did not file a motion to withdraw his plea. On February 14, 2014, defendant filed a "motion to leave to file a late notice of appeal." In his motion, defendant stated that he believed his sentence was excessive, and that "the alleged victim doesn't have any knowledge who the alleged assailant is." On February 25, 2014, this court allowed defendant's motion for leave to file late notice of appeal.

¶ 9 ANALYSIS

¶ 10 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 comply with Illinois Supreme Court Rule 605(c) (eff. Oct. 1, 2001)). He specifically contends that the court did not advise him of his right to counsel to assist him in drafting post-plea motions or that he needed to file a motion to withdraw his guilty plea as a prerequisite to filing a notice of appeal.

¶ 11 The State responds that defendant's appeal must be dismissed because defendant failed to file a motion to withdraw his guilty plea, which is a prerequisite to filing an appeal under Rule 604(d). The State further contends that defendant may not invoke the admonition exception to the rule because the trial court substantially complied with Rule 605(c).

¶ 12 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 a defendant fails to file a motion to withdraw his guilty plea, he is procedurally defaulted from pursuing an appeal and dismissal of the appeal is required. *People v. Flowers*, 208 Ill. 2d 291, 300-01 (2003); Ill. S. Ct. R. 604(d) (eff. Dec. 11, 2014). 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. 2d at 301).

¶ 13 Defendant asserts that the admonition exception to Rule 604(d) applies here because the trial court did not sufficiently admonish him in accordance with Rule 605(c), which applies to negotiated pleas.¹ The State does not dispute the application of Rule 605(c). As such, we find Rule 605(c) applicable to this case, and review the court's admonishments for compliance with this rule. *People v. Dunn*, 342 Ill. App. 3d 872, 880 (2003). Our review is *de novo*. *People v. Henderson*, 217 Ill. 2d 449, 458 (2005).

¶ 14 Rule 605(c) provides, in pertinent part, that the court "shall advise the defendant substantially *** that prior to taking an appeal the defendant must file in the trial court, within 30 days of the date on which the sentence is imposed, a written motion asking to have the judgment vacated and for leave to withdraw the plea of guilty, setting forth the ground for the motion." Ill. S. Ct. R. 605(c)(2) (eff. Oct. 1, 2001). The Rule further provides that if defendant is indigent,

¹ Although no specific reference was made to the nature of the plea during the plea proceeding, defendant states on appeal that he entered a negotiated plea, and this conclusion is supported by the comments of the court and counsel during the proceeding and the import of the court's language in announcing sentence.

counsel will be appointed to assist him with the preparation of the motions at no cost to him. Ill. S. Ct. R. 605(c)(5) (eff. Oct. 1, 2001). In this case, defendant contends that the trial court's admonishments were ambiguous because the court never told him that he was required to file a motion to withdraw his guilty plea, or that filing that motion was a prerequisite to filing a notice of appeal. The plain language of Rule 605(c) does not require the court to read the rule to defendant verbatim in order to satisfy its obligations to "substantially advise" defendant of the contents of the rule. *People v. Dominguez*, 2012 IL 111336, ¶ 19. Instead, the court is required to "impart to a defendant largely that which is specified in the rule, or the rule's 'essence' " by putting him on notice that he could challenge his guilty plea, and that some action on his part was necessary within 30 days if he wished to appeal. *Id.* at ¶¶ 19-20, citing *In re J.T.*, 221 Ill. 2d 338, 347-48 (2006).

¶ 15 Here, the record shows that the trial court informed defendant that "within 30 days of today's date," he had to file a motion to withdraw or "take back" his guilty plea and to vacate the judgment entered by the court. The court further admonished defendant that if the motion were denied, he would be able to appeal that denial. Through these admonitions, the court informed defendant of his rights under Rule 605(c). Although the court did not use the exact language of the rule, its admonitions imparted the essence of the rule to defendant and put him on notice that some action on his part was necessary within 30 days if he wished to appeal. *Dominguez*, 2012 IL 111336, ¶¶ 19-20.

¶ 16 Defendant nonetheless contends that the court's admonitions did not substantially comply with the rule where the court failed to advise him that, because he was indigent, counsel would be appointed to assist him in the preparation of post-plea motions. In *Dominguez*, 2012 IL

111336, ¶ 51, the supreme court rejected this precise claim. In that case, the trial court admonished defendant as follows:

"Should 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 notice of appeal of 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."

Dominguez, 2012 IL 111336, ¶ 46.

On appeal, defendant contended that the trial court failed to properly admonish him regarding his right to the assistance of counsel in drafting post-plea motions. The supreme court upheld defendant's conviction, finding that the trial court's admonitions were sufficient to apprise defendant of his right to a court-appointed attorney despite the fact that the court did not explicitly explain that an indigent defendant is entitled to receive legal assistance in the preparation of post-plea a motion. *Dominguez*, 2012 IL 111336, ¶ 51. Citing its prior decisions in *In re J.T.*, 221 Ill. 2d at 347-48 and *Dunn*, 342 Ill. App. 3d at 882, the *Dominguez* court held that the admonitions were found sufficient to inform defendant of his right to counsel under Rule 605(c), despite the court's deviation from the exact language of the rule.

¶ 17 In the case of *In re J.T.*, the trial court informed defendant that he had the right to file a petition to withdraw his guilty plea, and that if his petition were denied, the petition would go to a higher court which would look at everything, and that if he were "unable to hire an attorney to represent [him], the Court [would] appoint an attorney for [him] free of charge." *J.T.*, 221 Ill. 2d at 343. The supreme court found these admonitions "sufficient to put J.T. on notice that he could

challenge his guilty plea and that some action on his part within 30 days was necessary if he wished to appeal." *Id.* at 347-48.

¶ 18 Similarly, in *Dunn*, the trial court admonished defendant that he had the right to appeal, but before doing so he had to "file a motion to withdraw [his] guilty plea within 30 days" and that if he could not afford an attorney or copy of the transcript, they would be provided to him free of charge. *Dunn*, 342 Ill. App. 3d at 876. On appeal, the court held that the admonishments were sufficient under Rule 605(c) because they reflected "that a court-appointed attorney would be available for defendant," and even though "the language used by the trial court was not exact language of the rule *** the trial court's admonitions did convey the substance of the rule." *Id.* at 882.

¶ 19 Defendant argues that *Dominguez* is distinguishable from the current case because in that case, the supreme court's disposition largely relied on the fact that the defendant was also given a written copy of the Rule 605(c) admonishments. We disagree. In *Dominguez*, the supreme court specifically relied on the holdings in *J.T. and Dunn*, two cases where no written admonishments were given, and noted that the written admonitions only served to further inform defendant of his rights. *Dominguez*, 2012 IL 111336, ¶ 51.

¶ 20 We find no appreciable differences between the admonishments given in this case and those found sufficient in *Dominguez* and the cases cited therein. Though imperfect, the trial court's admonishments put defendant on notice that he was required to file a post-plea motion to withdraw his plea within 30 days, and that an attorney would be available to him. *Dominguez*, 2012 IL 111336, ¶ 51. Defendant indicated his understanding of the admonishments given, but failed to file a timely post-plea motion to withdraw his guilty plea, as required. Accordingly, we conclude that defendant failed to establish that his failure to file a post-plea motion as required

by Rule 604(d) should be excused under the admonition exception, and, therefore, his appeal must be dismissed. *Flowers*, 208 Ill. 2d at 301.

¶ 21 Defendant argues in the alternative that we should remand his cause for the appointment of post-plea counsel because in order for Supreme Court Rule 606(a) (Ill. S. Ct. R. 606(a) (eff. Dec. 11, 2014)) to be constitutional, it must be construed as to require the appointment of counsel for an indigent defendant in the preparation of post-plea motions. Defendant maintains that the 30-day period following a guilty plea is a "critical stage of the proceedings" for which counsel must be appointed.

¶ 22 Defendant concedes that this court rejected this same argument in *People v. Merriweather*, 2013 IL App (1st) 113789, but contends that the court erroneously distinguished the Supreme Court's holdings in *Evitts v. Lacey*, 469 U.S. 387 (1985) and *Roe v. Flores-Ortega*, 528 U.S. 740 (2000), in reaching its decision. In *Merriweather*, this court held that the plain language of Rule 606(a) is unambiguous and that the rule expressly permits the filing of the notice of appeal by a *pro se* defendant. *Merriweather*, 2013 IL App (1st) 113789, ¶ 32.

¶ 23 In *Merriweather*, this court also considered the same Supreme Court and Illinois cases that defendant now brings to our attention in this case. *Merriweather*, 2013 IL App (1st) 113789, ¶¶ 33-34. We found *Flores-Ortega*, *Evitts*, and *People v. Ross*, 229 Ill. 2d 255 (2008) inapplicable, and concluded that the plain language of Rule 604(d) and Rule 606(a) explicitly allow the filing of a notice of appeal by a *pro se* defendant, and found no reason to deviate from the plain language of the rule by reading into it exceptions, limitations, or conditions that conflict with the expressed intent. *Merriweather*, 2013 IL App (1st) 113789, ¶¶ 32-34. We also found that none of the cited cases stood for the proposition that "a defendant who pleads guilty and later defaults on the procedural requirements of Rule 604(d) shall be entitled to the appointment

of counsel to assist him in perfecting an appeal upon the filing of a *pro se* notice of appeal." *Id.* at ¶ 33. We continue to find the reasoning in *Merriweather* sound, and therefore have no basis for departing from the conclusion reached in that case, and decline defendant's invitation to do so.

¶ 24

CONCLUSION

¶ 25 For the reasons stated, we find that defendant waived his right to an appeal by failing to file a motion to withdraw his plea and to vacate the judgment. We also find that the trial court's admonishments to defendant on August 19, 2013, prior to taking defendant's guilty plea, satisfied the requirements of Rule 605(c). Therefore, we must dismiss this appeal. *Flowers*, 208 Ill. 2d at 301.

¶ 26 Appeal dismissed.