2015 IL App (5th) 130510-U

NO. 5-13-0510

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Montgomery County.
	)	
v.	)	No. 12-CF-75
	)	
MATTHEW W. GRAY,	)	Honorable
	)	Douglas L. Jarman,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Presiding Justice Cates and Justice Chapman concurred in the judgment.

ORDER

¶ 1 *Held*: Because defendant failed to file a motion to withdraw his guilty plea and vacate judgment within 30 days of the date on which his sentence was imposed as required by Supreme Court Rule 604(d) (eff. July 1, 2006), we are without jurisdiction to hear this appeal.

¶ 2 Following a partially negotiated plea agreement, defendant, Matthew W. Gray, pled guilty to aggravated driving under the influence of alcohol (625 ILCS 5/11-501(d)(1)(F) (West 2010)). In exchange for the plea, the State agreed not to recommend more than 20 years in the Department of Corrections (Department). Ultimately, the trial court sentenced defendant to six years in the Department, two years of mandatory supervised release, and a fine and costs under section 11-501(d)(2)(G) of the Illinois

Vehicle Code (Code) (625 ILCS 5/11-501(d)(2)(G) (West 2010)). Defendant filed a motion to reconsider or reduce sentence. The trial court refused to entertain the motion, finding it was not properly before the court because defendant entered into a negotiated plea and failed to file a motion to withdraw his guilty plea. The issues raised in this appeal are: (1) whether the trial court erred in failing to consider defendant's motion to reduce sentence and, if so, (2) whether section 11-501(d)(2)(G) of the Code, the statute under which defendant was sentenced, is unconstitutional.

¶ 3 FACTS

¶ 4 On December 24, 2011, at approximately 1:35 a.m., defendant, age 19, was involved in a motor vehicle accident which resulted in the death of two people, Clayton Owens and Cody Dewitt, both passengers in defendant's car. Owens and Dewitt were also 19 years old and were friends of defendant. Blood tests revealed that all three were legally drunk, with defendant having a blood-alcohol content of 226 milligrams per deciliter, Owens 213 milligrams per deciliter, and Dewitt 209 milligrams per deciliter.

¶ 5 On April 26, 2012, a grand jury indicted defendant on one count of aggravated driving under the influence. Defendant entered into a partially negotiated plea agreement with the State in which he pled guilty to the charge and in exchange the State agreed to a sentencing cap of no more than 20 years in the Department. Defendant signed a jury waiver and a plea of guilty to the Class 2 felony, which specifically stated *inter alia*:

> "The Defendant is first admonished by the Court that the punishment for such offense is *a determinate sentence of incarceration in the Department of Corrections if* [*sic*] *not less than 6 years nor more than 28 years, and/or a fine not*

to exceed $25,000.00, or both, up to those maximums, and a 2 year term of Mandatory Supervised Release." (Emphasis in original.)

At the sentencing hearing defendant informed the trial court he was pleading guilty to the charge because he was guilty of it.

¶ 6 The trial court gave defendant one last chance to change his mind, but defendant declined. The trial court found that because "defendant persists in his plea of guilty[,] [h]e will be found guilty of the Class II Felony of aggravated driving under the influence." The trial court then ordered a presentence investigation.

¶ 7 Defendant was sentenced pursuant to section 11-501(d)(2)(G) of the Code which provides as follows:

> "(G) A violation of subparagraph (F) of paragraph (1) of this subsection (d) is a Class 2 felony, for which the defendant, unless the court determines that extraordinary circumstances exist and require probation, shall be sentenced to *** (ii) a term of imprisonment of not less than 6 years and not more than 28 years if the violation resulted in the deaths of 2 or more persons." 625 ILCS 5/11-501(d)(2)(G) (West 2010).

¶ 8 On February 4, 2013, a sentencing hearing was conducted. The trial court heard live testimony and the reading of victim impact statements. The trial court also heard arguments from the State and defense counsel. Defendant gave a statement in allocution in which he reiterated his extreme remorse and detailed his plan to speak at local high schools to warn students of the dangers of drinking and driving. The trial court noted that defendant was remorseful, had no prior criminal record, incurred his own physical

injuries as a result of the accident, and that his vehicle appeared to have some mechanical problems. The trial court noted factors in aggravation and mitigation and sentenced defendant to six years in the Department followed by two years of mandatory supervised release.

¶ 9 Defendant was specifically admonished concerning his right to appeal, including a warning that in order to do so he must file a written motion to have the judgment vacated and for leave to withdraw his guilty plea within 30 days. Defendant did not file a motion to vacate the judgment and withdraw his plea within 30 days. Instead on January 18, 2013, defendant filed a motion to reconsider or reduce sentence in which he *inter alia* challenged the constitutionality of the statute under which defendant was sentenced.

¶ 10 The motion was set for March 18, 2013, at which time defense counsel informed the trial court he was no longer defendant's attorney and requested additional time for defendant to obtain new counsel. Defendant obtained new counsel who filed on May 28, 2013, a motion entitled "Defendant's Position Statement Concerning Further Pleadings and Appeal Rights" in which he addressed the issue presented in this appeal which is whether defendant can pursue a motion to reconsider or appeal his sentence in light of the fact that defendant's plea was not open. Defense counsel also filed a memorandum in support of the motion to reduce sentence.

¶ 11 On October 2, 2013, the trial court entered an order striking defendant's motion to reconsider or reduce sentence as follows:

> "Defendant contends that because he is challenging the constitutionality of the statute under which he was sentenced, 625 ILCS 5/11-501(d)(2)(G), the

> requirements of [Illinois Supreme Court Rule] 604(d) do not apply. I reject that claim and strike Defendant's Motion to Reconsider or Reduce Sentence as not properly before this court. Defendant entered a negotiated plea and failed to file a Motion to Withdraw his guilty plea."

Defendant now appeals.

¶ 12 ANALYSIS

¶ 13 Before we address the issues raised by defendant on appeal, we must first consider whether we have jurisdiction to hear this appeal. The State contends that because defendant entered a negotiated plea with a sentence cap, defendant was required to move for leave to withdraw his guilty plea and vacate the judgment within 30 days of imposition of his sentence, and because defendant failed to do so, we are without jurisdiction to hear this appeal. We agree.

¶ 14 In *People v. Evans*, 174 Ill. 2d 320, 673 N.E.2d 244 (1996), the defendants pled guilty to certain charges in return for specific sentences and the dismissal of other pending charges. They appealed their sentences without moving to withdraw their guilty pleas. Applying contract law principles to the plea bargain, our Illinois Supreme Court stated that "under these circumstances, the guilty plea and the sentence 'go hand in hand' as material elements of the plea bargain." *Evans*, 174 Ill. 2d at 332, 673 N.E.2d at 250. The *Evans* court specifically held that "following the entry of judgment on a negotiated guilty plea, even if a defendant wants to challenge only his sentence, he must move to withdraw the guilty plea and vacate the judgment." *Evans*, 174 Ill. 2d at 332, 673 N.E.2d at 250.

¶ 15 In *People v Linder*, 186 Ill. 2d 67, 708 N.E.2d 1169 (1999), relied upon by the trial court herein, our Illinois Supreme Court expanded the rule announced in *Evans* to include challenges to a trial court's ruling on a defendant's motion to reconsider sentence when the plea agreement calls for a sentencing range or cap. *Linder*, 186 Ill. 2d at 74, 708 N.E.2d at 1172. In *Linder*, the defendant pled guilty to armed robbery and aggravated vehicular hijacking after the State agreed to dismiss the other charges and not seek a sentence in excess of 15 years' imprisonment. *Linder*, 186 Ill. 2d at 69, 708 N.E.2d at 1170. "By agreeing to plead guilty in exchange for a recommended sentencing cap, a defendant is, in effect, agreeing not to challenge any sentence imposed below that cap on the grounds that it is excessive." *Linder*, 186 Ill. 2d at 74, 708 N.E.2d at 1172. Accordingly, a defendant who agrees to plead guilty in exchange for the State's recommendation of a sentencing cap may not move the trial court to reconsider a sentence within that cap without also moving to withdraw the guilty plea. *Linder*, 186 Ill. 2d at 74, 708 N.E.2d at 1172-73. Our Illinois Supreme Court specifically stated the appellate court should not have entertained the appeal because "[w]here a defendant fails to comply with the motion requirements of Rule 604(d), *** the appellate court must dismiss the appeal." *Linder*, 186 Ill. 2d at 74, 708 N.E.2d at 1173.

¶ 16 Defendant asserts that *Linder* is distinguishable because in that case the defendant merely argued that the trial court abused its discretion in sentencing to a term of imprisonment which was within the range of the capped sentence as agreed to by the parties, whereas in the instant case, defendant contends the entire sentencing scheme is unconstitutional. We are unconvinced. Here, defendant failed to file a Rule 604(d)

motion to withdraw his guilty plea. Instead, he filed a motion to reconsider or reduce his sentence. If defendant filed a motion to withdraw his guilty plea and vacate sentence, he would have preserved his claim of error, but, as the State points out, it could have potentially exposed him to considerably more prison time. As it is, defendant received the minimum of six years in the Department. As previously discussed, "the guilty plea and the sentence 'go hand in hand' as material elements of the plea bargain. To permit a defendant to challenge his sentence without moving to withdraw the guilty plea in these instances would vitiate the negotiated plea agreement he entered into with the State." *Evans*, 174 Ill. 2d at 332, 673 N.E.2d at 250. While defendant would have preferred probation, the minimum 6-year term was a risk he assumed as part of the bargain for the State's agreeing to seek no more than 20 years.

¶ 17 Furthermore, we disagree with defendant's contention that the plea was really an open plea. Under the sentencing statute, defendant was subject to between 6 and 28 years in the Department; however, the State agreed not to seek more than 20 years. Thus, the plea was a partially negotiated plea between defendant and the State, not an open plea.

¶ 18 The instant case is directly on point with *People v. Albers*, 2013 IL App (2d) 111103, 992 N.E.2d 600. In that case, the defendant, who had a blood-alcohol concentration of .08 or higher, was involved in a fatal car accident in which one person was killed and another was injured. The grand jury returned an eight-count indictment, with charges ranging from aggravated DUI to reckless homicide. *Albers*, 2013 IL App (2d) 111103, ¶ 4, 992 N.E.2d 600. Defendant ultimately pled guilty to one count of aggravated DUI, and in return for defendant's plea, the State dismissed the remaining

charges and recommended a sentencing cap of 10 years' imprisonment. *Albers*, 2013 IL App (2d) 111103, ¶ 5, 992 N.E.2d 600. After a hearing, the trial court imposed a 10-year sentence. Despite being properly admonished, defendant merely filed a motion to reconsider sentence. The *Albers* court concluded as follows: "The plea at issue here was a negotiated plea in that the State agreed to a sentencing cap. Under this type of plea agreement, defendant was not allowed to challenge merely his sentence under Rule 604(d); he was required to file a motion to withdraw his guilty plea and vacate the judgment." *Albers*, 2013 IL App (2d) 111103, ¶ 11, 992 N.E.2d 600. Likewise, in the instant case, defendant failed to file a motion to withdraw his guilty plea and vacate judgment. Relying on *Linder* and *Albers*, we hold that we are without jurisdiction to hear this appeal.

¶ 19 For the foregoing reasons, we dismiss defendant's appeal.

¶ 20 Appeal dismissed.