

SIXTH DIVISION  
May 13, 2016

No. 1-14-2394

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 12 CR 22620
	)	
BILLY CLEVELAND,	)	Honorable
	)	Thomas P. Fecarotta, Jr.,
Defendant-Appellant.	)	Judge Presiding.

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PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.  
Justices Hoffman and Hall concurred in the judgment.

**O R D E R**

¶ 1 *Held:* We dismissed defendant's appeal because he failed to file a motion to withdraw his guilty plea prior to filing a notice of appeal and his failure to do so was not excused under the "admonishment exception" to Illinois Supreme Court Rule 604(d).

¶ 2 Pursuant to a negotiated guilty plea, defendant Billy Cleveland was convicted of aggravated criminal sexual abuse and sentenced to five years' imprisonment. He did not file a postplea motion in the circuit court. On appeal, defendant contends that the circuit court's admonishments did not substantially comply with Illinois Supreme Court Rule 605(c) and we should, therefore, remand for proper admonishments and an opportunity for defendant to file a

motion to withdraw his guilty plea. Defendant also argues that the circuit court erred by applying a three-year mandatory supervised release (MSR) term and improperly assessing a \$250 DNA indexing fee. We find the admonishments sufficient and dismiss the appeal for defendant's failure to file a motion to withdraw his plea.

¶ 3 Defendant was charged with criminal sexual assault and multiple counts of aggravated criminal sexual assault. The charges arose from a November 4, 2012, incident in which defendant threatened minor, K.W., with a sword and forced him to place his hand on defendant's penis.

¶ 4 On March 4, 2014, after negotiations, the State and defendant agreed that defendant would plead guilty to a single reduced charge of aggravated criminal sexual abuse, a Class 2 felony, in exchange for a five year sentence and dismissal of the other pending charges. The agreement also called for defendant to provide a DNA sample. The State informed the court of the plea agreement.

¶ 5 After plea admonitions, the circuit court accepted defendant's plea and sentenced him to the agreed five year term of imprisonment with credit for the 481 days defendant served during presentence incarceration. The court imposed a three year MSR term and fines and fees, including a \$250 DNA indexing fee.

¶ 6 The circuit court then admonished defendant as follows:

"Even though you pled guilty you still have the right to appeal the judgment and sentence of this Court if you so desire. In order to do that you file a notice of appeal and cause the Clerk of the Circuit Court to file that notice on your behalf within 30 days of today's date because today is the judgment day. In the notice of appeal, you must allege

any errors or mistakes you believe the Court made, otherwise they could be deemed waived and given up for purposes of your appeal.

Because this was a negotiated or an agreed plea, to further protect you, you have the right to appeal. First, within 30 days of today's date you must file a motion to withdraw your plea of guilty and vacate the judgment. That motion must be in writing, if it is not, that motion shall be considered waived and given up for purposes of your appeal. If you are successful withdrawing your plea of guilty after a hearing on that motion, should you decide to file it, you would then have a right to have a trial in this matter in front of myself or a jury. However, the State at that time upon their request would have the right to redocket this case as it existed prior to today's court proceedings.

And finally, if you cannot afford a copy of the transcript of today's proceedings from the Court Reporter, or a lawyer because you were found to be indigent or poor, both the transcript and the attorney will be given and appointed to you free of charge, and that will include a lawyer on any postplea motions you wish to make, as well as a lawyer on appeal."

¶ 7 On July 2, 2014, defendant filed *pro se* a late notice of appeal. On August 24, 2015, our supreme court entered a supervisory order directing this court to treat defendant's appeal as a properly perfected appeal. We find, however, that defendant's appeal must be dismissed as he failed to comply with the requirements of Illinois Supreme Court Rule 604(d) (Ill. S. Ct. R. 604(d) (eff. July 1, 2006)).

¶ 8 Rule 604(d) requires a defendant who wishes to appeal from a judgment entered upon a negotiated plea of guilty to first file a written motion with the trial court to withdraw his guilty

plea and vacate the judgment. *People v. Dominguez*, 2012 IL 111336, ¶ 12. Compliance with Rule 604(d) is a condition precedent to an appeal from a judgment on a guilty plea. *People v. Flowers*, 208 Ill. 2d 291, 301-02 (2003). If a defendant fails to meet such requirement, the appellate court must dismiss the appeal. *Id.* at 301.

¶ 9 However, due process prohibits "[d]ismissal of an appeal based on a defendant's failure to file the requisite motions \*\*\* if the defendant did not know that filing such motions was necessary." *Id.* at 300 (citing *People v. Foster*, 171 Ill. 2d 469, 473 (1996)). Accordingly, Rule 605(c) mandates that, at the time sentence is imposed, the trial court admonish defendants regarding the procedural requirements of Rule 604(d). *Id.* at 301. Under this exception, if the trial court fails to give the requisite Rule 605(c) admonishments and a defendant subsequently attempts to appeal without first filing a Rule 604(d) motion, the appeal is not dismissed; the cause, instead, is remanded to the trial court for strict compliance with Rule 604(d). *Id.*

¶ 10 Defendant did not file a motion to withdraw his guilty plea prior to filing his notice of appeal as required by Rule 604(d) and his appeal, therefore, is subject to dismissal. Defendant argues, however, that the circuit court's admonishments were insufficient to comply with Rule 605(c) and his cause should be remanded to the circuit court for proper admonishments and an opportunity to file the requisite motion in accordance with Supreme Court Rule 604(d).

¶ 11 Supreme Court Rule 605(c) provides:

"[T]he trial court shall advise the defendant substantially as follows: (1) that the defendant has a right to appeal; (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 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 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; (4) that upon the request of the State any charges that may have been dismissed as part of a plea agreement will be reinstated and will also be set for trial; (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; and (6) that in any appeal taken from the judgment on the plea of guilty any issue or claim of error not raised in the motion to vacate the judgment and to withdraw the plea of guilty shall be deemed waived." Ill. S. Ct. R. 605(c) (eff. Oct. 1, 2001).

¶ 12 Defendant argues the circuit court failed to admonish him that he must file a motion to withdraw his guilty plea prior to filing an appeal and instead appeared to give him the option of filing an appeal or filing a motion to vacate his guilty plea. He also contends that the court incorrectly implied that, to avoid waiver on appeal, defendant had to raise his claims of error in the notice of appeal, but not in the motion to withdraw. He further argues the court did not specifically advise him that any charges dismissed as part of the plea agreement could be reinstated and set for trial.

¶ 13 While trial courts must comply with the duty to admonish under Rule 605 those admonishments need only " 'substantially' " convey the Rule's contents. (Emphasis in original.) *Dominguez*, 2012 IL 111336, ¶ 15 (quoting Ill. S. Ct. R. 605(c) (eff. July 1, 2006)). Thus, "the rule does not require a strict verbatim reading" but rather that the trial court "impart to a

defendant the essence or substance of the rule." *Id.* ¶ 19. So long as the court's admonitions put a defendant on notice of what he must do to appeal his guilty plea, the court has informed defendant of the substance of the rule. *Id.* ¶ 22. Admonishments, if sufficient to notify defendant that a timely postplea motion is necessary to preserve an appeal, will be deemed to substantially comply with Rule 605(c) unless the "missing verbiage" resulted in prejudice to the defendant. See *People v. Crump*, 344 Ill. App. 3d 558, 563 (2003).

¶ 14 We review the sufficiency of the Rule 605(c) admonishments *de novo*. *Dominguez*, 2012 IL 111336, ¶ 13.

¶ 15 In admonishing defendant, the circuit court did begin by informing defendant that he had the right to an appeal and must file a notice of such appeal within 30 days of the date of judgment. Crucially, the circuit court then stated: "*First*, within 30 days of today's date you *must* file a motion to withdraw your plea of guilty and vacate the judgment." (Emphases added.) The court further admonished defendant that the postplea motion should be in writing and, if he was indigent, transcripts and counsel would be provided to him without costs, including "a lawyer on any postplea motions you wish to make as well as a lawyer on appeal." Thus, the admonishments adequately notified defendant of the basic procedural requirements necessary to perfect his appeal by informing him that a motion to vacate his guilty plea must be filed within 30 days before taking an appeal and his right to appointed counsel to pursue the motion. We find that the circuit court substantially complied with Rule 605(c). See *Id.* ¶ 43; see also *Crump*, 344 Ill. App. 3d at 563 (finding admonishment that defendant must file a timely motion to withdraw his guilty plea or he loses his right to appeal substantially complied with Rule 605 despite the

court's failure to admonish the defendant regarding waiver of any allegations not raised in the motion to withdraw or that any *nol prossed* charges could be reinstated).

¶ 16 The trial court's admonishments regarding possible reinstatement of the charges which had been dismissed if a motion to withdraw the plea was granted and waiver of any arguments not included in a postplea motion were arguably unclear and incomplete. However, we find defendant was not prejudiced by the missing verbiage. Generally, our courts have found prejudice where a defendant complied with the admonishments as given by the trial court, but due to their insufficiency, a defendant's right to appeal was adversely affected. See *In re J.T.*, 221 Ill. 2d 338, 347-48 (2006). Accordingly, if defendant's failure could be explained or excused by the omitted language, the proper remedy would be to remand the cause for proper admonishments and allow defendant time to file a motion to withdraw. *Flowers*, 208 Ill. 2d 301; *Foster*, 171 Ill. 2d at 474.

¶ 17 Here, despite being admonished that he must first file a motion to withdraw his plea within 30 days of the date of judgment before filing an appeal, defendant failed to file any postplea motion whatsoever. Instead, he filed a late notice of appeal. Therefore, any lack of clarity as to waiver of unargued issues in the postplea motion and reinstatement of dismissed charges if the motion to withdraw his plea was granted, did not prejudice defendant.

¶ 18 In summary, while the court's admonishments did not strictly comply with Rule 605(c), they were sufficient to put defendant on notice that he had the right to appeal but was required first to file a motion to withdraw his negotiated plea within 30 days. See *J.T.*, 221 Ill. 2d at 347-48. Defendant took no action whatsoever within the 30-day time period. *Id.* He ignored the admonishments and, therefore, was not prejudiced by any omission as to waiver of arguments

and reinstatement of the dismissal. *Id.* Therefore, as the court substantially complied with Rule 605(c), the matter does not warrant remand (see *Dominguez*, 2012 IL 111336, ¶ 22), and his appeal must be dismissed. *J.T.*, 221 Ill. 2d at 346-47.

¶ 19 Defendant also contends, and the State concedes, that the trial court improperly applied a three-year MSR term when the crime for which he was convicted mandates a two-year term and that he was improperly assessed a \$250 DNA indexing fee. Defendant, in his initial brief, acknowledged that he raised neither issue below, but argues that as the MSR term and the DNA index fee failed to comply with statutory requirements, they are void and may be attacked at any time.

¶ 20 After the appellant's brief was filed, our supreme court issued an opinion in, *People v. Castleberry*, 2015 IL 116916, and held that, only fundamental defects, such as a lack of personal or subject matter jurisdiction, warrant declaring a judgment void. *Id.* ¶ 19. Thus, under *Castleberry*, the fact that defendant's MSR term and the DNA indexing fee failed to conform to statutory provisions do not render defendant's sentence void. Defendant, in his reply brief, agrees that *Castleberry* forecloses a challenge on appeal to the MSR term and the DNA indexing fee as void.

¶ 21 Defendant suggests, in his reply brief, that if we remand this case for proper admonishments, defense counsel could raise the sentencing errors before the circuit court. In the alternative, as to the MSR term only, defendant suggests we could remand the case and order the circuit court to issue an amended mittimus with the correct MSR term. However, as stated, we are required to dismiss this appeal and, thus, the relief suggested by defendant is not available.

¶ 22 Appeal dismissed.