FIRST DIVISION
October 31, 2016

No. 1-14-3041

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. 14 CR 11765
	)	
MARVIN SULLIVAN,	)	Honorable
	)	Mauricio Araujo,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE SIMON delivered the judgment of the court.
Presiding Justice Connors and Justice Harris concurred in the judgment.

O R D E R

¶ 1 *Held*: Appeal dismissed over defendant's contention that the trial court failed to specify that defendant was entitled to the appointment of counsel to assist with his postplea motion.

¶ 2 On August 13, 2014, following a conference held pursuant to Illinois Supreme Court Rule 402(d) (eff. July 1, 2012), defendant Marvin Sullivan pled guilty to the Class 3 felony of possession of cannabis with the intent to deliver. He was sentenced to 30 months' "intensive probation," which included random drug testing. On appeal, defendant concedes that he did not file a motion to withdraw his negotiated guilty plea before filing a notice of appeal *pro se*.

However, defendant maintains that the trial court's postjudgment admonitions regarding his right to counsel did not substantially comply with Illinois Supreme Court Rule 605(c) (eff. Oct. 1, 2001). Thus, he requests that we remand this case for proper admonitions and the opportunity to file a motion to withdraw his guilty plea. Defendant also contests the $5 court system fee assessed against him. Because we find that the trial court's admonitions substantially complied with the mandates of Rule 605(c), we dismiss this appeal without vacating the $5 court system fee.

¶ 3 Defendant was charged with possession of more than 30 grams but not more than 500 grams of cannabis with intent to deliver pursuant to section 5(d) of the Illinois Cannabis Control Act (720 ILCS 550/5(d) (West 2014)). While out on bond, defendant pled guilty to a subsequent count of misdemeanor possession of cannabis and he was sentenced to two days in jail with time considered served.

¶ 4 On August 13, 2014, the trial court granted the State leave to file a petition for violation of bail bond, and then participated in a Rule 402(d) conference in this case at defendant's request. Pursuant to the plea, the State withdrew the violation of bail bond. The trial court then advised defendant of the charge against him and explained the potential sentencing outcomes, which included two to five years in the penitentiary. After waiving his right to a trial, defendant pled guilty.

¶ 5 The parties then stipulated to the factual basis for the plea, including that on June 13, 2014, Officer Jeanette Cegielski and her team were executing a search warrant at 245 West 109th Street in Chicago, Illinois, when defendant arrived. "[D]uring a systematic search of the residence," Officer Cegielski recovered one bag containing "29 bags of suspect cannabis," and

"one bag found to contain nine bags of suspect cannabis." The parties stipulated regarding the chain of custody for the recovered items which were inventoried under number 13196345. Regarding the chemical composition, it was stipulated that Kristin Dillo Benak, who was qualified in the area of forensic chemistry, used commonly accepted tests to analyze nine of the items recovered. She opined that, to a reasonable degree of scientific certainty, "the contents tested positive for cannabis, and that the actual weight was 36.4 grams."

¶ 6 After defendant agreed to the stipulated facts, the trial court accepted his plea and found him guilty of possession of cannabis with the intent to deliver. Defendant waived his right to a presentence investigation report and did not speak in allocution. The trial court sentenced him to 30 months' of "intensive probation," which included random drug testing, and ordered "DNA indexing, $1,269 in mandatory fees and costs, [and] three days credit."

¶ 7 The court then stated, "[B]efore I read your appeal rights," as a preface to explaining the potential consequences of a probation violation, which included imposition of the previously described sentencing outcomes. The following exchange then occurred:

> "THE COURT: Sir, you have the right to appeal. However, before you can appeal my decision within 30 bays of [*sic*] days of today's date, you need to file with the clerk of the court a written motion to withdraw your plea of guilty and vacate the judgment. In that motion, you must state each and every reason why you want to do that.
>
> If I grant it, I will set the guilty plea, sentence and judgment aside and set the case for trial.
>
> Since the violation of bail bond was dismissed pursuant to this agreement, I assume the State would want to reinstate that if it comes to that. Just so you're aware,

that's a possibility. Your attorney will talk to you about all of that. I didn't have to get into it with you.

But if I deny it, you have 30 days from the date of that denial to file your written notice of appeal. Your appeal would be based on whatever you put in that motion. Generally, you can't add to it. So when I say put everything in the motion, I mean put everything in the motion. Does that make sense to you, sir?

THE DEFENDANT: Yes, sir.

THE COURT: If you can't afford a copy of today's transcript and an attorney, that will be provided to you free of charge. Do you understand your appeal rights, sir?

THE DEFENDANT: Yes.

THE COURT: Basically if you don't like what happened here today, you have 30 days to do something."

¶ 8 Defendant did not file a motion to withdraw his guilty plea. Rather, on September 10, 2014, he filed a notice of appeal *pro se*.

¶ 9 On appeal, defendant contends that the trial court failed to substantially admonish him as required by Rule 605(c). Specifically, defendant maintains that the trial court's explanation of his right to counsel was confusing and did not clearly indicate that it included the right have an attorney assist him with his postplea motion. We disagree.

¶ 10 Illinois Supreme Court Rule 604(d) (eff. Feb. 6, 2013) dictates, in relevant part, "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 [the] sentence is imposed, files in the trial court, *** if the plea is being challenged, a motion to withdraw the plea of guilty and vacate the judgment." Thus, a

motion pursuant to Rule 604(d) is a mandatory precondition for an appeal from a defendant's guilty plea. *People ex rel. Alvarez v. Skryd*, 241 Ill. 2d 34, 40 (2011); *People v. Merriweather*, 2013 IL App (1st) 113789, ¶ 14. Although the appellate court is not deprived of jurisdiction when a defendant fails to file a timely Rule 604(d) motion in the circuit court, that failure generally requires the appellate court to dismiss the appeal without consideration on the merits. *People v. Flowers*, 208 Ill. 2d 291, 301 (2003). However, dismissal on this basis would violate due process if the defendant were unaware that a motion to withdraw his guilty plea was required. *Skryd*, 241 Ill. 2d at 41. As a result, the "admonition exception" relieves a defendant of his Rule 604(d) obligation when the trial court's Rule 605(c) admonitions were deficient. *Id*.

¶ 11 Under the admonition exception, a defendant's failure to comply with Rule 604(d) may be excused if the trial court fails to substantially advise a defendant of his rights as required by Rule 605(c). *Flowers*, 208 Ill. 2d at 301. Rule 605(c) provides:

> "In all cases in which a judgment is entered upon a negotiated plea of guilty, at the time of imposing sentence, the 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 a 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.

For the purposes of this rule, a negotiated plea is one in which the prosecution has bound itself to recommend a specific sentence, or a specific range of sentence, or where the prosecution has made concessions relating to the sentence to be imposed and not merely to the charge or charges then pending." Ill. S. Ct. R. 605(c) (eff. Oct. 1, 2001).

¶ 12 "Rule 605(c) admonitions are mandatory and failure to give such admonitions will result in remand to the trial court for proceedings in accordance with Rule 605(c)." *People v. Dominguez*, 2012 IL 111336, ¶ 15. A trial court's admonitions to a defendant are sufficient if they "substantially" advise him of his rights as outlined in Rule 605(c). *Id.* ¶ 19. To substantially

advise a defendant, the trial court must admonish him "in such a way that [he] 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." *Id*. ¶ 22. Substantial compliance does not require a verbatim recitation of Rule 605(c). *Id*. ¶ 19. Rather, admonitions are sufficient if they "impart to a defendant the essence or substance of the rule." *Id*. ¶ 22.

¶ 13 In the instant case, it is undisputed that defendant entered a negotiated plea of guilty, and subsequently filed his *pro se* notice of appeal without first filing a Rule 604(d) motion to withdraw his plea. Accordingly, we must determine whether the trial court's admonitions to defendant substantially complied with the mandates of Rule 605(c). See *id*. ¶ 15. We review a trial court's compliance with Rule 605(c) *de novo*. *People v. Young*, 387 Ill. App. 3d 1126, 1127 (2009).

¶ 14 Here, the trial court put defendant on notice of what was required to preserve his right to appeal his guilty plea or sentence. First, the trial court stated, "[Y]ou have the right to appeal. However, before you can appeal my decision within 30 bays [*sic*] of days of today's date, you need to file with the clerk of the court a written motion to withdraw your plea of guilty and vacate the judgment." The court explained that if it granted the motion to withdraw his guilty plea, the instant charge would be set for trial. Additionally, the State could reinstate the violation of bail bond which was dismissed as part of the plea deal. If the motion to withdraw the plea were denied, the court said, "you have 30 days from the date of that denial to file your written notice of appeal." The court stressed that defendant's "appeal would be based on whatever [he] put in that motion," and stated that, "Generally, you can't add to it. So when I say put everything in the motion, I mean put everything in the motion." Immediately after explaining the

consequences of failing to raise issues in his motion to withdraw his guilty plea, the court advised defendant of his right to counsel stating, "If you can't afford a copy of today's transcript and an attorney, that will be provided to you free of charge."

¶ 15 We find that with these admonitions, the trial court put defendant on notice of what was required to preserve his right to appeal his guilty plea or sentence, and advised him of his right to counsel. Having admonished defendant regarding all six requirements of Rule 605(c), the trial court substantially imparted "to the defendant the essence or substance of the rule." See *Dominguez*, 2012 IL 111336, ¶ 22. Therefore, the admonition exception does not excuse defendant's failure to file a Rule 604(d) motion to withdraw his guilty plea, and we must dismiss this appeal. See *Flowers*, 208 Ill. 2d at 301.

¶ 16 Defendant nevertheless maintains that because of the sequence of the admonishments, the trial court "tethered" his right to counsel to the appeal rather than the motion to withdraw his plea. He asserts that the prejudice "is apparent from the fact that [defendant] filed a notice of appeal without first filing a motion to withdraw his plea." We disagree. As noted above, in discussing the motion to withdraw his guilty plea, the trial court stressed that defendant should "put everything in that motion" and then segued into his right to counsel, immediately prior to concluding that defendant had "30 days to do something." We find that this explanation of the requirements necessary to preserve defendant's appeal, immediately before and after articulating his right to counsel, shows that his right to an attorney applied to all these requirements, including the referenced motion to withdraw his guilty plea. Defendant's argument fails.

¶ 17 Defendant next maintains, and the State concedes, that the $5 court system fee was improperly assessed against him. Although the failure to file a timely Rule 604(d) motion

generally requires dismissal and precludes review of the merits of the appeal (*Flowers*, 208 Ill. 2d at 301), neither party has addressed whether we may vacate the court system fee even if we dismiss the appeal. Rather, citing *People v. Lewis*, 234 Ill. 2d 32 (2009), and Illinois Supreme Court Rule 615(b) (eff. July 1, 2011), defendant argues that we may review the merits of his claim of sentencing error stating, "Unauthorized fees qualify as plain error." We disagree.

¶ 18 The plain-error doctrine permits a court to consider the merits of an unpreserved "claim of error." *Lewis*, 234 Ill. 2d at 42 (*citing* Ill. S. Ct. R. 615(a)). Defendant has not explained how the plain-error doctrine may be applied to review the merits of a claim where the appeal itself was not preserved. As noted above, under Rule 604(d), "No appeal from a judgment entered upon a plea of guilty shall be taken unless the defendant" timely files "a motion to withdraw the plea of guilty and vacate the judgment." Because we are precluded from reaching the merits of the appeal, we cannot review defendant's sentence. See *Flowers* 208 Ill. 2d at 301-02.

¶ 19 *Lewis* supports our conclusion. In *Lewis*, prior to reaching the merits of the defendant's forfeited claim of sentencing error, our supreme court addressed whether the notice of appeal conferred jurisdiction upon the appellate court to review the sentence. *Lewis*, 234 Ill. 2d at 37-39. Finding that the notice of appeal adequately identified the complained of judgment, the court determined that it had the authority to review his sentence on the merits and subsequently discussed plain error. *Id.* at 39. Here, in contrast to *Lewis*, we have jurisdiction to dismiss defendant's appeal, or remand for proper admonitions, but are precluded from considering the appeal on the merits. See *Flowers*, 208 Ill. 2d at 301-02. Because we dismiss the appeal, unlike in *Lewis*, we may not reach the merits of defendant's claim.

¶ 20 Moreover, to obtain relief under this narrow exception, a defendant must first show a clear or obvious error occurred. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). The defendant must then show "either that (1) the evidence at the sentencing hearing was closely balanced, or (2) the error was so egregious as to deny the defendant a fair sentencing hearing." *Id*. The burden of persuasion remains with the defendant under both prongs of the plain-error test. *Id*. Thus, "when a defendant fails to present an argument on how either of the two prongs of the plain-error doctrine is satisfied, he forfeits plain-error review." *Id*. at 545-46. Here, defendant's bare assertion that unauthorized fees qualify as plain error falls short of any argument on either of the two prongs. As such, even if we did reach defendant's appeal on the merits, we would deny his claim for plain- error relief from forfeiture.

¶ 21 For the reasons stated, we dismiss this appeal.

¶ 22 Appeal dismissed.