2017 IL App (1st) 151006-U

FIRST DIVISION
September 25, 2017

No. 1-15-1006

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 12 CR 21491
	)	
DERRICK JONES,	)	Honorable
	)	Paula M. Daleo,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE MIKVA delivered the judgment of the court.
Presiding Justice Pierce and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held*: Where defendant failed to file a timely postplea motion under Supreme Court Rule 604(d) and the trial court's admonitions substantially complied with Supreme Court Rule 605(c), defendant's appeal is dismissed.

¶ 2 Defendant Derrick Jones pled guilty, pursuant to a negotiated plea agreement, to one count of attempted first degree murder (820 ILCS 5/8-4(a) (West 2012)) (720 ILCS 5/9-1(a)(1) (West 2012)) and two counts of violation of probation. Pursuant to the agreement, Mr. Jones was

sentenced to 10 years' imprisonment for attempted murder, to be served concurrently with 1-year and 4-year terms for violating his probation. The trial court denied Mr. Jones's postplea motion for a reduction of his sentence because it was not timely filed within 30 days. On appeal, Mr. Jones argues that the trial court's admonitions failed to substantially comply with Supreme Court Rule 605(c) (eff. Oct. 1, 2001). He requests that we remand for new admonitions and to give him an opportunity to file a timely postplea motion. We conclude that Mr. Jones was not justified in filing a late postplea motion and dismiss his appeal.

¶ 3 BACKGROUND

¶ 4 Mr. Jones was charged with one count of attempted first degree murder and three counts of aggravated battery in case No. 12 CR 21491, violation of probation in case No. 12 CR 03072, and violation of probation in case No. 12 C4 40465. On October 6, 2014, the parties participated in a Supreme Court Rule 402 conference regarding all three cases. After the conference, the State *nolle prossed* the three counts of aggravated battery, and Mr. Jones pled guilty to one count of attempted first degree murder and two counts of violation of probation, where the underlying charges were residential burglary and criminal damage to property. The trial court explained the rights Mr. Jones was giving up by pleading guilty and the possible sentences for each offense, and Mr. Jones acknowledged that he understood. He also acknowledged that no one threatened him or promised him anything and that he was pleading guilty freely and voluntarily.

¶ 5 The State presented its factual basis for the guilty plea. The State explained that, if this case went to trial, Keither Castro would testify that, on October 18, 2012, he saw Mr. Jones and another individual running and chasing someone. Mr. Castro started to run, and the second assailant approached Mr. Castro and punched him in the head. Mr. Jones then pulled out a knife and stabbed Mr. Castro approximately 11 times, causing serious injury to Mr. Castro. Mr. Jones

stipulated that the foregoing would be the testimony and stated that he understood the facts that the State had read into the record. The court accepted the pleas and found Mr. Jones guilty of attempted murder and two violations of probation. It sentenced Mr. Jones, "as agreed," to 10 years' imprisonment for attempted murder, to be served concurrently with 1-year and 4-year terms for the probation violations. Mr. Jones stated that he understood his sentences.

¶ 6 The trial court then admonished Mr. Jones as follows:

> "I want you to understand that even though you pled guilty you have a right to appeal. In order to appeal, you must within 30 days file with this court a written motion asking me to vacate these pleas of guilty or reconsider the sentences being entered here today. If you are successful, you'll have trials on these charges. If you can't afford an attorney, one would be appointed for you free of charge and you'd get a free transcript of proceedings. But if you fail to put this in writing within 30 days, your rights on appeal will be waived or given up by you for all time."

Mr. Jones stated that he understood his right to appeal and had no questions.

¶ 7 After a discussion about Mr. Jones's probation violations, the trial court clarified to Mr. Jones that the sentences for those offenses had to run consecutively to each other but that they would run concurrently with his sentence for attempted first degree murder. Mr. Jones again stated that he understood his sentences. The trial court admonished Mr. Jones a second time, as follows:

> "Okay. So I want you to again understand that you have a right to appeal. In order to appeal, you must within 30 days file with this court a written motion asking me to vacate this plea of guilty or reconsider the sentence being entered

> here today. If you are successful, you'll get trials on these charges or hearings. If you cannot afford an attorney, one would be appointed for you free of charge and you'd get a free transcript of proceedings. But if you fail to put this in writing within 30 days, your rights on appeal will be waived or given up by you for all time."

Mr. Jones stated that he understood his right to appeal.

¶ 8 The record on appeal contains Mr. Jones's handwritten *pro se* motion for a reduction of his sentence for attempted first degree murder. The certificate of service form shows that the motion was addressed to Keither Castro at 2114 South 57th Avenue, Cicero, IL, 60804, and that Mr. Jones placed the motion in the institutional mail at the Pontiac Correctional Center on October 31, 2014. Neither the motion nor the motion's proof of service are stamped as received by the clerk of the circuit court. The record also contains a copy of an envelope postmarked November 6, 2014, indicating that the envelope was returned to Mr. Jones for "Insufficient Address." On the same document that contains a copy of the envelope, in handwriting, it states: "Im [*sic*] sorry It's [*sic*] late but I wrote the wrong Adrees [*sic*]. I hope you will see through that and accept my motion please and thank you."

¶ 9 The record also includes two undated handwritten letters from Mr. Jones, addressed to the State's Attorney's office and the trial court judge, apologizing for the untimely motion and explaining that Mr. Jones had sent it to the wrong address. A copy of an envelope addressed to the State's Attorney's office from Mr. Jones is postmarked February 4, 2015, but the letters are not stamped as received by the clerk of the circuit court.

¶ 10 On March 3, 2015, the court held a hearing on what it characterized as "a piece of jail mail" from Mr. Jones. Mr. Jones was not present. The court explained that Mr. Jones requested a

reduction in his sentence and summarized Mr. Jones's contentions, which included that Mr. Jones was trying to protect his family, was under the influence of drugs, had mental health issues since his youth, had a son that he wanted to see grow up, had a clean record, and was working on changing his life. The State noted, "I don't know that it's ever necessarily been put on file. It was mailed directly to the state's attorney's office." The trial court responded, "And it's not stamped received," and "it says it was mailed February 4th, but it doesn't have when we received it." The trial court denied Mr. Jones's motion, stating, "the Court really has no jurisdiction to entertain even this motion for reconsideration because it's over the 30 days." This appeal followed.

¶ 11 JURISDICTION

¶ 12 The trial court entered its order denying Mr. Jones's motion on March 3, 2015, and Mr. Jones timely filed his notice of appeal on March 20, 2015. Accordingly, while Mr. Jones's failure to file a posttrial motion may preclude us from considering the merits of this appeal, the State does not dispute that this court has jurisdiction over the appeal pursuant to article VI, section 6, of the Illinois Constitution (Ill. Const. 1970, art. VI, § 6) and Supreme Court Rules 606 and 651, governing criminal appeals and appeals from final judgments in postconviction proceedings (Ill. S. Ct. R. 606 (eff. Mar. 20, 2009); R. 651(a) (eff. Dec. 1, 1984)). See *People v. Flowers*, 208 Ill. 2d 291, 301 (2004) ("The discovery that a defendant has failed to file a timely 604(d) motion in the circuit court does not deprive the appellate court of jurisdiction over a subsequent appeal.").

¶ 13 ANALYSIS

¶ 14 Under Supreme Court Rule 604(d), a defendant who wishes to appeal a judgment entered upon a guilty plea must first file a written postplea motion with the trial court within 30 days of the date on which the trial court imposed sentence. Ill. S. Ct. R. 604(d) (eff. Feb. 6, 2013);

People v. Flowers, 208 Ill. 2d 291, 300-01 (2003). If a defendant fails to file a timely Rule 604(d) motion with the trial court, the trial court does not have jurisdiction to review the merits of the postplea motion. *People v. Bailey*, 2014 IL 115459, ¶ 28. And, as a reviewing court, we do not have authority to consider the appeal on the merits and must dismiss the appeal. *Flowers*, 208 Ill. 2d at 301, 306-07.

¶ 15 The State argues that, here, the appeal must be dismissed because there was no proper or timely postplea motion filed. Mr. Jones responds that the lateness of his postplea filing should be excused because the trial court failed to properly advise him, under Supreme Court Rule 605(c), of the procedural steps that he needed to follow under Rule 604(d) to appeal in this case. Because this case concerns the interpretation of a supreme court rule, the parties agree that our standard of review is *de novo. People v. Dominguez*, 2012 IL 111336, ¶ 13.

¶ 16 Mr. Jones is correct that a defendant may be excused from failing to comply with Rule 604(d) if the trial court failed to give the admonitions required by Rule 605. Under this "admonishment exception," when this court has found that the trial court failed to properly admonish a defendant in accordance with Rule 605, we have remanded the case to the trial court for the defendant to receive proper admonitions. *People v. Foster*, 171 Ill. 2d 469, 474 (1996). Rule 605(b) sets forth those requirements for a plea that is not negotiated, while Rule 605(c) sets forth the requirements for a negotatied plea. *People v. Merriweather*, 2013 IL App (1st) 113789, ¶ 17; Ill. S. Ct. R. 605(b), (c) (eff. Oct. 1, 2001).

¶ 17 Because Mr. Jones entered into a *negotiated* guilty plea, Rule 605(c) contains the appropriate admonitions and provides in relevant part as follows:

> "(c) On Judgment and Sentence Entered on a Negotiated Plea of Guilty. 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." Ill. S. Ct. R. 605(c) (eff. Oct. 1, 2001).

¶ 18 In *Dominguez*, 2012 IL 111336, ¶ 22, our supreme court made clear that Rule 605(c) only requires that the trial court "substantially advise" a defendant so 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." If the admonitions "impart to a defendant the essence or substance of the rule," a trial court is considered to have "substantially complied" with Rule 605. *Id.*

¶ 19 Mr. Jones argues first that the trial court incorrectly admonished him under Rule 605(b)(2), rather than Rule 605(c)(2), as it admonished him that he could file either a motion to vacate his plea of guilty or a motion to reconsider the sentence. Under Rule 604(d), the only motion Mr. Jones could have filed after entering into the negotiated guilty plea was a motion asking the court to vacate the judgment and for leave to withdraw the guilty plea. Ill. S. Ct. R. 604(d) (eff. Feb. 6, 2013). Here, however, the trial court admonished Mr. Jones that "[i]n order to appeal, you must within 30 days file with this court a written motion asking me to vacate these pleas of guilty *or reconsider the sentence* being entered here today." (Emphasis added.) This would be the appropriate admonition for a nonnegotiated plea under Rule 605(b)(2) and Mr. Jones is therefore correct that the trial court misadvised him about the type of postplea motion that he was required to file.

¶ 20 Mr. Jones does not dispute, however, that the trial court's admonition correctly and clearly informed him that, to appeal, he had to first file a written motion with the trial court within 30 days. The court's admonition thus "put him on notice" of the steps he needed to take to appeal under Rule 604(d). See *Dominguez*, 2012 IL 111336, ¶¶ 41, 43, 54; *In re J.T.*, 221 Ill. 2d 338, 347-48 (2006).

¶ 21 In his opening brief, Mr. Jones appears to concede that he did not take any timely action to file a postplea motion. In his reply brief, he suggests that the proof/certificate of service—which is almost illegible but which appears to be dated October 31, 2014—demonstrates that he mailed his motion to reduce sentence within the 30 days, but misaddressed it by mailing it to

Keither Castro rather than the court. Therefore, while he argues that the "only barrier to a timely filing was a mistaken address by a *pro se* litigant who was improperly admonished as to the proper procedures to follow," he does not in any way tie those improper admonitions to his failure to timely file a postplea motion with the court, despite the trial court's clear admonition that he was required to do so.

¶ 22 Mr. Jones also argues that the trial court's admonitions were lacking because the court did not make clear that counsel could be appointed to assist Mr. Jones in preparing his postplea motion and incorrectly suggested that he would only be appointed counsel if he was successful in his motion. Mr. Jones claims that if he had been properly admonished, he would have availed himself of such representation and he would have "filed a motion to withdraw his plea in a timely manner and in the proper legal form."

¶ 23 The trial court told Mr. Jones, "If you are successful, you'll get trials on these charges or hearings. If you cannot afford an attorney, one would be appointed for you free of charge and you'd get a free transcript of proceedings." In contrast to the wording in Rule 605, the trial court's admonition did not make clear that Mr. Jones was entitled to the assistance of counsel for his postplea motions. However, again, there is no causal connection between this deficiency and the problems with Mr. Jones's postplea motion because, in order to trigger his entitlement to the assistance of counsel, Mr. Jones first would have had to file a timely postplea motion.

¶ 24 As this court recognized in *People v. Merriweather*, 2013 IL App (1st) 113789, ¶ 25, "Rule 604(d) expressly states that the trial court shall appoint counsel to represent an indigent defendant, if the defendant so chooses, *after* he files a proper postplea motion." (Emphasis in original.) In that case, we also noted:

> "The rule further provides that counsel who is appointed to represent a defendant

> after the defendant's filing of a proper postplea motion, shall file a certificate before the trial court stating, *inter alia,* that counsel 'has made any amendments to the motion necessary for adequate presentation of any defects in those proceedings.' " *Id.* (quoting Ill. S. Ct. R. 604(d) (eff. Feb. 10, 2006)).

The case that Mr. Jones relies on, *People v. Anderson*, 309 Ill. App. 3d 417, 422, (1999), is not to the contrary. The court there noted that the defendant was entitled to appointment of counsel to "argue" his postplea motions. *Id.*

¶ 25 In short, the Rules put the burden on criminal defendants to timely file and serve a postplea motion in the first instance. Once that occurrs, counsel will be appointed for indigent defendants. Mr. Jones failed to file any motion with the clerk of the court within the allotted 30 days. While the defect in the trial court's admonitions may have affected the type of motion Mr. Jones filed, they bear no relation to and do not excuse his failure to file any timely postplea motion.

¶ 26 A defendant is not required to show prejudice to invoke the "admonition exception" under Rule 605(b) or (c). See *People v. Henderson*, 217 Ill. 2d 449, 463 (2005). This is in contrast to Rule 605(a), under which "remand is required only where there has been prejudice or a denial of real justice" as a result of improper Rule 605(a) admonitions—which inform a defendant that he must file a motion to reconsider his sentence following a conviction to preserve sentencing issues on appeal. *Id.* at 461-63. However, both this court and our supreme court have repeatedly recognized that there must be some correlation between the defects in the trial court's admonitions and the defendant's own failure to meet the Rule 604(d) requirements.

¶ 27 For example, in *In re J.T.*, 221 Ill. 2d 338, 347-48 (2006), our supreme court found that the trial court's admonitions—despite not being in strict compliance with Rule 605(c)—were

nonetheless sufficient to put the juvenile respondent 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. Because the respondent took no action whatsoever to challenge the plea until years later, our supreme court concluded that he should not be excused from taking the proper steps to appeal his plea based on the trial court's inadequate admonitions. In *People v. Crump*, 344 Ill. App. 3d 558, 563 (2003), we likewise held that although the trial court's admonitions did not inform the defendant that any issues not raised in his postplea motion would be waived on appeal, the defendant was "substantially advised" of his rights and "was not prejudiced by the missing verbiage" because he did not file any postplea motion with the trial court. Following *Crump*, this court in *People v. Claudin*, 369 Ill. App. 3d 532, 534-35 (2006), also rejected a claim that a defendant was incorrectly advised as to the type of postplea motion that he had to file to appeal his negotiated guilty plea. We again concluded that, because the defendant did not file *any* postplea motion with the trial court, even if the admonitions did not strictly comply with Rule 605(c), they "were sufficient to put defendant on notice of the postplea action necessary to preserve his appeal, and he ignored it." *Id.* at 534.

¶ 28 Mr. Jones cites *People v. Young* 387 Ill. App. 3d 1126 (2009), where the defendant entered into a negotiated guilty plea, and where, as here, the trial court incorrectly admonished him that in order to appeal, he had to first file either a written motion to reconsider his sentence or a motion to withdraw his guilty plea. *Id.* at 1126-27. The defendant incorrectly filed a motion to reconsider sentence, which is applicable only for a nonnegotiated plea. *Id.* at 1127. The trial court denied the motion on that basis. *Id.* On appeal, the State conceded the error, and the appellate court found that the trial court's admonitions were not proper and remanded the case for the defendant to receive new admonitions "strictly complying" with Rule 605. *Id.* at 1126,

1129. In contrast to the situation in *Young*, here Mr. Jones's motion was not timely filed and there was no causal connection between this timeliness deficiency and the error in the trial court's admonition. If the only error had been that Mr. Jones had filed an incorrect motion to reduce his sentence, we would agree that *Young* should control here.

¶ 29 Mr. Jones also cites *People v. Perper*, 359 Ill. App. 3d 863, 866 (2005), in which the Second District held that no showing of prejudice was required if admonitions were incorrect under Rule 605(b). But, in *Perper*, the trial court's admonitions fell "far short of strict compliance with Rule 605(b)": they did not tell the defendant the consequences of prevailing on his motion to vacate his plea, that he had the right to a free report of the proceedings at the time of his plea, or that any issue that he did not raise in his postrial motion would be waived. *Id.* at 866. Thus, the facts of that case are very different from those present here. To the extent that *Perper* would suggest that Mr. Jones need not show *any* causal connection between his postplea actions and the deficiencies in the trial court's admonitions, we believe that our supreme court's holdings in *In re J.T.* and *Dominguez* have cast the reasoning of *Perper* into doubt.

¶ 30 In sum, the trial court here complied with the standards set forth in *Dominguez*. It complied with Rule 605(c) by admonishing Mr. Jones that he needed to file a timely motion with the trial court within 30 days, of the consequences of failing to do so, and of his right to appointed counsel. Although the admonitions were not technically perfect, they were "sufficient to impart the essence or substance of the rule" to Mr. Jones. *Dominguez*, 2012 IL 111336, ¶ 54. We conclude that the "admonition exception" does not excuse Mr. Jones's failure to timely file a postplea motion under Rule 604(d). Accordingly, Mr. Jones has forfeited his right to a direct appeal and we dismiss his appeal.

¶ 31 Appeal dismissed.