2018 IL App (2d) 160794-U
Nos. 2-16-0794, 2-16-0795, 2-16-0796 cons.
Order filed November 19, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ALBERTO JIMENEZ, a/k/a Miguel Ortiz, Defendant-Appellant.	)))))))))	Appeal from the Circuit Court of Kane County. No. 14-CF-1331 Honorable James C. Hallock, Judge, Presiding.

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ALBERTO JIMENEZ, a/k/a Miguel Ortiz, Defendant-Appellant.	)))))))))	Appeal from the Circuit Court of Kane County. No. 15-CF-339 Honorable James C. Hallock, Judge, Presiding.

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v.	))))))	Appeal from the Circuit Court of Kane County. No. 16-CF-56

ALBERTO JIMENEZ, a/k/a Miguel Ortiz,	)	Honorable
	)	James C. Hallock,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Zenoff and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: We dismissed defendant's appeal, as defendant did not comply with Rule 604(d): his postplea filing, in its substance as well as in its title, was a notice of appeal, not a motion to withdraw his plea.

¶ 2 I. BACKGROUND

¶ 3 On August 18, 2016, defendant pleaded guilty in case No. 16-CF-56 to one count of violating an order of protection (720 ILCS 5/12-3.4(a)(1) (West 2016)) and one count of domestic battery (720 ILCS 5/12-3.2(a)(1) (West 2016)). On that same date, defendant stipulated that, by pleading guilty in that case, he violated the terms of probation that had been previously imposed in case No. 14-CF-1331 and case No. 15-CF-339. (In each of those cases, he had pleaded guilty to one count of violating an order of protection.) Defense counsel indicated that an agreement had been reached pursuant to which defendant would be sentenced, in case No. 16-CF-56, to 27 months' imprisonment, to be served at 50%, followed by a term of four years of mandatory supervised release (MSR). In addition, in case No. 14-CF-1331 and case No. 15-CF-339, defendant would be resentenced to 27 months' imprisonment, to be served at 50%, followed by a term of four years of MSR. The three sentences would be served concurrently. After hearing the factual basis of the plea and determining that the plea was voluntarily made, the trial court entered judgment in accordance with the agreement. Thereafter, the trial court admonished defendant as follows:

"You have the right to an appeal, but you must file with the trial court within 30 days of today's date a written motion asking to have the judgments vacated and for leave to withdraw your plea of guilty and your stipulations, and then you'd have to set forth the reason for your request in that motion.

If the motion is allowed, then the plea of guilty, the sentence, and the judgments would all be vacated and a trial date would be set on the new file and hearing dates would be set on the old files.

At that time, if you're still unable to afford an attorney, you're entitled to ask the Court for the continued services of the Kane County Public Defender's Office to assist you in preparation of those motions.

You're also entitled to a free transcript of today's hearing if you needed for purposes of preparation of that notice—that motion under your appeal rights.

Now, it's important to remember that any issue or claim of error that you don't raise in these motions will be deemed to be waived.

Now, do you understand these appeal rights?"

Defendant indicated that he understood.

¶ 4 On September 13, 2016, defendant mailed, in each of the three cases, the following identical documents to the trial court: (1) a "Notice of Filing," indicating that he had filed a "Notice of Appeal, Notice of Filing and Proof of Service"; (2) an "Affidavit"; (3) a "Motion for Appointment of Counsel"; (4) an "Application to Sue or Defend as a Poor Person"; and (5) a "Late Notice of Appeal." In his "Late Notice of Appeal" (which, we note, was not actually late), underneath the preprinted prompt asking "why you believe your appeal has merit," defendant wrote: "wrong plea advice—ineffective counsel."

¶ 5 On September 30, 2016, the trial court appointed the Office of the State Appellate Defender to represent defendant on appeal.

¶ 6 II. ANALYSIS

¶ 7 On appeal, defendant argues that the trial court erred in its handling of defendant's filings. According to defendant, because his "notice of appeal" "clearly evinced a desire to challenge the validity of his guilty plea as well as his admissions to violations of his probation," the trial court should have treated it as a motion, in accordance with Illinois Supreme Court Rule 604(d) (eff. July 1, 2017), to withdraw his plea and admissions and should have appointed counsel to represent him in the presentment of the motion. The State responds that defendant's plainly labeled "notice of appeal" should not have been treated as such a motion just because defendant made a vague reference to his plea. We agree with the State.

¶ 8 Rule 604(d) provides, in pertinent part, that "[n]o appeal shall be taken upon a negotiated plea of guilty *** unless the defendant, within 30 days of the imposition of sentence, files a motion to withdraw the plea of guilty and vacate the judgment." Ill. S. Ct. R. 604(d) (eff. July 1, 2017). The supreme court has made it clear that its rules are not mere suggestions, but rather have the force of law and enjoy the presumption that they will be obeyed and enforced as written. *People ex rel. Alvarez v. Skryd*, 241 Ill. 2d 34, 39 (2011). Defendant's compliance with Rule 604(d) is a condition precedent for an appeal from a plea of guilty (*People v. Wilk*, 124 Ill. 2d 93, 105 (1988)), and as a general rule, the failure to file a timely motion under Rule 604(d) precludes the appellate court from considering the appeal on the merits (*People v. Merriweather*, 2013 IL App (1st) 113789, ¶ 14).

¶ 9 Here, defendant's "notice of appeal" did not amount to a motion required by Rule 604(d). *Merriweather* is instructive. In *Merriweather*, following the entry of a negotiated guilty plea, the

defendant filed a *pro se* notice of appeal. *Id.* ¶¶ 10-11. In his notice of appeal, the defendant alleged "that defense counsel provided ineffective assistance and that the State 'failed to prove its burden [of] proof,' " and he requested an attorney to represent him. *Id.* ¶ 11. The trial court appointed the Office of the State Appellate Defender to represent the defendant on appeal. On appeal, the defendant argued that the *pro se* "notice of appeal" was mislabeled as a notice of appeal, because the content of the document revealed his desire to withdraw his plea. According to the defendant, it should have been treated as a motion to withdraw his plea. The First District disagreed, stating:

> "The content of the document at issue, apart from its 'notice of appeal' title, stated that the defendant 'gives notice that an appeal is taken from the order of judgment.' The document contained a heading for the 'Appellate Court of Illinois' and set forth the background of his case—including the trial court's disposition of his motion to quash and motion to reconsider the denial of the motion to quash. It further alleged that [the] defense attorney provided ineffective assistance of counsel, that the State 'failed to prove its burden [of] proof,' and that, '[t]herefore, with these issues *** [defendant's] motions should have been granted.' *** We find no indication in the *pro se* notice of appeal that the defendant desired to withdraw his guilty plea, but had inadvertently mislabeled the document as a notice of appeal. The notice of appeal showed that the defendant sought to directly appeal the order of judgment, and the denial of his motion to quash and motion to reconsider, on the basis that his counsel was ineffective and that the State somehow failed to carry its burden of proof during the pretrial proceedings." (Emphasis omitted.) *Id.* ¶ 21.

¶ 10 Here, as in *Merriweather*, defendant filed a document titled "notice of appeal," which was specifically directed to this court. In the notice, he indicated that "[a]n appeal is taken from the order or judgment listed below," and he listed the order or judgment entered on August 18, 2016. When asked to indicate why he believed that his appeal had merit, he stated: "wrong plea advice—ineffective assistance." Despite being admonished that if he wished to appeal he "must file with the trial court within 30 days of today's date a written motion *asking to have the judgments vacated and for leave to withdraw your plea of guilty and your stipulations*," he made no such request. (Emphasis added.) Therefore, we find that defendant's notice of appeal was properly treated as such.

¶ 11 The cases relied on by defendant do not support a different conclusion. In *People v. Trussel*, 397 Ill. App. 3d 913 (2010), the defendant, 22 days after pleading guilty and being sentenced, sent a *pro se* letter to the trial court, stating that he wished to appeal, that he did not get a fair trial, that his lawyer scared him into his plea, and that he was not guilty. *Id.* at 913-14. The circuit court clerk treated the letter as a notice of appeal. *Id.* at 914. On appeal, the defendant argued that the document should have been treated as a motion under Rule 604(d), arguing in part that, although the defendant stated that he wished to appeal, he did not file a notice of appeal. The Fourth District agreed, finding that the defendant should have been afforded counsel to assist him in preparing a postplea motion. *Id.* at 915.

¶ 12 Defendant also points to *People v. Gibson*, 96 Ill. 2d 544 (1983) (supervisory order), and *People v. Gonzalez*, 375 Ill. App. 3d 377 (2007). In each case, as in *Trussel*, the defendant wrote a letter to the trial court judge, complaining about the plea. In *Gibson*, the defendant wrote that he wanted to appeal and that he was psychologically coerced into pleading guilty. *Gibson*, 95 Ill. 2d at 544. The supreme court held that the letter "sufficiently complied with Rule 604(d)." *Id.*

In *Gonzalez*, the defendant wrote that she was threatened when she told counsel that she did not want to plead guilty. *Gonzalez*, 375 Ill. App. 3d at 377. Relying on *Gibson*, we found that the letter should have been treated as a motion to withdraw the plea under Rule 604(d). *Id.* at 377-79.

¶ 13 Here, unlike in *Trussel*, *Gibson*, and *Gonzalez*, defendant did not send the trial court a mere letter alleging that he was threatened, coerced, or scared into pleading guilty. Instead, defendant filed a notice of appeal, specifically directed to this court, indicating that he was taking "[a]n appeal" from "the order or judgment described below." Defendant's statement in the notice of appeal that his appeal has merit due to "wrong plea advice—ineffective assistance" simply does not equate to a request for the trial court to withdraw his plea and thus should not have been treated as such. We acknowledge that a filing's identity is controlled by its substance, not its title. See *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 102 (2002). Here, however, defendant's filing was substantively a notice of appeal.

¶ 14 Based on the above, defendant's failure to file a motion in compliance with Rule 604(d) results in the loss of the right to a direct appeal. *People v. Dunn*, 342 Ill. App. 3d 872, 878 (2003). Thus, we must dismiss the appeal, leaving the Post-Conviction Hearing Act (735 ILCS 5/2-1401 (West 2016)) as his only recourse. See *People v. Flowers*, 208 Ill. 2d 291, 302 (2003) ("[t]he requirements of Rule 604(d) are inapplicable to postconviction proceedings"); *Merriweather*, 2013 IL App (1st) 113789, ¶ 35.

¶ 15 III. CONCLUSION

¶ 16 For the reasons stated, we dismiss this appeal. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 17 Appeal dismissed.