

No. 1-11-3627

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).

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. 11 CR 13857
)	
KENNETH JOHNSON,)	Honorable
)	Nicholas R. Ford,
Defendant-Appellant.)	Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Justices Hoffman and Cunningham concurred in the judgment.

ORDER

¶ 1 **Held:** Where defendant was substantially admonished of his appellate rights under Supreme Court Rule 605(c), his failure to file a timely motion to withdraw his plea cannot be excused by the admonition exception, and the appeal is dismissed.

¶ 2 Defendant Kenneth Johnson entered a negotiated plea of guilty to possession of a controlled substance, and was sentenced to 18 months' probation. On appeal, he contends that the trial court failed to properly admonish him of his appellate rights pursuant to Illinois Supreme Court Rule 605(c), and that we should remand the case for compliance with the rule

and for him to file a motion to withdraw his guilty plea. He also contends that we should construe Illinois Supreme Court Rules 604(d) and 606(a) to require the appointment of counsel during post-plea proceedings, and that his plea should be vacated because the record lacks a factual basis to support its entry.

¶ 3 The record on appeal shows that defendant was charged with one count of possession of a controlled substance. At the bond hearing that followed, the court imposed special conditions of bond, subjecting him to a 24-hour curfew, and requiring him to report in person on a monthly basis to the Pretrial Services Unit of the Adult Probation Department. Defendant did not comply with those conditions and also failed to report. The trial court modified the conditions of his pre-trial release by imposing a 6 p.m. to 6 a.m. curfew, and ordered him to submit to random drug screens. Defendant again failed to report or comply with the curfew order.

¶ 4 On September 27, 2011, defense counsel informed the court that defendant had been evicted from his home and had no current residence. The court allowed defendant additional time to find a place to live and indicated that it would excuse curfew violations for two weeks.

¶ 5 At the end of that period, defendant repeatedly violated the conditions of his pre-trial release and did not report as required. On November 9, 2011, a violation of pre-trial services was filed, and defendant requested a Supreme Court Rule 402 conference. The State indicated that an offer of 18 months' probation had been extended to defendant, and the court agreed to hold a conference.

¶ 6 When the case was recalled, the court announced that defendant had accepted the State's offer of 18 months' probation. The court also noted that it had informed defense counsel that it would increase defendant's bond in light of his pre-trial violations. The court then stated:

“COURT: That’s what happened. Do you want to go into custody or you accept the offer of probation? The choice is yours.

DEFENDANT: I’ll take it. You do what you do, your Honor.

COURT: You’re the one that’s deciding, I’m not. I’m just telling you that I’m—

DEFENDANT: It’s set up to me, man. I’ll take the probation, man.

COURT: All right, I did indicate, Mr. Johnson, that in exchange for a plea of guilty on your case, I’d sentence you to a period of 18 months’ probation for the offense of [possession] of a controlled substance. I’ve been told that you want to accept that offer and plead guilty, is that right?

DEFENDANT: Yes.”

¶ 7 The court admonished defendant of the rights he was giving up by pleading guilty, and defendant indicated his understanding of them. The court then continued:

“COURT: Did anyone threaten you or promise you anything in order to make you plead guilty here today?

DEFENDANT: You asking me did they, did—

COURT: All I’m telling you is I was increasing your bond because you didn’t comply with the orders of your probation [*sic*]. So you can do whatever you want, because I told your attorney in the back, I’ll take you into custody today and you can have a trial

next week. Whatever you want to do. But you're going in today. It wasn't a threat. That was a reaction to a failure to do what I asked you to do.

DEFENDANT: I did what you asked me to do. I pleaded guilty.

COURT: But you—

DEFENDANT: I understand. I understand everything.

COURT: Did anyone threaten you to make you plead guilty here today?

DEFENDANT: No.

COURT: You're pleading guilty of your own free will?

DEFENDANT: Yes, sir."

¶ 8 After admonishing defendant of the range of penalties he faced, the court asked, "Is there a stipulation that the facts I heard during the 402 conference are sufficient to prove [defendant] guilty of the offense charged?" Defense counsel replied, "Yes. There is a stipulation on behalf of the defense." The court then found the stipulation sufficient to prove defendant's guilt, sentenced him to the agreed term, and admonished him as follows:

"I want you to know that even though you pled guilty, you have the right to appeal. In order to appeal, you must first within 30 days file in this court a written motion asking for leave to withdraw your plea of guilt. The motion must set forth the grounds and reasons why you feel the motion should be granted, in writing, and be filed within 30 days.

If it is granted, the plea of guilty, sentence and judgment will be vacated and a trial will be set on all the charges that were once pending against you.

If not, you have 30 days to appeal the denial in the court. In that circumstance, you would get a free attorney and free transcript of that plea. But any issue or claim of error that you got that you didn't first raise in the motion to vacate the judgment or withdraw the plea of guilty, will be waived or given up on appeal."

Defendant acknowledged his understanding of the court's admonitions, but did not attempt to file a motion to withdraw his guilty plea. Instead, five days later, he filed a notice of appeal.

¶ 9 In this court, defendant contends that the trial court failed to properly admonish him of his appellate rights following the negotiated plea, requiring a remand for compliance and an opportunity to file a motion to withdraw his guilty plea. The State initially responds that the court substantially complied with Supreme Court Rule 605(c), (Ill. S. Ct. R. 605(c) (eff. October 1, 2001)), and, as such, we should dismiss defendant's appeal because he failed to file a timely motion to withdraw his plea under Supreme Court Rule 604(d). Ill. S. Ct. R. 604(d) (eff. July. 1, 2006).

¶ 10 Rule 604(d) provides, in pertinent part, that "[n]o appeal from a judgment entered upon a plea of guilty shall be taken unless the defendant, within 30 days of the date on which sentence is imposed, files in the trial court *** a motion to withdraw the plea of guilty and vacate the judgment." Generally, when a defendant fails to file a timely motion to withdraw his guilty plea under Rule 604(d), the appellate court is precluded from considering the appeal on the merits, and must dismiss it. *People v. Flowers*, 208 Ill. 2d 291, 301 (2003).

¶ 11 Under the admonition exception to this rule, however, defendant's noncompliance with the requirements of Rule 604(d) will not result in dismissal of the appeal if the court failed to advise defendant of the procedural steps necessary to perfect his appeal as set forth in Rule 605. *Id.*; *People v. Foster*, 171 Ill. 2d 469, 473 (1996). In that situation, the proper course is to remand the cause for proper admonishments. *People v. Dominguez*, 2012 IL 111336, ¶ 11; *Flowers*, 208 Ill. 2d at 301.

¶ 12 Defendant and the State agree that defendant entered a negotiated guilty plea and the trial court was therefore required to admonish defendant pursuant to Supreme Court Rule 605(c). Ill. S. Ct. R. 605(c) (eff. Oct. 1, 2001). Rule 605(c) requires the trial court, after entering judgment upon defendant's guilty plea, to advise defendant of the conditions that must be satisfied before an appeal may be taken. The trial court must *substantially* advise defendant of the content of the rule, *i.e.*, it must "impart to a defendant largely that which is specified in the rule, or the rule's 'essence,' as opposed to 'wholly' what is specified in the rule." *Dominguez*, 2012 IL 111336, at ¶ 19. So long as defendant 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, the admonitions are sufficient to impart to defendant the essence or substance of the rule and the court has substantially complied with Rule 605. *Id.* ¶ 22. We review the trial court's compliance with the rule *de novo*. *People v. Breedlove*, 213 Ill. 2d 509, 512 (2004).

¶ 13 Defendant specifically contends that the admonishments were insufficient because the court failed to inform him that he had the right to counsel and a copy of the transcript to assist him in the preparation of his post-plea motion, instead informing him that he was entitled to such assistance only in the event that his post-plea motion was denied and he appealed. This contention is similar to the one addressed by the supreme court in *Dominguez*, 2012 IL 111336.

¶ 14 In that case, defendant challenged the court’s Rule 605 admonishments based on, *inter alia*, the court’s failure to inform him that he had the right to the assistance of counsel in preparing his post-plea motions, alleging that the court, instead, implied that counsel was only available after post-plea proceedings. *Id.* ¶ 47. The court admonished defendant in *Dominguez* that, “even though you have pled guilty and been found guilty, you have certain rights. Those rights include your right to return to the courtroom within 30 days to file motions to vacate your plea of guilty and/or reconsider your sentence. The motions must be in writing and contain all the reasons to support them. * * * In the event the motions are denied, you have 30 days from denial to return to file a notice of appeal the Court’s ruling. If you wish to do so and could not afford an attorney, we will give you an attorney free of charge, along with the transcripts necessary for those purposes.” *Id.* ¶¶ 41, 46. The supreme court concluded that this admonishment, while imperfect, was sufficient to comply with Rule 605, as it reflected that a court-appointed attorney would be available for defendant. *Id.* ¶ 51.

¶ 15 In the case at bar, defendant was informed that “even though you pled guilty, you have the right to appeal. In order to appeal, you must first within 30 days file in this court a written motion asking for leave to withdraw your plea of guilt. * * * If [your motion for leave to withdraw the plea is denied], you have 30 days to appeal the denial in the court. In that circumstance, you would get a free attorney and free transcript of that plea.” We find no meaningful difference in the admonishment given in *Dominguez* and the admonishment at issue here. We likewise conclude that defendant was substantially admonished pursuant to Rule 605(c), and that his failure to file a Rule 604(d) motion is not cured by the admonition exception. *Id.*

¶ 16 Defendant disagrees, and contends that *Dominguez* is distinguishable because defendant in that case was given both oral and written admonishments of his rights. We observe, however, that in finding the admonishment sufficient, the court in *Dominguez* relied on *In re J. T.*, 221 Ill. 2d 338 (2006), and *People v. Dunn*, 342 Ill. App. 3d 872 (2003), neither of which involved written admonishments. The supreme court noted that in those cases, the trial court also “arguably did not inform defendant that he was entitled to have an attorney appointed to help him prepare the post-plea motions[,]” but despite the imperfection of the oral admonishments, they were sufficient to convey the substance of the rule to defendant and thus complied with Rule 605. *Dominguez*, 2012 IL 111336, ¶ 51.

¶ 17 In this case, the court explained to defendant that he had the right to appeal, but in order to do so, he was required to file a written motion to withdraw his guilty plea with the court within 30 days. By informing him that he had certain appellate rights, but that he had to file a motion challenging the plea within 30 days in order to exercise them, the trial court properly imparted the essence of the rule and therefore substantially advised defendant under Rule 605(c). *People v. Claudin*, 369 Ill. App. 3d 532, 534 (2006). Defendant told the trial court that he understood this requirement, but did not file a motion to withdraw his plea, and instead filed a notice of appeal. Under these circumstances, defendant’s failure to file a Rule 604(d) motion to vacate the judgment and withdraw the guilty plea is not excused under the admonition exception, and he has thus waived his right to a direct appeal. *Id.*

¶ 18 Defendant alternatively requests this court to construe Illinois Supreme Court Rules 604(d) and 606(a) to require the automatic appointment of counsel during the post-plea stage when a defendant files any document with the trial court or a *pro se* notice of appeal. He contends that the time for filing a post-plea motion is a “critical stage” in proceedings, in which a

right to counsel is required. By filing a notice of appeal, defendant asserts that it is apparent that he wished to vacate his guilty plea, and that it would be “fundamentally unfair, and a denial of due process” to hold that he waived his right to appellate review by filing the wrong document. He thus asks this court to remand the matter for the appointment of counsel and for an opportunity to file a post-plea motion with the assistance of counsel.

¶ 19 The sixth amendment provides that, “[i]n all criminal prosecutions, the accused shall enjoy the right *** to have the Assistance of Counsel for his defence.” U.S. Const. amend VI. This provision, “safeguards to an accused who faces incarceration the right to counsel at all critical stages of the criminal process.” *Iowa v. Tovar*, 541 U.S. 77, 80 (2004). This sixth amendment right to counsel attaches at the commencement of criminal proceedings (*Kirby v. Illinois*, 406 U.S. 682, 688-89 (1972)), and continues during the direct appeal process (*McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 436 (1988)). Where defendant pleads guilty and does not move to withdraw that plea, however, he waives his right to appeal. *Claudin*, 369 Ill. App. 3d at 535.

¶ 20 Defendant attempts to circumvent the above principles by asserting that he demonstrated a desire to withdraw his guilty plea when he filed notice of appeal. Accordingly, he contends that he merely filed the wrong document to formalize his intent to withdraw his waiver of his appeal right. We disagree.

¶ 21 In *People v. Brooks*, 233 Ill. 2d 146, 155-56 (2009), our supreme court reaffirmed that a defendant must comply with Rule 604(d) to file an appeal following a guilty plea, even if he files notice of appeal indicating an intent to challenge the guilty plea. The supreme court thus indicated that it does not view the difference between a notice of appeal and a Rule 604(d) motion as a mere formality, holding that Rule 604(d) must be followed even if defendant evinces

a desire to appeal by filing a notice of appeal. *Id.* In accordance with *Brooks*, we reject defendant's argument that, under the sixth amendment, a defendant who pleads guilty must be provided counsel following his guilty plea if he files a *pro se* notice of appeal from that plea.

¶ 22 Defendant additionally argues that Supreme Court Rule 606(a) (eff. March 20, 2009), which describes how defendant may perfect an appeal, can be deemed constitutional only if we interpret it to require the appointment of counsel to help a defendant who files *pro se* notice of appeal after a guilty plea. However, for the reasons explained above, we disagree that the constitution requires the appointment of counsel to a defendant who files a bare notice of appeal without first moving to withdraw his guilty plea. For the same reasons, we reject defendant's argument that Rule 606(a) should be interpreted to require the appointment of counsel in his situation.

¶ 23 Defendant finally contends that the record reflects no basis to support his plea, and that he must be permitted to withdraw it. He asserts that the trial court did not adequately comply with the requirements of Supreme Court Rule 402(c) (Ill. S. Ct. R. 402(c) (eff. July 1, 1997)), when it accepted a stipulation to the factual basis based on an off-the-record exchange. He acknowledges, however, that he did not raise this issue in a motion to withdraw his plea. Instead, he asks this court to review the issue as plain error. In response, the State contends that we cannot reach the merits of this issue, under plain error or otherwise, because defendant did not comply with Supreme Court Rule 604(d), as discussed above.

¶ 24 The failure of a defendant convicted on a plea of guilty to file a Rule 604(d) motion precludes the appellate court from entertaining any appeal from that judgment, except if the defendant had not been properly admonished pursuant to Supreme Court Rule 605. *Flowers*, 208 Ill. 2d at 301. Because we have previously found that defendant was substantially admonished

under Rule 605(c) and failed to file a written motion to withdraw his plea of guilty before filing his notice of appeal, we cannot reach the issue of the use of off-the-record discussions to satisfy the factual basis requirement.

¶ 25 In sum, we may not consider this appeal on the merits, but must dismiss it. *Id.*

¶ 26 Dismissed.