

No. 1-12-0380

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. 08 CR 1114101 |
| |) | |
| ROYCE WATSON, |) | Honorable |
| |) | William J. Kunkle |
| Defendant-Appellant. |) | and Victoria Stewart, |
| |) | Judges Presiding. |

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

ORDER

- ¶ 1 *Held:* Where defendant failed to file a timely motion to withdraw his plea, appeal challenging his plea for lack of factual basis was dismissed.
- ¶ 2 Defendant Royce Watson was convicted of possession of a controlled substance with intent to deliver, and sentenced to 36 months of probation following his guilty-plea. During his period of probation, which had been extended due to filings of petitions to revoke probation, defendant was charged with possession of a controlled substance in circuit court case number 11 CR 1590598363. Defendant pled guilty to this new charge and admitted he had violated his

probation in this case. The circuit court revoked defendant's probation and resentenced him to four years' imprisonment and imposed a consecutive sentence of one-year imprisonment in circuit court case number 11 CR 1590598363. On appeal, defendant contends his original guilty plea in this case lacked a factual basis in that the stipulated facts presented during his guilty plea proceedings disclosed that it was codefendant, Justin Watson, who actually possessed the controlled substance. Defendant argues that as a result, all orders entered based on his plea, are void. We dismiss this appeal in that defendant failed to file a motion to vacate his plea pursuant to Illinois Supreme Court Rule 604(d) (Ill. S. Ct. R. 604(d) (eff. Feb. 6, 2013)).

¶ 3 This matter began when defendant was charged by indictment with possession of a controlled substance, heroin, with intent to deliver, and two counts of unlawful use of a weapon by a felon. Codefendant, Justin Watson, was charged with two counts of unlawful use of a weapon by a felon, and possession of a stolen firearm. Codefendant Tonya Bennett was charged with possession of a controlled substance, cocaine. The indictments stated the offenses were alleged to have taken place on May 23, 2008.

¶ 4 Defendant's arrest report stated he was arrested on May 23, 2008, at 7958 S. Burnham Avenue in Chicago and that narcotics were recovered. Chicago police officer R. Arroya was an arresting officer. The arrest report gave a recitation of the facts for probable cause to arrest defendant and to substantiate the charges against him. On May 23, 2008, the police were in "hot pursuit" of codefendant Watson. The police pursued codefendant Watson into a building where they saw defendant standing in the hallway. Defendant then fled into a first-floor apartment. While the officers struggled with codefendant Watson in the apartment, they saw defendant toss

a black object into an open closet. One of the officers went to the closet and saw a loaded blue steel semiautomatic pistol and a clear plastic bag containing 11 smaller plastic bags of a white powdery substance suspected to be heroin, in plain view lying on top of clothing in the closet. A property inventory report numbered 11309586 reflected that a firearm and ammunition were recovered from codefendant Watson, but not any drugs. A property inventory report numbered 11309614 reflected that a clear plastic bag which contained eleven smaller bags containing a white powder was recovered from defendant.

¶ 5 On September 17, 2008, defendant pled guilty to the possession of heroin with intent to deliver charge. That charge specifically stated that on May 23, 2008:

"[DEFENDANT], KNOWINGLY AND UNLAWFULLY POSSESSED WITH INTENT TO DELIVER OTHERWISE THAN AS AUTHORIZED IN THE ILLINOIS CONTROLLED SUBSTANCES ACT OF SAID STATE OF ILLINOIS THEN IN FORCE AND EFFECT, 1 OR MORE GRAMS BUT LESS THAN 15 GRAMS OF A SUBSTANCE CONTAINING A CERTAIN CONTROLLED SUBSTANCE, TO WIT: HEROIN, IN VIOLATION OF CHAPTER 720 ACT SECTION 401(c)(1) OF THE ILLINOIS COMPILED STATUTES 2002, AS AMENDED AND, contrary to the Statute and against the peace and dignity of the same People of the State of Illinois."

¶ 6 After determining defendant understood the charge to which he was pleading guilty, and that defendant was pleading guilty of his own free will and without threat of force or promises, the circuit court asked for the factual basis for the plea of guilty. The State responded that if the

case were to proceed to trial, Chicago police officer Arroyo would testify that on May 23, 2008, he was on patrol at 7958 South Burnham Avenue and would further testify:

"[C]o-defendant *** Justin Watson [was] standing on the sidewalk in front of the apartment building at 7958 South Burnham while in possession of a handgun.

Upon observing the handgun the officers exited the vehicle and approached the defendant or the co-defendant at that time who at that time ran, put the weapon in his waistband and ran into the building and up into the first floor.

The officers gave chase and observed the defendant running into the first floor apartment. They also observed at that time *** defendant *** running into the apartment behind [codefendant].

The officers *** followed the defendant into the apartment, at which time they observed [codefendant] throw an object into the closet in the residence. The defendant was subsequently taken into custody.

The object was recovered from the closet. It was a clear plastic bag containing eleven smaller clear plastic bags which contained an off white powdery substance which the officers suspected of being narcotics.

These items were seized, inventoried and submitted to the State Lab where Arlene Weathers performed tests commonly used in the field of forensic chemistry for ascertaining the presence of heroin on the contents of the bag - - of several of the bags.

He would testify that after performing said tests it's his professional opinion that seven of these items tested positive for 1.2 grams of heroin and one of the other bags tested positive for 1.2 grams of heroin.

They'd identify the defendant in open court as the individual for whom the heroin was recovered, and that these events occurred in Cook County."

¶ 7 Defense counsel stipulated to this rendition of the facts. The circuit court found there was a factual basis for defendant's guilty plea, accepted defendant's plea of guilty, and sentenced him to 36 months of probation. The circuit court admonished defendant as to his appeal rights.

¶ 8 On August 29, 2011, the State filed a petition to revoke defendant's probation which alleged that on August 28, 2011, defendant committed the offense of possession of a controlled substance (case number 11 CR 1590598363). On December 2, 2011, after a conference, pursuant to Supreme Court Rule 402 (Ill. S. Ct. R. 402 (eff. July 1, 2012, as amended)), defendant pled guilty to possession of a controlled substance in case number 11 CR 1590598363, and then admitted to violating his probation here. Defendant's probation was revoked, and he was resentenced to four years' imprisonment and sentenced to one year imprisonment in case number 11 CR 1590598363. The circuit court admonished defendant as to his appeal rights. Defendant now appeals.

¶ 9 On appeal, defendant contends the circuit court's orders are void because it had no authority to accept his original guilty plea in this case because the factual basis for his plea was inadequate in violation of Supreme Court Rule 402(c) (Ill. S. Ct. R. 402(c) (eff. July 1, 2012, as amended)). Specifically, defendant's argument is that the factual basis showed codefendant

Watson, and not defendant, possessed the heroin and, thus, defendant pleaded guilty to a crime he did not commit. Defendant requests that his conviction for possession of a controlled substance with intent to deliver, the order revoking his probation and the four-year prison sentence be vacated.

¶ 10 The State responds that this court lacks jurisdiction to consider defendant's appeal because defendant failed to file a motion to withdraw his guilty plea within 30 days of sentencing. The State further argues that a violation of Supreme Court Rule 402 (Ill. S. Ct. R. 402 (eff. July 1, 2012)), is merely voidable, not void and not subject to collateral attack at any time. Even assuming this court had jurisdiction, the State maintains defendant forfeited the issue on appeal because he failed to argue plain error. Finally, the State maintains that no error occurred because a sufficient factual basis for the guilty plea existed in compliance with Supreme Court Rule 402(c).

¶ 11 As stated, defendant, on appeal, challenges his original plea of guilty in this matter on the ground that it failed to comply with Rule 402(c) and, thus, the circuit court's orders based on that plea are void. Rule 402(c) provides that the court "shall not enter final judgment on a plea of guilty without first determining that there is a factual basis for the plea." Ill. S. Ct. R. 402(c) (eff. July 1, 2012, as amended).

¶ 12 We first address the State's contention that we lack jurisdiction to consider defendant's challenge to his original guilty plea in that he failed to move to vacate that plea as required by Supreme Court Rule 604(d) which provides 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 sentence is imposed, files in the trial court a motion to reconsider the sentence, if only the sentence is being challenged, or, if the plea is being challenged, a motion to withdraw the plea of guilty and vacate the judgment." Ill. S. Ct. R. 604(d) (eff. Feb. 6, 2013).

Our supreme court has explained:

"The filing of a Rule 604(d) motion is a condition precedent to an appeal from a judgment on a plea of guilty. [Citation.] 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. [Citation.] As a general rule, however, the failure to file a timely Rule 604(d) motion precludes the appellate court from considering the appeal on the merits. Where a defendant has failed to file a written motion to withdraw his plea of guilty or to reconsider his sentence, the appellate court must dismiss the appeal [citation], leaving the Post-Conviction Hearing Act as the defendant's only recourse [citation].

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 merits, and must dismiss it." *People v. Flowers*, 208 Ill. 2d 291, 300-01 (2003).

An exception to the rule set forth in *Flowers* exists where the defendant had not known a Rule 604(d) motion was necessary because, at the time of the plea, the circuit court had not admonished the defendant as to the required procedural steps for an appeal as set forth in

Supreme Court Rule 605. See Ill. S. Ct. R. 605 (eff. Oct. 1, 2001, as amended). Under those circumstances, we would be required to remand the matter to the circuit court for a defendant to fully comply with Rule 604(d). *Flowers*, 208 Ill. 2d at 301.

¶ 13 Defendant does not argue that he was not informed of the steps he was required to take before filing an appeal at his original plea hearing. The record, in fact, shows the circuit court admonished defendant as to his appeal rights in compliance with Rule 605.

¶ 14 Defendant contends that because the circuit court did not adequately comply with the requirements of Rule 402(c) at the time he pled guilty, his original plea was void and, therefore, may be attacked at any time. We disagree.

¶ 15 A judgment is void, rather than voidable, only where the court entering the judgment lacks jurisdiction over the parties, or over the subject matter, or exceeded its statutory authority to act. *People v. Davis*, 156 Ill. 2d 149, 155-56 (1993). "Once a court has obtained jurisdiction, it will not lose jurisdiction due to a mistake of the law, the facts or both." *People v. Smith*, 406 Ill. App. 3d 879, 887 (2010) (citing *People v. Ramirez*, 361 Ill. App. 3d 450, 454 (2005)).

¶ 16 Defendant does not contend the circuit court lacked subject matter jurisdiction, or personal jurisdiction, or that his sentence of probation was beyond the circuit court's sentencing authority. His argument is solely that the factual basis as required by Rule 402(c) was insufficient and, therefore, all subsequent orders are void.

¶ 17 We have held that "a violation of Rule 402, a procedural rule, does not defeat the trial court's jurisdiction to enter convictions based on a defendant's pleas and such a violation, even if constitutional in dimension, renders a conviction merely voidable." *People v. Smith*, 406 Ill.

App. 3d 879, 887 (2010). Furthermore, full compliance with Rule 604(d) has been found to be necessary where, as here, a defendant raises an issue as to the insufficiency of the factual basis under Rule 402(c). See *People v. Kline*, 80 Ill. App. 3d 66, 68 (1980) (plea not subject to collateral attack based on failure to comply with Rule 402(c)); *People v. Williams*, 299 Ill. App. 3d 791, 795 (1998) (defendant forfeited argument that plea lacked factual basis by not including the issue in his motion to withdraw guilty plea). *People v. McGee*, 314 Ill. App. 3d 1037-38 (2000) ("Though the trial court clearly erred when it accepted the defendant's guilty plea without requiring the State to establish a factual basis, we cannot change, however, the fact that the defendant violated Supreme Court Rule 604(d) ***").

¶ 18 Defendant does not raise any separate challenge to his plea to a violation of probation or to his sentence after the revocation of his probation. His challenge is to the original plea of guilty and its factual basis. Defendant, however, cannot attack his original plea on appeal here where he failed to file a timely motion to vacate his plea of guilty pursuant to Rule 604(d).

¶ 19 Even assuming that a lack of a sufficient factual basis for the plea could render the subsequent judgments void, and subject the plea to collateral attack, defendant has not shown the factual basis was insufficient under Rule 402(c). The record demonstrates that a sufficient factual basis existed to support defendant's plea of guilty.

¶ 20 Rule 402(c) serves to ensure that a defendant does not plead "by mistake or under a misapprehension or been coerced or improperly advised to plead to crimes they did not commit." *People v. Bannister*, 378 Ill. App. 3d 19, 35 (2007) (citing *People ex rel. Daley v. Suria*, 112 Ill.2d 26, 32 (1986)). The factual basis for a guilty plea generally consists of either an express

admission by the accused that he committed the acts alleged in the indictment, or a recital of the evidence to the court that supports the allegation in the indictment. *People v. Brazee*, 316 Ill. App. 3d 1230, 1236 (2000). There need not be strict compliance with Rule 402(c); substantial compliance is sufficient. *People v. Barker*, 83 Ill. 2d 319, 327-29 (1980). In determining whether there is a factual basis, "the trial court may look anywhere in the record to find a sufficient factual basis for the plea." *People v. Banks*, 213 Ill. App. 3d 205, 211 (1991). The necessary factual basis exists if "the judge could reasonably reach the conclusion that the defendant actually committed the acts with the intent (if any) required to constitute the offense to which the defendant is pleading guilty." *In Int. of C.K.G.*, 292 Ill. App. 3d 370, 376 (1997) (citing *People v. Barker*, 83 Ill.2d 319, 327-28 (1980)). The circuit court's finding of a factual basis is reviewed for an abuse of discretion. *In Int. of C.K.G.*, 292 Ill. App. 3d at 377.

¶ 21 Defendant was charged with the unlawful possession of a controlled substance with intent to deliver. To support such a conviction, there must be evidence that defendant had knowledge of the presence of narcotics, the narcotics were in the immediate control or possession of defendant, and the amount of narcotics was in excess of any amount which might be viewed as merely possessed for personal use. *People v. Herrera*, 238 Ill. App. 3d 284, 291 (1992).

¶ 22 Defendant pled guilty to the charge as set forth in the indictment. The indictment included the requisite elements of the offense, including an allegation that defendant possessed the drugs. The factual basis given to the circuit court at the guilty plea proceeding provided that defendant and codefendant Watson were arrested in the same apartment. At the scene, the police recovered a clear plastic bag containing 11 smaller bags of a white substance, in plain view, in an

open closet. The State laboratory conducted tests which revealed the white substance was heroin. The individual packaging and number of bags would be indicative that the drugs were for more than personal use. The factual basis also provided that the arresting officer would identify defendant in court as the person "[from] whom the heroin was recovered." The arrest report sets forth that the drugs were recovered from the closet after defendant was seen throwing an object into the closet. The inventory report states the bag of drugs was recovered from defendant.

¶ 23 Defendant challenges the factual basis on one ground—his possession of the heroin. His challenge is based on the statement included in the recitation of the factual basis during the guilty plea proceedings that it was codefendant Watson who threw an object into the closet. Defendant construes the factual basis as stating this object was the bag of drugs. However, the arrest report shows it was defendant who threw a "black" object into the closet. According to the arrest report, the police then looked into the closet and found a "blue steel semiautomatic pistol," and "a *clear* plastic bag containing 11 smaller bags of a white powdery substance suspected to be heroin." (Emphasis added.) Even if the circuit court concluded codefendant Watson threw an "object" into the closet, it can reasonably be concluded that the "object" was the gun and not the drugs. Furthermore, the arrest report and the inventory report state that the drugs were recovered from defendant. The factual basis at the guilty plea also included a statement that the arresting officers would identify defendant as the individual from whom the drugs were recovered. The indictment to which defendant pled guilty included the allegation that defendant possessed the drugs.

¶ 24 Based on this record as a whole, we find the circuit court could reasonably conclude that defendant committed the offense of possessing the heroin with intent to deliver, and did not abuse its discretion in determining that a factual basis existed for defendant's plea under Rule 402(c).

¶ 25 As discussed, under the holding in *Flowers*, we may not consider this appeal on the merits, but must dismiss it for defendant's failure to comply with Rule 604(d).

¶ 26 Appeal dismissed.