

No. 1-12-2950

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.)	Nos. 10 CR 21331,
)	10 CR 21332
PAUL GANNELLO,)	10 CR 21333
)	
Defendant-Appellant.)	Honorable
)	William G. Lacy,
)	Judge Presiding.

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

ORDER

¶ 1 *Held:* Where the defendant pleaded guilty to various sex offenses and filed an untimely postplea motion to reduce his sentence, the appellate court vacated the circuit court order denying defendant's motion, based on the circuit court's lack of jurisdiction. The appellate court also dismissed defendant's untimely motion, based on the Illinois Supreme Court's decision in *People v. Bailey*, 2014 IL 115459.

¶ 2 Following the entry of negotiated guilty pleas on various sex offenses, defendant Paul Gannello filed a *pro se* motion to reduce sentence. The circuit court denied the motion to reduce

sentence. Gannello now appeals, arguing: (1) he had an automatic constitutional right to counsel following the entry of his negotiated guilty plea, regardless of whether he has filed a motion to withdraw his guilty plea; (2) he had an automatic constitutional right to counsel to assist him in perfecting his appeal following the entry of his guilty plea. For the following reasons, we conclude the circuit court lacked jurisdiction to rule upon Gannello's untimely postplea motion, vacate the judgment of the circuit court and order that Gannello's motion is dismissed.

¶ 3

BACKGROUND

¶ 4 The record on appeal discloses the following facts. On December 8, 2010, Gannello was charged with various sex offenses under three indictments involving three alleged victims. In case number 10 CR 21331, Gannello was charged with six counts of criminal sexual assault, four counts of aggravated criminal sexual abuse, and six counts of criminal sexual abuse. In case number 10 CR 21332, Gannello was charged with four counts of predatory criminal sexual assault of a child, six counts of criminal sexual assault, four counts of aggravated criminal sexual abuse, and nine counts of criminal sexual abuse. In case number 10 CR 21333, Gannello was charged with nine counts of criminal sexual assault, five counts of aggravated criminal sexual abuse, and six counts of criminal sexual abuse.

¶ 5 Pursuant to a court order entered on September 13, 2011, Gannello was evaluated by Forensic Clinical Services (FCS). In a letter dated September 27, 2011, a staff psychiatrist for FCS opined Gannello was mentally fit to stand trial and understood his constitutional rights.

¶ 6 On April 12, 2012, during a status conference regarding plea negotiations, the public defender representing Gannello informed the court that Gannello had requested a second fitness examination. The public defender stated she did not believe a second examination was warranted. According to the public defender, Gannello had been uncooperative during a meeting

one day prior, but she could communicate with Gannello, who understood the charges against him and was able to assist in his own defense. Gannello informed the circuit court he had complained to the Illinois Supreme Court about his public defender. The public defender informed the circuit court Gianello had complained to the Attorney Registration and Disciplinary Commission (ARDC) about her and she had received a letter from the ARDC informing her she was not required to respond because Gannello's complaint was unwarranted.

¶ 7 Gannello complained to the circuit court that he was not receiving good counsel because the public defender was not doing what he wanted. The circuit court responded that sometimes being good counsel required doing something other than what a defendant wants. Gianello claimed he needed medicine and that a doctor diagnosed him with "depression, a little bit of schizophrenia, and a little bit of something else." The circuit court responded it had received a report indicating Gannello was fit to stand trial. Gannello then stated he had a learning disability and was incapable of making decisions by himself. Gannello stated he wanted to assert that he had a mental disability and did not want his current public defender. After observing that Gannello's current public defender was an excellent attorney, the circuit court informed Gannello he could proceed with his current public defender, hire private counsel, or proceed *pro se*. After further colloquy, the circuit court advised Gannello to listen to any offer received from his public defender and reject any offer he found unacceptable. The case was continued to May 8, 2012.

¶ 8 On May 8, 2012, the parties informed the circuit court of the terms of a negotiated plea under which Gannello would be sentenced to 29 years in prison, with mandatory supervised release between three years and natural life. Gannello informed the circuit court he considered the negotiated plea a reasonable offer, adding he appreciated what his public defender and the State had done. After the circuit court apprised Gannello of each of the charges to which he

would be pleading guilty, the available sentencing ranges, and the fact that Gianello would serve his sentences consecutively, Gannello pleaded guilty to five counts of aggravated criminal sexual abuse involving victims at least 13 years of age but under 17 years of age (720 ILCS 5/12-16(d) (West 2010)) and two counts of predatory criminal sexual assault involving a victim under 13 years of age (720 ILCS 5/12-14.1(a)(1) (West 2010)). The circuit court then admonished Gannello he was waiving his right to compel the State to prove him guilty beyond a reasonable doubt, his right to a jury or bench trial, and his right to confront the witnesses against him. Gannello stated he understood these waivers. Gannello also stated his plea was not induced by undisclosed threats or promises.

¶ 9 The State then recited the factual bases for each of the charges against Gannello. The public defender stipulated to the facts recited by the State.

¶ 10 The circuit court found Gannello understood the nature of the charges against him. The circuit court also found there were factual bases to support Gannello's guilty pleas, which Gannello entered into freely and voluntarily. Gannello affirmed his written waivers of a jury trial and a presentence investigation. In allocution, Gannello expressed remorse for his actions and again thanked his public defender and the State for bringing the matter to completion. The circuit court then sentenced Gannello in accordance with the terms of the negotiated plea.

¶ 11 The circuit court then provided the following admonishments to Gannello:

"Now, Mr. Gannello, even though you plead guilty to these three cases and the counts that you pled guilty to, you do still have certain appellate rights, but in order for you to exercise those rights, within 30 days, you must file with this court a written motion to withdraw your pleas of guilty. In your written motion, you must state every reason why you wish to withdraw your pleas of

guilty and any reason not stated will be deemed waived on any subsequent appeal.

If I were to grant your motion, then I would allow you to withdraw your pleas of guilty, I would vacate the judgments and sentences, and all the counts the State will be dismissing will be reinstated at their request, all these counts that will be dismissed today. After that occurred, I would set your cases -- or one of your cases for trial, and we would proceed in that fashion.

Now, [if] I were to deny your motion, you would have 30 days from the date of that denial in which to file a written notice of appeal with the clerk of the court.

If you need an attorney to help you prepare a motion to withdraw and/or the notice of appeal and you could not afford one, the [c]ourt would appoint one for you as well as provide you with a free transcript of everything that was said here today or anything that was pertinent to prosecute your appeal and/or prepare your motion to withdraw."

¶ 12 The circuit court inquired whether Gannello understood that. Gannello responded he understood. The proceedings on the negotiated plea concluded with the circuit court awarding Gannello time for days already served in custody.

¶ 13 On August 30, 2012, Gannello filed a *pro se* motion to reduce his sentence, arguing his sentence was excessive in light of the fact that he was 56 years old. On September 7, 2012, the circuit court denied the motion. The cover page for the September 7 transcript of proceedings indicates an assistant State's Attorney and the public defender appeared for the proceedings. The clerk and the circuit court, however, are the only persons quoted in the transcript.

¶ 14 On September 18, 2012, Gannello filed a *pro se* notice of appeal to this court.

¶ 15

ANALYSIS

¶ 16 The State initially maintains that this appeal should be dismissed, arguing this court does not have jurisdiction to consider Gannello's postplea motion where he failed to timely file a notice of appeal pursuant to Illinois Supreme Court Rule 604(d) (eff. Jul. 1, 2006), which provides in 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 [the] 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." Moreover, "[n]o appeal shall be taken upon a negotiated plea of guilty challenging the sentence as excessive 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. Jul. 1, 2006). The State specifically notes Gannello's postplea motion was filed beyond the 30-day period stated in the rule and the notice of appeal was untimely.

¶ 17 The purpose of Rule 604(d):

" ' is to ensure that before a criminal appeal can be taken from a guilty plea, the trial judge who accepted the plea and imposed sentence be given the opportunity to hear the allegations of improprieties that took place outside the official proceedings and *dehors* the record, but nevertheless were unwittingly given sanction in the courtroom.' " *People v. Skryd*, 241 Ill. 2d 34, 39-40 (2011) (quoting *People v. Wilk*, 124 Ill. 2d 93, 104 (1988)).

"The rule was designed to eliminate needless trips to the appellate court and to give the circuit court an opportunity to consider the alleged errors and to make a record for the appellate court to consider on review in cases where a defendant's claim is disallowed." *Skryd*, 241 Ill. 2d at 40.

Accordingly, the procedural requirements under Rule 604(d) are a "condition precedent" for an appeal from a defendant's plea of guilty. (Internal quotation marks omitted.) *Id.* Generally, the failure to file a timely motion under Rule 604(d) precludes this court from considering the appeal on its merits. *Id.*

¶ 18 Moreover, where a defendant files an untimely postplea motion, the circuit court lacks jurisdiction to consider the motion, unless both parties reconstitute the circuit court with jurisdiction by: (1) actively participating in further proceedings; (2) failing to object to the untimeliness of the late filing; and (3) asserting positions that make the proceedings inconsistent with the merits of the prior judgment and support the setting aside of at least part of that judgment. See *People v. Bailey*, 2014 IL 115459, ¶¶ 25-27. In such cases, this court must vacate the trial court's judgment and order that defendant's motion be dismissed. *Bailey*, 2014 IL 115459, ¶ 29.

¶ 19 In this case, the circuit court sentenced Gannello on his negotiated guilty pleas on May 8, 2012. Gannello filed a *pro se* motion to reduce his sentence (without seeking to withdraw his guilty plea) on August 30, 2012. Accordingly, Gannello's postplea motion was untimely. The transcript for the September 7, 2012, dismissal of Gannello's motion indicates counsel for both parties appeared, but did not actively participate in the proceedings. Accordingly, the circuit court lacked jurisdiction to consider the motion and this court is required to vacate the circuit court's judgment and order that defendant's motion be dismissed. *Id.*

¶ 20 Gianello argues, however, that Rule 604(d) and Illinois Supreme Court Rule 606(a) (eff. Mar. 20, 2009) (generally governing the perfection of appeals in criminal cases) should not be interpreted as denying the circuit court's jurisdiction over his postplea motion or as denying this court's jurisdiction over his appeal, because such a construction would, in Gianello's view, violate his constitutional right to counsel. Gannello relies on the principle that supreme court

rules must be construed to avoid an absurd or unconstitutional result. *In re Loss*, 119 Ill. 2d 186, 194 (1987).

¶ 21 Gannello also relies upon the sixth amendment, which 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. See *Kirby v. Illinois*, 406 U.S. 682, 688-89 (1972)). The constitutional right to counsel, whether conferred by the sixth amendment or the due process and equal protection clauses of the fourteenth amendment, continues during the direct appeal process. See *McCoy v. Court of Appeals of Wisconsin, District 1*, 486 U.S. 429, 436 (1988) ("If a convicted defendant elects to appeal, he retains the Sixth Amendment right to representation by competent counsel"); but see 3 W. LaFave, *Criminal Procedure* 624-26 (3d ed. 2007) (stating that the Supreme Court has "clearly indicated that [the sixth amendment right to counsel] has ended where the defendant is pursuing an appeal from his conviction" and discussing the due process and equal protection guarantees of counsel on direct appeal). The constitutional right to counsel ends when a defendant is no longer entitled to a direct appeal as of right. See, e.g., *Ross v. Moffitt*, 417 U.S. 600, 618-19 (1974) (holding that there is no constitutional right to counsel to seek discretionary appellate review); *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) (holding that there is no constitutional right to counsel in collateral attacks on a conviction).

¶ 22 This court previously considered the basic arguments advanced by Gannello here and rejected them, ruling the 30-day period following sentencing on a negotiated guilty plea is not a critical stage of the criminal process during which a defendant has an absolute right to counsel.

People v. Merriweather, 2013 IL App (1st) 113789, ¶¶ 28. Gannello argues *Merriweather* was incorrectly decided. "We do not, and should not, manufacture reasons to address issues—constitutional or otherwise—where the record has not been fully and fairly developed for that purpose and where resolution of the issues is unnecessary." *People v. White*, 2011 IL 109689, ¶ 148. In this case, we need not reach the constitutional questions, as the record on appeal does not affirmatively establish Gannello was deprived of his right to counsel during the 30-day period following his sentencing on the negotiated guilty pleas.

¶ 23 We find *People v. Brooks*, 233 Ill. 2d 146 (2009), instructive. In *Brooks*, the defendant pleaded guilty to criminal sexual assault and was properly admonished by the trial court of the procedural requirements under Rule 604(d). *Id.* at 148. Rather than file the requisite postplea motion, the defendant sent a letter to the clerk of the circuit court stating that he wanted to appeal his sentencing. *Id.* The clerk then filed the letter as a notice of appeal. *Id.* Thereafter, the appellate court dismissed the appeal for failure to comply with Rule 604(d) requirements. *Id.* The defendant then filed a *pro se* postconviction petition seeking to have his sentence vacated. *Id.* The postconviction petition alleged that the trial court violated his due process rights when it failed to appoint counsel to amend his letter to the clerk as a motion to reconsider sentence, and that he had received ineffective assistance of counsel because his trial attorney had told him to send the letter. *Id.* at 148-49. The circuit court summarily dismissed the defendant's postconviction petition but the appellate court reversed and remanded the cause for further proceedings. *Id.* at 149.

¶ 24 On the State's petition for leave to appeal, our supreme court affirmed the appellate court's judgment, albeit on different grounds. The *Brooks* court rejected the defendant's due process claim, ruling the defendant must be held to the consequences of failing to comply with

Rule 604(d). *Id.* at 155-56 . Our supreme court also ruled the defendant could not argue that he was deprived of a right to counsel when the defendant's own postconviction petition made it clear that he had met with his attorney after the sentencing hearing and had discussed the sentence that had been imposed. *Id.* at 156. The *Brooks* court, however, further ruled the defendant's postconviction petition had stated the gist of a claim of ineffective assistance of counsel by alleging that his trial attorney erroneously told him to send the letter to the clerk. *Id.* at 156-57.

¶ 25 In this case, unlike *Brooks*, the record on appeal does not establish whether Gannello communicated with counsel during the 30-day period following his sentencing on his guilty pleas. The record also does not affirmatively establish Gannello's public defender did not continue to represent him during this period. Gannello does not identify any official discharge of his public defender. The transcript of proceedings for September 7, 2012, indicates the public defender who represented Gannello regarding his negotiated pleas appeared on Gannello's behalf, although the transcript does not reflect her stating anything on the record on that date. "Matters not of record are not properly before a reviewing court and will not ordinarily be considered on appeal." *People v. Miller*, 253 Ill. App. 3d 1032, 1035 (1993). Accordingly, we decline to consider Gannello's constitutional arguments in this direct appeal.

¶ 26 **CONCLUSION**

¶ 27 For all of the aforementioned reasons, the judgment of the circuit court of Cook County is vacated and Gannello's untimely postplea motion is dismissed.

¶ 28 Vacated; defendant's motion is dismissed.