No. 1-09-3025

FOURTH DIVISION
JUNE 23, 2011

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. 08 CR 20486
	)	08 CR 20487
	)	
RUSSELL MORRIS,	)	Honorable
	)	Diane Gordon Cannon,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE STERBA delivered the judgment of the court. Presiding Justice Lavin and Justice Salone concurred in the judgment.

O R D E R

Held: Where defendant failed to properly file a motion to withdraw his guilty plea before filing a notice of appeal, the appeal was dismissed; where defendant was entitled to additional days of presentence custody credit, the mittimus was corrected.

Defendant Russell Morris entered into a negotiated plea of guilty to two charges of burglary and was sentenced, as a Class X offender, to two concurrent eight-year prison terms. On appeal, defendant contends that this court should remand his cause to the

circuit court to consider his *pro se* 18-page notice of appeal as a motion to withdraw his guilty plea. In the alternative, defendant maintains that we should remand his cause to the circuit court for proper admonishments pursuant to Illinois Supreme Court Rule 605(c) (eff. Oct 1, 2001). Defendant finally contends that the mittimus must be amended to reflect more days of presentence custody credit. We dismiss the appeal, but correct the mittimus to reflect 350 days of presentence custody credit.

Defendant was charged with two counts of burglary stemming from his unauthorized entrance into two Chicago buildings with the intent to commit thefts therein on August 20 and August 22, 2008. On September 17, 2009, following a conference pursuant to Illinois Supreme Court Rule 402 (eff. July 1, 1997), defendant entered a negotiated plea of guilty to both counts of burglary, was sentenced to concurrent terms of eight years' imprisonment, and received 333 days of presentence custody credit.

After imposing these sentences, the court admonished defendant as follows:

> "Although you have plead [*sic*] guilty, you have rights to appeal. Should you change your mind, you have 30 days to file a motion to vacate your plea. Those motions must be made in writing setting forth the reason why

> or they may be waived. If you do not have the money for a lawyer, one will be provided free of charge to assist you with those motions and transcripts will be provided free of charge. If those motions are granted, both the cases will be set down for trial. Do you understand?
>
> DEFENDANT: Yes, ma'am.
>
> THE COURT: If those motions are denied, you have 30 days to appeal. And those motions must be made in writing setting forth the reasons why or they may be waived. If you do not have the money for a lawyer, one will be provided free of charge to assist you and transcripts will be provided free of charge."

Following the court's admonishments, it stayed defendant's mittimus until September 30, 2009.

On October 14, 2009, defendant mailed his 18-page *pro se* notice of appeal, which was received on October 20, 2009. The notice of appeal stated that defendant was appealing both sentences because he was not credited the correct number of days at sentencing, was improperly sentenced as a Class X offender, and was improperly denied TASC probation. In his brief on appeal, defendant now asks this court to recharacterize his *pro*

se notice of appeal as a motion to withdraw his guilty plea. The State responds that defendant's appeal must be dismissed because he failed to file a written post-plea motion in accordance with Illinois Supreme Court Rule 604(d) (eff. July 1, 2006).

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." Defendant's compliance with Rule 604(d) is a condition precedent to an appeal from a plea of guilty (*People v. Wilk*, 124 Ill. 2d 93, 105 (1988)), and his failure to file a post-plea motion can result in the loss of his right to direct appeal (*People v. Flowers*, 208 Ill. 2d 291, 301 (2004)).

Here, defendant never filed a motion to withdraw his guilty plea, and thus lost his right to appeal. Defendant, however, maintains that his notice of appeal should have been construed as a motion to withdraw his plea because it sufficiently expressed a wish to do so.

We find *People v. Frey*, 67 Ill. 2d 77 (1977), instructive to the issue presented here. In *Frey*, the defendant asserted that his *pro se* document entitled "notice of appeal" should have been treated as a motion to withdraw his plea because it was filed within the 30-day period following his conviction. In rejecting defendant's argument, the supreme court stated that:

> "[t]he documents in question not only fail to conform to the requirements of Rule 604(d) that facts not appearing of record be supported by affidavit, but they do not request the trial court to permit withdrawal of the pleas, and request no action other than in matters relative to the appeal." *Frey*, 67 Ill. 2d at 83.

Here, the notice of appeal suffers from similar difficulties. The document, although filed within 30 days of defendant's convictions, was labeled "Notice of Appeal," failed to comply with Rule 604(d), and did not assert that defendant sought to withdraw his guilty plea. Defendant argues that his pleading does suggest that he wished to withdraw his plea because he stated that he was "misled" and that he "should never have plead [*sic*] guilty." However, when read in its entirety, the full passage states that he was "mislead [*sic*] and *** should have never *** plead [*sic*] guilty to a Class X but to a Class 2 instead." In fact, defendant pled guilty to the Class 2 felony of burglary. 720 ILCS 5/19-1(a) (West 2008). Defendant's sentence, however, was imposed based on his status as a Class X offender. 730 ILCS 5/5-5-3(c)(8) (West 2008). Accordingly, defendant's statement in his notice of appeal demonstrates that he was not contesting his plea of guilty to Class 2 burglaries

but, rather, was taking issue with his sentence as a Class X offender. Moreover, defendant requested "the higher court to make a ruling" regarding his eligibility for TASC probation. As in *Frey*, defendant's contention that his *pro se* filing should have been treated as a motion to vacate his plea is "plainly untenable." *Frey*, 67 Ill. 2d at 83.

In reaching this conclusion, we find *People v. Trussel*, 397 Ill. App. 3d 913 (2010) and *People v. Gonzalez*, 375 Ill. App. 3d 377 (2007), relied on by defendant, distinguishable from the case at bar. In both cases, the defendants sent letters to the court alleging that their pleas were involuntary and explicitly stating that they did not wish to plead guilty. *Trussel*, 397 Ill. App. 3d at 914; *Gonzalez*, 375 Ill. App. 3d at 377. Here, however, defendant never alleged that he did not voluntarily enter his guilty plea, but instead complained of issues relating to TASC, the number of days he was credited at sentencing, and the court's determination to sentence him as a Class X offender.

In the alternative, defendant contends that the trial court failed to properly admonish him in accordance with Rule 605(c); and, as a consequence, his case should be remanded for new admonishments and an opportunity to withdraw his plea. In particular, defendant maintains that the trial court failed to make clear that he would need to file a motion prior to filing a notice of appeal in accordance with Rule 605(c)(2), and that any

claim not raised in said motion is waived in accordance with Rule 605(c)(6).

As stated above, defendant's compliance with Rule 604(d) is a condition precedent to an appeal from a plea of guilty. *Wilk*, 124 Ill. 2d at 105. Defendant seeks to avoid that result by invoking the admonitions exception to filing a timely Rule 604(d) motion where the trial court fails to substantially admonish defendant in accordance with Rule 605(c). *Flowers*, 208 Ill. 2d at 301.

As relevant to this appeal, Rule 605(c) provides that where a judgment is entered upon a negotiated plea of guilty, the trial court shall advise the defendant:

> "(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;
>
> * * *
>
> (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)(2),(6) (eff. Oct 1, 2001).

Here, we find that defendant was substantially advised of his appellate rights at his plea proceeding, and he acknowledged that he understood them. Defendant's contention that he was not admonished in accordance with subsections (c)(2) and (c)(6) of Rule 605 is contradicted by the record. The trial court stated,

> "[a]lthough you have plead [*sic*] guilty, you have rights to appeal. Should you change your mind, you have 30 days to file a motion to vacate your plea. Those motions must be made in writing setting forth the reason why or they may be waived.
>
> * * *
>
> If those motions are denied, you have 30 days to appeal."

Although the trial court did not use the exact language of the rule, it substantially advised defendant that he was required to file a motion within 30 days asking to have his "plea vacated", he could not file a notice of appeal until his post-plea motion was denied, and that claims not included in his post-plea motion may be waived. In this way, the case at bar is similar to *People v. Claudin*, 369 Ill. App. 3d 532, 534 (2006), where we concluded that the trial court "conveyed the substance

of the rule and put defendant on notice of the necessity of first filing a postplea motion within 30 days." See also *People v. Gougisha*, 347 Ill. App. 3d 158, 162 (2004) (stating that trial courts are not required to use the exact language of the rule).

Defendant attempts to distinguish *Claudin* from the case at bar by asserting that, there, the defendant was advised that he "first" had to file a post-plea motion, and was further advised that any issue not raised in the motion "would" be considered waived. Here, although the trial court did not use the word "first," it made sufficiently clear that defendant's post-plea motion had to be denied before he could appeal. In regard to the waiver admonishment, it is significant that the court in *Claudin* relied on *People v. Crump*, 344 Ill. App. 3d 558, 563 (2003), where this court found the 605(c) admonishments sufficient despite the fact that the trial court failed to even mention the word "waiver."

Therefore, the fact that the trial court stated in this case that defendant's failure to include an issue in his motion to withdraw his guilty plea "may," instead of "shall," result in waiver is not dispositive. Under these circumstances, we conclude that defendant's failure to file a timely motion to withdraw his negotiated plea and vacate his sentence is not encompassed within the admonishment exception and that he has waived his right to appeal. *Claudin*, 369 Ill. App. 3d at 535.

Defendant next contends, and that State agrees, that he is entitled to 350 days of presentence custody credit pursuant to section 5-8-7(b) of the Unified Code of Corrections (730 ILCS 5/5-8-7(b) (West 2008)), instead of the 333 days with which he is currently credited.

The record establishes that defendant was arrested on October 15, 2008, sentenced on September 17, 2009, and his mittimus was issued on September 30, 2009. The mittimus incorrectly awards defendant only 333 days of presentence custody credit. Defendant, in his initial brief, maintained that the mittimus must be amended to reflect a total of 351 days of credit against his sentence, including the day of sentencing. The State asserted that defendant is entitled to 350 days, excluding the day of sentencing. In his reply brief, defendant acknowledged that the Illinois Supreme Court recently held that the date of sentencing is not included in calculating presentence credit (*People v. Williams*, 239 Ill. 2d 503 (2011)), and agreed with the State that his mittimus should be amended to reflect 350 days of presentence custody credit. We agree.

A reviewing court may correct the mittimus at any time. *People v. Quintana*, 332 Ill. App. 3d 96, 110 (2002). The right to receive *per diem* credit is mandatory, and normal waiver rules do not apply. *People v. Williams*, 328 Ill. App. 3d 879, 887 (2002). A defendant is statutorily entitled to credit for all

"time spent in custody as a result of the offense for which the sentence was imposed." 730 ILCS 5/5-4.5-100(b) (West 2008). A defendant held in custody for any part of a day should be given credit against his sentence for that day. *People v. Smith*, 258 Ill. App. 3d 261, 267 (1994). Therefore, we award defendant presentence custody credit from October 15, 2008, through September 30, 2009. As the parties now correctly agree, we must deny credit for the date of sentencing because the supreme court has held that the day of sentencing, as evidenced by the issuance of the mittimus, is not to be counted as a day of presentence custody. *Williams*, 239 Ill. 2d at 510.

For the foregoing reasons, we amend the mittimus to award defendant 350 days of presentence custody credit and dismiss the appeal.

Appeal dismissed; mittimus corrected.