2012 IL App (1st) 101471-U

SIXTH DIVISION
March 9, 2012

Nos. 1-10-1471 & 1-10-2375 (cons.)

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. LEON MCCOY, Defendant-Appellant.	)))))))))	Appeal from the Circuit Court of Cook County No. 08 CR 661748 Honorable Michelle M. Simmons, Judge Presiding.

PRESIDING JUSTICE ROBERT E. GORDON delivered the judgment of the court. Justices Garcia and Lampkin concurred in the judgment.

ORDER

¶ 1 *Held:* Where defendant was represented by counsel at a hearing following both his motion to withdraw his plea and his *pro se* motion for sentence reduction, the dismissal of defendant's motions under Rule 604 was affirmed.

¶ 2 Following the acceptance and entry of judgment on a guilty plea to a charge of residential burglary, defendant Leon McCoy was sentenced to 10 years in the Illinois Department of Corrections. Defendant filed a motion to vacate his plea. Defendant then filed a *pro se* motion to reconsider his sentence. Subsequently, at a hearing with his attorney, defendant withdrew his motion to vacate. The trial court later denied his motion to reconsider his sentence without either

defendant or his attorney present. Defendant now appeals and makes two claims: 1) the trial court erred in denying defendant's motion to reconsider his sentence without defendant or his attorney being present, and 2) defendant is entitled to six additional days of credit for the time he spent in pre-sentencing custody when the trial court stayed his mittmus for 6 days following his sentencing hearing. We affirm and modify defendant's sentence by adding six days to reflect the 544 days spent in pre-sentencing custody.

¶ 3 BACKGROUND

¶ 4 On September 25, 2008, defendant was charged with residential burglary (720 ILCS 5/19-3(A) (West 2008)), a Class X felony, in relation to an incident on the same date. At a subsequent "402" conference, the trial judge recommended a 10-year sentence in the Illinois Department of Corrections. Ill. S. Ct. R. 402(d)(2), (eff. July 1, 1997). On March 16, 2010, defendant pleaded guilty and was sentenced to the agreed-upon 10-year term.

¶ 5 At the plea hearing, the State outlined a factual basis for the plea. The facts showed that Cheryl Cotton would testify that on September 25, 2008, around 4:30 or 5 p.m., she observed defendant enter the garage at 35 Cunningham in Park Forest and then leave the garage holding a yellow air compressor and place other items in the bushes before leaving the area. Cotton notified the owner of the garage, John Goodrich, and the police. Cotton later identified defendant as the offender at the police station.

¶ 6 The State stated that John Goodrich would testify that he is the owner of the home and attached garage at 35 Cunningham and did not give the defendant permission to enter the garage

and remove the items. Goodrich would further identify his air compressor and other property that were inside his garage prior to 5 p.m. on September 25.

¶ 7 The State also indicated that if called to testify Detective Rzyski of the Chicago Police Department would state that he arrested defendant and recovered Goodrich's property. Rzyski would also testify that Cotton identified defendant as the man she observed taking property from Goodrich's garage. The State further indicated Rzyski obtained a handwritten statement from defendant admitting to entering Goodrich's garage and taking property that did not belong to him.

¶ 8 The trial judge accepted defendant's plea and imposed a 10-year sentence as agreed in the 402 conference. The trial judge admonished defendant that he had a right to appeal the sentencing order but was required to file a written motion asking for leave to withdraw his plea and vacate the judgment against him within 30 days. The trial judge further admonished defendant as follows:

> "Your motion must set forth your grounds and your basis you are seeking to withdraw your plea of guilty. Any grounds or basis not set forth in your motion cannot be used on appeal if your motion is denied. If only your sentence is being challenged, since this is part of a plea agreement, then you must file a written motion to withdraw your plea of guilty within 30 days of today's date, if you were challenging your sentence."

¶ 9 Within 30 days of sentencing, defendant filed a motion to withdraw his plea. The motion alleges both that defendant did not understand the ramifications of his plea and that his arrest was "unconstitutional." Defendant subsequently mailed a *pro se* motion for sentence reduction to the circuit court and a handwritten "Motion to Appeal," which was docketed in this court as case No. 1-10-1471. At the hearing on defendant's motion to withdraw his plea, defendant indicated he had spoken with his attorney and that he now wished to withdraw his motion, leaving his 10-year sentence to stand. The following exchange took place:

> "THE COURT: * * * So, it is your desire to withdraw your motion to withdraw your guilty plea?
>
> DEFENDANT: Yes
>
> THE COURT: In other words, you're asking for the ten years to stand; is that correct?
>
> DEFENDANT: Yes."

¶ 10 Subsequently, the case appeared on the trial court's call based on defendant's earlier *pro se* motion for sentence reduction. Neither defendant nor his lawyer was present when the trial court denied the motion, stating in part, "This was an agreed upon disposition. The defendant pled guilty under the advice of counsel, and the Court admonished the defendant with regard to pleading guilty." The trial judge on the record further cited the previous hearing, at which defendant indicated he wished to withdraw his motion to vacate his plea and have his 10-year sentence stand. The trial judge continued: "The defendant is asking to have his sentence reduced. There is not (sic) basis. The defendant is just asking for a sentence reduction."

¶ 11 A notice of appeal from the second order was filed and assigned case No. 1-10-2375. The two appeals were subsequently consolidated before this court. On the day of his sentencing, the trial court stayed defendant's mittmus for six days. Defendant now also requests an additional six days credit against his sentence for the time he spent in pre-sentencing custody.

¶ 12 ANALYSIS

¶ 13 On appeal, defendant makes two claims: 1) the trial court erred in denying defendant's motion to reconsider his sentence without his and his attorney's presence, and 2) defendant is entitled to six additional days of credit for the time he spent in pre-sentencing custody.

¶ 14 I. Standard of Review

¶ 15 We review a trial court's compliance with Illinois Supreme Court rules *de novo*. *People v. Wigod*, 406 Ill. App. 3d 66, 77 (2010). *De novo* review means we perform the same analysis that a trial judge would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011). However, a trial court's decision to deny a post-plea motion to modify a sentence will be overturned only if there is a clear abuse of discretion. *People v. Davis*, 145 Ill. 2d 240, 244 (1991). "A circuit court abuses its discretion when its ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court." *Taylor v. County of Cook*, 2011 IL App (1st) 093085, ¶23 (2011).

¶ 16 II. Denial of Motion to Reconsider Sentence

¶ 17 Before accepting a negotiated guilty plea, a judge must advise the defendant of his right to an appeal. Ill. S. Ct. R. 605(c)(1) (eff. Oct. 1, 2001). Further, a judge should advise a defendant that such appeal must include a request for leave to withdraw the guilty plea, and that if the

request is granted, the guilty plea and sentence will be withdrawn and a trial will be set on the charges to which the guilty plea was made. Ill. S. Ct. R. 605(c)(2),(3) (eff. Oct. 1, 2001).

¶ 18 Illinois Supreme Court Rule 604(d) (eff. July 1, 2006) governs such appeals from defendants who have negotiated a guilty plea in exchange for a specific sentence. In pertinent part, the rule states, "[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. July 1, 2006); *People v. Evans*, 174 Ill. 2d 320, 325 (1996) (holding that a guilty plea and sentence "go hand in hand" as material elements of the plea bargain, and therefore a defendant challenging his sentence must also move to vacate his plea). Rule 604(d) continues, "[t]he trial court shall *then* determine whether the defendant is represented by counsel, and if the defendant is indigent and desires counsel, the trial court shall appoint counsel." (Emphasis added.) Il. S. Ct. R. 604(d) (eff. July 1, 2006). A court's compliance with Rule 604(d) must be strict. *People v. Janes*, 158 Ill. 2d 27, 33 (1994). A court should not approach such cases "in terms of whether the error in failing to comply with [the rule] was harmless or prejudicial." *Janes*, 158 Ill. 2d at 33.

¶ 19 In the instant case, at the time his guilty plea was entered, the defendant was properly admonished about his right to appeal and the requirements for such an appeal under Rule 605. Ill. S. Ct. R. 605(c) (eff. Oct. 1, 2001). Defendant was further admonished of his right to an attorney to help prepare the appeal. Subsequently, defendant filed a timely motion to withdraw his guilty plea. He also timely filed a motion to reduce his sentence. We consider the trial court's handing of the motions in order.

¶ 20 Concerning the motion to withdraw the guilty plea, the trial court held a hearing on the motion, where defendant indicated he had spoken with his attorney and that he now desired to withdraw his motion, leaving his 10-year sentence to stand. The trial judge's compliance was strict: the defendant was not only represented by an attorney but also indicated that he had spoken with his attorney before requesting his motion be withdrawn and his plea to stand. Therefore, no error was committed.

¶ 21 Regarding defendant's *pro se* motion to reduce his sentence, the defendant did not follow the strict requirements of Rule 605, to which he was clearly admonished the day of his plea. Ill. S. Ct. R. 605(c) (eff. Oct. 1, 2006). A naked motion to reconsider a negotiated sentence without an accompanying motion to withdraw the plea violates the premise outlined by the Illinois Supreme Court in *Evans* that a negotiated plea goes "hand in hand" with a sentence. *Evans,* 174 Ill. 2d at 325. Thereby, the Rule 604 requirement that "no appeal shall be taken upon a negotiated plea of guilty * * * unless the defendant * * * files a motion to withdraw the plea of guilty and vacate the judgment" allowed the trial judge to deny defendant's motion because the defendant has previously withdrawn his motion to withdraw his plea. Ill. S. Ct. R. 604(d) (eff. July 1, 2006).

¶ 22 Defendant's argument under *People v. Smith,* 365 Ill. App. 3d 356, 359 (2006), that he should have been "afforded an opportunity to explain his allegations and that he be given assistance of counsel in preparing the motion" is unpersuasive. Both of defendant's motions were filed well before he appeared in court with his attorney, leading to an inference that both motions were considered. Even if, however, neither the judge nor defendant's attorney was aware that

both motions were filed and being considered, the defendant himself certainly knew they were when the following exchange took place:

> "THE COURT: In other words, you're asking for the ten years to stand; is that correct?
>
> DEFENDANT: Yes."

¶ 23 At the time defendant was represented by counsel, he clearly and voluntarily indicated he intended his sentence to stand. Any subsequent reversal of that intention – whether made with the assistance of counsel or not – is barred by *Evans. Evans*, 174 Ill. 2d at 325. As a result, the trial court did not abuse its discretion by denying the motion for sentence reduction without defendant or his attorney present when it subsequently appeared on the court's docket. Further, the trial court's then-recognition of the earlier hearing is evidence that both motions were considered at the time that defendant appeared with counsel.

¶ 24 Defendant's appeal at this juncture represents his third attempt to adjudicate his sentence in a manner better than he bargained for. Like the defendants in *Evans*, defendant in the instant case is "seeking to hold the State to its part of the bargain while unilaterally modifying the sentences to which they had earlier agreed." *Evans*, 174 Ill. 2d at 327. Because a 10-year sentence is precisely what defendant bargained for, it is precisely what he shall receive. We affirm the dismissal of defendant's motion to reconsider sentence.

¶ 25 III. Credit on Defendant's Mittmus

¶ 26 Because the issue of whether the days were correctly credited is a matter of law, we review such decisions *de novo*. *People v. Robinson*, 172 Ill. 2d 452, 457 (1996). A defendant is entitled to credit for the time he spent in custody before sentencing. 730 ILCS 5/5-8-7(b) (West 2010). If the mittmus is "not effective on the day of the sentencing, the defendant is not yet in Department custody so that the presentencing credit" still applies. *People v. Williams*, 394 Ill. App. 3d 480, 483 (2009). This court has authority to order the Clerk of the Circuit Court to correct the mittmus. Ill. S. Ct. R. 615(b)(1) (eff. Aug. 27, 1999) .

¶ 27 In the present case, because defendant's mittmus was stayed for six days following his sentencing, it does not adequately reflect the time he spent in custody. The State does not dispute this issue. Accordingly, we modify defendant's sentence by adding 6 days to reflect the 544 days spent in pre-sentencing custody.

¶ 28 CONCLUSION

¶ 29 Because defendant was represented by counsel at a hearing following both his motion to withdraw his plea and his *pro se* motion for sentence reduction, we affirm the trial court's dismissal of his motion under Rule 604. Further, we modify defendant's sentence by adding 6 days to reflect the 544 days spent in pre-sentencing custody.

¶ 30 Affirmed.