

No. 1-11-2744

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10 C4 40627
	)	
JERRY D. HUDGENS,	)	Honorable
	)	Noreen Love,
Defendant-Appellant.	)	Judge Presiding.

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PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.  
Justices Cunningham and Rochford concurred in the judgment.

**ORDER**

- ¶ 1 Held: The untimeliness of defendant's postplea motion was not excused where the trial court properly admonished him under Supreme Court Rule 605(c); appeal dismissed.
- ¶ 2 Defendant Jerry Hudgens pleaded guilty to one count of armed robbery and was sentenced to 12 years in prison. On appeal, defendant contends that this cause must be remanded because the trial court failed to provide adequate postplea admonishments under Illinois Supreme Court Rule 605 (eff. Oct. 1, 2001), and because he was sentenced without a written presentence investigation (PSI) report, or an on-the-record finding regarding his criminal history.

¶ 3 Defendant was charged with armed robbery, aggravated kidnaping, aggravated unlawful use of a weapon, unlawful use or possession of a weapon by a felon, and aggravated unlawful restraint. These charges stemmed from an incident in which defendant entered a store at 446 North Mannheim Road in Hillside, Illinois on February 2, 2010, displayed a weapon to the clerk, demanded cash, and took a lock box containing \$1,500. Following a Supreme Court Rule 402 (eff. July 1, 2012) conference, the case was continued. On the next court date, defense counsel asked for another continuance because defendant was "still discussing how he wants to proceed." The circuit court granted defendant's request, but stated that the next date was "going to be final for him to make a decision on the offer."

¶ 4 On July 21, 2011, the defendant appeared to enter a guilty plea. The State moved to amend Count 1, which stated that defendant committed armed robbery with a firearm. The State sought to strike the language indicating that defendant used a firearm, and replace it with "dangerous weapon." After granting the motion, the circuit court admonished defendant of the rights he was waiving by pleading guilty, and the State provided a factual basis for the guilty plea, which indicated that defendant was armed with a dangerous weapon. Defendant then pleaded guilty to armed robbery as charged in Count 1 as amended. The court gave the State an opportunity to offer additional evidence in aggravation, and the State indicated that, "as set forth in the 402 conference, this [d]efendant has three prior felonies." In mitigation, defense counsel stated that a Rule 402 conference was completed, and highlighted defendant's age and employment status.

¶ 5 The court acknowledged that defendant signed a PSI waiver, and told him that by signing it, he was giving up his right to have the probation department provide a written report regarding his criminal and personal history. Defendant then addressed the court, stating that he was unemployed and robbed the store in order to pay rent and bills. After sentencing him to 12 years'

imprisonment, and noting that the State dismissed the other charges against him pursuant to the plea, the court admonished defendant as follows:

"Even though you have pled guilty, you do have the right to an appeal. You would have to within 30 days of today's date file with this court a written motion. In that motion, you would have to ask the Court to allow you to withdraw your plea of guilty and vacate the judgment that was entered here today. If I deny that, you can appeal that decision to a higher court. If I allowed that, then the matter would be set for trial. If you cannot afford an attorney at that time, I would appoint one for you and also make sure you have a free transcript of today's proceedings. All charges that were dismissed today by the State would be reinstated against you, and that anything you failed to include in your motion you would forever waive and give up."

¶ 6 Defendant acknowledged that he understood the court's admonishments. He failed to file a motion to withdraw his guilty plea, but sought to file an untimely *pro se* motion to reduce his sentence and an untimely notice of appeal several months later, on September 13, 2011. This court allowed defendant's late notice of appeal.

¶ 7 On appeal, defendant asserts that his failure to file a timely postplea motion is excused because the trial court failed to provide adequate postplea admonishments.

¶ 8 Where, as here, a defendant fails to file a timely postplea motion, we normally must dismiss the appeal. Ill. S. Ct. R. 604(d) (eff. July 1, 2006); *People v. Flowers*, 208 Ill. 2d 291, 301 (2004). Dismissal is not proper, however, where the trial court failed to adequately admonish the defendant of his appeal rights under Supreme Court Rule 605 (eff. Oct. 1, 2001); *Flowers*,

208 Ill. 2d at 301. Defendant argues that this exception applies in his case. We review *de novo* the trial court's compliance with Rule 605. *People v. Young*, 387 Ill. App. 3d 1126, 1127 (2009).

¶ 9 In order to determine whether the court properly admonished defendant, we must first decide whether defendant entered an open plea, which is governed by Rule 605(b), or a negotiated plea, which is governed by Rule 605(c). *People v. Dunn*, 342 Ill. App. 3d 872, 878-79 (2003). Defendant claims that he entered an open plea, while the State takes the position that the plea was negotiated.

¶ 10 Our examination of the record leads us to conclude that defendant entered a negotiated plea. A negotiated plea is defined in Rule 605(c) as "one in which the [State] has bound itself to recommend a specific sentence or \*\*\* range of sentence, or where the [State] has made concessions relating to the sentence to be imposed \*\*\*. Ill. S. Ct. R. 605(c)(6) (eff. Oct. 1, 2001).

¶ 11 Here, the record clearly reveals a sentencing concession. Following plea discussions, the State amended the armed robbery count by replacing the element of a "firearm" with a "dangerous weapon." See *People v. Keller*, 353 Ill. App. 3d 830, 831 (2004). The armed robbery count initially charged that defendant committed the crime with a firearm, which constituted a Class X felony that required a 15-year sentencing add-on due to the firearm. 720 ILCS 5/18-2(a)(2),(b) (West 2010). The armed robbery count was amended to charge that defendant committed the crime with a dangerous weapon, which constituted a Class X felony with no additional sentencing enhancements. 720 ILCS 5/18-2(a)(1),(b) (West 2010). The sentence for an armed robbery with a *dangerous weapon* ranges from 6 to 30 years, which is the range for a Class X felony sentence. 730 ILCS 5/5-4.5-25 (West 2010). The sentence for an armed robbery with a *firearm* ranges from a minimum of 21 years to a maximum of 45 years in prison because of the 15-year add-on. In the present case, defendant received a 12-year sentence, which would

not be permissible if the State had not amended the armed robbery to excise the "firearm" element. Moreover, the factual basis of the plea included the amended language and did not mention a firearm. See *People v. White*, 2011 IL 109616.

¶ 12 Moreover, the State *nolled* the remaining charges. When asked whether there was anything further in aggravation or mitigation, the State replied "[a]s set forth in the 402 conference, this defendant has three prior felonies." Defense counsel then reiterated in mitigation that "we had a 402 conference" and added that defendant was 29 years old, had three children, and discussed his employment history.

¶ 13 The record also shows that defendant and the State waived the PSI in open court, supporting the conclusion that the parties had agreed to a specific sentence. See 730 ILCS 5/5-3-1 (West 2010) (requiring the completion and consideration of a PSI report before a defendant is sentenced for a felony, except "where both parties agree to the imposition of a specific sentence"). After listening to defendant's statements in allocution, the court sentenced him to 12 years' imprisonment for armed robbery with a dangerous weapon. Finally, the trial court instructed defendant that he must move to withdraw his plea of guilty in order to preserve an appeal, which is the admonishment for a negotiated plea. Ill. S. Ct. R. 605(c) (eff. Oct. 1, 2001). Therefore, we agree with the State that defendant entered a negotiated guilty plea.

¶ 14 In turning to defendant's contention that the trial court's admonishments pursuant to Rule 605 were inadequate, we note that his argument presupposes that his plea was open, and thus is framed within the context of Rule 605(b). However, as this was a negotiated plea, the circuit court was required to admonish him in accordance with Rule 605(c), which it did.

¶ 15 As relevant to this appeal, Rule 605(c)(2) 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."

¶ 16 Here, the trial court expressly followed the dictates of Rule 605(c)(2) by stating:

"You would have to within 30 days of today's date file with this court a written motion. In that motion, you would have to ask the Court to allow you to withdraw your plea of guilty and vacate the judgment that was entered here today."

¶ 17 Accordingly, we reject defendant's argument that the admonishments should have included the language allowing a postplea motion to challenge the sentence, because such motion only applies to an open plea.

¶ 18 Defendant next maintains that the trial court failed to inform him that he had a right to appointed counsel to assist with his postplea motions. Defendant specifically claims that the trial court's admonishments indicated that counsel would be appointed only if defendant filed a motion to vacate, the court granted that motion, and his case was set for trial. Although defendant's argument stems from the language found in Rule 605(b)(5), the same language is contained in Rule 605(c)(5), which is applicable here.

¶ 19 Rule 605(c)(5) provides that:

"(5) if the defendant is indigent, a copy of the transcript of the proceedings at the time of the defendant's plea of guilty and sentence will be provided without cost to the defendant and

counsel will be appointed to assist the defendant with the preparation of the motions."

¶ 20 Here, the trial court adequately conveyed the dictates of Rule 605(c)(5) by stating:

"If I deny that [motion to withdraw], you can appeal that decision to a higher court. If I allowed that, then the matter would be set for trial. If you cannot afford an attorney at that time, I would appoint one for you and also make sure you have a free transcript of today's proceedings. All charges that were dismissed today by the State would be reinstated against you, and that anything you failed to include in your motion you would forever waive and give up."

¶ 21 The trial court conveyed the substance of Rule 605(c)(5) where it admonished defendant that he had the right to an attorney and transcripts, even if it did not explicitly state that the attorney could assist him with postplea motions. See *Dunn*, 342 Ill. App. 3d at 882 (the trial court's admonishments were sufficient where the court admonished the defendant that, if indigent, he had the right to counsel and free transcripts, despite not specifically referring to the right in the context of postplea motions); cf. *People v. Anderson*, 309 Ill. App. 3d 417, 419, 422 (1999) (the court failed to adequately convey that the defendant had a right to counsel for postplea motions where it referred to the appointment of counsel to represent him "on appeal").

¶ 22 In conclusion, we find that defendant entered a negotiated guilty plea and the court's postplea admonishments were sufficient. Accordingly, the admonition exception under *Flowers* does not excuse defendant's untimely filed and inappropriate postplea motion to reduce his sentence. We must dismiss the appeal.

¶ 23 Because defendant waived his right to appeal, we cannot reach his argument that his sentence must be vacated and remanded for re-sentencing where the trial court did not comply

with section 5-3-1 of the Unified Code of Corrections (Code) (730 ILCS 5/5-3-1 (West 2010)), which prohibits a court from sentencing a defendant for a felony without first receiving and considering a PSI report and making a finding on the record as to his criminal history. In so finding, we note that the cases defendant relies on to show that strict compliance with section 5-3-1 of the Code is mandatory were not subject to dismissal pursuant to Rule 604(d). See *e.g.*, *People v. Jennings*, 364 Ill. App. 3d 473 (2005); *People v. Walton*, 357 Ill. App. 3d 819 (2005); *People v. Childress*, 306 Ill. App. 3d 755 (1999).

¶ 24 For the foregoing reasons, we dismiss the appeal.

¶ 25 Appeal dismissed.