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2014 IL App (3d) 130768-U

Order filed August 19, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE OF)	Appeal from the Circuit Court
ILLINOIS,)	of the 21st Judicial Circuit,
)	Iroquois County, Illinois,
Plaintiff-Appellee,)	
)	Appeal No. 3-13-0768
v.)	Circuit No. 13-CM-69
)	
KYLE L. OWENS,)	Honorable
)	Gordon L. Lustfeldt,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Justice McDade concurred in the judgment.
Justice Schmidt dissented.

ORDER

¶ 1 *Held:* This case is remanded to the trial court for proper Supreme Court Rule 605(b) admonishments.

¶ 2 Defendant, Kyle L. Owens, appeals his conviction in case No. 13-CM-69 following the entry of his guilty plea to seven counts of deceptive practices (720 ILCS 5/17-1(B)(1) (West 2012)) and one count of theft (720 ILCS 5/16-1(a)(1) (West 2012)). On appeal, defendant moves to consolidate this cause with appeal No. 3-13-0767, which concerned the revocation of

his probation in case No. 12-CF-32. Defendant requests a remand of both cases due to the trial court's improper Illinois Supreme Court Rule 605(b) (eff. Oct. 1, 2001) admonishments in this case. The State has filed a response, and we grant defendant's motion for leave to reply to the State's response. We deny defendant's motion to consolidate, and remand this case to the trial court for further proceedings.

¶ 3

FACTS

¶ 4

In case No. 12-CF-32, defendant entered a negotiated plea of guilty to forgery (720 ILCS 5/17-3(a)(2) (West 2012)) and was sentenced to 30 months of probation. On May 30, 2013, in case No. 13-CM-69, defendant entered an open guilty plea to seven counts of deceptive practices and one count of theft. He also admitted to allegations in the State's petition to revoke probation filed in case No. 12-CF-32 that he violated his probation in that case by committing the crimes alleged in case No. 13-CM-69.

¶ 5

Prior to sentencing, defendant filed a motion to withdraw his guilty plea and his admission to the petition to revoke, which was denied. The trial court sentenced defendant to four years of imprisonment in case No. 12-CF-32 to run concurrently with sentences of 364 days of imprisonment for each misdemeanor count in case No. 13-CM-69, which were in turn concurrent with each other. The court properly admonished defendant pursuant to Rule 605(b) that in order to preserve his right to appeal his guilty plea conviction (No. 13-CM-69) he must file a motion to withdraw his guilty plea or a motion to reconsider sentence in the trial court within 30 days of sentencing. See Ill. S. Ct. R. 605(b) (eff. Oct. 1, 2001).

¶ 6

On October 7, 2013, defense counsel informed the court that he would be proceeding with an appeal. The trial court asked whether defendant was required to file a motion to withdraw guilty plea prior to filing an appeal. Defense counsel indicated that because a motion

to withdraw guilty plea had been filed prior to sentencing, the case was "ripe for the notice of appeal." The trial court agreed that it would not "make a lot of sense to do it twice" and that it "will be sorted out in the appeals court." The following day defendant filed notices of appeal in both cases.

¶ 7

ANALYSIS

¶ 8

On appeal, defendant requests that we remand case No. 13-CM-69 for additional proceedings under Supreme Court Rules 604(d) and 605(b). Because defendant pled guilty, a timely Illinois Supreme Court Rule 604(d) (eff. Jan. 1, 2013) motion was a condition precedent to defendant filing an appeal. See *People v. Flowers*, 208 Ill. 2d 291 (2003). Rule 604(d) mandates that an appeal from a defendant's plea of guilty be preceded by the filing of a motion to withdraw the guilty plea and vacate judgment in the trial court "within 30 days of the date on which sentence is imposed[.]" Ill. S. Ct. R. 604(d) (eff. Jan. 1, 2013). Generally, where a guilty plea defendant fails to file a timely Rule 604(d) motion, the trial court loses jurisdiction over the matter 30 days after sentencing, and the appellate court must dismiss an ensuing appeal. *Flowers*, 208 Ill. 2d 291. However, if proper 605(b) admonishments were not given, then defendant was at risk of completely losing his ability to appeal, and fundamental fairness requires that we remand the case for proper admonishments instead of dismissing the appeal. *Id.*; *People v. Henderson*, 217 Ill. 2d 449 (2005).

¶ 9

Here, defendant was properly admonished under Rule 605(b) of the requirements for perfecting his appeal after an open guilty plea. However, defendant had prematurely filed a motion to withdraw guilty plea prior to sentencing and, therefore, was required to renew his motion to withdraw guilty plea following sentencing. See *People v. Ramage*, 229 Ill. App. 3d 1027 (1992); *People v. Gamboa*, 225 Ill. App. 3d 668 (1992); *People v. Riegle*, 246 Ill. App. 3d

270 (1993). The trial court's statements on October 7, 2013, that it did not "make a lot of sense" for defendant to file the motion twice misled defendant as to his requirement of filing a motion to withdraw guilty plea within 30 days following sentencing in order to perfect an appeal. Based upon the trial court's misstatement of the law, we must remand case No. 13-CM-69 to the trial court for proper admonishments under Rule 605(b). See *Gamboa*, 225 Ill. App. 3d 668.

¶ 10 Defendant argues that the cases should be consolidated because they have been "linked together since the filing of the petition to revoke probation." However, the procedural safeguards of Rules 604(d) and 605(b) that are applicable to defendant's guilty plea in this case do not apply to his admission of probation violation in the revocation proceedings in case No. 12-CF-32. See *People v. Tufte*, 165 Ill. 2d 66 (1995). Therefore, we find no reason to remand case No. 12-CF-32 to the trial court in consolidation with this case.

¶ 11 CONCLUSION

¶ 12 For the foregoing reasons, we grant defendant's request to remand this case, No. 13-CM-69, to the trial court for proper admonishments under Rule 605(b) and further proceedings in compliance with Rule 604(d).

¶ 13 Remanded with directions.

¶ 14 JUSTICE SCHMIDT, dissenting.

¶ 15 I respectfully dissent from that portion of the order remanding case No. 13-CM-69 for no admonishments. The majority finds that the trial court's statement on October 7, 2013, that it "did not 'make a lot of sense' " for defendant to file the same motion twice was a misstatement of law. It was neither a statement nor a misstatement of the law, but rather an opinion as to the wisdom of the law, one with which I concur, at least on the facts of this case.

¶ 16 The parties agree that the trial court gave proper Rule 605(b) admonishments. It is the October 7, 2013, conversation between defense counsel and the court that defendant argues and the majority agrees, somehow negated the proper 605(b) admonishments, which everyone agrees the court gave on October 1, 2013. If defense counsel and the trial court had simply agreed that the previously-filed motion to withdraw guilty plea was being refiled and that the court was entering the same ruling as it did the first time (denying the motion), then the notice of appeal would be fine. This procedure elevates form over substance. Also, the trial court was neither defendant's lawyer nor defense counsel's law professor. Neither had a right to rely upon any statement about the law made by the trial court, even if it were a misstatement of the law. Mistakes in the trial court are the *raison d'être* for courts of review. That is why we have appeals. It makes no sense to say that rules of appellate procedure do not apply since the trial court made a mistake.

¶ 17 So what will happen? This case will go back, the trial court will once again give 605(b) admonishments. The defendant will refile the motion to withdraw his guilty plea, the trial court will deny it and defendant will file his notice of appeal. Quite frankly, it would make more sense to me to avoid all of that and simply treat the notice of appeal as if it were timely filed since the gist of the October 7 conversation between the trial court and counsel was simply that: if defendant refiles the same motion, the result will be the same.

¶ 18 Since I cannot convince my colleagues to take a different approach, I am at liberty to suggest two alternatives. First, dismiss the appeal since the trial court did give proper 605(b) admonishments; any discussion with defense counsel six days later did not undo that. Second, treat the October 7 discussion as a refile and denial of the motion to withdraw guilty plea and rule that there is no need for remand. Of course, defendant would not be able to raise any

objections to sentencing since those objections would not have been raised in the presentencing motion. In light of the sentence on this case, as compared to the sentence on the felony case (No. 12-CF-32), I doubt that this would cause defendant any heartburn.