

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).

2015 IL App (4th) 140407-U

NO. 4-14-0407

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

September 21, 2015

Carla Bender

4th District Appellate

Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
MARK DAVIS,)	No. 13CF30
Defendant-Appellant.)	
)	Honorable
)	Harry E. Clem,
)	Judge Presiding.

PRESIDING JUSTICE POPE delivered the judgment of the court.
Justices Turner and Holder White concurred in the judgment.

ORDER

¶ 1 *Held:* We allow OSAD's motion to withdraw as counsel as no meritorious issue can be raised on appeal.

¶ 2 This case comes to us on the motion of the office of the State Appellate Defender (OSAD) to withdraw as counsel on appeal pursuant to *Anders v. California*, 386 U.S. 738 (1967), asserting no meritorious issues can be raised in this case. After carefully reviewing the record, we allow OSAD's motion to withdraw.

¶ 3 I. BACKGROUND

¶ 4 In January 2013, defendant, Mark Davis, was charged with theft (720 ILCS 5/16-1(a)(1)(A) (West 2012)) (count I) and burglary (720 ILCS 5/19-1(a) (West 2012)) (count II), stemming from an incident at Walmart in Savoy, Illinois. Because the value of the items

exceeded \$500, the theft was charged as a Class 3 felony. Defendant was also eligible for extended-term sentencing.

¶ 5 In June 2013, while represented by an assistant public defender, Anthony Ortega, defendant pleaded guilty to count I in exchange for the State agreeing to dismiss count II and cap its sentencing recommendation at five years if defendant did not violate any criminal statutes between the date of the guilty plea and the date of sentencing, cooperated with the presentence investigation (PSI), and appeared at the sentencing hearing.

¶ 6 The State gave the following factual basis for the plea: On January 7, 2013, at the Walmart in Savoy, Illinois, a loss-prevention officer saw defendant put three bottles of alcohol, two desktop computers, and a gaming headset into a cart. He then put a coat over the items in an attempt to hide them, passed all points of purchase, and exited the store without paying. He was approached by the loss-prevention officer but got into the passenger seat of a waiting vehicle and drove away, leaving the items in the cart behind. As sheriff deputies later tried to stop the vehicle, defendant jumped out of the car and started running through a field, where he was eventually apprehended. Defendant "admitted being in the store and selecting the items." The total value of the items was over \$1,100.

¶ 7 After admonishing defendant about the nature of the charges, the rights he was giving up by pleading guilty, and the possible penalties, the trial court found the plea to be knowing and voluntary, accepted the plea, ordered a PSI, and continued the case for a sentencing hearing.

¶ 8 At the July 25, 2013, sentencing hearing, defendant was represented by an assistant public defender, Stephanie Corum. At the hearing, the trial court was advised

defendant was found eligible for Treatment Alternatives for Safe Communities (TASC) probation and suitable for drug court. The State recommended a sentence of five years' imprisonment and the defense recommended a sentence to TASC probation or to the drug-court program. The court noted defendant's criminal history spanned over 20 years, during which time defendant had never taken the initiative to get substance-abuse treatment. The court acknowledged defendant had recently made efforts to resume his education and find employment; however, the court found "this flurry of activity after this long history of criminality" was "too little and too late." The court sentenced defendant to five years in prison. The court admonished defendant regarding his appeal rights as follows:

"You have a right, sir, to take an appeal from the order I just entered if you wanted to do that. If you wanted to appeal any issues in your case to the appellate court, that's the court of review that sits in Springfield and reviews the actions of this court to determine whether any errors have been committed, you would first have to file within 30 days of today's date with this court a written motion asking leave to withdraw your guilty plea and plead not guilty again. That motion would have to set out the grounds, that is the facts you were relying on to support the action you were requesting the court take.

You would be entitled to be represented by a lawyer if you wanted to file such a motion. Since you're already represented by [the assistant public defender], we'll continue the appointment of

that office an additional 30 days if you want to consult with [the assistant public defender] or any of the other lawyers who work in her office about filing such a motion.

You would be entitled to a transcript of today's hearing or any other hearing in your case if you needed it to assist you in filing a motion to attempt to withdraw your guilty plea.

Based on findings that have already been made in your case, any transcript you required would be provided at no cost to you.

If you filed your motion and if it was allowed after a hearing, you would be allowed to withdraw your guilty plea, plead not guilty again[,] and the case would go on for trial as though today's hearing and the hearing at which you first tendered your plea to the court had not occurred.

If you are successful in withdrawing your guilty plea as to the charge to which that plea was entered, the charge that was dismissed as part of the plea agreement could be reinstated and also set for trial.

If your motion was denied, you would have an opportunity at that point to proceed on to the appellate court with any issues you wanted that court to consider and review.

For any issue or claim of error to be considered by the

appellate court, it must first be presented to this court in the form of a motion to withdraw your guilty plea.

Any issue or claim of error not included in such a motion is considered waived, that means it could not and would not be considered by the judges of the appellate court.

If you fail to file a motion to attempt to withdraw your guilty plea within 30 days of today's date, you would have given up any opportunity you had to present issues to the appellate court for their review.

Do you understand how that procedure works?

THE DEFENDANT: Yeah."

¶ 9 On August 15, 2013, defendant filed a *pro se* motion for a reduction of his sentence. On August 26, 2013, Corum filed a motion for reconsideration of the sentence. On November 8, 2013, Corum filed an amended motion for reconsideration of the sentence, along with a Rule 604(d) certificate. On November 12, 2013, the trial court denied the amended motion to reconsider the sentence. The court admonished defendant he had 30 days within which to file a notice of appeal and asked if he wanted the court to direct the clerk of the court to file a notice of appeal on his behalf. Defendant advised the court, "No, not at this time, no." The court advised defendant again he must file a notice of appeal within 30 days or he would in all likelihood lose his right to appeal. Defendant indicated he understood.

¶ 10 Defendant wrote a letter dated February 14, 2014, to the trial court indicating he had written to his attorney a week or two after the hearing asking her to file an appeal. He

inquired whether the appeal had been filed. The letter was filed February 28, 2014. That same day, Corum filed a letter with the court indicating defendant had notified her about his desire to appeal his case. She asked the court to direct the circuit clerk to file a notice of appeal on defendant's behalf. A late notice of appeal was filed on May 16, 2014. On May 20, 2014, this court allowed the filing of a late notice of appeal.

¶ 11 In April 2015, OSAD moved to withdraw as counsel because it felt no meritorious issue could be raised on appeal. The record shows service of the motion on defendant. On its own motion, this court granted defendant leave to file additional points and authorities by May 28, 2015. Defendant has filed none. After carefully examining the record, we allow OSAD's motion to withdraw for the reasons that follow.

¶ 12 II. ANALYSIS

¶ 13 In its motion to withdraw, OSAD asserts defendant failed to comply with the requirements of Illinois Supreme Court Rule 604(d) (eff. Feb. 6, 2013) to perfect his appeal rights because he failed to file a motion to withdraw his guilty plea. We agree defendant failed to file the appropriate postplea motion required under Rule 604(d).

¶ 14 Pursuant to Rule 604(d), a defendant may not appeal from a judgment entered upon a plea of guilty unless (1) he files a timely motion to reconsider, if challenging only his sentence; or (2), if challenging his plea, he files a timely motion to withdraw his guilty plea and to vacate the judgment. In the case of a negotiated plea, however, a defendant cannot challenge his sentence without filing a timely motion to withdraw his guilty plea and vacate the judgment. "For purposes of [Rule 604(d)], a negotiated plea of guilty is one in which the prosecution has bound itself to recommend a specific sentence, or a specific range of sentence, or where the

prosecution has made concessions relating to the sentence to be imposed and not merely to the charge or charges then pending." Illinois Supreme Court Rule 604(d) (eff. Feb. 6, 2013).

¶ 15 Here, defendant pleaded guilty to the Class 3 felony of theft of property valued between \$500 and \$10,000 (720 ILCS 5/16-1(b)(4) (West 2012)) (count I). Because of defendant's prior convictions, including a 2009 residential burglary, he was eligible for an extended-term sentence of 5 to 10 years' incarceration (730 ILCS 5/5-5-3.2(b)(1); 730 ILCS 5/5-4.5-40(a) (West 2012)). This was a negotiated plea agreement because, in exchange for his plea, the State agreed to recommend a nonextended sentencing cap of five years and dismiss count II. See *People v. Diaz*, 192 Ill. 2d 211, 223-24, 735 N.E.2d 605, 611-12 (2000) (a plea is negotiated where the State agrees not to seek an extended-term sentence), and *People v. Linder*, 186 Ill. 2d 67, 74, 708 N.E.2d 1169, 1172 (1999) (a plea is negotiated where the State agrees to a sentencing cap). The trial court explicitly admonished defendant he must file a timely motion to withdraw his plea before he could file an appeal. Instead, he filed a motion to reconsider the sentence. As a result, defendant failed to perfect his appeal.

¶ 16 III. CONCLUSION

¶ 17 For the foregoing reasons, we grant OSAD's motion for leave to withdraw and affirm the trial court's judgment.

¶ 18 Affirmed.