2020 IL App (4th) 180810-U

NO. 4-18-0810

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
December 14, 2020
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Vermilion County
JENNIFER R. MARKS,	)	No. 18CF207
Defendant-Appellant.	)	
	)	Honorable
	)	Nancy S. Fahey,
	)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Knecht and Harris concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court dismissed defendant's appeal where she failed to move to withdraw her guilty plea, as required by Illinois Supreme Court Rule 604(d) (eff. July 1, 2017), before challenging her sentence.

¶ 2 In August 2018, defendant, Jennifer R. Marks, pleaded guilty to aggravated robbery (720 ILCS 5/18-1(b)(1) (West 2016)) in exchange for a sentencing cap of four years in prison. The Vermilion County circuit court sentenced defendant to four years in prison. Defendant filed a motion to challenge her sentencing hearing, arguing the court considered an improper aggravating factor at sentencing, which the court denied. On appeal, defendant argues she was deprived of a fair sentencing hearing in violation of her constitutional right to due process. Pursuant to our supreme court's holding in *People v. Johnson*, 2019 IL 122956, ¶¶ 1, 57, 129 N.E.3d 1239, we must dismiss defendant's appeal because she has failed to comply with the requirements of Illinois Supreme Court Rule 604(d) (eff. July 1, 2017).

¶ 3 I. BACKGROUND

¶ 4 In April 2018, the State charged defendant with armed robbery, a Class X felony (720 ILCS 5/18-2(a)(1) (West 2016)), and aggravated robbery, a Class 1 felony (*id.* § 18-1(b)(1)).

¶ 5 In July 2018, defendant and the State entered into a plea agreement. In exchange for defendant's plea of guilty to aggravated robbery, the State agreed to dismiss the armed robbery charge and cap its sentencing recommendation at four years in prison. At the plea hearing, the court admonished defendant regarding (1) the possible penalties she faced if convicted of aggravated robbery, (2) the rights she was relinquishing by entering into the plea agreement, (3) the consequences of pleading guilty, and (4) the terms of the plea agreement. Defendant also signed a document titled, "Admonishment of Rights Under Supreme Court Rule 402," which mirrored the oral admonishments given to defendant by the court. The State presented the following factual basis for the plea:

> "On April 6, 2018, the victim in this case, Joshua Cummings, was picked up at his residence at 718 North Griffin street. Sergeant Heckerson, other members of the Vermilion County Sheriff's Department, if called to testify, would testify that Shelby Haner, [defendant], who was the driver of the vehicle, Kevin Humphreys and a Callie Johnson all picked up the victim. At one point, the other co-defendant pointed a handgun, which was later found to be a pellet gun, at the victim. At that time, another co-defendant robbed the victim of his phone. There was a physical altercation. The victim was actually struck with the pellet gun, and he was forced out of the vehicle by [defendant] after she stopped the motor vehicle.

> Subsequent to that, there would be testimony, and there is admissions also by [defendant] that the group of individuals went back to one of the houses, cleaned up everything, cleaned up and blood and everything that was on them, and the victim suffered a laceration on his forehead, causing extensive bleeding. He did receive medical treatment, Your Honor. And that would be the sum and substance of the testimony."

¶ 6 In August 2018, the court conducted defendant's sentencing hearing. At the outset of the hearing, the court noted the Presentence Investigation Report (PSI) on file. Neither the State nor defendant presented evidence in aggravation or mitigation.

¶ 7 During argument, the State recommended a sentence of four years in prison. The State argued defendant's participation in the offense was "significant," emphasizing defendant was the driver of the car—rather than merely a passenger—and the robbery seemed to have been planned with her codefendants. The State further argued that defendant's conduct caused serious harm to the victim and a prison sentence was necessary to deter others.

¶ 8 Defendant's counsel argued defendant was only 29 years old and lacked any significant criminal history. When not in custody, defendant was also the primary caregiver to her two children. Additionally, defendant's counsel emphasized an LSI-R (a recidivism risk assessment tool) was not prepared in defendant's case because her background indicated her risk was so low that it was unnecessary. Further, defendant did not personally physically harm the victim and took responsibility for her role in the robbery. Finally, defendant struggled with substance abuse and acknowledged she could benefit from treatment. Based on these mitigating factors, defendant's counsel requested a sentence of probation.

¶ 9 Following argument, the court stated it found that the events in this case constituted a "very serious crime." In pronouncing its sentence, the court made the following comments:

> "[Defense counsel's] argument that you had no physical contact with [the victim] is disputed with the factual basis, which he did not add anything to at the time, which said that he was forced out of the vehicle by [defendant] after she stopped the motor vehicle. So I'm not sure how you forced him out, but he was bleeding profusely from the head at that juncture, so I'm sure he was, you know, in distress, obviously, at that time, and you know, I don't care whether it was a pellet gun or not, the victim didn't know that at the time.
>
> And I'm just not going to tolerate this type of behavior in my community, and I'm going to send a strong message to anyone that participates in this type of behavior that it is not tolerated under any circumstances. You have to pay a price for your bad judgment that you made in this case, and the distress *** that you caused the victim in this case.
>
> So when I look at the factors in mitigation, I do find that you have a minimal background, and I would agree that if you were placed on court supervision and completed that successfully, the DUI is not a conviction. I don't find any other—yes, you do have two children, but your PSI indicates that they are with your parents, and there's been no evidence that that's a—that this is going to cause a hardship on your children. It sounds like they are being well taken care of. You know, ideally, should their mother be around, yes, but that was your choice, not mine.

> When I look at the factors in aggravation, I find that your conduct caused or threatened serious harm, that you received compensation for committing the offense, and that the sentence, most importantly, is necessary to deter others from committing the same crime.
>
> So having regard to the nature and circumstance of the offense, and to the history, character and condition of the offender, the Court is of the opinion that probation would deprecate the seriousness of the offender's conduct and would be inconsistent with the ends of justice. I'm sentencing you to four years in the Illinois Department of Corrections ***."

¶ 10 Later in August 2018, defendant filed a motion to reconsider the sentence. Defendant argued, *inter alia*, the court improperly considered at sentencing two factors inherent in the offense of aggravated robbery: (1) that defendant's conduct caused or threatened harm to the victim and (2) that defendant received compensation (*i.e.*, proceeds) in committing the offense.

¶ 11 In December 2018, the court conducted a hearing on defendant's motion to reconsider the sentence. At the beginning of the hearing, defendant's counsel orally moved to amend the title of the motion to a "Motion to Challenge Sentencing Hearing," which the court allowed. Following arguments, the court denied defendant's motion. Along with a notice of appeal, defendant's counsel filed a certificate pursuant to Illinois Supreme Court Rule 604(d) (eff. July 1, 2017). Defense counsel certified he (1) consulted with defendant in person, by mail, by phone, or by electronic means to ascertain her contentions of error in the entry of the plea of guilty and in the sentence; (2) examined the trial court file and report of proceedings of the plea

of guilty and the report of proceedings in the sentencing hearing; and (3) made any amendments to the motion necessary for the adequate presentation of any defects in those proceedings.

¶ 12 This appeal followed.

¶ 13 II. ANALYSIS

¶ 14 On appeal, defendant argues that this court may review her constitutional challenge to her sentencing hearing despite her failure to file a motion to withdraw her plea of guilty pursuant to Illinois Supreme Court Rule 604(d) (eff. July 1, 2017), because her right to due process was violated. We disagree and dismiss defendant's appeal.

¶ 15 A. Rule 604(d) and Excessive Sentence Claims

¶ 16 Rule 604(d) states the following:

> "No appeal from a judgment entered upon a plea of guilty shall be taken unless the defendant, within 30 days of the date on which sentence is imposed, files in the trial court a motion to reconsider the sentence, if only the sentence is being challenged, or, if the plea is being challenged, a motion to withdraw the plea of guilty and vacate the judgment.
>
> No 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. For purposes of this rule, 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."

¶ 17 The Illinois Supreme Court recently held the following regarding Rule 604(d):

> "[A] defendant who enters into a negotiated plea agreement may not challenge his sentence on the basis that the court relied on improper statutory sentencing factors. This type of sentencing challenge is an excessive sentence challenge. Under Rule 604(d), a defendant's recourse is to seek to withdraw the guilty plea and return the parties to the status quo before the plea." *Johnson*, 2019 IL 122956, ¶ 57.

¶ 18 There are two exceptions to the application of Rule 604(d): (1) where the defendant challenges his sentence as not authorized by statute (*People v. Williams*, 179 Ill. 2d 331, 333, 688 N.E.2d 1153, 1154 (1997)) and (2) where the defendant challenges the statute under which he was sentenced as facially unconstitutional and void *ab initio* (*People v. Guevara*, 216 Ill. 2d 533, 542-43, 837 N.E.2d 901, 906-07 (2005)). We note our supreme court pointed out in *Johnson* these exceptions stem from cases relying on the now abolished void sentence rule. At any rate, if these exceptions do still exist, they do not serve as the basis for defendant's claim.

¶ 19 Defendant contends the circuit court considered improper aggravating factors in sentencing that were inherent in the offense and this deprived her of a fair sentencing hearing in violation of her constitutional right to due process. At sentencing, the circuit court may consider factors in aggravation as set forth by statute. 730 ILCS 5/5-5-3.2 (West 2016). The court may not consider factors inherent in the offense as aggravating factors at sentencing, based on the assumption that, in designating the appropriate range of punishment for a criminal offense, the legislature necessarily considered the factors inherent in the offense. *People v. Phelps*, 211 Ill. 2d 1, 11-12, 809 N.E.2d 1214, 1220 (2004). "Thus, when a defendant contends the court improperly considered a statutory aggravating factor that was implicit in the offense, the defendant is asserting that the court imposed a harsher sentence than might otherwise have been imposed had

the court not considered the improper statutory factor." (Internal quotation marks omitted.) *Johnson*, 2019 IL 122956, ¶ 38.

¶ 20 Here, we may not review defendant's challenge to her sentencing hearing because she failed to file a motion to withdraw her guilty plea as required by Rule 604(d) and as mentioned above, she does not allege (1) her sentence was unauthorized or (2) the statute under which she was convicted is facially unconstitutional. Defendant attempts to circumvent the requirements of Rule 604(d) by styling her challenge as a due process violation, arguing that she was deprived of a fair sentencing hearing due to the court's consideration of improper aggravating factors—not that her sentence itself is excessive. Defendant argues Rule 604(d) does not by its terms prohibit appellate review of such a claim. Defendant's attempt to distinguish her claim is unavailing because our supreme court unequivocally held that an argument asserting the circuit court considered improper aggravating factors at sentencing is functionally no different than an excessive sentence claim. See *id.* ¶¶ 39-41. Just as the *Johnson* court rejected the defendant's argument that "his challenge [to the circuit court's consideration of improper sentencing factors] is one of constitutional dimension that implicates due process and fundamental fairness," we too find defendant's due process argument in this case "to be a distinction without a difference for purposes of Rule 604(d)." *Id.* ¶¶ 36, 41.

¶ 21 B. Constitutionality of Rule 604(d) as Applied to Defendant

¶ 22 Defendant argues in the alternative that, to the extent Rule 604(d) prohibits our review of her case, it is unconstitutional as applied to her. Specifically, defendant argues that her plea was not knowingly and voluntarily made because she was not admonished that by entering into a negotiated plea agreement with the State, she was waiving her constitutional right to a fair sentencing hearing. See, *e.g.*, *People v. Williams*, 188 Ill. 2d 365, 370, 721 N.E.2d 539, 543

(1999) ("If a defendant's guilty plea is not voluntary and knowing, it has been obtained in violation of due process and, therefore, is void."). Accordingly, defendant argues, this court should remand for a new sentencing hearing. We disagree.

¶ 23 Defendant cites no authority for her proposition that a trial court's failure to admonish a criminal defendant prior to entering her guilty plea regarding the requirements for appealing her (at that point, undetermined) sentence renders the guilty plea involuntary and therefore unconstitutional. Defendant correctly notes that Illinois Supreme Court Rule 402 (eff. July 1, 2012), which governs the admonishments the court must provide a criminal defendant prior to accepting a plea of guilty, does not state "that a defendant who enters a negotiated guilty plea, where the range of sentence is capped, is foreclosed from challenging her sentencing hearing without a withdrawal of her guilty plea." Defendant fails to acknowledge, however, that Rule 402 does not discuss appellate rights at all—likely because a guilty plea alone does not constitute a final judgment from which a criminal defendant may appeal. See *People v. Lilly*, 56 Ill. 2d 493, 496, 309 N.E.2d 1, 2 (1974) ("[I]n the absence of the imposition of sentence an appeal cannot be entertained."). Defendant does not otherwise challenge the propriety of the court's admonishments pursuant to Rules 402 or 604(d), and we conclude they were adequate.

¶ 24 Defendant was advised that in order to challenge her sentence pursuant to her negotiated plea agreement with the State, she was required to file a motion to withdraw her guilty plea. She failed to do so and instead chose to file a motion to "challenge sentencing hearing"—a pleading not recognized under Rule 604(d). Under Rule 604(d) and *Johnson*, defendant's appeal must be dismissed.

¶ 25 III. CONCLUSION

¶ 26 For the reasons stated, we dismiss this appeal.

¶ 27 Appeal dismissed.