

Opinion filed December 28, 2023

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2023

THE PEOPLE OF THE STATE OF)	Appeal from the Circuit Court
ILLINOIS,)	of the 21st Judicial Circuit,
)	Kankakee, Illinois,
Plaintiff-Appellee)	
)	Appeal No. 3-23-0491
v.)	Circuit No. 22-CF-446
)	
MARCUS A. GATHING,)	Honorable
)	William S. Dickenson,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE DAVENPORT delivered the judgment of the court, with opinion.
Justices Brennan and Peterson concurred in the judgment and opinion.

OPINION

¶ 1 Defendant, Marcus A. Gathing, appeals from the circuit court's order granting the State's verified petition to revoke pretrial release under section 110-6 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/110-6 (West 2022)), as amended by Public Act 101-652 (eff. Jan. 1, 2023), commonly known as the Pretrial Fairness Act (Act).¹ He asserts, among other things, a

¹The legislation has also been referred to as the Safety, Accountability, Fairness and Equity-Today (SAFE-T) Act. Neither commonly known name is official, as neither appears in the Illinois Compiled Statutes or the public act.

violation of his statutory right to an in-person hearing on the State’s petition. We vacate the court’s order and remand for a new hearing.

¶ 2

I. BACKGROUND

¶ 3

Defendant was charged with five felony drug counts in July 2022. Bond was originally set at \$750,000 but was later reduced to \$200,000. In December 2022, defendant posted bond and was released. On September 22, 2023, the State filed a verified petition to revoke pretrial release under section 110-6 of the Code, alleging that while on pretrial release defendant was charged with a felony or Class A misdemeanor.

¶ 4

A hearing was held on the petition on October 5, 2023. Defendant was in custody and appeared via a two-way audio-video communication system. Defense counsel appeared in court. It was counsel’s first appearance. The court asked counsel if he wanted a continuance “to get [his] feet on the ground.” Counsel said he was ready to proceed on the petition. The State told the court a grand jury had indicted defendant, in case No. 23-CF-128, on two new felonies (one of which was later dismissed) while he was on pretrial release on the July 2022 offenses. Defendant was also on conditional discharge for a prior felony and on pretrial release in a Will County felony matter when he committed the July 2022 offenses and the new offenses. The State argued there were no conditions that would prevent defendant from committing further offenses. Defendant asked if he could speak on his own behalf, but the court stated he had an attorney to speak for him.

¶ 5

The court granted the State’s petition, finding the State met its burden by clear and convincing evidence and there were no conditions to prevent defendant from being charged with a subsequent offense. In doing so, it noted defendant’s history of being released and continuing to be charged with new felony offenses.

¶ 6 After the court announced its ruling and read defendant his appeal rights, defendant told the court, “I would like to file an appeal today ***. And I—I don’t understand why I wasn’t able to talk or why I wasn’t in court.” Later, defendant told the court, “I was under the impression that I had the right to be present and be heard on my own behalf” and “they were supposed to have me in court for a hearing on this.”

¶ 7 Defendant filed a notice of appeal on October 10, 2023. The notice of appeal was not prepared on the form approved by our supreme court for appeals by defendants under Illinois Supreme Court Rule 604(h) (eff. Sept. 18, 2023). Rather, it was prepared on the form approved for appeals under Illinois Supreme Court Rule 606 (eff. Sept. 18, 2023) and only identifies the judgment from which the appeal was taken: the “bond revocation hearing held on Thursday, October 5, 2023.”

¶ 8 II. ANALYSIS

¶ 9 On appeal, defendant contends the court erred in granting the petition to revoke. Specifically, he contends (1) his statutory right to be physically present for the hearing was violated, (2) defense counsel had no knowledge of the facts and circumstances surrounding the case, and (3) the State did not prove there were no conditions available to mitigate defendant’s risk.

¶ 10 A. Right to In-Person Hearing

¶ 11 Defendant first contends he is entitled to a new hearing because he was denied his statutory right to be physically present at the hearing on the State’s petition. This contention presents a question of law, in that it requires us to construe and determine whether the court complied with the Code. Accordingly, our review is *de novo*. *People v. Kurzeja*, 2023 IL App (3d) 230434, ¶ 10.

In construing the Code, we are bound by its text, which we must give its plain and ordinary meaning. *Id.*

¶ 12 Before addressing this issue, we note the State observes that defendant’s notice of appeal was not prepared on the form approved by our supreme court for Rule 604(h) appeals taken by defendants and does not describe the relief requested or the grounds for that relief. Thus, the State continues, the notice of appeal does not comply with Rule 604(h)(2) (Ill. S. Ct. R. 604(h)(2) (eff. Sept. 18, 2023)). Relying on *People v. Inman*, 2023 IL App (4th) 230864, ¶¶ 12-13, the State asks us to apply the principles of forfeiture and affirm the circuit court’s judgment.

¶ 13 The failure to comply with Rule 604(h)(2)’s requirement that the notice of appeal describe the relief requested and the grounds for that relief is not jurisdictional. *People v. Presley*, 2023 IL App (5th) 230970, ¶ 25; see *People v. Lewis*, 234 Ill. 2d 32, 37 (2009) (no step, other than timely filing a notice of appeal, is jurisdictional). Rather, it raises a question of forfeiture. It is well settled that forfeiture is a limitation on the parties, not the reviewing court. See, e.g., *Kurzeja*, 2023 IL App (3d) 230434, ¶ 9. We may overlook the principles of forfeiture when “necessary to obtain a just result or maintain a sound body of precedent.” (Internal quotation marks omitted.) *Id.*

¶ 14 Here, defendant raised the issue himself in the circuit court, giving his counsel, the State, and the circuit court the opportunity to correct the error before appeal and alerting the State that this was a possible basis for appeal. See *People v. Jackson*, 2022 IL 127256, ¶ 15 (the principles of forfeiture are designed to preserve judicial resources, by allowing errors to be corrected before appeal and preventing a defendant from allowing an irregular proceeding to go forward only to seek reversal due to the error when he receives an unfavorable outcome). Additionally, defendant filed a memorandum in this court, in part arguing he did not waive his statutory right to an in-

person hearing on the State’s petition.² Cf. *Inman*, 2023 IL App (4th) 230864, ¶¶ 12-13 (finding the defendant’s failure to provide argument in his notice of appeal or in a memorandum left the court in the position of developing an argument on the defendant’s behalf). Moreover, the hearing at issue took place on October 5, 2023, within the first 20 days of the effective date of the Act’s amendments to the Code, which implemented wholesale changes to the law governing pretrial release. Under these circumstances, we choose to overlook the forfeiture that resulted from defendant’s failure to describe the grounds for relief in his notice of appeal.

¶ 15 We also note the State maintains it did not receive defendant’s memorandum until December 12, 2023, after its own memorandum was due. The supporting record in this case was filed on November 2, 2023, meaning defendant’s memorandum would have been due on November 23, 2023. Ill. S. Ct. R. 604(h)(2) (eff. Oct. 19, 2023). However, November 23 and 24, 2023, were both court holidays, making defendant’s memorandum due on November 27, 2023. 5 ILCS 70/1.11 (West 2022). Defendant filed his memorandum that day, and thus, the State’s memorandum was due on December 18, 2023. Ill. S. Ct. R. 604(h)(2) (eff. Oct. 19, 2023). Defendant’s memorandum contains a proof of service, in which defendant’s counsel stated he served the memorandum on the State’s appellate counsel by e-mail on November 27, 2023, the date the memorandum was due. See *id.* (stating that memoranda must be served as provided in Illinois Supreme Court Rule 11 (eff. July 1, 2021)). Thus, we are perplexed by the State’s assertions. In any event, the State filed a memorandum on December 12, 2023, and we allowed the State to amend its memorandum *instantly* on December 15, 2023, after it purportedly received

²We note defendant’s memorandum is entirely devoid of any citations of the record. Though Illinois Supreme Court Rule 341 (eff. Oct. 1, 2020) technically does not apply in this appeal, the better practice is to cite the supporting record and any controlling authority (if available) in a memorandum. See *Inman*, 2023 IL App (4th) 230864, ¶ 12 (“[W]e should not ignore the principles producing the rule—namely, coherent argument and analysis supported by proper record citations and legal authorities.”). We trust counsel will provide us this courtesy in any future appeals under Rule 604(h).

defendant's memorandum. The State did not offer any argument on the issue of defendant's right to be physically present and instead raised only the forfeiture argument we have rejected above. We now turn to the merits.

¶ 16 Section 110-6(a) of the Code reads in part as follows:

“A hearing at which pretrial release may be revoked *must* be conducted in person (and not by way of two-way audio-visual communication) *unless* the accused waives *the right to be present physically in court*, the court determines that the physical health and safety of any person necessary to the proceedings would be endangered by appearing in court, or the chief judge of the circuit orders use of that system due to operational challenges in conducting the hearing in person. Such operational challenges must be documented and approved by the chief judge of the circuit, and a plan to address the challenges through reasonable efforts must be presented and approved by the Administrative Office of the Illinois Courts every 6 months.” (Emphases added.) 725 ILCS 5/110-6(a) (West 2022).

The plain text of section 110-6 gives the accused the right to be physically present at a hearing at which pretrial release might be revoked. Indeed, the Code *requires* an in-person hearing on such matters, subject to three exceptions: when (1) the accused waives his or her right to be physically present, (2) the court determines that an in-person hearing would endanger the physical health and safety of any necessary participant, or (3) the chief judge of the circuit orders the use of a two-way audio-video communication system due to operational challenges.

¶ 17 The record before us does not establish any of the three exceptions to section 110-6's in-person hearing requirement. The record does not show defendant waived his right to be physically present for the hearing. Indeed, there is nothing from which we can conclude defendant

intentionally relinquished his right to an in-person hearing. See *People v. Bartels*, 2022 IL App (3d) 190635, ¶ 21 (a waiver is an intentional relinquishment or abandonment of a known right). Admittedly, defendant did not raise his right to be physically present until after the court had granted the State’s petition. However, he attempted to address the court before its ruling, was rebuked, and then asserted his right at least three times before the hearing’s conclusion.

¶ 18 Further, the circuit court did not make a finding that an in-person hearing would endanger the physical health and safety of any necessary participant. See 725 ILCS 5/110-6(a) (West 2022). Nor does the record contain any indication that, due to operational challenges, the chief judge of the circuit ordered this hearing—or any other hearing at which pretrial release may be revoked—to proceed via a two-way audio-visual communication system. See *id.*

¶ 19 Simply put, defendant had a right, under section 110-6 of the Code, to be physically present for the hearing on the State’s verified petition to revoke his pretrial release. The record does not establish that any of section 110-6’s exceptions are present. Accordingly, we vacate the circuit court’s order granting the State’s petition and remand for a new hearing on the State’s petition, at which defendant must be physically present unless one of the exceptions contained in section 110-6 is satisfied. Given this conclusion, we need not address the other substantive issues raised by defendant.

¶ 20 B. Reassignment on Remand

¶ 21 As a final matter, defendant requests that we reassign the matter to a different judge upon remand. He asserts reassignment “would promote both actual fairness and the appearance of fairness in further proceedings in this matter.”

¶ 22 Under Illinois Supreme Court Rule 366(a)(5) (eff. Feb. 1, 1994) and Rule 615(b)(2) (eff. Jan. 1, 1967), this court has the discretion to reassign a matter to a different judge on remand.

People v. Campbell, 2023 IL App (1st) 220373, ¶ 67. The party seeking reassignment need not show the original judge was actually biased or prejudiced; we may exercise our discretion to remove “any suggestion of unfairness.” *People v. Dameron*, 196 Ill. 2d 156, 179 (2001).

¶ 23 Based on our review of the record, we have no reason to doubt the judge will properly apply the relevant provisions of the Code on remand, and we do not believe there is “any suggestion of unfairness” to be removed. Accordingly, we decline to order the matter reassigned to a different judge on remand.

¶ 24 III. CONCLUSION

¶ 25 For the reasons stated, we vacate the judgment of the circuit court of Kankakee County and remand for a new hearing on the State’s verified petition to revoke pretrial release, at which defendant must be physically present unless one of the exceptions contained in section 110-6 is satisfied.

¶ 26 Judgment vacated; cause remanded.

People v. Gathing, 2023 IL App (3d) 230491

Decision Under Review: Appeal from the Circuit Court of Kankakee County, No. 22-CF-446; the Hon. William S. Dickenson, Judge, presiding.

**Attorneys
for
Appellant:** Anthony Burch, of Chicago, for appellant.

**Attorneys
for
Appellee:** Patrick Delfino and David J. Robinson, of State's Attorneys Appellate Prosecutor's Office, of Springfield, for the People.
