

No. 1-10-0904

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of
)	Cook County, Illinois.
Plaintiff-Appellee,)	
)	
v.)	No. 09 MC5 8131
)	
CHERYL SMITH,)	Honorable Joan Margaret O'Brien,
)	Judge Presiding.
Defendant-Appellant.)	

JUSTICE Murphy delivered the judgment of the court.
Justices Neville and Steele concurred in the judgment.

ORDER

HELD: Post-plea counsel for defendant convicted on a negotiated guilty plea did not file a certificate of compliance as required by Supreme Court Rule 604(d), which applies to retained private counsel and appointed counsel alike.

Pursuant to a negotiated guilty plea in 2009, defendant Cheryl Smith was convicted of domestic battery and sentenced to one year of conditional discharge and time served of 58 days' detention with a two-year order of protection. Defendant, through retained private counsel rather than appointed counsel, filed a motion to withdraw her plea, which the court denied. Defendant contends on appeal that counsel failed to file a certificate as provided in Supreme Court Rule 604(d) (eff. July 1, 2006) and that post-plea counsel was ineffective for not presenting issues

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raised in the written motion or evidence in support of the motion. The State responds that private counsel is not required to file a separate certificate under Rule 604(d) and that post-plea counsel here complied with Rule 604(d) and did not render ineffective assistance.

Supreme Court Rule 604(d), governing appeals from guilty pleas, provides that a defendant must first file a motion to withdraw the plea and requires that counsel be appointed for indigent defendants. Additionally:

"The defendant's attorney shall file with the trial court a certificate stating that the attorney has consulted with the defendant either by mail or in person to ascertain defendant's contentions of error in the sentence or the entry of the plea of guilty, has examined the trial court file and report of proceedings of the plea of guilty, and has made any amendments to the motion necessary for adequate presentation of any defects in those proceedings." Ill. S. Ct. R. 604(d) (eff. July 1, 2006).

Strict compliance with the certificate requirement of Rule 604(d) is required. *People v. Janes*, 158 Ill. 2d 27, 34-35 (1994). Thus, "when defense counsel neglects to file a Rule 604(d) certificate, the appropriate remedy is a remand for (1) the filing of a Rule 604(d) certificate; (2) the opportunity to file a new motion to withdraw the guilty plea *** if counsel concludes that a new motion is necessary; and (3) a new motion hearing." *People v. Lindsay*, 239 Ill. 2d 522, 531 (2011).

In support of its contention that the certificate requirement of Rule 604(d) does not apply to retained private counsel, the State cites *People v. Whitlow*, 86 Ill. App. 3d 858 (1980). The *Whitlow* court stated that the "filing of such a certificate is required of appointed counsel and in the instant case [the defendant] was represented by private counsel. Even if this requirement related to private counsel, the failure to file the certificate is harmless error where counsel had in fact conferred with his client as required by Supreme Court Rule 604(d)." *Whitlow*, 86 Ill. App.

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3d at 875. There are two distinct problems with this holding: the *Whitlow* court failed to cite any authority for the proposition at issue, and the supreme court expressly rejected both harmless error and substantial compliance analysis with regards to the Rule 604(d) certificate requirement in *Janes*. *Janes*, 158 Ill. 2d at 34-35.

By contrast, in *People v. Edwards*, 228 Ill. App. 3d 492, 498 (1992), this court expressly rejected the contention that Rule 604(d) does not apply to private counsel but only appointed counsel. We noted that the State cited no case law to support that contention and found that accepting that contention would defeat a key purpose of Rule 604(d): ensuring that a defendant's constitutional rights are protected. *Edwards*, 228 Ill. App. 3d at 498. "We do not believe that the supreme court intended to provide greater protection to indigent defendants than to defendants who are able to retain private counsel." *Edwards*, 228 Ill. App. 3d at 498.

Here, the State makes virtually the same textual argument it made in *Edwards*. "In making this argument, the State relies on the following sentence from Rule 604(d): 'If the defendant is indigent, the trial court shall order a copy of the transcript as provided in Rule 402(e) be furnished the defendant without cost.'" *Edwards*, 228 Ill. App. 3d at 497. "The defendant discussed until that point [in the Rule] is an indigent defendant," the State argues here. However, we do not read Rule 604(d) that way. The sentence in Rule 604(d) preceding the one relied upon by the State provides that, after a motion to withdraw a plea is filed, the "trial court shall then determine whether the defendant is represented by counsel, and if the defendant is indigent and desires counsel, the trial court shall appoint counsel." Thus, the Rule does not concern only appointed counsel for indigents but expressly requires an inquiry in all cases into whether a defendant has counsel. Moreover, Rule 604(d) requires "defendant's attorney" to file a certificate, rather than "appointed counsel" or similar less-inclusive language. *Cf.* Ill. S. Ct. R. 607 (eff. Dec. 13, 2005)(using term "court-appointed counsel" repeatedly though that Rule concerns only "Appeals by Poor Persons"). We therefore reject the State's contention that "there is nothing in the plain language of the rule to suggest that the subject of the rule changes in the

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sentence setting forth the certificate requirement." We see no reason to carve out an unwritten exception to the clear language of Rule 604(d) as explained even more clearly by the supreme court in *Janes* and *Lindsay*.

Because we are remanding for further proceedings regarding the motion to withdraw defendant's plea, in accordance with *Janes* and *Lindsay*, we need not address her contention that post-plea counsel rendered ineffective assistance.

Accordingly, we vacate the order denying defendant's motion to withdraw her plea and remand this cause for defense counsel to file a Rule 604(d) certificate and have the opportunity to file a new motion to withdraw defendant's guilty plea if counsel concludes that a new motion is necessary.

Vacated and remanded with directions.