

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 by Rule 23(e)(1).

2011 IL App. (3d) 100374-U

Order filed December 21, 2011

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT
A.D., 2011

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 14th Judicial Circuit Whiteside County, Illinois,
Plaintiff-Appellee,)	
v.)	Appeal No. 3-10-0374
)	Circuit No. 09-CF-134
JAMES M. MORENO,)	Honorable
Defendant-Appellant.)	John Hauptman, Judge, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Justices Schmidt and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held:* Where counsel fails to strictly comply with Rule 604(d) the appropriate remedy is to remand the matter to afford the defendant another opportunity to be heard on his Rule 604(d) motion. However, once this remedy is granted, there is no further requirement under Rule 604(d) that successive remands and rehearings will be ordered.

¶ 2 Defendant, James M. Moreno, appeals from the trial court's judgment denying his motion to withdraw his guilty plea. For the reasons that follow, we reverse and remand the matter with directions.

¶ 3

FACTS

¶ 4 On March 25, 2009, defendant was charged by information with two counts of aggravated criminal sexual abuse. Both counts alleged that sometime during December 2007, defendant engaged in sexual intercourse with A.R. A.R. was between the ages of thirteen and seventeen, and defendant was at least five years her senior.

¶ 5 On April 30, 2009, the parties announced that they had agreed to a fully negotiated guilty plea. Under the agreement, defendant was to plead guilty to both counts in exchange for concurrent sentences of twenty-five years' imprisonment. The State agreed to dismiss two other pending cases in which defendant was charged with committing aggravated criminal sexual abuse of other victims, and agreed not to file charges in any other investigations of defendant that were pending at the time.

¶ 6 The parties further agreed that defendant's criminal history included, *inter alia*, three separate burglary convictions in 1993, 1998, and 2002, and a conviction for aggravated criminal sexual abuse in 2002. As a result, defendant was subject to sentencing as a Class X offender on both counts in the instant case.

¶ 7 After admonishing defendant of the nature of the offenses, the possible penalties, and his due process rights, the trial court accepted defendant's plea. Pursuant to the agreement, the court sentenced defendant to concurrent terms of twenty-five years' imprisonment.

¶ 8 On May 12, 2009, the trial court received a letter from defendant indicating that defendant was not satisfied with the performance of his original attorney, assistant public defender, Elwin Neal, and that he wished to withdraw his plea. Defendant subsequently filed a formal motion to withdraw guilty plea. A hearing commenced on the motion, with Neal

representing defendant. The trial court, however, ordered the public defender's office to assign the case to another attorney.

¶ 9 A new hearing was held on defendant's motion to withdraw plea on April 29, 2010. Defendant was represented by assistant public defender, Colleen Buckwalter. After hearing testimony from defendant and Neal, the trial court denied defendant's motion. On May 5, 2010, six days after the trial court's ruling on defendant's motion, Buckwalter filed an attorney certificate pursuant to Supreme Court Rule 604(d) (Rule 604(d) attorney certificate) (Ill. S. Ct. R. 604(d) (eff. July 1, 2006)).

¶ 10 ANALYSIS

¶ 11 The sole ground for defendant's appeal is the failure of Buckwalter to file her Rule 604(d) attorney certificate prior to the hearing on defendant's motion to withdraw guilty plea.¹

According to defendant, Buckwalter's late filing entitles him to new post-plea proceedings. Because strict compliance with Rule 604(d)'s attorney certificate requirement is mandatory, and the rule requires the certificate to be filed before the hearing on a motion to withdraw guilty plea or to reconsider sentences (*People v. Shirley*, 181 Ill. 2d 359, 370-71 (1998)), we agree.

¶ 12 Rule 604(d) provides in pertinent part that before a defendant who pleaded guilty may appeal from a judgment entered on the plea, the defendant must file a motion to withdraw the guilty plea and vacate the judgment within 30 days of the imposition of sentence. Ill. S. Ct. R. 604(d) (eff. July 1, 2006). The rule further provides that in conjunction with the motion the defendant's attorney "shall file with the trial court a certificate stating that the attorney has

¹ We review the construction of a supreme court rule *de novo*. *Robidoux v. Oliphant*, 201 Ill. 2d 324, 332 (2002).

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).

¶ 13 The supreme court's decision in *Shirley* is dispositive of the issue before us. In *Shirley*, the trial court denied the defendant's motion to reconsider the sentence, but the cause was remanded, as defendant's counsel had not complied with Rule 604(d). On remand, the defendant filed a new motion to reconsider the sentence. The trial court denied the motion. Four days later, the defendant's attorney filed both a notice of appeal and a Rule 604(d) certificate. Before the supreme court, the defendant argued that the certificate had not been timely filed, making a second remand necessary. In rejecting this argument, the supreme court held that the tardy filing of a Rule 604(d) certificate does not require a second remand "[w]here, as here, the defendant was afforded a full and fair second opportunity to present a motion for reduced sentencing." *Shirley*, 181 Ill. 2d at 369.

¶ 14 While the *Shirley* court expressly held that a second remand is not necessary, it also held remand is required where counsel initially fails to timely file her Rule 604(d) attorney certificate. Specifically, the court stated:

"Compliance with the motion requirement of Rule 604 permits the trial judge who accepted the plea and imposed sentence to consider any allegations of impropriety that took place *dehors* the record and correct any error that may have led to the guilty

plea. [Citations.] Requiring the defendant's counsel to file the requisite certificate enables the trial court to insure that counsel has reviewed the defendant's claim and considered all relevant bases for the motion to withdraw the guilty plea or to reconsider the sentence. The attorney certificate thereby encourages the preservation of a clear record, both in the trial court and on appeal, of the reasons why a defendant is moving to withdraw his plea or to reduce sentence. [Citation.] Because Rule 604(d) is designed both to protect defendant's due process rights and to eliminate unnecessary appeals, this court requires strict compliance with its requirements, including the filing of the attorney certificate in the trial court. [Citation.]

* * *

Our holding in no way retreats from this court's call for strict compliance with our rules. We observed, in *Janes I*, that after this court's ruling in *Wilk*, the appellate court adhered to the strict compliance mandate and renounced the prior practice of determining whether errors in failing to comply with Rule 604(d) were harmless or prejudicial. [Citation.] We reaffirm the reasoning and disposition of those cases which have faithfully followed the strict compliance standard. In general, strict compliance with the attorney certification component of Rule

604(d) means the certificate must be filed in the trial court, rather than on appeal, as occurred in *Janes I*. *The filing should precede or be simultaneous with the hearing in the trial court*. Such a procedure will insure that the trial court, in considering a defendant's motion to withdraw his or her guilty plea or to reduce sentence, will be apprised that defense counsel has reviewed the proceedings with the defendant and prepared any necessary amendments to the motion. *If this standard of strict compliance is not met, the remedy is a remand to afford defendant another opportunity to be heard on his Rule 604(d) motion*. However, once this remedy is granted, there is no further requirement under Rule 604(d) that successive remands and rehearings will be ordered. (Emphasis added.) *Shirley*, 181 Ill. 2d at 361-71.

¶ 15 Here, there is no dispute that Buckwalter failed to timely file her Rule 604(d) attorney certificate. Thus, we reverse the trial court's denial of defendant's motion to withdraw guilty plea and remand the "to afford defendant another opportunity to be heard on his Rule 604(d) motion". *Shirley*, 181 Ill. 2d at 371.

¶ 16 Reversed and remanded.