

2012 IL App (1st) 102887-U

THIRD DIVISION
March 30, 2012

No. 1-10-2887

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
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 09 CR 13323
)	
ISIAH JOHNSON,)	Honorable
)	Thomas M. Tucker,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE STEELE delivered the judgment of the court.
Justices Murphy and Salone concurred in the judgment.

ORDER

- ¶ 1 *Held:* Where defense counsel failed to file a certificate of compliance under Supreme Court Rule 604(d) (eff. July 1, 2006), order denying defendant's motion to withdraw his guilty plea was reversed; cause remanded for strict compliance with the rule.
- ¶ 2 Following his negotiated plea of guilty to aggravated battery with a firearm but prior to the sentencing hearing, defendant Isiah Johnson filed a motion, which he later amended, to withdraw his guilty plea. The amended motion was denied and defendant was subsequently sentenced to 21 years in prison pursuant to the plea agreement. On appeal, defendant contends:

(1) the trial court erred in denying his motion to withdraw his plea because the court's guilty plea admonishments were inadequate and confusing; (2) the court erred in failing to appoint new counsel to present the motion to withdraw his plea; (3) defense counsel's failure to file a certificate pursuant to Supreme Court Rule 604(d) (eff. July 1, 2006) before presenting the motion to withdraw guilty plea made the hearing on the motion a nullity; and (4) the court erred in failing to order that defendant be tested to determine his fitness at the time he entered his guilty plea. We reverse and remand for strict compliance with the requirements of Rule 604(d).

¶ 3 Defendant was charged by indictment with five counts of attempted first degree murder and one count each of aggravated battery with a firearm and aggravated discharge of a firearm in connection with the shooting of Daniel Martinez on June 9, 2009. On April 14, 2010, the parties held a conference with the trial court pursuant to Supreme Court Rule 402(d)(2) (eff. July 1, 1997), at which defendant was represented by assistant Public Defender Halloran. Subsequently, the parties appeared in open court and the court informed defendant that, although in his case the minimum sentence for the charge of attempted first degree murder was 31 years (6-year minimum for attempted murder plus 25 years for use of a firearm in committing the offense), the conference had yielded a possible alternative when defendant's counsel had requested a minimum sentence of 21 years. The court advised defendant that if he were willing to plead guilty in return for a 21-year sentence, the State would seek authorization for defendant to plead guilty to another count of the indictment. Defendant replied: "I will think about it."

¶ 4 The matter was passed. When the case was recalled, assistant Public Defender Halloran advised the court: "The defendant is asking if you would take his plea today, and if he could be sentenced on another date." The court conducted a change-of-plea hearing in which defendant pleaded guilty to aggravated battery with a firearm, a nonprobationable Class X felony punishable by 6 to 30 years in the penitentiary and fines ranging up to \$25,000. After explaining

what rights defendant would be giving up by pleading guilty, the court inquired whether defendant was pleading guilty of his own free will, without threat or intimidation, and defendant replied that he was. The State presented as a factual basis for the plea that on June 9, 2009, defendant approached Daniel Martinez and two other persons in an alley in Cicero; defendant asked Martinez whether he was a street gang member; and defendant produced a nine-millimeter handgun and fired at Martinez, striking him in the jaw and mouth and causing great bodily harm to Martinez. Defendant agreed that those were the facts forming the basis of his guilty plea, and the court found him guilty. The cause was continued to May 6, 2010, for sentencing.

¶ 5 On April 27, 2010, defendant filed a *pro se* "Petition to Withdraw Guilty Plea," asserting he had received inadequate representation by counsel. Defendant alleged that his counsel failed to file a motion to quash identification and also that defendant "has agreed to the plea agreement only under the misleading pressure" by counsel that defendant would have to serve only 50% of the 21-year prison sentence, when in fact he would be required to serve 85% of the sentence.

¶ 6 On May 6, 2010, assistant Public Defender Halloran was not present and the matter was continued to June 18, 2010. The record contains no transcript for June 18. Subsequently, defendant amended his petition to withdraw his guilty plea. The amended pleading was filed in court on June 29. The amendment alleged as a basis for withdrawing his plea that defendant "was diagnosed with a mental illness in the past and was prescribed certain psychotropic medication, and has a psychiatric history," and that he was not taking his medication when he pleaded guilty. The amended motion also contended that because defendant "was diagnosed with ADHD and given medication for mood swings, depression, and other mental illness, *** defendant was not capable of making [a] reasonable plea ***." Defendant asserted his guilty plea was not intelligently made and that his attorney was ineffective for not researching defendant's mental history and obtaining a fitness hearing.

¶ 7 On July 1, noting the contentions in the amended motion that defendant had a history of mental illness and use of prescribed psychotropic medications, the court stated that it would "have a BCX done on" defendant to determine his fitness at the time he pleaded guilty. Defendant's public defender advised the court: "Your Honor, I would indicate to the court that I lacked any information regarding Mr. Johnson's assurances that he has any mental health issues." The court responded: "And I didn't have any information as to that, either."

¶ 8 On August 11, Jonathan Kelly, M.D., evaluated defendant. In a letter dated August 16, Dr. Kelly sent the requested evaluation to the trial court. However, Dr. Kelly's evaluation addressed defendant's fitness to be sentenced, not his fitness at the time of the guilty plea. The evaluation stated that "[t]he defendant is presently FIT FOR SENTENCING. He understands the charge against him and the nature and purpose of legal proceedings. He is able to ascertain his defense. He understands that he was found guilty of committing a crime and that his sentence is punishment for having been convicted. He understands why he was convicted and the extent of sentence he is facing. He understands he has a right to appeal his conviction. The defendant is not on psychotropic medication."

¶ 9 The parties appeared before the court again on August 20 for the purpose of proceeding on defendant's motion to withdraw his plea. At that time, defendant advised the court he wanted to fire his attorney and obtain another lawyer. The case was passed to secure the attendance of another public defender. When the case was recalled, however, the court informed defendant he would continue to be represented by Mr. Halloran. Defendant stated he wanted to proceed *pro se* but needed additional time to prepare. The case was continued to a later date, at which time the assistant State's Attorney advised the court that the transcript of the guilty plea showed the defendant "was fully admonished to everything, including the 85 percent." The court agreed: "Yes, that's correct. And we did have a conference on the case. It was discussed at the

conference. So I know, Counsel, you've discussed that with your client prior to the plea, is that correct, sir?" Defendant's counsel replied, "Yes, it is."

¶ 10 The court denied defendant's motion to withdraw his plea. Defendant was sentenced to 21 years in prison. After pronouncing sentence, the trial court admonished defendant pursuant to Supreme Court Rule 605(c) (eff. Oct. 1, 2001). Following sentencing, defendant did not file a motion to vacate his plea of guilty but did file a timely notice of appeal.

¶ 11 On appeal, defendant argues that the trial court erred in denying his motion to vacate his guilty plea because the court's Rule 402 guilty plea admonishments were inadequate, the court erred in failing to appoint new counsel to present the motion to withdraw his plea, defense counsel's failure to file a Rule 604(d) certificate made the hearing on the motion a nullity, and the court erred in failing to order that defendant's fitness at the time he pleaded guilty be tested.

¶ 12 Rule 604(d) provides in pertinent part:

"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 *** withdraw the plea of guilty and vacate the judgment. *** 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."

¶ 13 In *People v. Wilk*, 124 Ill. 2d 93, 107 (1988), our supreme court reiterated its longstanding rule "that compliance with Rule 604(d) is a condition precedent to an appeal" and that if a defendant fails to file a motion to withdraw in compliance with the rule, an appeal from the guilty plea must be dismissed. As stated above, the rule imposes obligations on both the defendant and counsel, and both must strictly comply with its requirements. *People v. Janes*, 158 Ill. 2d 27, 35 (1994). "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 and/or reconsider the sentence, if counsel concludes that a new motion is necessary; and (3) a new motion hearing." *People v. Lindsay*, 239 Ill. 2d 522, 531 (2011).

¶ 14 Here, defendant filed his motion to withdraw the plea, and the trial court ruled on it prior to the imposition of sentence. On appeal, both parties treat defendant's motion to withdraw the plea as a proper motion to vacate the plea pursuant to Rule 604(d). If we accept the parties' position that defendant properly followed Rule 604(d) prior to filing this appeal, we must necessarily conclude that his appointed counsel did not. As stated above, Rule 604(d) requires counsel representing a defendant on a motion to vacate a guilty plea to file a certificate stating that he consulted with defendant regarding his contentions of error, examined the court file and the guilty plea transcript, and made corresponding amendments, if any, to the motion. The record contains no such certificate.

¶ 15 Although both parties note counsel's noncompliance with Rule 604(d), neither party seems to recognize the effect of this procedural defect on this appeal. Defendant asks us to decide the merits of the appeal and remand for compliance with Rule 604(d), while the State asks us to affirm the denial of defendant's motion to vacate and remand for the *pro forma* filing of a Rule 604(d) certificate. Both are wrong. The remedy for noncompliance with Rule 604(d) is a

remand for strict compliance - nothing more. Because defendant will have an opportunity on remand to file a new motion to withdraw the plea, it would be premature for this court to consider the issues raised in his current motion. See *People v. Janes*, 158 Ill. 2d 27, 36 (1994).

¶ 16 In reaching this conclusion, we reject the State's reliance on *Lindsay*, 239 Ill. 2d at 531, and *People v. Shirley*, 181 Ill. 2d 359, 369 (1998). Neither of those cases support the State's claim that this court may address and affirm the trial court's denial of defendant's motion to withdraw the plea and remand only for the filing of a Rule 604(d) certificate. *Lindsay* and *Shirley* involved situations where the reviewing court had already remanded for strict compliance with the rule, and the question in the subsequent appeals was whether the compliance on remand was sufficient. Nothing in those cases suggests that this court may overlook defense counsel's failure to file a Rule 604(d) certificate and reach the merits of this appeal.

¶ 17 Accordingly, we reverse the order of the circuit court denying defendant's motion to withdraw his plea and remand the cause to the trial court to allow defendant the opportunity to file a new motion to withdraw his guilty plea and for a hearing on that motion in full compliance with Rule 604(d).

¶ 18 Reversed and remanded with directions.