

No. 1-10-3706

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. 10 MC2 1572
)	
KEVIN CHEATEM,)	Honorable
)	Timothy J. Chambers,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE QUINN delivered the judgment of the court.
Justices Cunningham and Harris concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court erred in denying defendant's *pro se* motion to withdraw his guilty plea without first having appointed counsel to represent defendant in compliance with Supreme Court Rule 604(d).

¶ 2 Defendant Kevin Cheatem¹ pleaded guilty to one count of misdemeanor domestic violence and was sentenced to a 12-month term of conditional discharge. Defendant timely

¹While defendant's name is spelled "Cheatem" on his notice of appeal and, therefore, was docketed as such in this court, his name is spelled "Cheatom" in documents in the record.

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moved *pro se* to withdraw his guilty plea and the trial court summarily denied the motion. On appeal, defendant asserts the trial court erred in failing to appoint counsel for him pursuant to Supreme Court Rule 604(d) (eff. July 1, 2006) on his *pro se* motion to withdraw his guilty plea. We reverse the order denying the motion to withdraw plea and remand with directions.

¶ 3 Defendant was charged by complaint with misdemeanor domestic violence. The case pended for six months, during which time it was continued six times, including four times on defendant's motion in order to obtain counsel. On October 27, 2010, represented by an assistant Public Defender, defendant entered a jury waiver and a guilty plea to one count of domestic battery. During the change-of-plea hearing, defendant acknowledged the charge and the possible sentence, as well as the rights he would be forfeiting by changing his plea to guilty, and asserted that he was pleading of his own free will. The factual basis for the plea revealed that on April 10, 2010, defendant struck Tina Galbreath-Garron, his sister-in-law, on the side of her face and jowl with his fist, resulting in bruising and swelling to her face. Defendant was sentenced to one year of conditional discharge and was ordered to attend domestic violence counseling and to have no contact with Galbreath-Garron. The record is not clear whether defendant's plea was the product of a negotiated plea agreement involving a specific sentence recommendation by the State. However, at the end of the hearing the assistant State's Attorney advised the court that, "as part of the agreement," he amended the domestic battery from a charge of causing bodily harm to a family or household member (720 ILCS 5/12-3.2(a)(1) (West 2010)) to making physical contact of an insulting or provoking nature with a family or household member (720 ILCS 5/12-3.2(a)(2) (West 2010)).

¶ 4 On November 15, 2010, defendant had the case placed on the court's call, appeared before the same judge who had taken the guilty plea, and orally informed the court that he wished to withdraw his guilty plea. Defendant asserted that he was innocent and stated: "I pled guilty because the Public Defender basically told me I had a one[-]out-of-ten chance *** of going to

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jail." Defendant contended that he pleaded guilty because he "was under duress" and wanted to defend himself against the charge. The case was passed and recalled, after which an assistant Public Defender (APD) stepped up with defendant and stated he had spoken to defendant about his motion to vacate his guilty plea. The APD stated that defendant was deciding whether to proceed on his motion, and he had informed defendant "that before any decisions would be made, if he seeks to go forward, that the Court would need the transcript of the proceedings from the last date to see if all the proper conditions were met."

¶ 5 Speaking to the merits of the case, defendant stated: "I feel like I defended myself. I was attacked." Defendant said he had to plead guilty to stay out of jail. The following exchange took place between the court and defendant:

"THE COURT: I did the plea. I don't do the plea unless there's a sufficient factual basis. There was.

THE DEFENDANT: Sir, I'm not - -

THE COURT: I asked you repeatedly if you were pleading guilty. On each occasion you said yes. It seems to me you simply changed your mind here, Mr. Cheatom.

THE DEFENDANT: No, I didn't just change my mind. I felt like I was guilty all the time, but I had to think I'm guilty in order to stay out of jail. I was told I have a one-in-ten chance of not going to jail."

¶ 6 Defendant repeated that he had acted in self-defense against the complainant and alluded to other misdemeanor convictions he had. The court asked whether defendant had appealed any of the prior convictions and he replied: "Well, I don't know too much about the court and how it works. I'm not a lawyer. *** I can't afford a lawyer." Immediately after defendant's statement, the court ruled: "Your pro se motion to withdraw your freely and voluntarily entered plea of guilty is denied."

¶ 7 On appeal from denial of his motion, defendant contends that Supreme Court Rule 604(d) required the trial court to appoint counsel to assist him with his *pro se* motion to withdraw his guilty plea. Defendant asserts that we must reverse the denial of his *pro se* motion and remand for further proceedings, including appointment of counsel to assist him in preparing a new motion, a free transcript of the guilty plea proceeding, and a hearing on his new motion.

¶ 8 Rule 604(d) prescribes the procedure for a defendant's appeal from a judgment entered upon a guilty plea. The rule mandates that no appeal from a judgment entered upon a plea of guilty shall be taken unless the defendant files in the trial court, within 30 days of sentencing, a motion to withdraw the guilty plea and vacate the judgment thereon. The motion must be in writing and state the grounds therefor, and must be presented promptly to the trial judge who sentenced the defendant. The rule further states in pertinent part: "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. If the defendant is indigent, the trial court shall order a copy of the transcript *** be furnished the defendant without cost."

¶ 9 Fundamental fairness requires that a defendant be afforded a full opportunity to explain the allegations of his Rule 604(d) motion and that he receive the assistance of counsel to prepare and present the motion. *People v. Smith*, 365 Ill. App. 3d 356, 359 (2006) and cases cited therein. The motion should not be denied until that representation has been obtained. *People v. Pegues*, 277 Ill. App. 3d 884, 888 (1996). A trial judge is required to ascertain whether an indigent defendant desires counsel, even if the defendant makes no specific request for counsel. *Smith*, 365 Ill. App. 3d at 359; *People v. Griffin*, 305 Ill. App. 3d 326, 330 (1999). The judge may be required to make such an inquiry even if the defendant does not comply with the written-motion requirement of Rule 604(d). *Id.* We review a trial court's compliance with supreme court rules *de novo*. *Smith*, 365 Ill. App. 3d at 358.

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¶ 10 In the case *sub judice*, defendant appeared before the court 19 days after his guilty plea and represented that he wished to withdraw his plea because he "was under duress" when he pleaded guilty. On appeal, defendant interprets the source of the duress as having come from his trial counsel--he now contends that the basis of his 604(d) motion was that "he felt he was forced to plead guilty by his appointed public defender." The State interprets defendant's claim on appeal as a posttrial claim of ineffectiveness of counsel similar to that raised in *People v. Krankel*, 102 Ill. 2d 181 (1984). Citing *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003), the State responds that the trial court considered the factual basis of defendant's 604(d) motion, determined it had no merit, and thus properly denied the motion without appointing counsel. The State invites us to reject defendant's claim on its merits because his assertion of ineffective counsel lacked any factual basis.

¶ 11 In presenting his motion to the trial court, defendant did not request counsel but stated that he could not afford an attorney. We find that Rule 604(d) required that when defendant made it known to the trial court he wished to withdraw his previous plea of guilty, the court was obligated either to appoint counsel, even without a specific request by defendant, or to make a finding that defendant knowingly waived his right to counsel. *Smith*, 365 Ill. App. 3d at 360.

¶ 12 Here, as in *Smith*, the trial court failed to (1) appoint counsel for defendant, (2) inquire whether defendant sought counsel, or (3) obtain a waiver of counsel to assist defendant with his motion. We observe that defendant did enjoy access to an attorney when, during its consideration of defendant's motion, the court passed the case briefly. When the case was later recalled, an APD stepped up with defendant and stated: "The Court asked me to speak to [defendant] briefly about his motion to vacate his plea of guilty ***." The APD told the court only that defendant was deciding whether to proceed on his motion and that he had told defendant the court would need the transcript of the guilty plea before proceeding. The APD did not file an appearance on defendant's behalf nor reveal anything in his brief statement to the court

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to indicate he had advised defendant concerning the legal adequacy of defendant's motion. Accordingly, here, as in *Smith*, we find that the trial court failed to comply with Rule 604(d) and that we must reverse the order denying defendant's motion and remand this cause. Upon remand, the trial court should ascertain whether defendant is eligible for and desires appointment of counsel to assist him in preparing a new motion and should appoint counsel if that is defendant's wish. If the trial court determines defendant is indigent, the court should order that the transcript of the guilty plea hearing be furnished defendant without cost.

¶ 13 We note that the record as a whole indicates defendant's remark about "duress" was not a claim of ineffectiveness of his appointed trial counsel to plead guilty, but a reference to the one-in-ten chance he might be sentenced to prison if he went to trial and was found guilty. Whatever the actual basis of his claim, however, we express no opinion as to the merits of defendant's motion, as that determination belongs in the first instance to the trial court. *Pegues*, 277 Ill App. 3d at 888-89. We decline the State's invitation to draw a legal conclusion about defendant's motion before he has had the opportunity to consult with an attorney to ensure that his motion is legally adequate to challenge the judgment on his guilty plea. *Smith*, 365 Ill. App. 3d at 361; *People v. Barnes*, 291 Ill. App. 3d 545, 551 (1997).

¶ 14 Under our authority pursuant to Illinois Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), we reverse the trial court's order summarily denying defendant's Rule 604(d) motion and remand the cause for further proceedings consistent with this order.

¶ 15 Reversed and remanded.