2012 IL App (2d) 110605-U
No. 2-11-0605
Order filed August 17, 2012

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Winnebago County.
Plaintiff-Appellee,	)	
v.	)	No. 08-CF-3577
LEE A. JOHNSON,	)	Honorable John R. Truitt,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Birkett concurred in the judgment.

ORDER

Held: (1) The trial court did not abuse its discretion in sentencing defendant, as the court was not required to place "primary emphasis" on the seriousness of the offense (as opposed to defendant's criminal record), which, in any event, the court properly found would be deprecated by a minimal sentence; (2) defense counsel's Rule 604(d) certificate strictly complied with the rule although it did not specify the method by which he consulted with defendant and although it stated that he had ascertained defendant's contentions of error in the sentence "or" the plea; (3) defendant did not show that counsel was ineffective on his postplea motion, as he did not show that anything counsel could have done probably would have changed the outcome.

¶ 1 Defendant, Lee A. Johnson, entered a guilty plea in the circuit court of Winnebago County to a single count of aggravated battery (720 ILCS 5/12-4(b)(10) (West 2008)). In exchange for

defendant's plea, the State dismissed pending charges against him in other cases, but there was no agreement as to the sentence defendant would receive. The trial court imposed an extended-term sentence of 6½ years' imprisonment. Defendant moved to withdraw his plea or, in the alternative, for reconsideration of his sentence. The trial court denied the motion and this appeal followed. Defendant argues that his sentence was an abuse of the trial court's discretion. He alternatively argues that his attorney failed to comply with Illinois Supreme Court Rule 604(d) (eff. July 1, 2006) and to represent him adequately at the hearing on his postplea motion. We affirm.

¶ 2 As the factual basis for defendant's guilty plea, it was stipulated that, if the matter proceeded to trial, the State would present evidence that, in September 2008, defendant kicked Bland Childress in the back while Childress was sitting on the steps in front of his residence. Childress, who was over 60 years of age, fell face-first on the steps. After defendant entered his plea, the trial court continued the matter for sentencing and ordered the preparation of a presentence investigation report (PSI). The PSI indicated that defendant had been convicted of numerous criminal offenses, including, *inter alia*, robbery, forgery, and possession of a controlled substance. At defendant's sentencing hearing, a Winnebago County sheriff's deputy testified that on October 22, 2009, while working undercover, he spoke by telephone with an individual using the name "Flame" and made arrangements to purchase crack cocaine at a specified location. Flame indicated that he would be driving a white car. After arriving at the location where the transaction was to take place, the deputy saw a white car driven by defendant pull into a parking lot. The deputy approached defendant. Defendant was arrested after selling the deputy white powder packaged in the corners from a plastic baggie. The powder was tested and found to contain neither cocaine nor heroin.

¶ 3 Defendant's mother, Carrie Lee Johnson, testified that defendant was the father of four children ranging from 14 to 18 years of age and that defendant was involved in his children's lives. Ms. Johnson further testified that she suffered from serious health problems. Prior to his arrest, defendant had helped take care of her. She stated that it would be a hardship for her if defendant were incarcerated for a long period. Ms. Johnson testified that she was in a relationship with the victim. She indicated that the victim had told her that he did not want to see defendant punished harshly.

¶ 4 In pronouncing sentence, the trial court stated that "the biggest factor in aggravation, quite frankly, is the defendant's prior criminal history." The court indicated that defendant was a poor candidate for probation and that a sentence in the "minimal range" would be inappropriate because "it would deprecate the seriousness of the offense [and] wouldn't be consistent with the ends of justice." The court also noted the evidence that defendant had sold a counterfeit substance to a law enforcement officer. The court observed that the transaction (which occurred in October 2010) "obviously was at a time when the defendant was out on bond on [the aggravated battery charge]."

¶ 5 The following general principles govern our review of the trial court's sentencing decision:

> "The Illinois Constitution requires that '[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship.' [Citation.] A sentence within the statutory limits for the offense will not be disturbed unless the trial court has abused its discretion. [Citation.] An abuse of discretion occurs if the trial court imposes a sentence that 'is greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense.' [Citation.]" *People v. Flores*, 404 Ill. App. 3d 155, 157-58 (2010).

In imposing sentence, "the court must consider 'the nature and circumstances of the crime, the defendant's conduct in the commission of the crime, and the defendant's personal history, including his age, demeanor, habits, mentality, credibility, criminal history, general moral character, social environment, and education.' " *People v. Martin*, 2012 IL App (1st) 093506, ¶ 48 (quoting *People v. Maldonado*, 240 Ill. App. 3d 470, 485-86 (1992)).

¶ 6 Defendant argues that the trial court abused its discretion because, in determining defendant's sentence, the court focused on his criminal record. According to defendant, the trial court should have placed "primary emphasis" on the seriousness of the crime. The argument is meritless. To be sure, it has often been said that the seriousness of the offense is the most important sentencing factor. See, *e.g.*, *People v. Brazziel*, 406 Ill. App. 3d 412, 435 (2010); *Flores*, 404 Ill. App. 3d at 159; *People v. Hernandez*, 204 Ill. App. 3d 732, 740 (1990); *People v. Johnson*, 159 Ill. App. 3d 991, 1001 (1987). At the same time, however, it is also true that "[t]he weight to be accorded each factor in aggravation and mitigation in setting a sentence of imprisonment depends on the circumstances of each case" and "[a]s long as the court does not consider incompetent evidence, improper aggravating factors, or ignore pertinent mitigating factors, it has wide latitude in sentencing a defendant to any term within the statutory range prescribed for the offense." *Hernandez*, 204 Ill. App. 3d at 740. Accordingly, notwithstanding the significance accorded to the seriousness of the crime, our review of the trial court's sentencing decision does not involve divining the precise weight the trial court gave to each relevant factor or upon which factor the trial court placed "primary emphasis."

¶ 7 The record here does not show that the trial court considered any improper evidence or ignored any relevant evidence. In particular, it is clear that the trial court considered the seriousness

of the offense—the court specifically found that a "minimal" sentence would deprecate the seriousness of the offense. We therefore find no abuse of discretion.

¶ 8 We next consider whether defendant's attorney complied with Rule 604(d). That rule requires an attorney representing a defendant who has moved to withdraw a guilty plea, or to reconsider a sentence imposed after a plea of guilty, to certify that he or she "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). It is well established that "[d]efense counsel must strictly comply with Rule 604(d)'s certificate requirement, and, when counsel fails to do so, the case must be remanded to the trial court for proceedings in compliance with the rule." *People v. Love*, 385 Ill. App. 3d 736, 737 (2008).

¶ 9 Here, defendant's attorney filed a certificate stating as follows:

> "I hereby state that I have consulted with the Defendant, LEE ANDREW JOHNSON, by mail and/*or* in person to ascertain defendant's contentions of error in the sentence *or* the entry of the plea of guilty; have examined the trial court file and report of proceedings of the plea of guilty; and have made any amendments to the motion necessary for adequate presentation of any defects in those proceedings." (Emphases added.)

Defendant argues that "[t]he certificate was deficient because it used the disjunctive 'or' in two places." According to defendant, counsel should have specified the manner in which he consulted with him. Defendant also argues that, because defendant's motion challenged both his guilty plea and, alternatively, his sentence, counsel should have certified that the consultation pertained to

possible errors in the entry of the plea *and* the imposition of sentence. The arguments are meritless. We know of no requirement that counsel must specify precisely how he or she communicated with the defendant. It is sufficient that the certificate shows that at least one of the approved means on communication was used, even if it is not clear which one. See *People v. Prather*, 379 Ill. App. 3d 763, 767-68 (2008) (finding certificate deficient, but not because, as the defendant had argues, the certificate failed to specify the method of consultation). Nor do we find fault in the portion of the certificate stating that counsel consulted with defendant "to ascertain defendant's contentions of error in the sentence *or* the entry of the plea of guilty" (emphasis added). This comported with the text of the rule. In any event, we do not read this to mean that counsel limited his consultation to one type of error or the other. Rather, it is reasonably clear from the certificate that counsel consulted with defendant to ascertain what type (or types[1]) of error defendant was asserting.

¶ 10 Defendant also criticizes counsel's performance at the hearing on his Rule 604(d) motion. Given that counsel fulfilled the specific requirements of the rule, the question presented is simply whether defendant received the effective assistance of counsel. Under the two-prong test set forth

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[1]The word "or" can be inclusive ("A or B, *or both*") as well as exclusive ("A or B, *but not both*"). See *Lake v. Woodcreek Homeowners Ass'n*, 243 P.3d 1283, 1289 (Wash. 2010). The intended usage is usually apparent from the surrounding context. *Id.* Because errors in the entry of the plea and errors in sentencing are not mutually exclusive, it is reasonable to read "or," as used in the certificate, in its inclusive sense. See *Prather*, 379 Ill. App. 3d at 768 (interpreting Rule 604(d) to require counsel to ascertain defendant's contentions of error "in the guilty plea hearing as well as in the sentence") We are therefore confident that counsel addressed both subjects—defendant's plea and his sentence—during the consultation.

in *Strickland v. Washington*, 466 U.S. 668 (1984), a defendant claiming a deprivation of the right to the effective assistance of counsel must establish that counsel's performance "fell below an objective standard of reasonableness" and that the deficient performance was prejudicial in that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 688, 694. Suffice it to say that defendant has not shown that there is anything counsel could have done that would have given rise to a reasonable probability that the outcome below would have been different.

¶ 11 For the foregoing reasons, the judgment of the circuit court of Winnebago County is affirmed.

¶ 12 Affirmed.