

127, one count of aggravated arson in case No. 07-CF-207, and one count each of robbery and aggravated battery in case No. 07-CF-85.

¶ 5 Pursuant to the terms of a negotiated plea agreement, defendant would plead guilty to the charges in 07-CF-127 and 07-CF-207 and would be sentenced to 10 years' imprisonment on each of the charges, with the sentences to run concurrently with each other. The State would agree to dismiss the charges in 07-CF-85.

¶ 6 At the sentencing hearing, defendant and the State agreed to waive the preparation of a presentencing investigation report. The State then recited defendant's criminal history to the court as follows:

"In '98 and '01, he had misdemeanors; however, in '03 a misdemeanor theft was enhanced to a felony. He has a felony conviction from 03-CF-38 for theft. There were a couple misdemeanor domestic batteries."

¶ 7 The court accepted the parties' waiver of a presentencing investigation report, accepted defendant's guilty pleas, and imposed the agreed-upon 10-year sentence.

¶ 8 Defendant subsequently filed *pro se* a motion seeking to withdraw his guilty pleas, contending that he "was not in [his] right mind" when he entered the pleas and that his plea counsel "was not 100% honest" with him. Following a hearing, the court denied defendant's motion.

¶ 9 Defendant then filed a motion to vacate his sentence, arguing that at the time he entered his guilty pleas he believed he would only be required to serve half of his sentence in the Department of Corrections (Department) but that the Department subsequently informed him that he would be required to serve 85% of the sentence in its custody. He asked the court to resentence him in accordance with the terms of the plea agreement as he claims to have understood them at the time he entered his pleas.

¶ 10 Appointed counsel represented defendant at the hearing on the motion to withdraw

his guilty plea, but counsel failed to file a certificate of compliance with Supreme Court Rule 604(d) (eff. Dec. 13, 2005). The court denied defendant's motion. Defendant subsequently filed a motion to reconsider the court's denial of the motion, which was also denied. Defendant filed a timely notice of appeal.

¶ 11

DISCUSSION

¶ 12 On appeal, defendant puts forth two contentions of error. He argues that counsel's failure to file a certificate of compliance with Rule 604(d) mandates a remand to the circuit court for the filing of a new motion to withdraw his guilty plea and a new hearing on the motion. He also contends that his sentences must be vacated because the circuit court permitted the parties to waive preparation of a presentencing investigation report pursuant to section 5-3-1 of the Unified Code of Corrections (730 ILCS 5/5-3-1 (West 2006)) without first making itself aware of any sentences defendant had received as a result of previous convictions. The State has confessed error in regard to defendant's Rule 604(d) argument but opposes vacating defendant's sentences based upon section 5-3-1.

¶ 13

I. Rule 604(d)

¶ 14 Rule 604(d) provides that where a defendant pleads guilty but subsequently files *pro se* a motion to withdraw his plea, appointed counsel must file a certificate averring that he has consulted with the defendant to ascertain the defendant's contentions of error, that he has examined the trial court file and report of proceedings from the plea hearing, and that he has made any amendments necessary for presentation of the motion to the court.

¶ 15 Courts and attorneys must strictly comply with the provisions of Rule 604(d). *People v. Janes*, 158 Ill. 2d 27, 33, 630 N.E.2d 790, 792 (1994). The filing of the certificate of compliance "should precede or be simultaneous with the hearing in the trial court" so that the court "will be apprised that defense counsel has reviewed the proceedings with the defendant and prepared any necessary amendments to the motion." *People v. Shirley*, 181 Ill. 2d 359,

371, 692 N.E.2d 1189, 1195 (1998). The remedy for counsel's failure to strictly comply with Rule 604(d) "is a remand to the circuit court for the filing of a new motion to withdraw guilty plea *** and a new hearing on the motion." *Janes*, 158 Ill. 2d at 33, 630 N.E.2d at 792.

¶ 16 It is undisputed that counsel failed to comply with Rule 604(d). Defendant is thus entitled to a remand of the cause to the circuit court for the filing of a Rule 604(d) certificate of compliance, the opportunity to file a new motion to withdraw his plea, and a hearing thereon. *People v. Lindsay*, 239 Ill. 2d 522, 942 N.E.2d 1268 (2011).

¶ 17 II. Section 5-3-1

¶ 18 Defendant also argues that his sentences must be vacated because the circuit court failed to comply with section 5-3-1 of the Unified Code of Corrections. 730 ILCS 5/5-3-1 (West 2006). The State responds that vacation of the sentences is unwarranted because the court complied with the "spirit and purpose behind Section 5-3-1," and that, regardless, defendant has forfeited the issue on appeal.

¶ 19 Section 5-3-1 provides as follows:

"A defendant shall not be sentenced for a felony before a written presentence report of investigation is presented to and considered by the court.

However, *** the court need not order a presentence report of investigation where both parties agree to the imposition of a specific sentence, provided there is a finding made for the record as to the defendant's history of delinquency or criminality, *including any previous sentence to a term of probation, periodic imprisonment, conditional discharge, or imprisonment.*" (Emphasis added.) 730 ILCS 5/5-3-1 (West 2006).

¶ 20 Compliance with section 5-3-1 is mandatory and not subject to waiver. *People v. Youngbey*, 82 Ill. 2d 556, 564, 413 N.E.2d 416, 420 (1980). As this court held in *People v. Evans*, "[i]n order for the trial court not to order a presentence investigation report, the parties

must agree on a specific sentencing recommendation and section 5-3-1 must be strictly complied with in establishing defendant's history of criminality and delinquency, *including the disposition made of those charges.*" (Emphasis added.) *People v. Evans*, 273 Ill. App. 3d 252, 256, 651 N.E.2d 1143, 1146 (1994).

¶ 21 The State maintains that the court need not consider the specific sentences previously imposed upon a defendant so long as it is aware of a defendant's prior convictions. The State cites to *People v. Perez*, in which the court held that "[a]s long as the trial court is aware of the defendant's criminal history, it has complied with the statutory requirements and may accept the parties' sentencing agreement." *People v. Perez*, 288 Ill. App. 3d 1037, 1047, 681 N.E.2d 173, 180 (1997). This argument, however, ignores the plain language of the statute, which expressly requires that courts make a finding on the record of "any previous sentence to a term of probation, periodic imprisonment, conditional discharge, or imprisonment" imposed as a result of prior convictions. The court here failed to do so, and thus failed to comply with the mandates of section 5-3-1.

¶ 22 The State also asserts that because defendant failed to object to the court's acceptance of the parties' waiver of a presentencing investigation report he has forfeited review of the issue on appeal. As we held in *Evans*, though, compliance with section 5-3-1 is not subject to waiver or forfeiture by a defendant because it is "intended to serve as a useful tool for the sentencing judge, [and] it is not the defendant's personal right which could be waived." *Evans*, 273 Ill. App. 3d at 255, 651 N.E.2d at 1145.

¶ 23 Here, the sentencing court's failure to comply with section 5-3-1 requires that we vacate his sentence and remand for a new sentencing hearing.

¶ 24 CONCLUSION

¶ 25 For the foregoing reasons, defendant's sentences are vacated and the cause is remanded to the circuit court for the filing of a Rule 604(d) certificate of compliance. If

defendant chooses to file a new motion to withdraw his guilty pleas he is entitled to a hearing on the motion. If defendant chooses not to file a new motion to withdraw his pleas or if the court denies such a motion, then the court must either order the preparation of a presentencing investigation report or accept a valid waiver of the report prior to accepting the parties' plea agreement.

¶ 26 Sentence vacated; cause remanded with directions.