

No. 1-11-0181

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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. 09CR18282
)	
LUTHER SPENCER,)	Honorable
)	Charles P. Burns,
Defendant-Appellant.)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Lavin and Justice Epstein concurred in the judgment.

ORDER

HELD: Circuit court judgment denying defendant's post-plea motions reversed and the cause remanded where the requirements of Supreme Court Rule 604(d) and 605(b) were not strictly complied with during post-plea circuit court proceedings.

¶ 1 Defendant Luther Spencer appeals orders of the circuit court denying his *pro se* post-plea motion to withdraw his guilty plea to felony theft as well as his motion reconsider his sentence.

For the reasons set forth herein, we reverse the judgment of the circuit court and remand for

proceedings consistent with this disposition.

¶ 2

I. BACKGROUND

¶ 3 On September 24, 2009, 80-year old Anthony Malhous was a passenger on a CTA bus and had his wallet stolen. Defendant, another passenger on the bus, was subsequently arrested in connection with the incident and charged with theft. 720 ILCS 5/16-1-A(1) (West 2008).

¶ 4 A public defender was subsequently appointed to represent defendant. On January 5, 2010, defendant elected to participate in a Rule 402 conference. Ill. S. Ct. R. 402 (eff. July 1, 1997). After being apprised of the circumstances of the theft charge and defendant's criminal history, the court stated: "If the [d]efendant wants to plead guilty, I'll give him five years." Defendant conferred with counsel, and elected to proceed to trial rather than plead guilty.

¶ 5 Thereafter, on May 26, 2010, after a jury was selected, defendant, against the advice of counsel, addressed the court and stated: "As it stands right now, I feel that if I go to trial, I will be found guilty. Due to the fact that I don't have nobody in my defense but just me. I have three people saying I committed a crime. So what I'm saying is the five [years] you offered me, I would have taken that five years." In response, the court informed defendant that the offer was "off the table" and that the parties would proceed to trial.

¶ 6 At trial, Anthony Malouhos testified that on September 24, 2009, at approximately 5 p.m., he left Northwestern Hospital after receiving chemotherapy treatment for prostate cancer. His friend, Matthew Kavouras, accompanied him that day. After leaving the hospital, Malouhos and Kavouras boarded the #66 Chicago Transit Authority (CTA) bus. Malouhos sat down in one of a set of three vacant seats located near the rear exit door of the bus. Kavouras sat nearby. At

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the time, Malouhos was carrying a black bag over his left shoulder that contained his belongings, including his black leather wallet, which was in the side pocket of the bag. Malouhos testified that defendant got onto the bus "a little bit later," and sat in the seat directly to the left of him. After defendant sat next to him, Malouhos testified that he felt defendant "nudge" him with his elbow several times. Malouhos thought defendant needed more room and he tried to "oblige[] him as much as [he] could."

¶ 7 Once the bus reached the intersection of Chicago Avenue and Ashland Avenue, Malouhos and Kavouras prepared to exit. When he reached the front of the bus, Malouhos reached into his black bag and discovered that his wallet was missing. He panicked and said "my wallet's gone, my wallet's gone." Kavouras then pointed at defendant and said that "he took it." After being identified by Kavouras, defendant approached the front of the bus and handed Malouhos his wallet. Malouhos denied that he had given defendant permission to take his wallet, but acknowledged that he never actually saw defendant take the wallet.

¶ 8 Nicholas Matthew Kavouras testified that he met Malouhos on September 24, 2009, at Northwestern Hospital following Malhouhos' chemotherapy treatment. He explained that he wanted to make sure that Malouhos made it home safely after the hospital visit. Kavouras confirmed that he and Malouhos then boarded the #66 bus on Chicago Avenue.

¶ 9 At this point, in the middle of Kavouras' testimony, defendant interrupted the proceedings and addressed the court as follows: "I want to fire my attorney and plead guilty." The court indicated that it heard defendant make an outburst, but did not hear exactly what defendant said and excused the jury in order to confer with defendant and defense counsel. Outside of the

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presence of the jury, defendant stated: "I want to plead guilty. That's my position. The trial is not in my best interests. I'm not being represented properly. I don't have no right to have no--no--no--no witness to testify on my behalf. I can't win this trial. So I want to plead guilty."

One of defendant's court-appointed attorney's responded: "Well, if it's a defendant's desire to enter a blind plea of guilty, I don't believe any attorney has the right to stop him. We advised [defendant] to keep his mouth shut and be quiet. Our advice has not been heeded. While I think we already reviewed the issue of him having the right to fire us, I don't feel comfortable with the current situation. But I understand the court's ruling. We are counsel's [*sic*] of record. We're prepared to proceed. But I don't know that I can stop any defendant from entering a blind plea."

¶ 10 The court told defendant that it was not required to accept his plea in the middle of trial, but expressed concern as to whether the jury heard defendant's "totally outrageous" outburst. Accordingly, the court elected to poll the jury to ascertain what, if anything, the jury members heard defendant say. Before doing so, the court admonished defendant that if he made "another outburst in front of th[e] jury," he would be held in direct contempt of court and immediately sentenced. The court then questioned each of the 12 jurors and two alternates individually. Several of the jurors acknowledged that they heard defendant's statement, but most of those who heard defendant state that he wanted to plead guilty agreed that they would be able to disregard the statement and not consider it during deliberations. After hearing the responses of the jury members, defense counsel subsequently moved for a mistrial. The court, however, denied the motion, reasoning that "the defendant should not benefit from his own inappropriate behavior."

¶ 11 Defendant, however, again addressed the court and reaffirmed his desire to plead guilty.

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The court advised defendant that the plea would be "blind" with no agreement as to the sentence, and reiterated that the prior 5-year offer was no longer available. Defendant acknowledged that he understood, and indicated that he wished to continue with the plea proceedings. Accordingly, the court had defendant sign a jury waiver and admonished him about the nature of the charges, his rights and the range of potential sentences he could receive given his prior criminal history. In response to inquiries from the trial court, defendant denied that any promises or threats had been made to him in exchange for a guilty plea and stated multiple times that he was pleading guilty of his own free will. The court then accepted defendant's plea, finding that there was a "sufficient factual basis" to support his plea of guilty to theft and that his plea was "freely and intelligently entered into." The cause was then continued for sentencing.

¶ 12 Thereafter, prior to sentencing, defendant filed several *pro se* post-plea motions including a motion to suppress identification, a motion to suppress evidence and quash his arrest, and a motion to withdraw his guilty plea. In the latter motion, filed June 24, 2010, defendant argued that he was denied his right to effective assistance of counsel and stated that he was forced to plead guilty as a result of counsel's deficient representation as well as the court's judicial misconduct.¹ He urged the court to "appoint counsel of private practice" to represent him in

¹A motion to withdraw defendant's guilty plea was also filed by defense counsel. This motion also contained an ineffective assistance of counsel claim. During a status hearing, defense counsel explained that the motion had been filed after counsel had conferred with defendant and learned that he was seeking to withdraw his plea on the basis of ineffective assistance of counsel and had filed a *pro se* motion. When counsel had checked the record,

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upcoming court proceedings "due to conflict of interests, and the ineffective assistance of the Cook County Public Defender's Office."

¶ 13 At a subsequent court date, the court heard from defendant about his motion to withdraw his plea. After questioning and hearing remarks from defendant and defense counsel, the court denied defendant's *pro se* motion to withdraw his plea as well as his request for the assistance of alternative counsel, explaining:

"I don't believe there is any *Krankel* issue here. The motion to withdraw the plea the *pro se* motion that was filed by defendant, *** looks like a boiler plate motion that somebody copied from someplace. The allegation is that the defendant was denied an opportunity to adequately prepare for his defense, that he was forced by defense counsel to go to trial prematurely, that the counsel's performance and decisions undermine the confidence of the outcome of the proceedings, that counsel has failed in it's oath of duty to fundamental fairness, that supposedly the attorney's failed to keep the defendant informed of important developments in the course of the prosecution, that the defendant was forced to plead guilty for the purpose of stopping the trial as the defendant was not prepared for trial, the Public Defender's Office deprived defendant his 6th and 14th Amendment rights to representation. That counsel's representation fell below an

however, no *pro se* motion by defendant had been filed. Accordingly, counsel explained that he filed the motion simply because "there were no other motions that [he] could find in the file."

The cause was subsequently continued to allow defense counsel to read defendant's *pro se* motion, and the hearing that took place thereafter was held to consider defendant's *pro se* filing.

objective standard [of] reasonableness.

* * *

This motion to withdraw the plea of guilty based on competency of Counsel as I see is not well founded. The defendant has not met [his] burden to go into the second phase. I do not believe the defendant has a right to have an attorney representing him with regard to any ineffective assistance."

¶ 14 The court also denied defendant's *pro se* motion to quash arrest and suppress evidence and his motion to suppress identification without conducting a hearing on the motions, explaining: "I don't believe these are timely. I believe these are dilatory, not well founded in facts or law. I'm not going to entertain those motions."

¶ 15 On September 23, 2010, the parties appeared before the court for a status hearing prior to sentencing. On that occasion, defendant addressed the court and stated that he wanted to "fire" his attorneys and represent himself at the upcoming sentencing hearing. Defendant explained that his attorneys were "not representing him" well and that he desired to appear *pro se*. In response, the court acknowledged defendant's right to represent himself, but admonished him about the role of his attorneys at the sentencing phase as well as the potential sentence that could be imposed upon him. After ascertaining that defendant was aware of his rights and the consequences that could result from his decision to fire his attorneys, the court found that defendant was "making a knowing, voluntary, educated and intelligent waiver of his right to an attorney." Defendant then indicated that he wanted the court to reconsider its denial of his motion to withdraw his guilty plea, but his request was denied.

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¶ 16 Thereafter, defendant filed two additional *pro se* motions. One was captioned "motion to be tried as a habitual drug addict and treated for addictive physical and mental illness" and the other was entitled "motion for substitution of judge, for cause." In defendant's motion for substitution, he alleged that Judge Burns left the bench on three occasions during his abbreviated trial and stood next to him so that the victim could make an identification. The motions were heard by Judge Kazmierski and were both denied.

¶ 17 On November 22, 2010, defendant reappeared before Judge Burns and was asked if he was prepared for sentencing. In response, defendant indicated that he had encountered difficulties contacting his witnesses and requested legal representation. The court reminded defendant that he had fired his attorneys but acknowledged that defendant had a right to counsel and that he could continue being represented by the public defenders who had previously been appointed to represent him. Defendant objected, noting that "[m]y public defender is a defendant in one of my motions. I got a motion for ineffective assistance of counsel to one of my public defenders." The court informed defendant that while he had the right to an attorney, he "[did not] have the right to a public defender of [his] choice." Defendant indicated that he "would like the public defender." The court scheduled defendant's sentencing hearing to take place the following day.

¶ 18 On November 23, 2010, in accordance with the court's order, the parties appeared before Judge Burns for sentencing. Defendant addressed the court and stated "I object to [the public defender] being my attorney." He again argued that the public defender had a "conflict of interest" because he had cited the public defender's deficient representation in his earlier *pro se*

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motion to withdraw his guilty plea. The court reminded defendant that he could not "pick and choose which one of the public defenders [he] wanted to represent [him]." The court then informed defendant that the issue of whether his attorney had been ineffective at the time he entered his plea had already been decided and was "not an issue anymore;" rather, his guilty plea had been accepted and the cause had proceeded to sentencing. Defendant agreed to be represented by the public defender during the upcoming sentencing hearing.

¶ 19 During the sentencing hearing that followed, the court heard evidence in aggravation and mitigation. The court recounted the evidence it had heard and found an extended-term sentence was warranted based on defendant's extensive criminal history, which included twelve prior felony convictions and 15 prior misdemeanor convictions, as well as the fact that his victim was a senior citizen. The court ultimately sentenced defendant to nine and one-half years' imprisonment. Immediately after the court announced its sentence, defense counsel filed a motion to reconsider defendant's sentence, which the trial court denied. Counsel did not file a certificate in accordance with Supreme Court Rule 604(d) along with the motion to reconsider defendant's sentence. The court subsequently admonished defendant of his appellate rights, stating: "Okay if you wish to appeal the sentence in the matter, I already denied your motion to withdraw a plea of guilty in this matter, if you wish to appeal that you have to file a written motion within thirty days listing all of the reasons. If you wish to appeal your sentence you can do so by filing a notice of appeal today." Defense counsel immediately filed a notice of appeal with the court. No motion renewing his request to withdraw his guilty plea was filed. This appeal followed.

¶ 20

II. ANALYSIS

¶ 21 On appeal, defendant asserts that the trial court's denial of his post-plea motion to reconsider his sentence must be reversed and the cause remanded because counsel failed to file a certificate along with the motion as required by Supreme Court Rule 604(d). Defendant also argues that remand is warranted because the court failed to properly admonish him about his appeal rights concerning his prior *pro se* motion to withdraw his guilty plea as required by Supreme Court Rule 605(b). Defendant further argues that new conflict-free counsel must be appointed to represent him on remand because his *pro se* motion to withdraw his guilty plea contained an ineffective assistance of counsel claim.

¶ 22 In response, the State acknowledges that counsel failed to file a certificate along with the motion to reconsider defendant's sentence as required by Rule 604(d) and agrees that remand is warranted with respect to this motion. The State disagrees, however, that remand is warranted for additional consideration of defendant's *pro se* motion to withdraw his guilty plea because the motion was filed prior to sentencing and was never renewed after sentencing even though the circuit court admonished him to do so in accordance with Rule 605(b). The State further argues that new counsel need not be appointed on remand because the circuit court sufficiently inquired into the factual basis of defendant's allegations in accordance with the requirements set forth in *People v. Krankel*, 102 Ill. 2d 181 (1984) and determined that defendant failed to set forth a colorable claim of ineffective assistance of counsel and was not entitled to new counsel.

¶ 23 The issue of compliance with a supreme court rule is subject to *de novo* review. *People v. Grice*, 371 Ill. App. 3d 813, 815 (2007); *People v. Smith*, 365 Ill. App. 3d 356, 357 (2006).

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¶ 24 Rule 604(d) sets forth the procedures governing appeals from judgments entered following a guilty plea. In pertinent part, the rule provides as follows:

*"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 the sentence is imposed, files in the trial court a motion to reconsider the sentence, if only the sentence is being challenged, or, if the plea is being challenged, a motion to withdraw the plea of guilty and vacate the judgment. **** The motion shall be presented promptly to the trial judge by whom the defendant was sentenced, and if that judge is then not sitting in the court in which the judgment was entered, then to the chief judge of the circuit, or to such other judge as the chief judge shall designate. 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 as provided in Rule 402(e) be furnished the defendant without cost. *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.* The motion shall be heard promptly, and if allowed, the trial court shall modify the sentence or vacate the judgment and permit the defendant to withdraw the plea of guilty and plead anew. If the motion is denied, a notice of appeal from the judgment

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and sentence shall be filed ***." (Emphasis added.) Ill. S. Ct. R. 604(d) (eff. July 1, 2006).

¶ 25 It is well-settled that Rule 604(d) requires strict compliance. *People v. Janes*, 158 Ill. 2d 27, 33 (1994); *People v. Marquez*, 2012 IL App (2nd) 110475, ¶ 4. Accordingly, if defense counsel neglects to file a Rule 604(d) certificate entirely or if a certificate is filed, but is deficient, the proper remedy is to remand the cause to the trial court to allow 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); see also *Janes*, 158 Ill. 2d at 33.

¶ 26 Here, the record reflects that defense counsel filed a motion to reconsider defendant's sentence immediately following the sentencing hearing, which in turn, was immediately denied. No 604(d) certificate was filed in connection with the motion to reconsider defendant's sentence as required by the rule. Accordingly, the lack of a certificate filed in connection with the motion to reconsider defendant's sentence necessarily warrants remand for: (1) the filing of a Rule 604(d) certificate; (2) the opportunity to file a new motion to reconsider the sentence should counsel deem a new motion necessary; and (3) a new motion hearing if necessary. *Lindsay*, 239 Ill. 2d at 531; *Janes*, 158 Ill. 2d at 33; *Marquez*, 2012 IL App (2nd) 110475, ¶ 9.²

² In light of this decision, we need not consider defendant's argument that the trial court considered improper factors during the sentencing hearing. On remand, defendant will have the opportunity to file a new motion to reconsider his sentence and these contentions may be addressed in a new motion if counsel chooses to do so.

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¶ 27 The aforementioned motion seeking reconsideration of defendant's sentence was the only motion filed following the sentencing hearing. No motion challenging the underlying plea or an accompanying 604(d) certificate was ever filed after defendant's sentence was imposed.

Although defendant had sought to withdraw his plea prior to sentencing, his motion was never renewed following sentencing as required by Rule 604(d). See Ill. S. C. R. 604(d) (eff. July 1, 2006) (" 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 the sentence is imposed*, files in the trial court a motion to reconsider the sentence, if only the sentence is being challenged, or, if the plea is being challenged, a motion to withdraw the plea of guilty and vacate the judgment"); see also *Marquez*, 2012 IL App (2d) 11045, ¶ 14 (recognizing that "a motion filed prior to sentencing does not comply with Rule 604(d) and will not give rise to a right to appeal from the judgment" and that the defendant must "renew the premature motion in order to preserve the right to appeal").

¶ 28 Ordinarily, the filing of timely a Rule 604(d) motion is a "condition precedent" to a defendant's right to appeal a judgment entered on his guilty plea. *People v. Crump*, 344 Ill. App. 3d 558, 561 (2003). Our supreme court, however, has adopted an admonishment exception to this written-motion requirement. *People v. Foster*, 171 Ill. 2d 469, 473 (1996). In creating this exception, the court observed that Rule 605(b), which contains admonishments that must be provided to a defendant regarding his appeal rights following a judgment entered on his guilty plea, is a necessary corollary to the requirements set forth in Rule 604(d), and held that if those admonishments are not provided to the defendant, his non-compliance with the written-motion requirement will not bar him from advancing his claim; rather, the proper remedy is to remand to

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the trial court for proper admonishment. *People v. Dominguez*, 2012 IL 111336, ¶ 11; *Foster*, 171 Ill. 2d at 473; *Crump*, 344 Ill. App. 3d at 561.

¶ 29 Rule 605(b) provides as follows:

"(b) On Judgment and Sentence Entered on a Plea of Guilty. In all cases in which a judgment is entered upon a plea of guilty, other than a negotiated plea of guilty, at the time of imposing sentence, the trial court *shall advise* the defendant *substantially* as follows:

- (1) that the defendant has a right to appeal;
- (2) that prior to taking an appeal the defendant must file in the trial court, within 30 days of the date on which sentence is imposed, a written motion asking to have the trial court reconsider the sentence or to have the judgment vacated and for leave to withdraw the plea of guilty, setting forth the grounds for the motion;
- (3) that if the motion is allowed, the sentence will be modified or the plea of guilty, sentence and judgment will be vacated and a trial date will be set on the charges to which the plea of guilty was made;
- (4) that upon the request of the State any charges that may have been dismissed as a part of a plea agreement will be reinstated and will also be set for trial;
- (5) that if the defendant is indigent, a copy of the transcript of the proceedings at the time of the defendant's plea of guilty and sentence will be provided without cost to the defendant and counsel will be appointed to assist the defendant with the preparation of the motions; and

(6) that in any appeal taken from the judgment on the plea of guilty any issue or claim of error not raised in the motion to reconsider the sentence or to vacate the judgment and to withdraw the plea of guilty shall be deemed waived." Ill. S. Ct. R. 605(b) (eff. Oct. 1, 2001).

¶ 30 Like the requirements in Rule 604(d), the admonishments set forth in Rule 605(b) require strict compliance. *Dominguez*, 2012 IL 111336, ¶ 11.³ To strictly comply with the requirements of the rule, the trial court need not provide a defendant with a verbatim reading of the admonishments. *Id.* Rather, our supreme court has held that the rule is satisfied if the trial court "substantially" advises the defendant of his appellate rights "in such a way that the defendant is properly informed, or put on notice, of what he must do to preserve his right to appeal his guilty plea or sentence. So long as the court's admonitions were sufficient to impart to a defendant the essence or substance of the rule, the court has *** complied with the rule." *Id.* at ¶ 22.

¶ 31 Here, following defendant's sentencing hearing and the denial of his motion to reconsider his sentence, the court admonished defendant as follows:

"Okay if you wish to appeal the sentence in the matter, I already denied your motion to

³ We note that the supreme court's decision in *Dominguez* addressed the admonishments set forth in Rule 605(c), which specifically apply to defendants who enter into negotiated, rather than blind, guilty pleas. The admonishments for defendants who enter blind pleas are set forth in Rule 605(b). Because the admonishments of both sections mirror each other, we find the court's ruling in *Dominguez* and its interpretation of the admonishment requirements to be applicable to the case at bar.

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withdraw a plea of guilty in this matter, if you wish to appeal that you have to file a written motion within thirty days listing all of the reasons. If you wish to appeal your sentence you can do so by filing a notice of appeal today."

¶ 32 The State suggests that the admonishments provided by the court were sufficient because they "substantially advised [him] of the procedure that he was required to follow in order to contest the validity of his underlying plea." Because defendant failed to file the requisite post-sentencing motion, the State argues that he has forfeited his right to seek withdrawal of his plea.

¶ 33 We disagree. The record shows that the court's Rule 605(b) admonishments were incomplete. Contrary to the requirements of Rule 605(b), defendant was not put on notice that: if a post-plea motion were allowed, a trial date would be set; that any charges that may have been dismissed as part of a plea agreement could be reinstated; that he was entitled to a copy of transcript of the proceedings and the assistance of counsel; or that any claim of error not raised in the post-plea motion would be deemed waived. Although defendant was told that if he wished to appeal the trial court's earlier denial of his *pro se* motion to withdraw his plea, he needed to "file a written motion within thirty days listing all of the reasons," we note that this admonishment contradicted the court's prior representations it had made to defendant with respect to the motion to withdraw. Specifically, before defendant's sentence was imposed, in response to his complaints about the earlier denial of his motion to withdraw, the court informed him: "We are at a sentencing hearing. The issues of guilt or innocence ha[ve] been resolved. You have had motions that you filed. They have been denied. Those issues have been perfected for appeal. *** You made your record. Your record is clear." Ultimately, we find that the admonishments

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provided by the trial court were incomplete and did not comply with Rule 605(b). Defendant was not properly put on notice of the steps he needed to take to preserve his right to challenge his plea or the potential consequences that could result from challenging his plea. Accordingly, remand is required for proper Rule 605(b) admonishments. *Dominguez*, 2012 IL 111336, ¶ 11.

¶ 34 Although we agree with defendant that remand is necessary for the filing of a 604(d) certificate and for 605(b) admonishments, we disagree that he is entitled to the representation of new counsel on remand even though his motion to withdraw his plea contains an ineffective assistance of counsel claim.

¶ 35 In *People v. Krankel*, 102 Ill. 2d 181, 189 (1984) our supreme court held that where a defendant files a *pro se* posttrial motion that sets forth a colorable claim that he has received ineffective assistance of counsel, new counsel should be appointed to represent the defendant before the court conducts a hearing on his ineffective assistance claim because an attorney should not be forced to argue in favor of his or her own ineffectiveness. However, post-*Krankel*, courts recognized that "a *per se* conflict of interest does not exist merely because a defense attorney's competence is questioned by his client during post-trial proceedings; rather, the underlying allegations of incompetence determine whether an actual conflict of interest exists." *People v. Perkins*, 408 Ill. App. 3d 752, 762 (2011), citing *People v. Davis*, 151 Ill. App. 3d 435, 443 (1986). Accordingly, "[i]n interpreting *Krankel*, the following rule developed[:] New counsel is not automatically required in every case in which a defendant presents a *pro se* posttrial motion alleging ineffective assistance of counsel. Rather, when a defendant presents a *pro se* posttrial claim of ineffective assistance of counsel, the trial court should first examine the factual basis of

the defendant's claim. If the trial court determines that the claim lacks merit or pertains only to matters of trial strategy, then the court need not appoint new counsel and may deny the *pro se* motion. However, if the allegations show possible neglect of the case, new counsel should be appointed." *People v. Moore*, 207 Ill. 2d 68 (2003). In *Moore*, the court identified three ways in which a trial court may conduct its examination of a defendant's *pro se* ineffective assistance claim: (1) by asking trial counsel to "explain the facts and circumstances surrounding the defendant's allegations"; (2) by engaging in a "brief discussion" with the defendant about the substance of his claim; or (3) by using its own "knowledge of defense counsel's performance at trial" and resolving the claim based on "the insufficiency of the defendant's allegations on their face." *Moore*, 207 Ill. 2d at 78-79.

¶ 36 In this instance, the record shows that the trial court utilized all three of the methods delineated in *Moore* to evaluate defendant's *pro se* ineffective assistance of counsel claim. The court questioned defense counsel about the allegations raised by defendant, discussed the allegations at length with defendant and considered the record and its own recollection about the case, including defendant's actions and the representation provided by defense counsel throughout pre-trial and the interrupted trial proceedings. The court then concluded: "This motion to withdraw the plea of guilty based on competency of Counsel as I see is not well founded. The defendant has not met [his] burden to go into the second [*Krankel*] phase. I do not believe the defendant has a right to have an attorney representing him with regard to any ineffective assistance."

¶ 37 Defendant does not cite *Krankel* or *Moore* or advance any argument that the court's

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inquiry was inadequate; rather, he essentially argues that the court erred in making any inquiry at all and that new counsel should have been automatically appointed once it became apparent that he was advancing an ineffective assistance of counsel claim. Defendant's argument is unavailing. See *People v. Dean*, 2012 IL App (2d) 110505, ¶ 14 (recognizing that a defendant who files a *pro se* motion to withdraw his guilty plea on the grounds that he received ineffective assistance of counsel is not automatically entitled to new counsel; rather the "operative concern" is simply whether the trial court properly inquired into the underlying factual allegations of ineffectiveness contained in the defendant's post-plea claim). Where, as here, defendant filed a *pro se* motion to withdraw his guilty plea on the grounds that he received ineffective assistance of counsel and the court conducted an inquiry into his claims and deemed them conclusory and meritless, the court properly denied his request to appoint new counsel. *Id.* at 15. Defendant is thus not entitled to the appointment of new counsel on remand.

¶ 38 As a final matter, we decline defendant's request to assign the matter to another judge on remand. He suggests that a different judge should hear the matter "to avoid any appearance of impropriety." Although we acknowledge that a reviewing court has the authority to assign a case to a new judge on remand if there are circumstances which call into question a judge's impartiality (*Eychaner v. Gross*, 202 Ill. 2d 228, 279 (2002)), we do not find, and defendant does not suggest, that any such circumstances exist. We acknowledge that defendant did advance a judicial misconduct claim in his motion to withdraw his plea. Specifically, defendant alleged that Judge Burns had left the bench on several occasions during the trial and stood by defendant during Anthony Malouhos' testimony to assist Malouhos in identifying defendant. The record,

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however, reveals that although Judge Burns did leave the bench during Malouhos' testimony, he did so to better view Malouhos, who was testifying from his wheelchair in front of the witness stand, as he was gesticulating and attempting to show how he was sitting and how he was holding his bag prior to the theft, and not to signal Malouhos to identify defendant. We note that defendant's claim of judicial misconduct was considered by Judge Kazmierski and found to be without merit and defendant abandoned his claim of judicial misconduct on appeal. As such, we conclude that reassignment is not necessary on remand.

¶ 39

III. CONCLUSION

¶ 40 Accordingly, we reverse the judgment of the circuit court and remand for proceedings consistent with this disposition.

¶ 41 Reversed and remanded.