

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).

2013 IL App (4th) 120134-U
NO. 4-12-0134
IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

FILED
January 18, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Douglas County
JOSE ASCENCION PACHECO,)	No. 06CF104
Defendant-Appellant.)	
)	Honorable
)	Chris E. Freese,
)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Presiding Justice Steigmann and Justice Appleton concurred in the judgment.

ORDER

- ¶ 1 *Held:* The appellate court remanded with directions, concluding (1) it possessed jurisdiction to address the \$500 public defender reimbursement fee, but (2) defense counsel failed to strictly comply with Illinois Supreme Court Rule 604(d).
- ¶ 2 In October 2007, defendant, Jose Ascencion Pacheco, entered an open plea of guilty to criminal sexual assault. In December 2007, the trial court sentenced defendant to 15 years in prison, followed by 2 years' mandatory supervised release (MSR), and ordered defendant to pay various assessments, including a \$500 public defender reimbursement fee. On direct appeal, this court vacated defendant's sentence and remanded because the trial court sentenced defendant to a term of MSR below the statutory minimum. *People v. Pacheco*, No. 4-10-0459 (Mar. 7, 2011) (unpublished order under Supreme Court Rule 23).
- ¶ 3 On July 14, 2011, the trial court resentenced defendant to 14 years' imprisonment

with a 3-year MSR term to follow. That same day, defendant filed a motion to withdraw his guilty plea. Defendant's hired counsel, Ronald Tulin, orally argued the motion. The court subsequently denied the motion, and Tulin requested the clerk file a notice of appeal, stating he no longer represented defendant. The clerk filed a notice of appeal and the court appointed the office of the State Appellate Defender (OSAD) to represent defendant on appeal.

¶ 4 On August 8, 2011, defendant filed a *pro se* motion for reduction of sentence, motion to withdraw guilty plea and vacate sentence, and motion to proceed as a poor person and for appointment of counsel. The trial court struck the *pro se* pleadings "[b]ecause the defendant ha[d] an attorney appointed to represent him." In September 2011, this court entered an order for summary remand for the filing of a Supreme Court Rule 604(d) certificate. *People v. Pacheco*, No. 4-11-0645 (Sept. 8, 2011) (agreed order remanding). The trial court scheduled a hearing for further Rule 604(d) proceedings, and Tulin filed a motion to be excused, contending he had been hired only to handle defendant's direct appeal and he argued defendant's motions on remand because defendant was unable to do so *pro se*. The trial court denied Tulin's motion because Tulin was "trial counsel of record" and had not filed a motion to withdraw.

¶ 5 In October 2011, Tulin filed a motion to withdraw, and in January 2012, Tulin filed a Rule 604(d) certificate, which stated that he had "consulted with Defendant to ascertain his conditions [*sic*] of error in the entry of the plea of guilty." In January 2012, the trial court (1) noted Tulin had filed a Rule 604(d) certificate, (2) stated its prior ruling stood as the ruling of the court, and (3) granted Tulin's motion to withdraw.

¶ 6 Defendant appeals, arguing (1) this court should vacate the \$500 public defender fee because the trial court imposed the fee without conducting a hearing on defendant's ability to

Defendant made the following statement in allocution: "I just want to say to everyone that I'm very sorry for what I did. And, certainly, this isn't ever going to occur again." Thereafter, the court sentenced defendant to 15 years in prison followed by 2 years' MSR. The court also ordered defendant to pay a \$500 public defender assessment.

¶ 11 In January 2008, defendant's appointed counsel filed a motion to withdraw guilty plea and reconsider sentence, arguing defendant's sentence was excessive in light of his lack of criminal history, the fact he pled guilty, and the impact of his sentence upon his family. In December 2009, defendant retained private counsel, Ronald Tulin, who filed an entry of appearance and motion for substitution of attorney in January 2010. In May 2010, Tulin filed an amended motion to withdraw guilty plea and reconsider sentence, with a Rule 604(d) certificate. Later that month, he filed a supplement to the amended motion. Following a June 2010 hearing, the trial court denied the amended motion.

¶ 12 On direct appeal, this court affirmed the trial court's denial of defendant's amended motion to withdraw guilty plea and reconsider sentence but remanded for resentencing because the trial court sentenced defendant to a term of MSR below the statutory minimum. *People v. Pacheco*, No. 4-10-0459 (Mar. 7, 2011) (unpublished order under Supreme Court Rule 23) (Appleton, J., dissenting).

¶ 13 On July 14, 2011, the parties appeared for a resentencing hearing, at which the trial court resentenced defendant to 14 years in prison plus a 3-year MSR term, ordering defendant to "pay all costs of the proceedings." That day, defendant filed a new *pro se* motion to withdraw his guilty plea. Later that day, after hearing oral arguments from Tulin and the prosecutor on defendant's motion, the court denied it. Tulin requested the clerk file a notice of

appeal and stated he would no longer represent defendant. On July 15, 2011, the clerk filed a notice of appeal. On July 21, 2011, the court appointed OSAD to represent defendant on appeal.

¶ 14 While defendant's appeal was pending, on August 8, 2011, defendant filed a *pro se* motion for reduction of sentence, a motion to withdraw guilty plea and vacate sentence, and an application to proceed as a poor person and for appointment of counsel. Thereafter, the trial court entered a written order striking the pleadings "[b]ecause the defendant ha[d] an attorney appointed to represent him" and thus could not file any *pro se* pleadings.

¶ 15 In September 2011, this court entered an order for summary remand for the filing of a certificate in compliance with Illinois Supreme Court Rule 604(d) (eff. July 1, 2006) and the filing of a new postplea motion, if counsel concluded such a motion was necessary. The trial court, on its own motion, scheduled a hearing for October 27, 2011, to conduct further proceedings pursuant to this court's mandate. On October 13, 2011, Tulin filed a motion to be excused from the hearing, contending he had only been hired to handle defendant's appeal. Tulin further explained he appeared before the court on July 14, 2011, to argue the motions on remand because defendant could not do so himself and needed a Spanish interpreter.

¶ 16 The trial court denied Tulin's motion to be excused because "Mr. Tulin [was] trial counsel of record and no motion to withdraw [had] been filed." The court's order stated:

"This case was sent back from the Appellate Court due to trial counsel's failure to file a certificate pursuant to Supreme Court Rule 604(d). If counsel wishes to file a proper [Rule] 604(d) certificate and stand on his previous arguments in this case, he should so advise the Court. Upon filing of same, the Court will

rule on the case."

¶ 17 On October 18, 2011, the trial court rescheduled the hearing for January 6, 2012. On October 28, 2011, Tulin filed a motion to withdraw, again stating defendant had hired him only for representation on direct appeal and thus, Tulin's representation terminated following the July 14, 2011, hearing. The motion further stated both Tulin and defendant intended for Tulin's representation to terminate at that time.

¶ 18 On January 6, 2012, Tulin filed a Rule 604(d) certificate. At a hearing that day, the trial court initially denied Tulin's motion to withdraw. Thereafter, the court noted Tulin had filed a Rule 604(d) certificate and stated its prior ruling stood as the ruling of the court. The court subsequently granted Tulin's motion to withdraw.

¶ 19 This appeal followed.

¶ 20 II. ANALYSIS

¶ 21 On appeal, defendant contends (1) this court should vacate the \$500 public defender fee because the trial court imposed the fee without conducting a hearing on defendant's ability to pay, and 90 days have passed since the entry of the final order in this case, and (2) defendant's case must be remanded because either (a) defendant filed a *pro se* motion to reconsider sentence and the trial court failed to appoint counsel, or (b) defendant was represented by private counsel, who failed to fulfill his duty under Illinois Supreme Court Rule 604(d) (eff. July 1, 2006) to file a motion to reconsider sentence. In response, the State (1) claims this court lacks jurisdiction to review the propriety of the \$500 public defender fee, but (2) concedes this case should be remanded because counsel did not strictly comply with Rule 604(d) and because defendant did not receive a hearing on his August 8, 2011, *pro se* motion to reduce sentence.

¶ 22 We address defendant's contentions in turn.

¶ 23 A. Public-Defender Reimbursement Fee

¶ 24 Defendant first asserts the trial court erred by imposing a \$500 public defender reimbursement fee without first holding a hearing on defendant's ability to pay the fee.

Defendant further posits because more than 90 days have elapsed since the trial court entered its final order, this court should vacate the \$500 fee rather than remand the case for a hearing. The State does not dispute the trial court failed to conduct a hearing; rather, the State contends this court lacks jurisdiction to review the propriety of the \$500 assessment. We disagree with the State.

¶ 25 Section 113-3.1(a) of the Code of Criminal Procedure of 1963 (Criminal Procedure Code) provides "[w]henever" the trial court appoints counsel to represent a defendant under either section 113-3 of the Criminal Procedure Code or Illinois Supreme Court Rule 607 (Ill. S. Ct. R. 607 (eff. Dec. 13, 2005)), the court may order the defendant to pay "a reasonable sum to reimburse either the county or the State for such representation." 725 ILCS 5/113-3.1(a) (West 2010). Section 113-3.1(a) requires the trial court to conduct a hearing "at any time after the appointment of counsel but no later than 90 days after the entry of a final order disposing of the case at the trial level" to determine the amount of payment. 725 ILCS 5/113-3.1(a) (West 2010); *People v. Love*, 177 Ill. 2d 550, 555, 687 N.E.2d 32, 35 (1997).

¶ 26 Pursuant to Illinois Supreme Court Rules 606 (eff. Mar. 20, 2009) and 604(d) (eff. July 1, 2006), a defendant perfects his appeal by filing a notice of appeal with the clerk of the trial court within 30 days of the trial court's denial of the defendant's motion to withdraw guilty plea.

¶ 27 Our court recently considered whether we had jurisdiction to review a trial court's reimbursement order in the context of a defendant's resentencing following the revocation of his probation. In *People v. Somers*, 2012 IL App (4th) 110180, ¶ 30, 970 N.E.2d 606, 611, *pet. for leave to appeal pending*, No. 114525 (filed June 28, 2012), the trial court sentenced the defendant to probation in March 2010, ordering him to pay \$200 for his public defender's services. The defendant did not appeal that judgment. In December 2010, the trial court revoked the defendant's probation and resentenced him, stating in its written order, "all financial obligations previously imposed remain in full force [and] effect." *Somers*, 2012 IL App (4th) 110180, ¶ 14, 970 N.E.2d at 609. Following the trial court's February 2011 denial of the defendant's motions to reconsider sentence, the defendant appealed, challenging, among other things, the \$200 public defender fee. *Somers*, 2012 IL App (4th) 110180, ¶¶ 2, 16, 970 N.E.2d at 608, 609. We concluded, however, because the trial court did not expressly reimpose the public defender fee during resentencing, our court lacked jurisdiction to consider the public-defender fee, as it was entered at the time defendant was originally sentenced and defendant did not appeal that sentencing order. *Somers*, 2012 IL App (4th) 110180, ¶ 35, 970 N.E.2d at 612.

¶ 28 Here, the trial court ordered defendant to pay a \$500 public defender fee during his original December 2007 sentencing. In March 2011, on direct appeal, this court vacated defendant's sentence and remanded for resentencing. *People v. Pacheco*, No. 4-10-0459 (Mar. 7, 2011) (unpublished order under Supreme Court Rule 23). Defendant did not raise the issue of the public defender fee in his original appeal.

¶ 29 In July 2011, the trial court resentenced defendant to 14 years in prison, ordering him to pay "all costs of the proceedings." A certified copy of fines and fees assessed in this case

lists a \$500 public defender fee. Defendant had posted a \$20,000 cash bond that was reclassified on December 13, 2007. The public defender fee was satisfied at that time.

¶ 30 Although defendant failed to raise the public defender assessment initially, his case is still on direct appeal. Defendant is still in the process of appealing his original sentence. Since the public defender fee was imposed at defendant's original sentencing hearing and defendant is still on appeal from that order, we conclude we have jurisdiction to entertain the public defender reimbursement issue. The State does not argue waiver or forfeiture; it merely argues lack of jurisdiction. However, since we are remanding this matter for further proceedings, this issue can be dealt with in the trial court.

¶ 31 B. Supreme Court Rule 604(d) Certificate and Defendant's Motion To Reconsider Sentence

¶ 32 Defendant next argues we must remand this case to the trial court because either (a) defendant filed a *pro se* motion to reconsider sentence and the trial court failed to appoint counsel, or (b) defendant was represented by private counsel, who failed to fulfill his duty under Illinois Supreme Court Rule 604(d) to file a motion to reconsider sentence. The State concedes defense counsel's certificate failed to strictly comply with the requirements of Rule 604(d) and suggests this court remand again because defendant did not receive a hearing on his motion to reduce sentence. We accept the State's concession.

¶ 33 Rule 604(d) provides a defendant may not appeal from a judgment entered upon a plea of guilty unless the defendant, within 30 days of the date on which sentence is imposed, files in the trial court a motion to reconsider sentence, if only the sentence is being challenged, or a motion to withdraw the plea of guilty and vacate the judgment. The motion "shall be presented promptly to the trial judge," who "shall then determine whether the defendant is represented by

counsel." Ill. S. Ct. R. 604(d) (eff. July 1, 2006). If the defendant is indigent and desires counsel, "the trial court shall appoint counsel." Ill. S. Ct. R. 604(d) (eff. July 1, 2006).

¶ 34 After the trial court appoints counsel, counsel shall file with the trial court a certificate stating as follows:

"[T]he 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." Ill. S. Ct. R. 604(d) (eff. July 1, 2006).

We review a trial court's compliance with supreme court rules *de novo*. *People v. Starks*, 344 Ill. App. 3d 766, 768, 800 N.E.2d 1239, 1241 (2003).

¶ 35 On July 14, 2011, the trial court resentenced defendant. That same day, defendant filed a *pro se* motion to withdraw his guilty plea. Later that day, following Tulin and the State's arguments on defendant's motion, Tulin requested the clerk file a notice of appeal, stating he would no longer represent defendant, which the clerk did.

¶ 36 On August 8, 2011, defendant filed a *pro se* "Motion for Reduction of Sentence," "Motion to Withdraw Guilty Plea and Vacate Sentence," and "Application to Proceed as a Poor Person and for Appointment of Counsel." The trial court struck the *pro se* pleadings because defendant had an attorney appointed to represent him, apparently referring to OSAD's appointment to represent defendant on appeal, since Tulin had been privately retained.

¶ 37 In September 2011, this court granted an agreed motion and remanded defendant's case for the filing of a Rule 604(d) certificate. Thereafter, the trial court scheduled a hearing for further Rule 604(d) proceedings. Tulin filed a motion to be excused, explaining defendant had only hired him for representation on direct appeal, and he had argued the motion to withdraw guilty plea at the July 2011 hearing only because defendant could not do so *pro se* and needed a Spanish interpreter. The trial court denied Tulin's motion. Thereafter, in October 2011, Tulin filed a motion to withdraw, and on January 6, 2012, Tulin filed a Rule 604(d) certificate. The certificate indicated defendant complained about representation he received from his public defender, who represented him prior to Tulin. Tulin attached defendant's letter of complaint regarding defendant's prior attorney but refused to amend the petition to include those allegations. The record as a whole reflects the following: Tulin was hired to represent the defendant with respect to his appeal. He did not view his role as preparing proper postsentencing motions or proper Rule 604(d) certificates. No 604(d) certificate was filed concerning defendant's motion to reduce sentence following his second sentencing hearing. The trial court granted Tulin's motion to withdraw in January 2012 following the Rule 604(d) proceedings.

¶ 38 We remand defendant's case because Tulin's January 2012 Rule 604(d) certificate was deficient because he did not state he consulted with defendant about defendant's contentions of error in his *sentence*. Rather, Tulin's certificate stated he "consulted with Defendant to ascertain his conditions [*sic*] of error in the entry of the plea of guilty." As the State points out, defendant had filed a *pro se* motion for reduction of sentence, but Tulin pursued only the previously filed motion to withdraw guilty plea, without amendment. Nor did Tulin amend the motion to withdraw the plea of guilty to reflect defendant's additional contentions of error, which

defendant provided to Tulin in writing.

¶ 39 To further complicate matters, our supreme court recently vacated our decision in *People v. Rinehart*, 406 Ill. App. 3d 272, 943 N.E.2d 698 (2010), *vacated in part*, 2012 IL 111719, 962 N.E.2d 444, which was the basis of our decision in defendant's first appeal. In defendant's first appeal, he argued he was improperly admonished he would receive a two-year mandatory supervised release period.

¶ 40 In relying on our decision in *Rinehart*, 406 Ill. App. 3d at 281, 943 N.E.2d at 706, *vacated in part*, 2012 IL 111719, ¶ 30, 962 N.E.2d at 454, we remanded this case initially for resentencing. We held if defendant was resentenced in a manner that would not exceed the first sentence imposed (15 years plus 2 years MSR), he would suffer no prejudice. Following our suggestion, the trial court on remand imposed a 14-year sentence and a 3-year MSR term. Thereafter, our supreme court made clear, however, the MSR period for this offense is an indeterminate term of three years to life. *Rinehart*, 2012 IL 111719, ¶ 30, 962 N.E.2d at 454. Because we are remanding this case once again and because the supreme court decided *Rinehart* while defendant's appeals have been pending, we direct on remand the following:

The trial court shall appoint counsel to represent defendant on his postsentencing motions. New counsel shall consult with defendant concerning his contentions of error with respect to both his guilty plea and sentencing. Counsel shall review defendant's contentions of error with respect to his original public defender, provided in writing to Tulin, and include those contentions in an amended motion, state the legal basis for failing to include them,

or, if after consultation with defendant on those matters, should defendant desire to withdraw those contentions of error, state so in the amended motion. Counsel is directed to consider and include, if appropriate, the effect of the plea admonishments on the knowing and voluntary nature of defendant's plea in light of *People v. Rinehart*, 2012 IL 111719, 962 N.E.2d 444.

Counsel should include in any amended motion the issue regarding the propriety of assessing public defender fees without notice and a hearing.

Counsel shall file a Rule 604(d) certificate in strict compliance with the rule. The trial court shall then hold a hearing on the amended motions to withdraw plea and reduce sentence and decide the impact of the *Rinehart* decision on defendant's motion to withdraw guilty plea.

¶ 41

III. CONCLUSION

¶ 42

For the reasons stated, we remand defendant's case to the trial court for strict compliance with Rule 604(d). We direct the trial court to appoint new counsel to represent defendant, with counsel to (1) consult with defendant, (2) make any necessary amendments to defendant's *pro se* motions, (3) file a certificate strictly complying with Illinois Supreme Court Rule 604(d), and (4) set the motions for hearing and argument thereon.

¶ 43

Remanded with directions.