

No. 1-13-0394

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10 MC2 001572
	)	
KEVIN CHEATOM,	)	Honorable
	)	Callie Lynn Baird and
	)	Marguerite A. Quinn,
Defendant-Appellant.	)	Judges Presiding.

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PRESIDING JUSTICE PUCINSKI delivered the judgment of the court.  
Justices Lavin and Mason concurred in the judgment.

**O R D E R**

- ¶ 1 *Held:* Dismissal of motion to vacate guilty plea affirmed over defendant's contentions that the trial court vacated his guilty plea requiring remand for a trial, that the trial court improperly changed his sentence without counsel, and that post-plea counsel failed to comply with Rule 604(d).
- ¶ 2 Defendant Kevin Cheatom entered a plea of guilty to misdemeanor domestic battery and was sentenced to one year of conditional discharge. Defendant appealed the denial of his motion to withdraw his guilty plea, and this court remanded for compliance with Supreme Court Rule

604(d) (eff. Feb. 6, 2013). *People v. Cheatom*, 2012 IL App (1st) 103706-U. On remand, defendant was initially allowed to withdraw his plea; however, his subsequent written motion to do so was denied. On appeal, defendant contends that because the trial court granted his motion to withdraw, his cause should be remanded for trial. He further contends that he did not waive his right to counsel at a post-plea proceeding in which the trial court unilaterally modified the terms of his plea, and that his post-plea counsel failed to comply with Rule 604(d).

¶ 3 On October 27, 2010, defendant pleaded guilty to domestic battery and was sentenced to one year of conditional discharge with the requirement that he complete domestic violence counseling, and pay \$395 in fees and fines. On November 15, 2010, defendant made an oral motion to withdraw his guilty plea, in which he maintained his innocence and stated that he acted in self-defense. He asserted that he pleaded guilty because his appointed counsel told him that he had "a one-in-ten chance of not going to jail," and that the plea was entered under duress. The court denied the motion, and defendant filed a notice of appeal.

¶ 4 While that appeal was pending, a liaison from the Social Services Department appeared before the trial court, and advised that the State was seeking leave to file a petition to "revoke" defendant's conditional discharge. The liaison informed the court that defendant was discharged from the domestic violence counseling program because he failed to pay the fees, and that he has not taken responsibility for his violence. Defendant informed the court that he was told he had to plead guilty by his public defender, or he would go to jail. The trial court then "convert[ed]" defendant's domestic violence class requirement to 40 hours of Sheriff's Work Alternative Program (SWAP). On May 4, 2011, the court, after being advised that defendant completed SWAP, terminated his conditional discharge.

¶ 5 On July 17, 2012, this court found that the trial court had failed to comply with Rule 604(d) when it held a hearing to vacate defendant's plea without appointing him counsel, and without inquiring whether he sought counsel, or obtaining a waiver of counsel. We thus reversed the denial of defendant's motion to vacate, remanded the cause to the trial court and ordered the court to ascertain whether defendant is eligible for and desires the appointment of counsel to assist him in preparing a new post-plea motion and appoint counsel if he so desires. *People v. Cheatom*, 2012 IL App (1st) 103706-U, ¶12. We expressed no opinion on the merits of defendant's motion, and specifically noted that this determination belongs to the trial court in the first instance. *Cheatom*, 2012 IL App (1st) 103706-U, ¶13.

¶ 6 On November 28, 2012, the matter came before the trial court on record. The court noted the mandate from the appellate court regarding the trial court's error in denying defendant's *pro se* motion to withdraw his guilty plea without first appointing him counsel. The court asked defendant if he still wished to withdraw his guilty plea, and he responded, "[y]es." Defendant then told the court that he was innocent, and there was no deal with the State. The court responded that the appellate court only reversed the denial of his motion, and said "[n]othing about innocence or guilt, or having a deal or not having a deal." The court further stated that "[p]er appellate court: Defendant allowed to withdraw plea of guilty." The State then asked for clarity as to whether the motion had been granted, and the court stated, "I'm granting it. The Appellate Court is indicating for the defendant to be allowed to withdraw his plea of guilty." The court then noted that the matter should be set for trial.

¶ 7 On December 13, 2012, the matter appeared before another judge, and the State advised that defendant's motion to withdraw the plea was denied, and that he appealed. The court

observed that the appellate court reversed and remanded the cause for the appointment of counsel on a motion to withdraw the guilty plea. The court then stated that the prior order will stand, and appointed counsel.

¶ 8 On January 24, 2013, appointed counsel filed a motion to vacate defendant's guilty plea in which she noted that defendant was sentenced to one year of conditional discharge with the requirement that he complete domestic violence classes. Counsel alleged that defendant maintains his innocence, that he believed he would go to jail if he went to trial, and that he did not fully understand the rights he was waiving when he pleaded guilty. Counsel also filed a Rule 604(d) certificate stating that she had consulted with defendant in person to ascertain his contentions of error in the entry of his guilty plea or sentence, that pursuant to those consultations, she, in good faith, prepared the attached motion to vacate the guilty plea after examining the court file, and also examined a transcript of the plea proceedings. Counsel further stated that she had made any amendments to the motion necessary for adequate presentation of any defects in the proceedings.

¶ 9 On the same date, the court held a hearing on the motion to vacate. Defendant informed the court that he entered his plea of guilty under duress when his appointed counsel told him that he had to plead guilty or go to jail. Counsel then informed the court that she reviewed the transcript with defendant and her supervisor, and upon speaking to defendant, he has maintained his innocence and believed he would go to jail if he went to trial, and did not fully understand the rights he was waiving when he pleaded guilty. Defendant then told the court that the plea transcript is missing pertinent information such as his statement to the judge that he was pleading guilty under duress. The court denied defendant's motion finding that the transcript reflects that

he was properly admonished and advised of the charges against him and the possible penalties. The court found that the record showed that defendant knowingly and voluntarily entered his plea, and denied his motion to withdraw it.

¶ 10 On appeal, defendant first contends that because the circuit court granted his motion to withdraw his guilty plea on November 28, 2012, his cause should be remanded for a trial. He maintains that the subsequent order by a different judge, denying his motion to withdraw, was done without authority because the State never filed a motion to reconsider, and is thus void. The State responds that the initial order granting defendant's motion did not comply with this court's mandate to appoint counsel as required under Rule 604(d), falsely assumed that this court ruled on the merits of the motion to withdraw, and, accordingly, was entered without jurisdiction and is thus void. Defendant replies that the circuit court is not required to appoint counsel if it is granting his motion to withdraw the plea, and that the trial court noted, when granting his motion, that this court did not rule on the merits of the motion.

¶ 11 When a court of review issues a mandate, it vests the trial court with jurisdiction to take only such action as conforms to the mandate, and the trial court has no authority to act beyond the scope of the mandate. *People v. Abraham*, 324 Ill. App. 3d 26, 30 (2001). As a result, any order issued by the trial court outside the scope of its authority is void for lack of jurisdiction (*People v. Ruiz*, 177 Ill. 2d 368, 382 (1997), citing *People ex rel. Daley v. Schreier*, 92 Ill. 2d 271, 276-77 (1982)), and must be reversed and vacated (*People v. Bosley*, 233 Ill. App. 3d 132, 137 (1992)).

¶ 12 In defendant's prior appeal, this court found that the trial court had failed to comply with Rule 604(d) because it held a hearing to vacate defendant's plea without appointing him counsel,

and without inquiring whether he sought counsel, or obtaining a waiver of counsel. *Cheatom*, 2012 IL App (1st) 103706-U, ¶12. This court thus reversed the trial court's order and remanded the cause for further proceedings consistent with that order. *Cheatom*, 2012 IL App (1st) 103706-U, ¶13. This included the mandate that the trial court ascertain whether defendant is eligible for and desires the appointment of counsel to assist him in preparing a new motion and appoint counsel if defendant so chooses. *Cheatom*, 2012 IL App (1st) 103706-U, ¶12.

¶ 13 On November 28, 2012, the matter came before the trial court on remand, and the court mistakenly believed that this court had mandated that it grant defendant's motion to withdraw the guilty plea as evidenced by its statements, "[p]er appellate court: defendant allowed to withdraw plea of guilty," and the "Appellate Court is indicating for the defendant to be allowed to withdraw his plea of guilty." This court, however, specifically declined to express any opinion as to the merits of defendant's motion, recognized that the initial determination belonged to the trial court, and remanded the cause for compliance with Supreme Court Rule 604(d). *Cheatom*, 2012 IL App (1st) 103706-U, ¶¶12-13. This included ascertaining whether defendant was eligible for and desired the appointment of new counsel to assist him in preparing a new motion, and appoint counsel to represent him on his motion to withdraw the guilty plea if he wished. The trial court clearly failed to do so, and its failure to conform to the mandate rendered the order entered on November 28, 2012, void. *Ruiz*, 177 Ill. 2d at 382.

¶ 14 The record further shows that on December 13, 2012, this matter appeared before a different judge, who was advised by the State that defendant's motion to withdraw had been denied, and that matter was remanded on appeal. The court then stated that the prior order would

stand; however, this order, which allowed the prior void order to stand, was also void and entered without jurisdiction. *People v. Johnson*, 327 Ill. App. 3d 252, 256 (2002).

¶ 15 The same court then appointed counsel for defendant, and on January 24, 2013, counsel filed a written motion to withdraw defendant's guilty plea, and a certificate of compliance with Supreme Court Rule 604(d). On the same date, counsel argued the motion at a hearing, and the court denied it. The trial court thus fulfilled the mandate of this court, and, we, accordingly, find that this order was proper and valid.

¶ 16 In reaching this conclusion, we find defendant's reliance on *People v. Bryant*, 369 Ill. App. 3d 54 (2006); *People v. Petty*, 366 Ill. App. 3d 1170 (2006), and *People v. Wilk*, 124 Ill. 2d 93 (1988), for his contention that the trial court need not comply with Rule 604(d) where it grants defendant's motion to withdraw the guilty plea, and *People v. Williams*, 138 Ill. 2d 377 (1990), and *People v. Holmes*, 235 Ill. 2d 59 (2009), for his contention that the State was required to file a timely motion to reconsider in order for the trial court to review the prior order, misplaced. Here, unlike the cases cited by defendant, there was a specific mandate from this court for compliance with Rule 604(d), and any order entered in noncompliance with that mandate is without jurisdiction and void. *Ruiz*, 177 Ill. 2d at 382. Furthermore, and as explained above, the order granting defendant's motion was based on the mistaken belief that this court ordered the trial court to grant it. Thus, it clearly failed to comply with the mandate of this court where we expressed no opinion on the merits of the motion, and recognized that this was the responsibility of the trial court in the first instance. We, accordingly, find that the order of January 24, 2013, stands as it fulfilled the mandate of this court. *Abraham*, 324 Ill. App. 3d at 30.

¶ 17 Defendant next contends that the trial court's failure to admonish him in accordance with Supreme Court Rule 401(a) (eff. July 1, 1984), or to appoint counsel before unilaterally modifying the terms of the conditional discharge sentence entered on his guilty plea in a post-plea proceeding was reversible error. He maintains that this entitles him to an opportunity to file a new motion to withdraw his plea. The State responds that defendant is not required to have counsel present during a hearing to modify the terms of conditional discharge, and, further, that the issue is moot and allowing him another opportunity to vacate his plea is not the proper remedy.

¶ 18 We initially observe that defendant is raising these issues for the first time on appeal. Under well-settled principles, any issues not raised by defendant in his motion to withdraw the plea of guilty and vacate the judgment shall be deemed waived. *People v. Jolly*, 357 Ill. App. 3d 884, 886 (2005), citing Ill. S. Ct. R. 604(d). Thus, where, as here, defendant did not raise these issues in his post-plea motion, he has forfeited them for review. *Jolly*, 357 Ill. App. 3d at 886.

¶ 19 Defendant next contends that this court should remand his case because counsel failed to comply with the requirements of Rule 604(d). He maintains that counsel failed to allege that the plea proceedings were fatally flawed and that the plea was not entered knowingly and voluntarily where the trial court failed to admonish him that he would have to pay \$395 in fees and fines. He further maintains that the record demonstrates that counsel did not review the court file as represented in her certificate where she failed to ascertain that the trial court unilaterally changed the terms of his sentence without the benefit of the right to counsel, and previously granted his motion to withdraw the plea. Defendant also asserts that counsel failed to properly address his claim that he was coerced into pleading guilty.

¶ 20 Rule 604(d) provides, in relevant part, that counsel shall file a certificate with the circuit court stating that she has consulted with defendant either by mail or in person to ascertain his contentions of error in the entry of the guilty plea or sentence, examined the trial court file and report of proceedings of the guilty plea and has made any amendments to the motion necessary for adequate presentation of any defects in those proceedings. Ill. S. Ct. R. 604(d). The purpose of this rule is to ensure that before a criminal appeal can be taken from a guilty plea, the trial court which accepted the plea and imposed the sentence be given the opportunity to hear the allegations of improprieties that took place outside the official proceeding and *dehors* the record, but nevertheless were unwittingly given sanction in the courtroom. *People v. Tousignant*, 2014 IL 115329, ¶14; *People v. Wilk*, 124 Ill. 2d 93, 104 (1988). Strict compliance with Rule 604(d) is required (*People v. Foster*, 171 Ill. 2d 469, 474 (1996)), and our review of counsel's compliance with the rule is *de novo* (*People v. Grice*, 371 Ill. App. 3d 813, 815 (2007)).

¶ 21 Here, counsel filed a Rule 604(d) certificate in which she stated that she consulted with defendant to ascertain his contentions of error in the guilty plea and sentencing, examined the court file and transcript of plea proceedings, and made any amendments to the motion necessary for adequate presentation of any defects in the proceedings. As such, counsel fully complied with the requirements of Rule 604(d) (*People v. Folks*, 406 Ill. App. 3d 300, 304 (2010)), and the certificate filed by counsel was facially valid (*People v. Wyatt*, 305 Ill. App. 3d 291, 297 (1999)).

¶ 22 Defendant contends, however, that counsel should have amended his motion with the allegation that his plea was not knowing and voluntary where the trial court failed to admonish him that he would have to pay \$395 in fees and fines as part of his sentence. Defendant was found guilty of a Class A misdemeanor which carried a fine of not more than \$2,500. 720 ILCS

5/12-3.2(b) (West 2012); 730 ILCS 5/5-4.5-55(e) (West 2012). The failure to admonish defendant of possible fines prior to ordering the payment fails to comply with Rule 402 (eff. July 1, 2012). *People v. Wigod*, 406 Ill. App. 3d 66, 74-77 (2010). However, an improper admonishment does not automatically establish grounds for vacating a plea; rather, defendant must show that he was prejudiced by the inadequate admonition. *People v. Williams*, 2014 IL App (3d) 120824, ¶26. Here, defendant has not presented a good-faith argument that he was prejudiced by the inadequate admonitions (*People v. Fish*, 316 Ill. App. 3d 795, 801, n.1 (2000)), or that he would not have pleaded guilty if he had known he was required to pay the \$395 fine (*People v. Mendoza*, 324 Ill. App. 3d 195, 201-02 (2003)). Moreover, defendant has completed the terms of his conditional discharge, and it has been terminated. Under these circumstances, counsel's failure to amend the motion to vacate with this issue does not establish noncompliance with Rule 604(d).

¶ 23 We reach the same conclusion with regard to defendant's further and related claim that counsel failed to ascertain and review the changes in the terms of his sentence that were imposed without the benefit of counsel. Rule 604(d) does not require counsel to review the proceedings on the modification of conditional discharge (Ill. S. Ct. R. 604(d)), and compliance with Rule 604(d) in such a proceeding is not required (*People v. Jordan*, 2013 IL App (2d) 120106, ¶2, n.1, citing *In re J.E.M.Y.*, 289 Ill. App. 3d 389, 391 (1997)). Counsel thus fulfilled her duties under Rule 604(d), and defendant's contrary claim is without merit.

¶ 24 Notwithstanding, defendant further contends that counsel failed to address his claim of coercion in entering his plea. Counsel did include defendant's assertion that he believed he would go to jail if he did not plead guilty; moreover, the record of the plea proceeding shows that

defendant told the court in response to the court's queries as to whether anyone forced, threatened or promised him anything, that he was entering a plea of guilty of his "own free will." In addition, defendant was allowed to argue this issue at the hearing, and have the court consider it. Accordingly, counsel may not be faulted for failing to further amend defendant's motion with this issue. *Ivy*, 313 Ill. App. 3d at 1018.

¶ 25 Defendant further maintains that counsel was unaware that his motion to withdraw the plea was originally granted. As explained above, the prior order granting the motion to withdraw the plea was entered without jurisdiction, and void (*Abraham*, 324 Ill. App. 3d at 30), and thus, required no action by counsel, other than to file a motion to withdraw the plea, which counsel did. We, therefore, find that counsel was not required to amend the motion with the issues raised by defendant on appeal to comply with Rule 604(d).

¶ 26 We also observe that the appellate court can consider whether the issues defendant claims counsel should have amended his motion with are frivolous in determining whether counsel complied with Rule 604(d) by making any amendments to the motion necessary for adequate presentation of any defects in the plea proceedings. *People v. Bartik*, 94 Ill. App. 3d 696, 699 (1981). Thus, we reject defendant's contention that this court should not rule on the merits of the allegations that counsel failed to raise in his motion to withdraw the guilty plea.

¶ 27 Finally, defendant presents a separate claim for the invalidity of his guilty plea in his reply brief. Issues not raised in the opening brief cannot be argued for the first time in a reply brief (*People v. Burney*, 2011 IL App (4th) 100343, ¶78), and we therefore need not address it.

¶ 28 In light of the foregoing, we affirm the order of the circuit court of Cook County denying defendant's motion to vacate the guilty plea.

1-13-0394

¶ 29 Affirmed.