

2014 IL App (2d) 121413-U  
No. 2-12-1413  
Order filed May 19, 2014

**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  
SECOND DISTRICT

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THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of Lake County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 09-CF-2608
	)	
ROY MARQUEZ,	)	Honorable
	)	John T. Phillips,
Defendant-Appellant.	)	Judge, Presiding.

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PRESIDING JUSTICE BURKE delivered the judgment of the court.  
Justices Schostok and Birkett concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* Regardless of whether defense counsel's Rule 604(d) certificate was invalid for stating that counsel had consulted with defendant to ascertain his contentions of error only as to his plea, defendant was not entitled to a second remand for compliance where, because defendant had entered a negotiated plea, the only viable sentencing errors were those that pertained to the validity of his plea.
- ¶ 2 Defendant, Roy Marquez, appeals a second time from an order of the circuit court of Lake County denying his motion to withdraw his plea under *North Carolina v. Alford*, 400 U.S. 25 (1970), to a single count each of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2000)) and aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(1)(i) (West

2000)). Defendant argues that, because his attorney did not properly certify compliance with Illinois Supreme Court Rule 604(d) (eff. July 1, 2006), the matter must be remanded for new postplea proceedings. For the reasons that follow, we affirm.

¶ 3

### I. BACKGROUND

¶ 4 The pertinent facts are as follows. In exchange for defendant's *Alford* plea to the charges described above, additional charges against defendant were nol-prossed and the State agreed that the aggregate length of defendant's prison terms for the two offenses would not exceed 25 years. Prior to sentencing, defendant filed a *pro se* motion to withdraw his plea, arguing, *inter alia*, that he was "a reading and learning impaired adult" and that his attorneys had not explained the extent to which his plea would limit appellate review. Defendant's attorneys were permitted to withdraw and a new attorney was appointed to represent defendant. The new attorney filed a Rule 604(d) certificate.

¶ 5 An evidentiary hearing took place on January 18, 2011. After hearing the evidence, the trial court denied defendant's motion to withdraw his plea. Defendant moved, unsuccessfully, for reconsideration of the trial court's order. On March 28, 2011, trial court sentenced defendant to consecutive prison terms of 21 years for predatory criminal sexual assault and 3 years for aggravated criminal sexual abuse. The court admonished defendant that, if he wished to appeal, he would need to file, within 30 days, a written motion to withdraw his plea.

¶ 6 Following sentencing, on April 1, 2011, defendant's attorney moved, yet again, for reconsideration of the denial of defendant's previous motion to withdraw his plea. Defendant's attorney also filed a motion for reconsideration of defendant's sentence. At the outset of the hearing on the motions, the court noted that defendant could not move for reconsideration of his sentence. The court further noted that defendant's motion to withdraw his plea, filed prior to

sentencing, was likely premature. Thus, the court stated that it would deem the motion for reconsideration of the denial to be a motion to withdraw defendant's plea and would consider the motion anew. The court set the matter for a new hearing on May 18, 2011. The court directed defendant's attorney to file a new Rule 604(d) certificate and to file an amended motion to withdraw if so desired.

¶ 7 At the outset of the hearing on May 18, 2011, defendant's attorney filed what she purported to be an amended Rule 604(d) certificate. The court again noted that, because defendant entered a negotiated guilty plea, his only remedy was to withdraw his plea. Both parties agreed that, in ruling anew on the motion to withdraw the plea, the court should consider the evidence previously presented at the hearing on January 18, 2011. The court did so, and it denied defendant's motion. Defendant timely appealed. See *People v. Marquez*, 2012 IL App (2d) 110475 (*Marquez I*).

¶ 8 On appeal, the parties agreed that the amended certificate, filed by defendant's attorney at the May 18, 2011 hearing, was not a proper certificate of compliance under Rule 604(d), as it was, instead, a certificate of compliance with Illinois Supreme Court Rule 651 (eff. Dec. 1, 1984). *Id.* ¶ 4. However, defendant's attorney had previously filed a proper certification under Rule 604(d) prior to the court's ruling on the premature motion. Thus, the question on appeal was whether defendant's attorney was required to file a second Rule 604(d) certificate when she renewed the premature motion. We found that a second Rule 604(d) certificate was required, because "[a] certificate filed before sentencing does not ensure that counsel has considered all relevant bases for relief." *Id.* ¶ 8. We noted that, although a defendant who entered a negotiated guilty plea may not challenge the severity of his sentence, such a defendant may obtain "review of sentencing errors that bear on the validity of the guilty plea or that represent a breach of the

defendant's plea agreement." *Id.* We reasoned that postsentencing consultation was required because "it is not unlikely that a defendant will first become aware of such an error when the trial court imposes a sentence that does not conform to the defendant's understanding of the authorized sentences for an offense or the terms of his or her plea agreement." *Id.* Because we found that a certificate filed prior to sentencing does not comply with Rule 604(d), we vacated the denial of defendant's motion to withdraw his plea and remanded for new postplea proceedings. *Id.* ¶¶ 8-9.

¶ 9 On remand, defendant's attorney filed a new Rule 604(d) certificate that contained certain bracketed portions. It read as follows:

"I have consulted with the defendant [by mail]/[in person] to ascertain [his]/[her] contentions of error in [the sentence]/[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."

Defendant's attorney circled and initialed the words "in person," "his," and "the entry of the plea of guilty." The following colloquy occurred:

"THE COURT: And after consulting with your client, [defense counsel], you do not wish to, nor does he desire you to, file a new motion to withdraw?

[DEFENSE COUNSEL]: No, your Honor. No, your Honor.

THE COURT: The plea of guilty at this point to proceed on what was filed previously?

[DEFENSE COUNSEL]: That's correct.

THE COURT: And that is correct, [defendant]?

THE DEFENDANT: Yes, sir.”

Thereafter, the parties agreed that court should take judicial notice of the previous proceedings on the motion. The court did so and once again denied defendant’s motion to withdraw his plea. This appeal followed.

¶ 10

## II. ANALYSIS

¶ 11 Defendant argues that the Rule 604(d) certificate filed by defense counsel on remand did not strictly comply with Rule 604(d), because it shows that counsel consulted with defendant to determine his contentions of error regarding his guilty plea but not his contentions of error regarding the sentencing proceedings. Accordingly, defendant argues that we should reverse the order denying defendant’s motion to withdraw his plea and remand for further proceedings that comply with Rule 604(d). In response, the State maintains that a remand is unnecessary because the issue that defendant wished to raise was fully and fairly litigated. Further, the State maintains that the certificate was sufficient, because, where a defendant enters a negotiated guilty plea, any sentencing error that defendant could have raised was necessarily an error in the entry of his guilty plea.

¶ 12 Rule 604(d) provides that counsel’s certificate must state, *inter alia*, that counsel “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.” (Emphasis added.) Ill. S. Ct. R. 604(d) (eff. July 1, 2006). Recently, in *People v. Tousignant*, 2014 IL 115329, ¶ 20, the supreme court held:

“[I]n order to effectuate the intent of Rule 604(d), specifically the language requiring counsel to certify that he has consulted with the defendant ‘to ascertain defendant’s contentions of error in the sentence *or* the entry of the plea of guilty,’ the word ‘or’ is

considered to mean ‘and.’ Under this reading, counsel is required to certify that he has consulted with the defendant ‘to ascertain defendant’s contentions of error in the sentence *and* the entry of the plea of guilty.’ ” (Emphases in original.).

According to defendant, *Tousignant* makes clear that the certificate filed in this case was deficient, because it indicated that counsel consulted with defendant only as to the entry of his plea. It is not clear whether *Tousignant* applies under the facts of this case, because here, unlike in *Tousignant*, defendant entered a negotiated plea, and thus he could not challenge his sentence. See *People v. Linder*, 186 Ill. 2d 67, 74 (1999). In any event, we need not make that determination, because, even if the certificate in this case was deficient, a remand is not warranted.

¶ 13 In *People v. Shirley*, 181 Ill. 2d 359 (1998), the supreme court addressed the application of Rule 604(d)’s certificate requirement in the context of a second postjudgment proceeding after an initial remand based on a failure to comply strictly with that requirement. The court rejected the premise that the rule of strict compliance “must be applied so mechanically as to require Illinois courts to grant multiple remands and new hearings following the initial remand hearing.” *Id.* at 369. Instead, if the defendant has received a full and fair opportunity to raise his claim of error in the entry of the plea or the sentence, or both, another remand is not required, absent a good reason to do so. See *id.* A remand is not required if it would be “an empty and wasteful formality.” *Id.* at 370.

¶ 14 In *Marquez I*, we remanded the case for the express purpose of allowing counsel to consult with defendant about any “sentencing errors that bear on the validity of the guilty plea or that represent a breach of defendant’s plea agreement.” *Marquez*, 2012 IL App (2d) 110475, ¶ 8. Thus, any such sentencing errors were necessarily errors in the entry of the plea of guilty.

Accordingly, we presume that, when counsel certified that she had consulted with defendant about his contentions of error in the entry of the plea of guilty, that consultation extended to such sentencing errors. As a result, even if the certificate did not strictly comply with Rule 604(d), the violation on these facts was harmless, such that, under *Shirley*, there is no need for a second remand.

¶ 15

### III. CONCLUSION

¶ 16 Accordingly, we affirm the trial court's denial of defendant's motion to withdraw his plea.

¶ 17 Affirmed.