

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).

2014 IL App (4th) 130816-U

NO. 4-13-0816

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

January 7, 2014
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Coles County
CYRUS SCHOONOVER,)	No. 11CF295
Defendant-Appellant.)	
)	Honorable
)	Mitchell K. Shick,
)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Knecht and Harris concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court granted defendant's motion for summary remand, given that counsel's Rule 604(d) certificate did not strictly comply with the rule.

¶ 2 This appeal comes to us on the motion of the office of the State Appellate Defender (OSAD) to remand defendant's case to the trial court because his trial counsel's certificate pursuant to Illinois Supreme Court Rule 604(d) (eff. Feb. 6, 2013) does not strictly comply with the rule. Because we agree that defense counsel's certificate does not comply with Rule 604(d), we grant OSAD's motion to remand.

¶ 3 I. BACKGROUND

¶ 4 On February 21, 2013, defendant, Cyrus Schoonover, in an open plea in Coles County case No. 11-CF-295 pleaded guilty to forgery (720 ILCS 5/17-3(a)(2) (West 2010)). The State made no agreement about sentencing but agreed to dismiss Coles County case No. 11-CF-

501 and withdraw a petition to revoke probation in Coles County case No. 11-CF-55. In April 2013, the trial court sentenced defendant to five years' imprisonment.

¶ 5 On May 16, 2013, defendant filed a *pro se* motion to reconsider sentence. On August 14, 2013, defendant, through counsel, filed an amended motion to reconsider sentence. On August 27, 2013, defendant's trial counsel filed a certificate averring compliance with Rule 604(d). The certificate states as follows:

"I, *** counsel for the defendant, pursuant to [Illinois] Supreme Court Rule 604(d), hereby certify that I have consulted with the defendant in person to ascertain defendant's contentions of error in the sentence, have examined the trial court file and the 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."

The trial court denied defendant's motion.

¶ 6 This appeal followed.

¶ 7 **II. ANALYSIS**

¶ 8 Defendant contends trial counsel's Rule 604(d) certificate is deficient for failing to certify counsel consulted with him to ascertain his contentions of error in the entry of the plea of guilty. Defendant notes "Rule 604(d) is the only avenue for direct appeal of a conviction after a guilty plea" and asserts the purpose of Rule 604(d) is to ensure counsel consulted with defendant about both the contentions of error in the entry of the plea of guilty and the sentence. The State disagrees and asserts that Rule 604(d) uses disjunctive language and the rule "is satisfied by conferring with defendant about either or both topics." Moreover, the State seeks to have us

delay our decision in this matter due to pendency of this issue before the Illinois Supreme Court in *People v. Tousignant*, No. 115329. We decline to delay the matter and after consideration of the parties' arguments, we find defendant's position persuasive.

¶ 9 Illinois Supreme Court Rule 604(d) provides, in relevant part:
"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." (Emphasis added.) Ill. S. Ct. R. 604(d) (eff. Feb. 6, 2013).

¶ 10 "The question of whether defense counsel complied with Rule 604(d) is subject to *de novo* review." *People v. Grice*, 371 Ill. App. 3d 813, 815, 867 N.E.2d 1143, 1145 (2007). "[S]trict compliance with Rule 604(d) is required and a reviewing court must remand in any case where counsel failed to strictly comply." *People v. Prather*, 379 Ill. App. 3d 763, 768, 887 N.E.2d 44, 47 (2008). "While strict compliance does not require that the language of the rule be recited verbatim in the certificate, some indication must be presented that counsel performed the duties required under the rule." *People v. Richard*, 2012 IL App (5th) 100302, ¶ 10, 970 N.E.2d 35; see also *People v. Dryden*, 2012 IL App (2d) 110646, ¶ 11, 980 N.E.2d 203 (noting Rule 604(d)'s "purpose is to eliminate the need for guesswork about the 'core' of a defendant's contentions"). "The certificate itself is all this court will consider to determine compliance with Rule 604(d)." *People v. Neal*, 403 Ill. App. 3d 757, 760, 936 N.E.2d 726, 728 (2010).

¶ 11 In *People v. Jordan*, 2013 IL App (2d) 120106, 992 N.E.2d 585, the Second District recently addressed this very issue. It noted the strict meaning of "or" is more readily departed from than other words and may be construed to mean "and" where such construction is necessary to effectuate the drafter's intent. *Id.* ¶ 8, 992 N.E.2d 585 (quoting *John P. Moriarty, Inc. v. Murphy*, 387 Ill. 119, 129, 55 N.E.2d 281, 286 (1944)). The Second District found the purpose of Rule 604(d) is to avoid forfeiture of appealable issues. *Id.* ¶ 10, 992 N.E.2d 585. The court noted "counsel cannot avert the forfeiture of *any* such issue unless he consults with the defendant to ascertain *all* such issues, be they related to the sentence, the plea, or both." (Emphases in original.) *Id.* It added it is a "dangerous assumption" for appointed counsel to assume a defendant has no contentions of error in his plea where the defendant filed only a *pro se* motion to reconsider sentence. *Id.* ¶ 11, 992 N.E.2d 585. The court rejected the State's argument the scope of the motion should control the scope of the consultation because this "puts the cart before the horse" and would "seriously undermine[]" Rule 604(d)'s purpose. *Id.* ¶ 14, 992 N.E.2d 585. "[S]trict compliance enables us to *know* that a defendant's postplea motion contained every postplea contention he had," and without a plea consultation statement courts are left to speculate as to what, if any, contentions of error in the plea exist. (Emphasis in original.) *Id.* ¶ 16, 992 N.E.2d 585. "[W]here defendant could file both a motion to reconsider the sentence *and* a motion to withdraw his plea in order to preserve all of his appeal rights, but he filed only a motion to reconsider the sentence, we cannot know that the decision not to move also to withdraw the plea was defendant's decision based on proper advice and 'consultation' with counsel unless counsel's Rule 604(d) certificate contains language referring to consultation about the plea." (Emphasis in original.) *Id.*

¶ 12 In *Prather*, this court held the Rule 604(d) certificate failed to satisfy the consultation requirement where it stated counsel ascertained the defendant's " 'contentions of error and sentence.' " *Prather*, 379 Ill. App. 3d at 768, 887 N.E.2d at 47. There, we stated we need not take strict compliance with Rule 604(d) to "unreasonable extremes" but rejected the State's argument defense counsel "probably did ascertain all of defendant's errors" because "we do not know with certainty because counsel failed to strictly comply with Rule 604(d)." *Id.*

¶ 13 Here, counsel's certificate does not state he consulted with defendant about contentions of error in the plea. We can only speculate whether counsel in fact consulted with defendant on this point and whether defendant has any contentions of error in the plea. As this court has previously discussed, "[t]he particulars of the certificate requirements both give meaning to a defendant's right to appeal and assist defense counsel in fulfilling counsel's duties to his or her client to the best of his or her ability." *Neal*, 403 Ill. App. 3d at 761, 936 N.E.2d at 729. We agree with the Second District that where the defendant has only filed a motion to reconsider sentence, Rule 604(d)'s purpose is best served by requiring a statement referring to counsel's consultation with the defendant about the plea. Because we cannot determine whether counsel consulted with defendant to ascertain his contentions of error in the plea of guilty, we conclude the certificate fails to strictly comply with Rule 604(d).

¶ 14 III. CONCLUSION

¶ 15 For the reasons stated, we grant OSAD's motion and remand the cause for further proceedings consistent with Rule 604(d), that is, the appointment of counsel, the filing of a new motion to withdraw guilty plea or to reconsider sentence (if defendant so desires), a new hearing on the motion, and for strict compliance with the Rule 604(d) requirements.

¶ 16 Remanded with directions.