

No. 1-13-0230

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).

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. 12 DV 40108 |
| |) | |
| KIISHA SMITH, |) | Honorable |
| |) | Terence MacCarthy, |
| Defendant-Appellant. |) | Judge Presiding. |

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Pucinski and Justice Hyman concurred in the judgment.

O R D E R

¶ 1 **Held:** Trial court's order denying defendant's motion to vacate her guilty plea was vacated and remanded for compliance with Illinois Supreme Court Rule 604(d) (eff. Jan. 1, 2013), where the record did not contain a Rule 604(d) certificate.

¶ 2 Following a negotiated plea agreement, defendant Kiisha Smith pleaded guilty to battery and was sentenced to one year of supervision. Subsequently, she filed a motion to vacate her plea which the trial court denied. On appeal, defendant contends that the denial of her motion should

be vacated and her case remanded because the common law record does not contain a certificate as required by Illinois Supreme Court Rule 604(d) (eff. Jan. 1, 2013). We vacate and remand.

¶ 3 Defendant was initially charged with two counts of domestic battery arising out of an altercation with her daughter and grandson, and was represented by a public defender. After plea negotiations, she pleaded guilty to an amended charge of simple battery. She later filed a *pro se* motion to vacate her plea alleging she was forced to take the plea, did not understand its terms, and was undergoing medical care at the time. Shortly thereafter, defendant retained a private attorney.

¶ 4 At a status hearing, defense counsel informed the court that he was ready to argue defendant's *pro se* motion, despite not having read the case's transcript. The trial court informed counsel that Rule 604(d) required him to both read the transcript and file "an appropriate motion that complies with Supreme Court Rule 604(d)." Several weeks later, counsel indicated to the court that he had received a transcript and needed time to review it. Later that month, he filed an amended motion to withdraw defendant's guilty plea. The motion argued that defendant faced undue pressure to take the plea deal because of a high-risk pregnancy and fears as to what would happen to her other child if she were taken into custody.

¶ 5 At the hearing on the amended motion, the trial court asked defense counsel if he intended to file a Rule 604(d) certificate and counsel asked that the case be passed. When the matter was recalled, counsel stated, "Here is my 604-B [*sic*] certification." The State indicated that it had reviewed the certificate and the hearing proceeded. During its ruling, the trial court

stated, "[t]here is today, being filed a Supreme Court 604(d) certificate." It later addressed defense counsel:

"[The Court]: And, again, I note for the record that there is [a] 604(d) petition filed. And just so the record is clear for purposes of appeal, Counsel, I know that a couple of those – it's partially complied with, but I don't know if there is anything in here – it indicates that you have, in fact, spoken with your client regarding all contentions or error, is that correct?

[Defense counsel]: Yes, it's in there.

The Court: And that you have examined the Court file and reported proceedings.

[Defense counsel]: I tracked the language being the Supreme Court Rule, Judge."

The trial court denied defendant's amended motion. Defendant appeals.

¶ 6 Defendant filed a motion for summary disposition in this court which was denied.

¶ 7 Defendant solely contends that this court should vacate the trial court's order denying her motion to withdraw her guilty plea and remand the matter for a filing of a Rule 604(d) certificate, an opportunity to file a new motion to withdraw her plea, and a new hearing. She argues that the certificate's absence from the record indicates that the clerk either lost the document or defense counsel never actually filed it. She asserts that appellate review of the certificate is not possible in its absence, and thus, remand is required.

¶ 8 The State responds that defense counsel's strict compliance with Rule 604(d) is evident from the report of the proceedings, which supersedes the common law record when in conflict. It also argues that defendant, as appellant, bears the burden of producing a record on appeal.

¶ 9 We review compliance with Rule 604(d) *de novo*. *People v. Lindsay*, 239 Ill. 2d 522, 525 (2011). The rule requires a defense attorney to:

"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." Ill. S. Ct. R. 604(d) (eff. Jan. 1, 2013).

Rule 604(d)'s requirements must be met with strict compliance. *People v. Shirley*, 181 Ill. 2d 359, 362 (1998). If defense counsel fails to file a certificate or files an insufficient certificate the reviewing court should remand the matter back to the trial court 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." *Lindsay*, 239 Ill. 2d at 531. In determining compliance with Rule 604(d), "the certificate itself is all that this court will consider." *People v. Grice*, 371 Ill. App. 3d 813, 816 (2007); see also *People v. Dismuke*, 355 Ill. App. 3d 606, 609 (2005).

¶ 10 An appellant bears the burden of providing the reviewing court with a complete record. *People v. Bannister*, 378 Ill. App. 3d 19, 36 (2007). However, this rule is relaxed where (1)

defendant is not at fault for the missing item of record and (2) the item is material to a meaningful appeal. *People v. Sims*, 403 Ill. App. 3d 9, 15 (2010).

¶ 11 In its brief, the State does not argue that defendant is at fault for the missing 604(d) certificate. Rather, it asserts that defendant has not shown that the item is meaningful to the current appeal. This argument is unpersuasive. In order to determine defense counsel's compliance with the rule, a reviewing court requires the certificate itself. See, e.g., *Grice*, 371 Ill. App. 3d at 816. We will not search the record to supplement an insufficient certificate or replace the certificate completely. See *Dismuke*, 355 Ill. App. 3d at 609. Clearly, therefore, the certificate is material to any meaningful review of compliance with the rule. Furthermore, defendant has met any burden to supply a complete record. She argues, in part, that the certificate was never in fact filed. It would be illogical to require an appellant to produce a document on appeal before considering his or her claim that the document does not exist.

¶ 12 Without a certificate before us, we cannot conclude that defense counsel complied with Rule 604(d). A Rule 604(d) certificate provides "a simple, straightforward and mandatory procedure designed to insure that *** defendant's due process rights are protected." See *People v. Janes*, 158 Ill. 2d 27, 35 (1994). We will not disregard that procedure by looking solely to the report of proceedings. As there is no evidence in the common-law record of a Rule 604(d) certificate, we must remand to the trial court 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," in order to ensure defendant her due process rights. *Lindsay*, 239 Ill. 2d at 531.

¶ 13 The State cites *People v. Jones*, 2014 IL App (1st) 120927, for the proposition that in a conflict between the report of proceedings and the common law record, the report of proceedings controls. It argues that because the report of proceedings indicates a certificate was filed and the common law record is silent, we must conclude that the report of proceedings is correct. *Jones* is inapposite to the current facts. *Jones*, and the cases it relies on deal with contradictions between trial courts' oral pronouncements of sentence and the subsequent mittimus. See, e.g., *Jones*, 2014 IL App (1st) 120927, ¶ 63. We will not extend that doctrine to essentially create required, physical documents where such documents are absent from the record. Furthermore, even if such an extension were logical, the courts have made clear that in regards to Rule 604(d) certificates, the report of proceedings cannot substitute for the certificate itself. See *Grice*, 371 Ill. App. 3d at 816 ("[T]he certificate itself is all that this court will consider.")

¶ 14 For the foregoing reasons, we vacate the order of the circuit court of Cook County and remand for (1) the filing of a new postplea motion, (2) a new hearing on defendant's post-plea motion, and (3) strict compliance with Rule 604(d)'s requirements.

¶ 15 Order vacated; remanded with instructions.