2015 IL App (4th) 130963-U

NO. 4-13-0963

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
September 24, 2015
Carla Bender
4th District Appellate
Court, IL

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from |
| Plaintiff-Appellee, | ) | Circuit Court of |
| v. | ) | McLean County |
| BOBBY GUNN, | ) | No. 12CF750 |
| Defendant-Appellant. | ) | |
| | ) | Honorable |
| | ) | Robert L. Freitag, |
| | ) | Judge Presiding. |

JUSTICE HOLDER WHITE delivered the judgment of the court.
Presiding Justice Pope and Justice Appleton concurred in the judgment.

**ORDER**

¶ 1 *Held*: The appellate court affirmed the trial court's denial of the motion to withdraw the guilty plea based on ineffective assistance of counsel where defendant could not show the representation fell below an objective standard of reasonableness; but we reversed and remanded for (1) the filing of a new Rule 604(d) certificate; (2) the opportunity to file a new motion to withdraw the guilty plea and/or reconsider the sentence; and (3) a new motion hearing.

¶ 2 In March 2013, defendant, Bobby Gunn, entered into an open guilty plea on one count of unlawful delivery of a controlled substance within 1,000 feet of a church. 720 ILCS 570/407(b)(2) (West 2010). In June 2013, the trial court sentenced defendant to 11 years' imprisonment. Defendant filed a timely *pro se* motion to withdraw the guilty plea and vacate the sentence. Following consultation, appointed counsel determined defendant sought to (1) withdraw his guilty plea, *and* (2) move for reconsideration of his sentence. Accordingly, counsel sought leave to file a motion to reconsider the sentence. The court denied leave to file the

motion to reconsider as untimely but held a hearing on the motion to withdraw the guilty plea. The court denied the motion to withdraw the plea.

¶ 3 Defendant appeals, arguing the court erred in denying (1) the motion to withdraw the guilty plea and (2) leave to file the motion to reconsider the sentence. We affirm in part, reverse in part, and remand.

¶ 4 I. BACKGROUND

¶ 5 A. Guilty Plea

¶ 6 In August 2012, defendant was indicted for unlawful delivery of a controlled substance within 1,000 feet of a church, a Class 1 felony (count I), and unlawful delivery of a controlled substance, a Class 2 felony (count II). 720 ILCS 570/407(b)(2), 401(d)(i) (West 2010). The Bloomington vice unit conducted a controlled buy in April 2012, wherein defendant sold less than one gram of a substance containing heroin to a confidential source.

¶ 7 Prior to his March 2013 guilty plea hearing, defendant sent the trial court a letter. In his letter, defendant claimed his counsel, David Rumley, never conveyed a five-year plea deal the State offered. Defendant contended the only offer Rumley brought to him was a nine-year deal. Defendant asked the court to have some empathy based on the fact he was not extended-term eligible and wrote he could not see himself sentenced to 4 to 15 years' imprisonment under the final open plea offer.

¶ 8 Prior to entering the guilty plea, the trial court allowed defendant to expound upon his letter. Defendant claimed the only offer Rumley informed him of was a nine-year offer at the beginning of the case. Defendant claimed he learned of a five-year offer in January 2013, when he asked his counsel why the prosecutor was being so hard on him. Rumley allegedly responded the prosecutor was being tough because defendant turned down a five-year offer. When

defendant told Rumley he never received word of the five-year offer, counsel allegedly responded it was defendant's word against his. The prosecutor asserted he offered defendant a nine-year plea, which defendant rejected, and a six-year plea offer only available on October 31, 2012 (the date of a status hearing in defendant's case), which defendant also rejected. Rumley stated he did not specifically recall the terms of the offer but had a vague recollection there was a six-year offer at some point. Rumley stated the prosecutor had refreshed his recollection and he took the six-year offer to defendant, who held out for five years. Defendant responded, "I never received a offer [*sic*] of six years. I also asked [Rumley] when he came to visit me last time and told him I would take six years, and he told me he was going to notify" the prosecutor, who declined to agree to six years. Defendant insisted he never received any offer other than the initial nine-year plea.

¶ 9 The trial court credited the statements made by Rumley and the assistant State's Attorney, stating, "I don't think there is any issue of you not being told what the offers were. I think you were told, that you didn't want them, and now you've changed your mind, but, unfortunately, it's no longer available." The judge specifically stated he believed the attorneys and did not believe defendant's version of the plea negotiations.

¶ 10 Thereafter, defendant entered an open plea of guilty on count I and the State dismissed count II. Defendant faced a penalty of a minimum of 4 years' and a maximum of 15 years' imprisonment with a two-year term of mandatory supervised release.

¶ 11 B. Sentencing

¶ 12 At defendant's June 2013 sentencing hearing, the State emphasized his criminal history and recommended a term of 12 years' imprisonment. The presentence investigation report (PSI) detailed defendant's criminal history, including 10 felony convictions for unlawful

delivery of a controlled substance (September 1989); obstruction of justice (August 1993); theft (May 1995); child abduction (May 1995); retail theft (September 1997); obstruction of justice (March 1998); escape/failure to return from furlough (July 1998); criminal trespass to a residence (July 2002); domestic battery (July 2002); and forgery (June 2003). Rumley argued factors in mitigation included (1) the death of defendant's mother and two brothers shortly before he committed the charged crime; (2) defendant's age (50); (3) defendant's drug addiction; (4) defendant's acceptance of responsibility by pleading guilty; and (5) blindness in defendant's right eye. Counsel also highlighted the relatively long period between defendant's last felony conviction in 2003 and the instant charges committed in 2012, and he recommended a term of five years' imprisonment. Defendant made a statement in allocution, recounting the deaths in his family, his drug addiction, and his commitment to beating that addiction.

¶ 13 The trial court considered the PSI, defendant's statement in allocution, and the relevant factors in aggravation and mitigation. In particular, the court considered the recent deaths in defendant's family and his drug addiction mitigating factors. The court found defendant's extensive criminal history particularly aggravating and acknowledged a valid argument for the maximum sentence existed. However, given the mitigating factors, the court sentenced defendant to 11 years' imprisonment.

¶ 14 C. Posttrial Motions

¶ 15 Defendant, *pro se*, timely filed a motion titled, "motion to withdraw guilty plea and vacate sentence." In pertinent part, the motion read as follows:

> "1. Petitioner is presently incarcerated in the Centralia Correctional Center, Centralia, Illinois 62801.

2. Petitioner received inadequate representation by counsel. Had counsel *** relaid [*sic*] the [S]tate[']s offer of 6-years the [p]etitioner would of [*sic*] surely excepted [*sic*] that offer, but due to the inadequate representation [p]etitioner found out that this offer was offer[e]d and was no longer available to him. Thus den[y]ing him the benefit of the pleabargain [*sic*] process.

W[herefore], petitioner *** respectfully requests that his plea of guilty be withdrawn and his sentence entered as a result of that plea be vacated so that a more constitutional sentence be imposed, being the 6 years that the [S]tate offered."

In September 2013, appointed counsel, Brian McEldowney, filed a certificate pursuant to Illinois Supreme Court Rule 604(d) (eff. Feb. 6, 2013) and a motion to reconsider the sentence.

¶ 16 At the hearing on the motion to withdraw the guilty plea, McEldowney drew the court's attention to the previously filed motion to reconsider the sentence and asked for formal leave to file the motion. He asserted, "After conferring with the defendant, I believe it was his intention to address sentence in his motion. I believe the last phrase requests a reduced sentence, so I'm asking leave to file that motion to reconsider sentence and to hear that issue today." The assistant State's Attorney made an oral motion to dismiss the motion, arguing, "It's well past the 30 days, and I don't see anything in [defendant's *pro se* motion] that even remotely is a motion to reconsider sentence." McEldowney argued the *pro se* motion tolled the time period for counsel to supplement with the additional requested motion.

¶ 17 The trial court stated defendant, under Rule 604(d), could "file either a motion to withdraw guilty plea and vacate sentence or a motion to reconsider sentence or both." The court

found defendant timely filed only a motion to withdraw the guilty plea, which tolled the time for counsel to file an amended motion to withdraw the guilty plea. The court denied leave to file the motion to reconsider the sentence, prepared by McEldowney after consultation with the defendant, as untimely. With respect to the last phrase of defendant's *pro se* motion, the judge acknowledged counsel "could certainly in good faith absolutely argue that maybe *** he's also seeking reconsideration of the sentence." However, the court rejected the argument and stated, "I just don't read that as a request to reconsider the sentence that was imposed, but rather as a continuation of what he's asking for in his motion [to withdraw]."

¶ 18 The matter proceeded with the hearing on the motion to withdraw the guilty plea. Defendant testified he met with Rumley three times in jail and "a couple times" before status hearings in the trial court, and the only offer he ever received was for nine years. Defendant claimed he learned of another offer before a status hearing, sometime after the October 31, 2012, status hearing. Defendant testified, "[Rumley] came into the back. He said that all offers was [*sic*] off the table. I said, what do you mean? You say you told me you was going to [contact the assistant State's Attorney]. He said then that there was a five-year offer that I never took. I said, I never received a five-year offer." Defendant's testimony acknowledged there was never a five-year offer, only a six-year offer, which defendant learned of at the guilty plea hearing. Finally, defendant asserted he would have accepted a six-year plea deal had it been communicated to him. McEldowney chose not to call Rumley. Instead, McEldowney asked the court to consider the representations made by the assistant State's Attorney and Rumley at the guilty plea hearing.

¶ 19 The same assistant State's Attorney who was present at the guilty plea hearing then called Rumley as a witness. Rumley testified he communicated both the nine-year offer and the six-year offer to defendant. He further testified:

> "My recollection is that that discussion occurred in the hallway by the holding cells off of this courtroom. I communicated to him that the State had made a six-year offer, and that it was a today-only drop-dead offer. That it was only for today. [Defendant] asked me to inquire about lower numbers. I acquainted him with the mirror image rule, which I understood to mean if I communicated a response other than yes, it effectively killed a six-year offer, and he argued with me insisting I communicate a lower number, which I believe I did."

On cross-examination, McEldowney asked if it were true he met with defendant three times in jail. Rumley replied, "Probably. His recollection is better than mine, so, I would say, yeah, three times at least." McEldowney also established Rumley's recollection was refreshed by the State at the previous hearing.

¶ 20 McEldowney asked the trial court to reconsider the finding from the guilty plea hearing and make "a determination the defendant has testified that he didn't become aware of this six-year offer until substantially after the October 31st offer was made and expired and he lost the benefit of the opportunity to consider and perhaps accept that offer." The State asserted defendant originally tried to convince the court he did not receive a five-year offer and contradicted himself by claiming he never got the six-year offer.

¶ 21 The trial court stated its belief the plea negotiations were "not germane to the issue of whether or not the defendant made a knowing and voluntary waiver of his rights and *** knowingly entered a plea of guilty." The judge reiterated he believed defendant had received the six-year offer. The court determined there were no outstanding plea offers at the time of the

guilty plea hearing, defendant was fully admonished, and defendant persisted in his guilty plea. The court found defendant voluntarily, knowingly, and intelligently pleaded guilty and denied the motion to withdraw the plea.

¶ 22 This appeal followed.

¶ 23 II. ANALYSIS

¶ 24 Defendant appeals, arguing the trial court erred in denying (1) the motion to withdraw the guilty plea and vacate the sentence, claiming Rumley's failure to communicate the six-year plea deal constituted ineffective assistance of counsel; and (2) leave to file the motion to reconsider the sentence as untimely. We address these arguments in turn.

¶ 25 A. Motion To Withdraw the Guilty Plea

¶ 26 Defendant contends the trial court erred in denying the motion to withdraw the guilty plea wherein he alleged he was denied his right to effective assistance of counsel because counsel failed to communicate a six-year plea offer. Defendant further asserts the court erred in finding defendant knowingly and voluntarily entered a guilty plea, rather than using the familiar ineffective-assistance standard from *Strickland v. Washington*, 466 U.S. 668 (1984). The State argues this court may affirm on any basis in the record and the trial court's credibility determinations foreclose an ineffective-assistance claim under the *Strickland* standard.

¶ 27 We agree with defendant the trial court used the incorrect standard in evaluating the motion to withdraw the guilty plea. *Lafler v. Cooper*, __ U.S. __, 132 S. Ct. 1376, 1390 (2012) ("An inquiry into whether the rejection of a plea was knowing and voluntary, however, is not the correct means by which to address a claim of ineffective assistance of counsel."). Rather, we evaluate a defendant's claims of ineffective assistance of counsel under the two-part test the United States Supreme Court set forth in *Strickland*. To prevail on such a claim, "the defendant

must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. The defendant must also show a reasonable probability the outcome of the proceeding would have been different but for counsel's deficient representation. *Strickland*, 466 U.S. at 694.

¶ 28 Defendant contends a reviewing court may affirm on any grounds substantiated by the record only when affirming the dismissal of a first- or second-stage postconviction petition. We disagree. "It is well established that a reviewing court may affirm the circuit court's decision based on any ground in the record." *People v. Brownlee*, 186 Ill. 2d 501, 511, 713 N.E.2d 556, 562 (1999). As a general rule, claims of ineffective assistance of counsel are "better made in proceedings on a petition for post-conviction relief, when a complete record can be made and the attorney-client privilege no longer applies." *People v. Kunze*, 193 Ill. App. 3d 708, 726, 550 N.E.2d 284, 296 (1990). However, the record on direct appeal may sometimes form an adequate basis for review if the record demonstrates the defendant's claim is groundless. *People v. Shelton*, 401 Ill. App. 3d 564, 584, 929 N.E.2d 144, 163 (2010) (the record on direct appeal refuted the defendant's claim that defense counsel failed to call certain witnesses and present certain evidence). Where the resolution of an ineffective-assistance claim requires a credibility determination, the appropriate remedy on appeal is to remand for a hearing. *People v. Trujillo*, 2012 IL App (1st) 103212, ¶ 14, 972 N.E.2d 184. This is so because the trial court is in a superior position to determine witnesses' credibility and to resolve conflicting testimony. *People v. Tate*, 305 Ill. App. 3d 607, 612, 712 N.E.2d 826, 830 (1999).

¶ 29 Here, the trial court had the opportunity to hear testimony on this issue from both defendant and Rumley and, at the hearing on the motion to withdraw the guilty plea, separate counsel (McEldowney) had the opportunity to cross-examine Rumley. The court expressed its "firm belief that what happened here is exactly what was testified to by Mr. Rumley, and that is

that an initial offer was made of nine years. The defense engaged in counter-negotiations, secured a six-year offer, which I believe was communicated to the defendant by Mr. Rumley." The record shows the court clearly credited Rumley's testimony over defendant's testimony. Therefore, because the court found Rumley communicated the six-year offer to defendant, defendant cannot show Rumley's representation fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 688. As defendant cannot meet the first prong of the *Strickland* test for ineffective assistance of counsel, the court properly denied his motion to withdraw the guilty plea.

¶ 30 B. Motion To Reconsider the Sentence

¶ 31 Defendant argues the trial court erred in denying leave to file the motion to reconsider the sentence as untimely because (1) defendant was denied his right to assistance of counsel in presenting postplea claims as required by Illinois Supreme Court Rule 604(d) (eff. Feb. 6, 2013); and (2) the court's narrow interpretation of defendant's *pro se* motion to withdraw the guilty plea prevented defense counsel from properly amending the motion to adequately present defendant's claims of error as required by Rule 604(d). The State disagrees, but concedes the cause should be remanded for strict compliance with Rule 604(d).

¶ 32 Rule 604(d) provides the process by which a defendant may obtain appellate review of a judgment entered following an open guilty plea. The defendant must, within 30 days of sentencing, file "in the trial court a motion to reconsider the sentence, if only the sentence is being challenged, or, if the plea is being challenged, a motion to withdraw the plea of guilty and vacate the judgment." Ill. S. Ct. R. 604(d) (eff. Feb. 6, 2013). Thereafter, the court must appoint indigent defendants counsel to assist with the presentation of the motion. *Id.* Rule 604(d) requires counsel 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." *Id.*

Rule 604(d) requires strict compliance. *People v. Janes*, 158 Ill. 2d 27, 33, 630 N.E.2d 790, 792 (1994). Our review is *de novo*. *People v. Jordan*, 2013 IL App (2d) 120106, ¶ 4, 992 N.E.2d 585.

¶ 33 The supreme court has held "in 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.' " (Emphasis in original.) *People v. Tousignant*, 2014 IL 115329, ¶ 20, 5 N.E.3d 176. The supreme court found this reading best served the purpose of Rule 604(d): "to ensure that any improper conduct or other alleged improprieties *** are brought to the trial court's attention *before* an appeal is taken ***. Toward that end, the rule's certificate requirement is meant to enable the trial court to ensure that counsel has reviewed the defendant's claim and considered *all* relevant bases for the motion to withdraw the guilty plea or to reconsider sentence." (Emphases in original.) *Id.* ¶ 16, 5 N.E.3d 176. In so holding, the court necessarily rejected the State's argument that defense counsel's obligation to consult with a defendant extended only to the subject of the first motion. "Unless the defendant moves both to withdraw the guilty plea *and* to reconsider the sentence, this would mean counsel was obligated

to certify consultation with the defendant only about the sentence *or* the guilty plea, but not both. This flies in the face of the rule's intent." (Emphasis in original.) *Id.* ¶ 21, 5 N.E.3d 176.

¶ 34 The Second District considered the question of whether Rule 604(d) requires counsel to consult with defendant as to any errors in both sentencing and the entry of the guilty plea where defendant's motion requested reconsideration of the sentence. *Jordan*, 2013 IL App (2d) 120106, 992 N.E.2d 585. The *Jordan* court noted one purpose of strict compliance with Rule 604(d) is to safeguard a defendant's right to appeal because *any* issue not properly raised in the postplea motion is forfeited. *Id.* ¶ 10, 992 N.E.2d 585. We find the Second District's reasoning regarding the scope of the consultation required by Rule 604(d) persuasive and quote from its opinion at length:

> "[W]e reject any suggestion that which motion is filed will dictate the extent of the consultation that the rule requires. To be sure, counsel must certify that he has made any necessary amendments to 'the motion.' [Citation.] But we do not read this requirement to indicate that, where 'the motion' seeks only reconsideration of the sentence, the consultation (and any resulting amendments) need pertain only to sentencing issues. Obviously, a motion to reconsider the sentence may be amended (1) to raise additional sentencing issues *or* (2) to add the substance of a motion to withdraw the plea. And indeed, the rule states that the required amendments are those 'necessary for adequate presentation of any defects in *those* proceedings.' [Citation.] *** Thus, the rule envisions that, even where the motion filed seeks only

> reconsideration of the sentence, the consultation (and any resulting amendments) will pertain to the plea as well. ***
>
> More importantly, a suggestion that the scope of the motion controls the scope of the consultation—rather than vice versa—puts the cart before the horse. It is the consultation that should determine which issues are pertinent and thus which motion (or motions) should be filed. (For example, if the defendant has already filed a *pro se* motion only to reconsider the sentence, it is the consultation that should determine whether the motion to reconsider the sentence should be amended to include only additional sentencing issues or whether, in addition, the substance of a motion to withdraw the plea should also be filed.) If it were the scope of the motion that determines the scope of the consultation, the purpose of the rule would be seriously undermined." (Emphases in original.) *Id.* ¶¶ 13-14, 992 N.E.2d 585.

The *Jordan* court concluded defense counsel must consult with a defendant about both the sentence and the guilty plea in order to properly preserve all appealable issues. *Id.* ¶ 17, 992 N.E.2d 585.

¶ 35 While the *Jordan* court addressed the scope of consultation required by Rule 604(d), we find the reasoning applicable to the scope of the amended motion contemplated by the rule. Here, after properly consulting defendant regarding the plea and the sentence, McEldowney concluded defendant intended to also request a reduced sentence. Unfortunately,

the trial court, confronted with a motion to reconsider filed outside the statutory time period, felt constrained to sustain the State's timeliness objection. 730 ILCS 5/5-4.5-50(d) (West 2012). However, the motion to reconsider should have been treated as an amendment to defendant's *pro se* motion, as provided for in Rule 604(d), raising both the request to withdraw the guilty plea and the request to reconsider the sentence.

¶ 36 The State concedes remand is required because defense counsel did not properly amend the motion to withdraw the guilty plea to raise an excessive-sentence claim. However, the State also suggests defense counsel may only raise a sentencing claim in the context of an excessive-sentence challenge to the guilty plea and urges this court to reject any opportunity for a hearing on the substance of the untimely motion to reconsider the sentence. We decline to do so.

¶ 37 The State appears to suggest that allowing for a hearing on the substance of the motion to reconsider would place Rule 604(d) and section 5-4.5-50(d) of the Unified Code of Corrections in direct conflict because the substance of the motion to reconsider is untimely under the statute. 730 ILCS 5/5-4.5-50(d) (West 2012) (providing a motion to reduce the sentence must be filed within 30 days of sentencing). We need not address this concern because we are not persuaded by the trial court's characterization of the final phrase of defendant's *pro se* motion. Again, defendant's *pro se* motion concluded: "W[herefore], petitioner *** respectfully requests that his plea of guilty be withdrawn and his sentence entered as a result of that plea be vacated so that a more constitutional sentence be imposed, being the 6 years that the [S]tate offered." The trial court acknowledged a good-faith argument that this phrase addressed the reconsideration of defendant's sentence, but it rejected the argument.

¶ 38 One purpose of Rule 604(d), as discussed above, is to ensure a defendant has the advice of counsel before proceeding on posttrial motions. *Tousignant*, 2014 IL 115329, ¶ 16, 5 N.E.3d 176. Defendant's *pro se* motion should be liberally construed to preserve any contentions of error that may come to light *after* consultation with counsel. See *People v. Velasco*, 197 Ill. App. 3d 589, 590-91, 554 N.E.2d 1094, 1096 (1990). The trial court's strict interpretation of defendant's *pro se* motion defeats the purpose of the rule by preventing defense counsel from raising those same contentions of error Rule 604(d) seeks to protect. Under these circumstances, where the *pro se* motion expressly requests a lower, "more constitutional sentence," the trial court should have construed the final phrase of defendant's *pro se* motion as requesting reconsideration of his sentence. In accord with that liberal construction, the court should have characterized defense counsel's motion to reconsider as an amendment to defendant's *pro se* motion, thereby fulfilling the purpose of Rule 604(d) and preserving judicial resources on appeal.

¶ 39 McEldowney's Rule 604(d) certificate states he made the necessary amendments, after consultation, to the postplea motion to adequately present any defects in the sentence or the entry of the guilty plea. Clearly, however, there was not strict compliance with this requirement of Rule 604(d). "It is the consultation that should determine which issues are pertinent and thus which motion (or motions) should be filed. (For example, if the defendant has already filed a *pro se* motion only to reconsider the sentence, it is the consultation that should determine whether the motion to reconsider the sentence should be amended to include only additional sentencing issues or whether, in addition, the substance of a motion to withdraw the plea should also be filed.)" *Jordan*, 2013 IL App (2d) 120106, ¶ 14, 992 N.E.2d 585. See also *People v. Little*, 337 Ill. App. 3d 619, 622, 786 N.E.2d 636, 638 (2003) (where the record clearly shows counsel did not review the report of proceedings of the guilty plea, the cause was remanded for

strict compliance with Rule 604(d)). Accordingly, we "remand for (1) the filing of a new 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." *People v. Lindsay*, 239 Ill. 2d 522, 531, 942 N.E.2d 1268, 1274 (2011). On remand, defense counsel should draft his Rule 604(d) certificate according to the supreme court's interpretation of Rule 604(d) in *Tousignant*.

¶ 40 III. CONCLUSION

¶ 41 For the reasons stated, we affirm in part, reverse in part, and remand for further proceedings. As part of our judgment, because the State successfully defended a portion of this appeal, we award the State its $50 statutory assessment against defendant as costs of this appeal. See *People v. Smith*, 133 Ill. App. 3d 613, 619-20, 479 N.E.2d 328, 333 (1985) (citing *People v. Nicholls*, 71 Ill. 2d 166, 178, 374 N.E.2d 194, 199 (1978)).

¶ 42 Affirmed in part and reversed in part; cause remanded with directions.