

NOTICE
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2015 IL App (4th) 141019-U

NO. 4-14-1019

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
August 17, 2015
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Coles County
ROY L. LAWHORN,)	No. 04CF94
Defendant-Appellant.)	
)	Honorable
)	James R. Glenn,
)	Judge Presiding.

PRESIDING JUSTICE POPE delivered the judgment of the court.
Justices Harris and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant is not entitled to a second remand for compliance with Illinois Supreme Court Rule 604(d) (eff. Feb. 6, 2013) where he received a full and fair opportunity to raise his claims of error.

¶ 2 In April 2012, defendant, Roy L. Lawhorn, pleaded guilty to two counts of criminal sexual assault (720 ILCS 5/12-13(a)(3) (West 2002)). The trial court accepted the plea and later sentenced defendant to consecutive prison terms of 10 years on each count. Defendant appeals a second time from the denial of his motion to withdraw his guilty plea, arguing his attorney did not properly certify compliance with Illinois Supreme Court Rule 604(d) (eff. Feb. 6, 2013). We affirm.

¶ 3 I. BACKGROUND

¶ 4 In February 2004, the State charged defendant with two counts of criminal sexual

assault (720 ILCS 5/12-13(a)(3) (West 2002)). At a May 2004 hearing, the trial court was advised of a potential plea to both counts in this case, No. 04CF94, and another pending case, No. 04CF108, in exchange for dismissal of one of the five counts in case No. 04CF108. The court admonished defendant the court would have the discretion to impose concurrent sentences on each count in case No. 04CF108 and on each count in case No. 04CF94; however, the sentences in case No. 04CF94 would have to be served consecutively to the sentences in case No. 04CF108. In July 2004, the court sentenced defendant to concurrent prison terms of 14 years on each count in case No. 04CF94 to be served consecutively to a 14-year prison term in No. 04CF108. In November 2004, on defendant's motion, this court dismissed defendant's direct appeal.

¶ 5 In July 2007, defendant filed a *pro se* postconviction petition pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2006)). In his petition, defendant alleged (1) he had not been admonished it was mandatory his sentences be served consecutively in No. 04CF94, thereby making his guilty plea involuntary; and (2) he was denied effective assistance of counsel for failure to file a motion to withdraw his guilty plea. In September 2009, the trial court acknowledged its failure to address the petition in accordance with the Act (725 ILCS 5/122-2.1 (West 2006)) and appointed William McGrath to represent defendant.

¶ 6 In June 2010, McGrath filed an amended petition incorporating defendant's earlier allegations and making additional claims of ineffective assistance of counsel. McGrath also filed a certificate in accordance with Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984). In July 2010, the State moved to dismiss the amended petition. At a February 2011 hearing on the postconviction petition, the trial court found defendant had set forth a substantial showing of a

constitutional violation, denied the State's motion dismiss, and ordered the State to file a response to the amended petition. In March 2011, the State responded to the amended petition.

¶ 7 In August 2011, the trial court allowed defendant's postconviction petition, finding defendant had not been properly admonished the sentences on the two counts in case No. 04CF94 had to be served consecutively to each other. The court further allowed defendant to withdraw his guilty plea.

¶ 8 On April 9, 2012, the trial court was advised of a partially negotiated plea agreement whereby defendant would plead guilty to both counts and the State would agree to cap its sentencing recommendation at 22 years total. The court admonished defendant (1) of the charges against him, (2) of the potential penalties, (3) any sentences imposed must be served consecutively to each other, and (4) the court was not bound by any recommendation for sentencing. The factual basis for the plea reflected in December 2003 defendant had been having sexual contact with his then 14-year-old stepdaughter for approximately 2 years, including oral and penile penetration. The court accepted defendant's guilty plea to both counts of criminal sexual assault. At a hearing on May 14, 2012, the court admonished defendant, in addition to a potential prison sentence, he was actually eligible for probation. Defendant persisted in his guilty plea.

¶ 9 On November 14, 2012, the trial court sentenced defendant to consecutive prison terms of 10 years on each count. The court admonished defendant, prior to filing an appeal, he would be required to file a motion to withdraw his guilty plea within 30 days. On November 16, 2012, through his attorney, Chad Miller, defendant filed a motion to reconsider the sentence or, in the alternative, for a rehearing on the sentence. At a hearing on December 17, 2012, the court

noted this case involved a partially negotiated plea and, therefore, defendant was required to file a motion to withdraw his plea rather than the motion to reconsider sentence. During Miller's response, he questioned whether this was the case since the State only agreed to recommend a sentence cap. He stated, because he had not been involved in the negotiations, he had "asked for all three sets of transcripts." Miller asked for an opportunity to look at it again and sought leave to file an amended pleading, if necessary. Leave was granted to do so.

¶ 10 On January 28, 2013, defendant filed a motion to withdraw the guilty plea. Additionally, Miller filed a certificate pursuant to Supreme Court Rule 604(d) (eff. July 1, 2006) in which he certified he had (1) consulted with defendant in person to ascertain his contentions of error in the entry of his plea of guilty, (2) examined the trial court file and report of proceedings of the plea of guilty, and (3) made any amendments to the motion necessary for adequate presentation of any defects in those proceedings. At a March 28, 2013, hearing, the trial court denied the motion to withdraw the plea.

¶ 11 In April 2013, defendant filed a notice of appeal. In July 2014, on an agreed motion for summary remand, this court remanded to the trial court "for the filing of a Rule 604(d) certificate, the opportunity to file new post-plea motions, if counsel concludes that new motions are necessary, a new hearing on the motions, and strict compliance with the requirements of Rule 604(d)." *People v. Lawhorn*, No. 4-13-0263 (summary order under Supreme Court Rule 23(c)(2)).

¶ 12 On remand, on October 20, 2014, defendant filed an amended motion to withdraw the guilty plea. In addition to incorporating the allegations of the original motion to withdraw, defendant expanded on the allegations regarding the sentencing proceedings, added allegations

regarding the inappropriate imposition of fines, and added a request for additional monetary credit for time in pretrial custody.

¶ 13 At the November 19, 2014, hearing on the motion, Miller filed another Rule 604(d) certificate, which is the subject of this appeal. The trial court questioned Miller why the case had been remanded. Miller advised the court of the *Tousignant (People v. Tousignant, 2014 IL 115329, 5 N.E.3d 176 (2014))* ruling which "basically says on a 604(d) [c]ertificate, the plain language of the rules says you're supposed to say you discuss [*sic*] with the defendant the contentions of error in both the sentence 'or the guilty plea'; and it has to be 'and the guilty plea'. So I prepared a new 604(d) [c]ertificate which effectively just changed that 'or' to an 'and' which I think complies with that case." The State's Attorney agreed the certificate was in compliance with the rule and the court accepted the certificate.

¶ 14 At the hearing, Miller advised the trial court it had basically seen the motion to withdraw before because Miller had "essentially, for the most part, re-filed what [he] had previously filed." Counsel indicated "[t]he things that I had added are things that were noted to me whenever I re-reviewed it before I filed this" regarding the new line of cases dealing with imposition of fines, costs, and fees. Additionally, Miller indicated he added a section on credit for pretrial custody. Miller indicated the other matters had already been "hashed out." The State asked the court to adopt the arguments made in March 2013 as a basis to again deny the motion to withdraw the plea. The trial court denied the motion to withdraw, corrected the fines, and amended the statutory credit for time served.

¶ 15 This appeal followed.

¶ 16 II. ANALYSIS

¶ 17 As noted, this is the second time this case is before us. The first time, we remanded for compliance with Supreme Court Rule 604(d) (eff. July 1, 2006). Rule 604(d) states 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.)

Miller's certificate stated as follows:

"(1) I hereby state that I have consulted with the [d]efendant, in person to ascertain his contentions of error concerning both the sentence and the guilty plea in the above-entitled cause, resulting in the [m]otion to [w]ithdraw [g]uilty [p]lea that was filed in this case.

(2) I have examined the trial court file and report of proceedings *in this matter*.

(3) I have made any amendments to the motion necessary for adequate presentation of any defects in those proceedings." (Emphasis added.)

¶ 18 "The question of whether defense counsel complied with Rule 604(d) is subject to *de novo* review." *People v. Neal*, 403 Ill. App. 3d 757, 760, 936 N.E.2d 726, 728 (2010). While "strict 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)), "strict compliance does not require that the language of the rule be recited verbatim in the certificate, [but] 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)."

¶ 19 On appeal, defendant argues Miller's Rule 604(d) certificate was not in strict compliance with the rule because he did not specifically state he had examined the proceedings of "the plea of guilty" and asks this court to remand a second time for (1) the filing of a certificate in strict compliance with Rule 604(d); (2) the opportunity to file new postplea motions; and (3) if necessary, a new hearing. The State argues defendant is not entitled to a second remand because (1) it would be a "wasteful and empty exercise" (citing *People v. Shirley*, 181 Ill. 2d 359, 692 N.E.2d 1189 (1998)); and (2) "the phrase 'in this matter' is a broader, more encompassing phrase than is required by the Rule, which would include the report of proceedings from the defendant's guilty plea" (citing *People v. Larue*, 2014 IL App (4th) 120595, ¶ 62 (" 'matter' [is] synonymous with 'case' ")). We agree with the State a second remand is unnecessary because this issue was already fully and fairly litigated.

¶ 20 In *Shirley*, the supreme court addressed the application of the Rule 604(d) certificate requirement in the context of a second postjudgment proceeding after an initial remand based on trial counsel's initial failure to comply strictly with the certificate requirement.

The court rejected the premise 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, 692 N.E.2d at 1194. Instead, if the defendant has received a full and fair opportunity to raise his claims 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. *Id.* Thus, the court rejected the defendant's request for a second remand on the sole basis his trial counsel had filed the certificate late. The court examined the record and concluded, because there would be no point in providing the defendant with yet a third opportunity to argue his sentences were excessive (the trial court having rejected that contention twice already), another remand would be "an empty and wasteful formality." *Id.* at 370, 692 N.E.2d at 1195.

¶ 21 Here, defendant received a full and fair opportunity to raise his claims of error in the entry of the plea on remand. Indeed, the record shows, prior to Miller filing the motion to reconsider sentence, he had "asked for all three sets of transcripts." While Miller did not specify what they were, it can be inferred from the motions filed and comments at various hearings, these transcripts were from the two sentencing hearings and the plea hearing. Further, in his first Rule 604(d) certificate, Miller certified he had examined the trial court file and report of proceedings of the plea of guilty and filed a motion to withdraw the guilty plea. At the hearing on the initial motion, Miller made extensive arguments. After remand, Miller filed an amended motion in which he incorporated the previous allegations of error and added issues he identified when he "re-reviewed" on remand. At the November 2013 hearing, Miller noted his previous arguments and offered additional arguments on the amended motion. The trial court denied the motion for a second time. We see no point in providing defendant with a third opportunity to

argue his plea was involuntary, particularly since the trial court has rejected that contention twice already.

¶ 22 Additionally, defendant does not contend he had objections to the entry of his guilty plea and does not allege counsel failed to include other issues regarding the postplea proceedings. Rather, he raises only a claim of a technical semantic defect in the Rule 604(d) certificate. Therefore, while the language Miller used in his second certificate could have been more precise, defendant has raised no claim of omitted legal contentions or of prejudice. Accordingly we reject defendant's prayer for a second remand solely for the purpose of making counsel file yet another Rule 604(d) certificate. *Cf., People v. Scarbrough*, 2015 IL App (3d) 130426, ¶ 41 ("We agree that the language used in the certificate was insufficiently precise and technically non-compliant, but defendant has raised no claim of omitted legal contentions or of prejudice.")

¶ 23 Based on a review of the record, we conclude defendant has received a full and fair opportunity to raise his claims of error and another remand would be an empty and wasteful formality.

¶ 24 III. CONCLUSION

¶ 25 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002 (West 2012).

¶ 26 Affirmed