

No. 1-14-2350

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  
FIRST JUDICIAL DISTRICT

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PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
	)	Cook County, Criminal Division.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 10 CR 17921
	)	
CAREY DONALD,	)	
	)	
Defendant-Appellant	)	The Honorable
	)	Thomas V. Gainer Jr.,
	)	Judge, presiding.

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JUSTICE LAVIN delivered the judgment of the court.  
Presiding Justice Mason and Justice Fitzgerald Smith concurred in the judgment.

**ORDER**

¶ 1 *Held:* Post-plea counsel's certificate did not strictly comply with Illinois Supreme Court Rule 604(d) because counsel failed to certify that she consulted with defendant about his claims of error concerning his sentence. Ill. S. Ct. R. 604(d) (eff. Feb. 6, 2013). We reverse for new post-plea proceedings.

¶ 2 This appeal arises from the trial court's denial of defendant Carey Donald's motion to withdraw his guilty plea. On appeal, defendant contends that his post-plea counsel did not strictly comply with the certificate requirements of Supreme Court Rule 604(d) because she *solely* certified that she consulted with defendant about claims of error concerning his guilty plea

and failed to certify that she consulted with defendant about claims of error concerning his sentence. Ill. S. Ct. R. 604(d) (eff. Feb. 6, 2013). Therefore, defendant contends that his case should be remanded to the trial court for new post-plea proceedings. We reverse and remand.

¶ 3

### BACKGROUND

¶ 4 We recite only those facts necessary to understand the issues raised on appeal. Chicago Police Department (CPD) officers served defendant with an order of protection on behalf of his former girlfriend, Cherelyn Johnson-Ross, who lived in a different apartment in the same complex as defendant. Shortly thereafter, defendant struck Johnson-Ross 11 times with an ax-like object and she died as a result of defendant's attack.

¶ 5 The State charged defendant with four counts of first-degree murder and one count of aggravated unlawful restraint. Assistant Public Defender (APD) Caroline Glennon and APD Amy Campanelli were assigned to defendant's case. After being incarcerated, defendant was prescribed Prozac for depression. When APDs Glennon and Campanelli became aware of defendant's history of mental illness, they requested defendant's mental health records and hired psychologist Dr. Joan Leska to evaluate defendant's sanity at the time of the offense. Since Dr. Leska concluded that defendant was sane at the time of the offense, APD Glennon did not request a fitness evaluation.

¶ 6 The trial court held a 402 conference to discuss the possibility of a plea bargain. Ill. S. Ct. R. 402 (eff. July 1, 2012). The trial court agreed to offer defendant a 35-year sentence in exchange for defendant pleading guilty to first-degree murder under count I. Defendant initially rejected the offer and asked the trial court to reduce the length of the sentence, but the trial court determined 35 years was reasonable. Defendant then voluntarily accepted the plea and

confirmed that he understood the nature of the charge and potential penalties, the rights he was waiving, and the conditions upon his right to appeal.

¶ 7 Thereafter, defendant wrote letters to the trial court stating that he wanted to withdraw his guilty plea. The trial court accepted defendant's letters in lieu of a motion to withdraw his plea and appointed APD Karen Florek to defendant's case. APD Florek requested a fitness evaluation to examine whether defendant was fit to plead guilty during his 402 conference. Dr. Nishad Nadkarni, an expert in forensic psychiatry, evaluated defendant and examined his medical records. Dr. Nadkarni then testified that defendant was fit to plead guilty.

¶ 8 On October 28, 2013, APD Abigail Clough took over defendant's case and filed an amended motion to withdraw the plea and a 604(d) certificate. The motion claimed that defendant did not voluntarily plead guilty because he was suffering from depression, and thus, believed he had no choice but to accept the plea deal. In addition, APD Clough's Rule 604(d) certificate stated that she "consulted with Mr. Donald in person to ascertain his contentions of error in the plea of guilty." The certificate did not state that APD Clough consulted with defendant about any alleged errors in his sentence. Further, APD Clough filed a supplemental motion to withdraw the plea claiming that defendant's trial counsel, APDs Glennon and Campanelli, were ineffective because they did not request a fitness hearing.

¶ 9 After an evidentiary hearing, the trial court denied defendant's motion to withdraw the plea because the evidence demonstrated that defendant's trial attorneys were effective and defendant was fit to plead guilty. Consequently, defendant filed this timely notice of appeal.

¶ 10 ANALYSIS

¶ 11 On appeal, defendant contends that his post-plea counsel did not strictly comply with Rule 604(d) because she certified that she consulted with defendant about claims of error

concerning his guilty plea, but failed to certify that she consulted with him about claims of error concerning his sentence. Thus, defendant contends he is entitled to new post-plea proceedings.

We review the question of whether post-plea counsel strictly complied with Rule 604(d) *de novo*. *People v. Mason*, 2015 IL App (4th) 130946, ¶ 8.

¶ 12 Rule 604(d) requires a defendant seeking to appeal from a judgment entered upon a guilty plea to first file a motion to withdraw the guilty plea and vacate the judgment. Ill. S. Ct. R. 604(d) (eff. Feb. 6, 2013). In addition, the version of Rule 604(d) in effect at the time defendant moved to withdraw his guilty plea required that upon the filing of such motion, post-plea counsel must file a certificate stating that he or she:

"has consulted with the defendant either by phone, mail, electronic means 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.) *Id.*

¶ 13 Here, defendant's post-plea counsel failed to certify that she consulted with defendant regarding his sentence. Thus, we must determine whether her actions complied with Rule 604(d). In reaching our decision, we find *People v. Tousignant*, 2014 IL 115329, dispositive.

¶ 14 In *Tousignant*, defendant initially pled guilty to an open plea, but then filed a motion to reconsider his sentence. *Tousignant*, 2014 IL 115329, ¶ 4. Post-plea counsel certified that he consulted with defendant about claims of error concerning his sentence, but did not certify that he consulted with defendant about his guilty plea. *Id.* at ¶ 5. At the time, Rule 604(d) required post-plea counsel to consult with defendant about his contentions of error in the sentence *or* the entry of the plea of guilty. The supreme court, however, interpreted "or" to mean "and" because "and" is more consistent with the purposes behind Rule 604(d). *Id.* at ¶ 20. Namely, to confirm that counsel actually reviewed the defendant's claim and "considered *all* relevant bases" for

defendant's motion. *Id* at ¶ 16. The court further noted that to interpret the word "or" disjunctively frustrates the rule's purpose because some alleged errors might not be addressed by the trial court before the case is appealed. *Id* at ¶ 18. Accordingly, the supreme court held that post-plea counsel is required to certify that he consulted with defendant about both the sentence *and* the guilty plea. *Id* at ¶ 20.

¶ 15 The State, however, contends that *Tousignant* is limited to open pleas. Specifically, the State argues that whether post-plea counsel certified that she discussed with defendant his sentence is immaterial because it was a negotiated plea and defendant cannot even challenge his "sentence as excessive unless the defendant \*\*\* files a motion to withdraw the plea of guilty and vacate the judgment." Ill. S. Ct. R. 604(d) (eff. Feb. 6, 2013); See *People v. Evans*, 174 Ill. 2d 320, 332 (1996) (where the supreme court held that "following the entry of judgment on a negotiated guilty plea, even if a defendant wants to challenge only his sentence, he must move to withdraw the guilty plea and vacate the judgment so that, in the event the motion is granted, the parties are returned to the status quo"). Nonetheless, subsequent case law suggests that the type of plea agreement is inconsequential to the certification requirements.

¶ 16 In *People v. Martell*, 2015 IL App (2d) 141202, an analogous negotiated plea case, post-plea counsel's Rule 604(d) certificate stated that counsel consulted with the defendant about his contentions of error in the entry of his guilty plea, but failed to certify that she consulted with the defendant about his contentions of error in his sentence. The reviewing court determined that nothing in *Tousignant* or Rule 604(d) "state[d] or implie[d] that the consultation requirement's scope depend[ed] on the type of plea." *Id* at ¶ 14. Therefore, the court concluded that *Tousignant* applied to all types of pleas and reversed and remanded the case. *Id*.

¶ 19 Furthermore, additional decisions since *Tousignant* demonstrate that strict compliance is required under 604(d) regardless of the initial plea. See *People v. Jordan*, 2016 IL App (3d) 140262, ¶ 11 (in a negotiated plea case, the reviewing court reversed and remanded the case for post-plea counsel's failure to certify that he consulted with the defendant about both his guilty plea and sentencing errors); *People v. Hobbs*, 2015 IL App (4th) 130990, ¶ 34 (in an open plea case, the reviewing court determined that counsel's certificate did not strictly comply with Rule 604(d), despite literal compliance with Rule 604(d)'s language at the time, when counsel certified that he consulted with defendant about "contentions of error in the sentence or the entry of the plea of guilty"); *People v. Axelson*, 2015 IL App (2d) 140173, ¶ 10 (counsel's certificate *solely* stated that he had consulted with defendant "to ascertain [his] contentions of error regarding the entry of a plea of guilty," thus his certification "did not strictly comply with Rule 604(d)"); *cf. People v. Luna*, 2015 IL App (2d) 140983, ¶ 6 (the certificate complied with Rule 604(d) when "counsel indicated that he consulted with defendant to ascertain his 'contentions of error,'" thus "the certificate included no language limiting the scope of the consultation to a certificate's category of error"); *People v. Shirley*, 181 Ill. 2d 359, 369-71 (1998) (where the appeal involved the timing of the filing, not the contents of the certification).

¶ 18 Moreover, we observe that since *Tousignant* the legislature has amended Rule 604(d) to require post-plea counsel to "ascertain defendant's contentions of error in the sentence *and* the entry of the plea of guilty," including a specific certification form to match the two requirements. (Emphasis added.) Ill. S. Ct. R. 604(d) (eff. Mar. 8, 2016). Therefore, we find that post-plea counsel must certify that he or she discussed both contentions of error in the sentence and the guilty plea to meet the strict requirements under Rule 604(d). Accordingly, we reverse and remand for new post-plea proceedings.

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¶ 19

CONCLUSION

¶ 20 Based on the foregoing, we reverse the judgment of the circuit court of Cook County.

¶ 21 Reversed and remanded.