

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).

2016 IL App (3d) 140189-U

Order filed April 26, 2016

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2016

| | | |
|--------------------------------------|---|--|
| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois, |
| Plaintiff-Appellee, |) | |
| v. |) | Appeal No. 3-14-0189 |
| |) | Circuit No. 11-CF-792 |
| KENON L. ALLEN, |) | |
| Defendant-Appellant. |) | Honorable Kevin Lyons, Judge, Presiding. |

JUSTICE WRIGHT delivered the judgment of the court.
Presiding Justice O'Brien and Justice Carter concurred in the judgment.

ORDER

- ¶ 1 *Held:* Defense counsel's certification of counsel failed to strictly comply with Illinois Supreme Court Rule 604(d).
- ¶ 2 Defendant, Kenon L. Allen, pled guilty to first degree murder (720 ILCS 5/9-1(a)(2) (West 2010)) and attempted first degree murder (720 ILCS 5/8-4(a) (West 2010)). Following sentencing, defense counsel filed a motion to reduce sentence or to withdraw plea of guilty, asking the court for a reduction in defendant's sentence, or to withdraw his previously entered plea of guilty. On appeal, defendant contends the record demonstrates remand is necessary to

remedy noncompliance with Illinois Supreme Court Rule 604(d). Ill. S. Ct. R. 604(d) (eff. Feb. 6, 2013). Defendant further contends the trial court should have conducted an inquiry into defense counsel's possible conflict of interest.

¶ 3

BACKGROUND

¶ 4

On September 6, 2011, a grand jury in Peoria County returned a five-count indictment charging defendant with, *inter alia*, first degree murder (720 ILCS 5/9-1(a)(2) (West 2010)) and attempted first degree murder (720 ILCS 5/8-4(a) (West 2010)). On December 19, 2013, defendant entered a partially negotiated guilty plea that included a sentencing cap of 50 years' imprisonment for the first degree murder charge and a 20-year imprisonment cap with a consecutive sentence on the attempted first degree murder charge. Following the sentencing hearing on February 6, 2014, the court sentenced defendant to serve 50 years' imprisonment for murder with a 20-year consecutive sentence for attempted murder. On March 3, 2014, defense counsel filed a motion to either reduce the sentence or withdraw the guilty plea. The next day, defense counsel filed a certificate pursuant to Rule 604(d), which reads as follows:

“1. That the undersigned has consulted with the Defendant, KENON ALLEN, for the purpose of ascertaining the contentions of error claimed by Defendant to have occurred;

2. That the undersigned has examined the trial court file and the report of proceedings and has made any amendments to the motion of Defendant necessary for the adequate presentation of such defects claimed by Defendant to have occurred.”

¶ 5 On March 4, 2014, a hearing was held on defendant's motion to reduce sentence or withdraw the partially negotiated guilty plea. The trial court denied the motion. Defendant appeals. We reverse and remand.

¶ 6 ANALYSIS

¶ 7 On appeal, defendant raises two issues. First, that his trial counsel failed to comply with the provisions set forth in Rule 604(d) and therefore he is entitled to remand for new postplea proceedings. Ill. S. Ct. R. 604(d) (eff. Feb. 6, 2013). Second, defendant requests this court to include directions on remand which would require the trial judge to examine whether defendant received the effective assistance of defense counsel. When determining whether defense counsel complied with Rule 604(d), this court's review is *de novo*. *People v. Neal*, 403 Ill. App. 3d 757, 760 (2010); *People v. Prather*, 379 Ill. App. 3d 763, 768 (2008). Under the rule, defense counsel, representing a defendant after judgment on a guilty plea, must file a Rule 604(d) certification of counsel to accompany a motion to withdraw guilty plea or to reconsider sentence. Rule 604(d) requires defendant's attorney to:

"[F]ile with the trial court a certificate stating that the attorney has consulted with the defendant either by phone, mail, electronic means or in person to ascertain defendant's contentions of error in the sentence and the entry of the plea of guilty, has examined the trial court file and both the report of proceedings of the plea of guilty and the report of proceedings in the sentencing hearing, 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. Feb. 6, 2013).

¶ 8 Illinois courts no longer approach these cases in terms of whether the error in failing to comply with Rule 604(d) was harmless or prejudicial. *People v. Janes*, 158 Ill. 2d 27, 33 (1994).

Instead, the failure to strictly adhere to the requirements of Rule 604(d) is considered to create error. *Id.* Strict compliance does not mean the certification need recite word for word the language of the rule. *People v. Wyatt*, 305 Ill. App. 3d 291, 297 (1999).

¶ 9 It is not the duty of the appellate court to determine whether an argument could be made that the certificate strictly complies with the rule due to defense counsel’s use of ambiguous language. *People v. Richard*, 2012 IL App (5th) 100302, ¶ 15. The remedy for failing to strictly comply with Rule 604(d) is to remand to the circuit court for the filing of a new motion to withdraw the guilty plea or to reconsider sentence and to have a new hearing on the motion. *Janes*, 158 Ill. 2d at 33. In this case, defense counsel’s Rule 604(d) certificate stated as follows:

“1. That the undersigned has consulted with the Defendant, KENON ALLEN, for the purpose of ascertaining the contentions of error claimed by Defendant to have occurred;

2. That the undersigned has examined the trial court file and the report of proceedings and has made any amendments to the motion of Defendant necessary for the adequate presentation of such defects claimed by Defendant to have occurred.”

¶ 10 Upon first glance, we see that counsel’s certificate differs substantially from the language of Rule 604(d). While the language of the certificate need not match the language of Rule 604 word for word, the language used must serve to satisfy every element of the rule.

¶ 11 In a recent Illinois Supreme Court decision, the court held that the 604(d) certification in question did not strictly comply with the rule because the certificate only certified that counsel consulted with defendant as to errors in the sentence and not contentions of error in the guilty plea. *People v. Tousignant*, 2014 IL 115329, ¶23. The court reasoned that the legislative intent

behind the rule was to make sure counsel had reviewed and considered *all* relevant bases for the motion to withdraw the guilty plea or reconsider the sentence. *Id.* at ¶16.

¶ 12 In this case, defense counsel’s certification documents that counsel generally consulted with defendant for the purpose of ascertaining the contentions of error claimed by defendant to have occurred. However, a proper Rule 604(d) certificate specifically documents that defense counsel reviewed *both* defendant’s contentions of error in the sentence and any contentions of error defendant associated with the entry of his guilty plea. Hence, defense counsel’s Rule 604(d) certificate in the case at bar requires this court to make an assumption that defense counsel reviewed both the errors in the sentence and in the guilty plea with defendant before filing the posttrial motion. We decline to do so.

¶ 13 Based on this record, we conclude that defense counsel’s certificate was too vague and did not strictly comply with Rule 604(d). We reverse the order denying defendant’s motion to withdraw the guilty plea or to reconsider sentence and remand this case to the circuit court with instruction for defense counsel to file a compliant Rule 604(d) certificate. We further instruct defense counsel to file a properly amended postplea motion, including, if necessary, allegations regarding defense counsel’s conflict of interest, and for the court to hold a new hearing on the motion. We decline the defense’s specific request to provide the trial court with directions to evaluate whether defense counsel was ineffective based on the status of this record.

¶ 14 CONCLUSION

¶ 15 We reverse the circuit court of Peoria County’s denial of defendant’s motion to withdraw the guilty plea or to reconsider sentence and remand this case for defense counsel to strictly comply with the requirements of Rule 604(d).

¶ 16 Reversed and remanded with directions.