2016 IL App (5th) 120519-U

NO. 5-12-0519

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
	)	Circuit Court of
Plaintiff-Appellee,	)	St. Clair County.
	)	
v.	)	No. 11-CF-825
	)	
FLOYD ROBINSON,	)	Honorable
	)	Michael N. Cook,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Justice Chapman concurred and Justice Welch specially concurred in the judgment.

ORDER

¶ 1 *Held*: In light of defense counsel's failure to strictly comply with Supreme Court 604(d) by failing to certify that he made "amendments to the motion necessary for adequate presentation of any defects in those proceedings," and the trial court's failure to comply with Supreme Court Rule 402(b), we reverse and remand for the filing of a new motion to withdraw guilty plea and a new hearing on the motion.

¶ 2 Defendant, Floyd Robinson, was charged by information with two counts of burglary (720 ILCS 5/19-1(a) (West 2010)), one count of escape (720 ILCS 5/31-6(c) (West 2010)), and one count of retail theft (720 ILCS 5/16A-3(a) (West 2010)). Defendant entered an open guilty plea to escape and retail theft, and, in exchange, the two

counts of burglary were dismissed. After a sentencing hearing, the trial court sentenced defendant to 10 years for escape and 3 years for retail theft with the sentences to run concurrently. Defendant's counsel, Alex Baker (Attorney Baker), filed a motion to reconsider and a motion to withdraw guilty plea. Because the trial court found a conflict of interest existed between defendant and his counsel due to defendant's claim of ineffective assistance of counsel, the trial court ordered defendant's case reassigned to another public defender. Defendant claimed Attorney Baker was ineffective because he "coerced" defendant to plead guilty due to "misguidance" and a promise defendant would be sentenced to probation.

¶ 3 New counsel, Andrew Liefer (Attorney Liefer), filed a motion to withdraw guilty plea and vacate judgment. Defendant filed several *pro se* motions, which allegedly were waived or withdrawn. The trial court proceeded only on defendant's motion to withdraw the guilty plea filed by Attorney Liefer. Ultimately, the trial court denied the motion to withdraw guilty plea and vacate judgment. Defendant filed a timely notice of appeal. The issues raised by defendant on appeal are: (1) whether defense counsel's Rule 604(d) certificate was deficient; (2) whether the trial court failed to comply with Supreme Court Rule 402(b); and (3) whether the trial court failed to conduct an adequate inquiry into his claims of ineffective assistance of counsel against Attorney Liefer. We reverse and remand.

¶ 4 FACTS

¶ 5 The charges against defendant stem from the theft of ink cartridges at a Walmart store in Cahokia. Defendant was charged by information with two counts of burglary,

one count of retail theft, and one count of escape. The record indicates defendant was originally represented by attorney Anne Keeley (Attorney Keeley), a public defender. A preliminary hearing was scheduled, but defendant waived the preliminary hearing. Another public defender, Alex Baker, represented defendant when he entered an open plea to escape and retail theft in exchange for the State's dismissing the two counts of burglary.

¶ 6 At the plea hearing, the trial court explained that the possible penalties for escape included an extended term sentence of 3 to 14 years in prison, followed by 2 years of mandatory supervised release, and a fine of up to $25,000. The trial court also apprised defendant it was an offense for which he could be eligible for probation of up to four years. The trial court explained that the possible penalties for retail theft included an extended term sentence of one to six years, followed by one year of mandatory supervised release, a fine up to $25,000, or a probationary sentence of up to 30 months. Defendant stated on the record he understood the possible penalties and understood he would be sentenced later after a presentence investigation was conducted.

¶ 7 The trial court further explained to defendant that as a result of pleading guilty, he was giving up his right to a jury or bench trial, his right to make the State prove him guilty beyond a reasonable doubt, and his right to cross-examine and confront witnesses. The State then presented a factual basis for the plea, including the fact that a Walmart loss prevention officer observed defendant conceal several printer ink cartridges in his pants and leave the store. When defendant was stopped and escorted back into the store, he attempted to discard the items. After being booked and taken to the police

department, defendant fled and was later found by police hiding in nearby bushes. Defendant stated he wanted to plead guilty. The trial court found a factual basis for the plea and accepted defendant's guilty plea.

¶ 8 At the sentencing hearing held on May 1, 2012, the State requested defendant be sentenced to 14 years on the escape charge and 6 years on the retail theft charge, specifically arguing: (1) the sentence was necessary to deter others; (2) defendant committed the current offenses while serving a period of mandatory supervised release for a felony retail theft from which he had been released from prison only three months prior; (3) defendant's long history of prior criminality, dating back 35 years. Attorney Baker requested defendant be placed on probation, pointing out the current charges were nonviolent in nature, defendant was currently employed, defendant was cognizant of his mistakes and was begging for another chance, and it would be a hardship on defendant's 80-year-old dependent if defendant went to jail. Ultimately, the trial court sentenced defendant to 10 years on the charge of escape, followed by 2 years of mandatory supervised release, and 3 years on the charge of retail theft, followed by 1 year of mandatory supervised release, with the sentences to run concurrently.

¶ 9 On May 2, 2012, defendant filed a *pro se* motion to withdraw his guilty plea in which he alleged the plea was not made intelligently because if he had known that an extended term was going to be imposed upon the escape charge, he would have accepted the State's offer of three years. Defendant set forth that the offer of three years was made when Attorney Keeley was representing him, and she never told him the three-year offer had been retracted. According to defendant, he told his next attorney, Mr. Baker, about

the three-year offer, but Baker "told him to plea[d] guilty with a no cap plea to get probation." Defendant continued to file numerous *pro se* motions and make similar claims about a three-year offer, insisting he was coerced to plead guilty and was promised by Baker he would receive probation.

¶ 10 On May 11, 2012, Attorney Baker filed (1) a motion to reconsider sentence alleging in part that the sentence was "not in keeping with the defendant's past history of criminality" and (2) a motion to withdraw guilty plea, alleging defendant did not "knowingly, intelligently, or voluntarily waive" his right to jury trial. At a hearing on July 31, 2012, the trial court found a conflict of interest existed between defendant and Attorney Baker due to defendant's claim of ineffective assistance of counsel. The trial court then appointed Andrew Liefer to represent defendant.

¶ 11 On October 17, 2012, Attorney Liefer filed a motion to withdraw guilty plea and vacate judgment on behalf of defendant. Liefer asserted the trial court failed to: (1) advise defendant of the nature of the charges and the minimum and maximum sentences prescribed by law; (2) advise defendant he had the right to plead not guilty or persist in that plea; (3) advise defendant he had the right to a trial and by pleading guilty he waived that right. Liefer further argued the plea was not knowing and voluntary, there was no factual basis provided by the State, the trial court failed to provide proper Illinois Supreme Court Rule 605 admonishments, and defendant's sentence was excessive and unduly harsh. Liefer's motion was accompanied by a Rule 604(d) certificate.

¶ 12 The certificate, purportedly in compliance with Supreme Court Rule 604(d), provided:

"Comes now the counsel for defendant, Andrew M. Liefer, and states that he has consulted with his client, Floyd Robinson, in person and has ascertained Mr. Robinson's contention of error in the sentence and entry of the plea. Further that he has examined the trial court file and report of proceedings of the plea of guilty and has filed a motion to withdraw the guilty plea and vacate judgment based on these determinations."

¶ 13 A hearing was held on the motion to withdraw guilty plea and vacate judgment. The prosecutor pointed out that defendant and Attorney Baker filed several motions, and he wanted to make sure "we are only going forward on the motions that Mr. Liefer filed today, all the other ones are being waived and withdrawn." Attorney Liefer agreed, but when the trial court asked defendant if that was his understanding, defendant replied, "This is the first time I've known about it, but I guess so, yes sir." At the close of the hearing, the trial court denied the motion to withdraw the guilty plea and vacate judgment finding that defendant received proper admonishments.

¶ 14 Defendant then filed numerous other *pro se* motions in which he alleged Attorney Liefer was ineffective for failing to raise additional claims previously raised by defendant in *pro se* motions. Defendant also argued Liefer was ineffective for failing to address defendant's complaint he involuntarily and unknowingly pleaded guilty because he only did so because Attorney Baker falsely promised he would be sentenced to probation in exchange for his guilty plea. Defendant asserted he had a conversation with Liefer in which Liefer told him that he would bring the existence of the State's three-year offer to the attention of the court, but then Liefer failed to do so.

¶ 15 The trial court set defendant's motions for a hearing. At the hearing, the trial court noted it read all of defendant's *pro se* motions, but was unconvinced by defendant's arguments, specifically noting that at the previous hearing defendant waived everything except the motion to vacate. With regard to the motion to vacate, the trial court explained defendant entered his plea knowingly with the advice of counsel because the court not only admonished defendant of the sentence range, including the period of mandatory supervised release, but also admonished defendant that by pleading guilty he was waiving his right to a trial. With regard to the ineffective assistance claims against Mr. Liefer, the trial court determined that defendant did not demonstrate that but for counsel's errors, he would have refrained from pleading guilty and proceeding to trial. Defendant now appeals.

¶ 16 ANALYSIS

¶ 17 The first issue raised on appeal is whether defense counsel's Rule 604(d) certificate was deficient. Defendant contends his case must be remanded for the filing of a new motion to withdraw guilty plea and a hearing on that motion because Attorney Liefer failed to certify that he "made any amendments to the motion necessary for adequate presentation of any defects in those proceedings." We agree.

¶ 18 Supreme Court Rule 604(d) specifically sets forth the procedures to be followed after a defendant has filed a postplea motion to withdraw guilty plea and provides in pertinent part as follows:

> "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." Ill. S. Ct. R. 604(d) (eff. July 1, 2006).

Failure to strictly comply with the requirements set forth by Rule 604(d) compels "remand to the circuit court for the filing of a new motion to withdraw guilty plea or to reconsider sentence and new hearing on the motion." *People v. Janes*, 158 Ill. 2d 27, 33, 630 N.E.2d 790, 792 (1994).

¶ 19 Supreme Court Rules "are not suggestions; rather, they have the force of law, and the presumption must be that they will be obeyed and enforced as written." *People v. Campbell*, 224 Ill. 2d 80, 87, 862 N.E.2d 933, 938 (2006). The vast majority of courts follow the strict standard of Rule 604(d) compliance set forth in *Janes*, and we see no reason to depart from the strict compliance standard here. "While strict compliance does not require that the language of the rule be recited verbatim in the certificate, 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. Rule 604(d) requires counsel to determine the defendant's contentions of error in the sentence or the plea of guilty. *Id.*

¶ 20 In *Richard*, defense counsel's Rule 604(d) certificate stated that he consulted with the defendant to ascertain defendant's " 'contentions of deprivation of constitutional rights.' " *Id.* ¶ 11. This court held the Rule 604(d) certificate did not make clear whether counsel ascertained the defendant's nonconstitutionally based contentions of error in the

sentence or entry of the plea of guilty. *Id.* ¶ 14. We specifically stated, "Counsel must make clear to the court that he ascertained the defendant's contentions of error in sentence or the entry of the plea of guilty; it is not this court's duty to determine whether, because of counsel's poor terminology, an argument could be made that a certificate is sufficient." *Id.* ¶ 15.

¶ 21 Rule 604(d) requires the defendant's attorney to certify he "has made any amendments to the motion necessary for adequate presentation of any defects in those proceedings." Here, Attorney Liefer failed to certify that he made any such amendments. In fact, our review of the record indicates that Liefer's motion failed to include any of the numerous claims of ineffectiveness set forth in defendant's *pro se* pleadings. For example, defendant filed several *pro se* pleadings in which he alleged that his prior attorney, Alex Baker, assured him he would receive probation if he pleaded guilty to the theft and escape charges and failed to advise him prior to pleading guilty that the State's three-year offer was still on the table. The allegations Liefer did set forth in his motion were almost all claims rebutted by the record. While we would not expect Liefer's motion to necessarily recite all allegations defendant made in his *pro se* motions, we would expect the motion to contain at least one of defendant's contentions.

¶ 22 The State asserts a broad reading of Attorney Liefer's Rule 604(d) certificate implies that actions were taken by him to ascertain defendant's contentions of error, so that strict compliance with Rule 604(d) is unnecessary. However, because Attorney Liefer failed to cite any of defendant's numerous contentions of error with regard to his plea of guilty and subsequent sentence, we have serious concerns as to whether defense

counsel considered all of the relevant bases for defendant's motion to withdraw his guilty plea and vacate judgment. Moreover, it is simply a waste of judicial resources to require a reviewing court to search through the record when the simple solution is to enforce strict compliance. *Richard*, 2012 IL App (5th) 100302, ¶ 10, 970 N.E.2d 35.

¶ 23 We are also unconvinced by the State's assertion that defendant waived any issues raised in his *pro se* pleadings by agreeing to withdraw any issues previously raised and proceeding only on Attorney Liefer's motion to withdraw guilty plea and vacate judgment. At the hearing held on October 17, 2012, the prosecutor attempted to limit and define the issues, and the following colloquy ensued:

> "[Prosecutor:] Your honor, if you wouldn't mind just making a brief record, I know that Mr. Alex Baker had filed several motions and then the defendant had also filed motions. I want to make clear we are only going forward on the motions that Mr. Liefer filed today, all the other ones are being waived and withdrawn."
>
> THE COURT: Is that correct counsel?
>
> MR. LIEFER: Yes, Your Honor.
>
> THE COURT: Mr. Robinson that's your understanding as well?
>
> DEFENDANT: This is the first time I've known about it, but I guess so, yes sir."

This exchange shows a clear communication problem between Attorney Liefer and his client and supports defendant's argument that he should be granted a new hearing. From this exchange, we can only surmise that Attorney Liefer and defendant never discussed the fact that issues defendant attempted to raise in his numerous postplea *pro se* motions

were being waived, and they were only proceeding on the issues raised in Liefer's motion.

¶ 24 Furthermore, Attorney Liefer's failure to certify that he made any amendments to the motion necessary for adequate presentation of any defects is especially egregious here where the record fails to show compliance with Supreme Court Rule 402(b). That rule specifically states in pertinent part as follows:

> "(b) Determining Whether the Plea is Voluntary. The court shall not accept a plea of guilty without first determining that the plea is voluntary. *** The court, by questioning the defendant personally in open court, shall confirm the terms of the plea agreement, or that there is no agreement, and shall determine whether any force or threats or any promises, apart from a plea agreement, were used to obtain the plea." Ill. S. Ct. R. 402(b) (eff. July 1, 1997).

We have reviewed the transcripts from both the guilty plea hearing and the sentencing hearing. The record reveals the trial court failed to comply with the requirements set forth in Rule 402(b) in that the trial court failed to ask defendant whether any promises were used to obtain his plea. If the trial court asked defendant whether any promises had been made and defendant denied any such promises, then we might be inclined to rule differently. However, where defendant has repeatedly alleged that Attorney Baker promised him he would be sentenced to a term of probation if he pleaded guilty and the record fails to rebut that allegation, a real question remains as to whether defendant voluntarily and intelligently pleaded guilty.

¶ 25 In light of Attorney Liefer's failure to strictly comply with Rule 604(d) by failing to certify that he made "amendments to the motion necessary for adequate presentation of any defects in those proceedings" and the trial court's failure to comply with Rule 402(b), we reverse and remand. Upon remand, the circuit court is directed to allow defendant the opportunity to file a new motion to withdraw guilty plea, to conduct a hearing on the motion, and to require strict compliance with Rule 604(d).

¶ 26 CONCLUSION

¶ 27 Because our decision on the first issue raised by defendant is dispositive, we need not address the other issues raised by defendant, except to the extent that we have already addressed defendant's second issue regarding Supreme Court Rule 402(b). For the foregoing reasons, we hereby reverse the order of the circuit court of St. Clair County and remand for further proceedings.

¶ 28 Reversed and remanded with directions.

¶ 29 JUSTICE WELCH, specially concurring.

¶ 30 I agree with my distinguished colleagues that upon remand, the circuit court is directed to allow the defendant to file a new motion to withdraw his guilty plea and for a hearing on that motion in full compliance with Supreme Court Rule 604(d). However, I believe our analysis should end there, as provided by the Illinois Supreme Court in *People v. Wilk*, 124 Ill. 2d 93, 108 (1988). Thus, our court's discussion of the defendant's

second issue regarding Supreme Court Rule 402(b) is advisory. Advisory opinions are to be avoided. *People v. Hampton*, 225 Ill. 2d 238, 245 (2007).