

NOTICE

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2016 IL App (5th) 130008-U

NO. 5-13-0008

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Saline County.
)	
v.)	No. 11-CF-320
)	
JAMES J. SUTTON,)	Honorable
)	Walden E. Morris,
Defendant-Appellant.)	Judge, presiding.

JUSTICE CATES delivered the judgment of the court.

Presiding Justice Schwarm and Justice Welch concurred in the judgment.

ORDER

¶ 1 *Held:* Defense counsel failed to comply with the substantive requirements of Rule 604(d); therefore, the judgment of the circuit court is reversed and this cause is remanded to allow defense counsel to file a new motion or motions and to fully comply with Rule 604(d). The circuit court is instructed to modify the mittimus to reflect that the defendant was in custody through June 1, 2012.

¶ 2 The defendant, James J. Sutton, entered a plea of guilty to the offense of residential burglary (720 ILCS 5/19-3 (West 2012)), and he was later sentenced to a 12-year term of imprisonment. The defendant then filed a motion to reconsider his sentence, and a motion to withdraw his plea of guilty and to vacate the circuit court's judgment. The trial court denied both motions. On appeal, the defendant raises several

issues regarding his plea and sentence, including claims that his attorney failed to comply with the substantive requirements of Rule 604(d), and that his mittimus should be amended to reflect an additional day of credit that he spent in pretrial custody. For the following reasons, we reverse the judgment and remand this cause to the circuit court to allow counsel for the defendant to file a new motion or motions, and to comply with Rule 604(d), and instruct the circuit court to modify the defendant's mittimus to reflect an additional day of sentencing credit.

¶ 3

BACKGROUND

¶ 4 We present only the facts necessary to our disposition. On August 3, 2012, the defendant pleaded guilty to one count of residential burglary. Before entering his plea of guilty, the defendant was admonished by the circuit court in accordance with Supreme Court Rule 402 (eff. July 1, 2012). When asked if he had been made any promises in exchange for his plea of guilty, the defendant responded, "No, sir." The trial court was not presented with a plea agreement, and therefore, did not admonish the defendant under Rule 402(d)(3). Ultimately, the court found that there was a factual basis to support the defendant's plea of guilty, and that the plea was entered into knowingly, intelligently, and voluntarily. The circuit court accepted the defendant's plea, found him guilty of the offense of residential burglary, and entered a judgment of guilty upon that finding.

¶ 5 On September 18, 2012, the trial court held a sentencing hearing, and again there was no mention of a plea agreement between the State and the defendant. At the hearing, defense counsel offered two documents into evidence demonstrating that the defendant was eligible for TASC probation, and he presented testimonial evidence in mitigation of

the defendant's sentence. Based upon the evidence and other relevant information, defense counsel asked the court to find that the defendant was eligible for TASC probation and to sentence him accordingly. The State recommended that the defendant be sentenced to a period of nine years' imprisonment. The State relied on the presentence investigation report and the facts of the case in support of its recommendation.

¶ 6 After considering all of the relevant information, the circuit court found that a sentence of TASC probation would not be appropriate in light of the seriousness of the offense. The court sentenced the defendant to a 12-year term of imprisonment in the Illinois Department of Corrections, followed by a 2-year period of mandatory supervised release. The court further ordered, among other things, that the defendant receive credit for time served in pretrial custody between April 29 and May 31, 2012.

¶ 7 On October 11, 2012, the defendant filed a motion to reconsider sentence and a motion to withdraw his plea of guilty and to vacate the circuit court's judgment. Both motions were based upon the contention that the sentence of 12 years' imprisonment was excessive and manifestly unjust. In addition, for the first time, the defendant alleged that he entered his plea of guilty in exchange for the State agreeing to cap its sentencing prayer to nine years.

¶ 8 Both motions were called for hearing on December 6, 2012. At the hearing, counsel for the defendant filed a certificate in compliance with Supreme Court Rule 604(d), and argued that the defendant's sentence was excessive. Counsel also argued that because the State agreed to cap its prayer for sentence to nine years, it was necessary for the defendant to file a motion to vacate his plea of guilty. In response, the State indicated

that the defendant's plea was an open plea, and contended that the defendant's other arguments had already been considered during the plea hearing. The State asked the court to deny both motions.

¶ 9 After asking the court to deny the defendant's motions, the court asked counsel for the defendant if it was his contention that the defendant's plea of guilty was conditioned upon the State's agreement to cap the sentence request to nine years. Defense counsel responded, "Yes, Your Honor." The following colloquy ensued:

"THE COURT: And do you contend that in the hearing on August 3rd the Court failed to advise and admonish Mr. Sutton [under Rule 402(d)(3)] that the Court wasn't bound by any kind of caps or statements made by the state's attorney?

MR. HEFLIN: I'm not stating that, Your Honor. It is my memory that the Court did admonish my client to that effect.

THE COURT: Okay. And as it would relate to the Motion to Reconsider the Sentence, the argument is that the sentence imposed is excessive and not proportionate; is that correct?

MR. HEFLIN: Correct, Your Honor.

THE COURT: Any errors that you wish to point the Court to as to the actual sentence hearing as to failures of the Court to properly consider the requisite matters?

MR. HEFLIN: No, Your Honor."

The trial court denied both motions, and the defendant timely filed his notice of appeal.

¶ 10

ANALYSIS

¶ 11 The defendant raises several issues for our consideration. Initially, we will review the defendant's allegation that the trial court's judgment should be reversed and remanded because his attorney's certificate failed to comply with the requirements of Rule 604(d).

¶ 12

Compliance with Rule 604(d)

¶ 13 Rule 604(d) requires the defendant's attorney to file with the trial court a certificate stating that the attorney consulted with the defendant by mail or in person to determine the defendant's contentions of error in the sentence or the entry of the plea of guilty. Ill. S. Ct. R. 604(d) (eff. Nov. 28, 2012). Further, Rule 604(d) requires defense counsel to have examined the trial court file and report of proceedings of the guilty plea, and make any amendments to the motion which are necessary for the adequate presentation of any defects in the proceedings involving the sentence or the entry of the plea of guilty. Ill. S. Ct. R. 604(d). The purpose behind the certification requirement in Rule 604(d) is to provide proof of actual compliance with the rule, and not the mere intent to comply. *People v. Love*, 385 Ill. App. 3d 736, 738 (2008). Thus, strict compliance is required under Rule 604(d), and where counsel fails to do so, the case must be remanded to the trial court for proceedings in compliance with the Rule. *People v. Willis*, 2015 IL App (5th) 130020, ¶ 17. The issue of whether defense counsel complied with Rule 604(d) is reviewed *de novo*. *People v. Richard*, 2012 IL App (5th) 100302, ¶ 9.

¶ 14 On appeal, the defendant argues that while the certificate filed by defense counsel conformed to the technical requirements of Rule 604(d), the record demonstrates that defense counsel failed to fulfill his substantive obligations under the rule. Specifically, the defendant contends that the report of proceedings from the plea hearing does not support his counsel's statement that the trial court had admonished the defendant in accordance with Rule 402(d)(3). In support of his argument, the defendant cites *People v. Love*, 385 Ill. App. 3d 736 (2008), for the proposition that remand is necessary where defense counsel files a Rule 604(d) certificate that technically complies with the Rule, but is impeached by the record. We agree.

¶ 15 In *Love*, defense counsel filed a Rule 604(d) certificate that technically complied with the requirements of the rule. *Love*, 385 Ill. App. 3d at 736. During the hearing, however, defense counsel stated, "I think I need to review the transcript of the plea itself in order to proceed." *Love*, 385 Ill. App. 3d at 737. After reviewing the record, the appellate court noted that counsel's statement left the distinct impression that defense counsel had not examined the transcript. *Love*, 385 Ill. App. 3d at 737. The appellate court stated that while it found no conclusive evidence that defense counsel had filed her Rule 604(d) certificate without first examining the report of proceedings of the defendant's guilty plea, counsel's remark was enough to shake the court's confidence as to her "compliance with the substantive requirements of the rule." *Love*, 385 Ill. App. 3d at 738. The court further noted that the purpose of the certification requirement was to provide actual compliance with the rule, not the mere intent to comply. *Love*, 385 Ill. App. 3d at 738. The court held that "a Rule 604(d) certificate filed before counsel has

actually complied with the substantive requirements of Rule 604(d) is ineffective." *Love*, 385 Ill. App. 3d at 739. The court in *Love* went on to write, "[w]here, as here, the record impeaches the Rule 604(d) certificate, a remand for further proceedings is necessary." *Love*, 385 Ill. App. 3d at 739.

¶ 16 After reviewing the record of this case, we have doubts as to whether defense counsel complied with the substantive requirements of Rule 604(d). According to the transcript of the plea hearing, the circuit court did not admonish the defendant under Rule 402(d)(3). Yet, during the hearing on the defendant's motion to reconsider sentence and his motion to withdraw his plea of guilty, defense counsel told the trial court that it was his memory that the court had provided his client with this admonishment. The report of proceedings of the guilty plea was only 11 pages in length. An examination of this transcript would have informed defense counsel that the defendant was never provided with an admonishment under Rule 402(d)(3). If the trial court had been properly informed, it would have been able to conduct an inquiry regarding whether a negotiated plea agreement had been reached between the defendant and the State. This is a question that remains unanswered by the record. Defense counsel's statement to the trial court is wholly inconsistent with the report of proceedings of defendant's guilty plea, and leaves us with the impression that defense counsel failed to comply with one of the substantive requirements of Rule 604(d). Here, as in *Love*, there is serious doubt as to whether defense counsel examined the report of proceedings of the guilty plea, and as such, remand for further proceedings is necessary. Accordingly, we reverse the denial of

defendant's motions and remand with instructions to allow defense counsel to file a new motion or motions, and to comply with Rule 604(d).

¶ 17

Mittimus

¶ 18 Next, the defendant contends, and the State concedes, that he is entitled to an additional day's credit for time spent in pretrial custody. The judgment and sentence entered granted the defendant credit for time spent in pretrial custody through May 31, 2012, but the record reflects that he did not post bond until June 1, 2012. When a defendant is in custody for any part of a day he must be given credit against his sentence for that day. *People v. Hill*, 2014 IL App (3d) 120472, ¶ 27. On remand, the circuit court is instructed to modify the mittimus to reflect that the defendant was in custody through June 1, 2012.

¶ 19

CONCLUSION

¶ 20 Given our disposition, we need not address the other arguments raised by the defendant. For the abovementioned reasons, we reverse the judgment and remand this matter to the circuit court to allow defense counsel to file a new motion or motions and to fully comply with Rule 604(d), and we instruct the circuit court to correct the mittimus.

¶ 21 Reversed and remanded with instructions.