

NOTICE
Decision filed 06/09/16. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2016 IL App (5th) 140320-U

NO. 5-14-0320

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,)	Marion County.
)	
v.)	No. 13-CF-97
)	
GREGORY A. HOUSTON,)	Honorable
)	Mark W. Stedelin,
Defendant-Appellant.)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Presiding Justice Schwarm and Justice Stewart concurred in the judgment.

ORDER

¶ 1 *Held:* We grant the State Appellate Defender's motion to withdraw and affirm the circuit court because the court granted the defendant the relief he requested, and given the facts of the case, the order entered by the court was proper. Additionally, we need not remand for Supreme Court Rule 604(d) compliance because the defendant received the relief he requested.

¶ 2 The defendant, Gregory A. Houston, appeals his sentence of 11 years' incarceration followed by 3 years of mandatory supervised relief (MSR). The Office of the State Appellate Defender (OSAD) was appointed to represent the defendant. OSAD filed a motion to withdraw as counsel, alleging that there is no merit to the appeal. See *Anders v. California*, 386 U.S. 738 (1967). The defendant was given proper notice and

granted an extension of time to file briefs, objections, or any other document supporting his appeal. The defendant did not file a response. We considered OSAD's motion to withdraw as counsel on appeal. We examined the entire record on appeal and found no error or potential grounds for appeal. For the following reasons, we grant OSAD's motion to withdraw as counsel on appeal and affirm the judgment of the circuit court of Marion County.

¶ 3

BACKGROUND

¶ 4 On March 13, 2013, the State charged the defendant, Gregory A. Houston, by information. Count I alleged participation in methamphetamine manufacturing by producing more than 400 grams but less than 900 grams of methamphetamine, a Class X felony; count II alleged unlawful possession of methamphetamine manufacturing material. On May 14, 2013, after it was determined that the defendant was subject to Class X sentencing on count II because of previous convictions, the court admonished him accordingly. On June 13, 2013, the State amended count I to allege that the defendant produced less than 15 grams of methamphetamine, a Class 1 felony.

¶ 5 On June 28, 2013, the State referred the defendant to the Marion County drug court program, and the judge approved the referral. That same day, the defendant entered guilty pleas to both counts of the information. Prior to entering guilty pleas, the court admonished the defendant that count I was a Class 1 felony with a sentencing range between 4 and 15 years, followed by 2 years of MSR. The court admonished the defendant that count II was a Class 2 felony with a sentencing range up to a range of three to seven years' incarceration, to be followed by two years of MSR. These

admonishments were incorrect because the court did not admonish the defendant that he was subject to Class X sentencing and explain the Class X sentencing rules.

¶ 6 The court advised the defendant that his participation in the drug court program could be terminated for a number of reasons, including failure to submit to drug testing when required and failure to appear at court hearings. Additionally, the court told the defendant that if he was terminated from the program, the drug court judge would sentence him on the counts to which he was pleading guilty.

¶ 7 In mid-July of 2013 the defendant failed to appear for drug tests and counseling sessions. He also failed to appear for a court date on July 26, 2013. A warrant was issued, and the defendant was subsequently arrested in Oklahoma and returned to Marion County on September 5, 2013. On the same day the defendant returned to Marion County, the State filed a petition to revoke drug court participation.

¶ 8 On October 2, 2013, the defendant filed a motion to vacate his guilty plea. He argued that the incorrect admonishment on June 28, 2013, for Class 1 sentencing instead of the Class X sentencing to which he was subject, invalidated his guilty plea. On December 2, 2013, the court denied the defendant's motion to vacate his guilty plea. The court stated that the defendant would only have a right to withdraw his guilty plea if he was sentenced in excess of the range about which he was admonished on June 28, 2013. As he had yet to be sentenced, the court ruled that the motion to vacate was premature and denied the motion.

¶ 9 On December 13, 2013, the court held a hearing on the motion to revoke the defendant's participation in drug court; it also sentenced the defendant. The defendant

did not contest the revocation of his participation in the drug court program. The parties presented a joint recommendation of 12 years' incarceration followed by 3 years MSR. Before sentencing the defendant, the court asked counsel if the recommended sentence was within the range of sentences to which the defendant was admonished. The State indicated it was. The court then accepted the joint recommendation and sentenced the defendant to 12 years' incarceration to be followed by 3 years of MSR.

¶ 10 On January 9, 2014, the defendant filed a *pro se* motion to withdraw his guilty plea and vacate the sentence. He alleged that he was sentenced to three years of MSR, but that he was only admonished of a two-year term of MSR. Subsequently, the defendant obtained counsel who amended the defendant's *pro se* motion. The amended motion asserted that the defendant was admonished about a two-year term of MSR, but he received a three-year term of MSR, as required by his being subject to Class X sentencing. The amended motion indicated that the term of incarceration included in the defendant's sentence was within the range of allowed sentencing.

¶ 11 Defendant's counsel filed a certificate required by Supreme Court Rule 604(d) (eff. Feb. 6, 2013). In relevant part, the certificate stated the attorney: "consulted with the defendant by mail or in person to ascertain the defendant's contentions of error in his plea of guilty, has examined the trial court file and the reports of the proceedings for the guilty plea."

¶ 12 On June 17, 2014, the court held a hearing on the amended motion to withdraw plea. The defendant argued that his sentence was improper because he had not been admonished of a three-year term of MSR. The defendant argued the court had two

alternatives to address the situation. It could either vacate the sentence and allow the defendant to withdraw his guilty plea, or it could reduce the 12-year sentence of incarceration to 11 years. The State concurred in the two alternatives presented by the defendant, preferring the court choose the second alternative. The court modified the defendant's sentence of 12 years' incarceration with 3 years of MSR to 11 years' incarceration with 3 years of MSR. The defendant filed a timely notice of appeal. The court appointed OSAD to represent the defendant on appeal. After reviewing the matter, OSAD filed a motion to withdraw, pursuant to *Anders*, alleging there was no arguable merit to appeal and requesting to withdraw as counsel on appeal.

¶ 13

ANALYSIS

¶ 14 In its motion, OSAD addresses two issues that it believes might be raised but that it believes are frivolous: first, whether postplea counsel's admittedly deficient Rule 604(d) certificate is grounds for remand, and second, whether the incorrect admonishments require the vacatur of the defendant's plea. In support of its motion to withdraw, OSAD maintains that the defendant cannot appeal a ruling that granted him the relief he requested—where he was the prevailing party.

¶ 15 We first address the issue of whether or not the defendant is able to appeal from an order granting him what he requested. "[A]n accused may not ask the trial court to proceed in a certain manner and then contend in a court of review that the order which he obtained was in error." *People v. Lowe*, 153 Ill. 2d 195, 199 (1992) (citing *People v. Heard*, 396 Ill. 215, 219-20 (1947)); *People v. Harvey*, 211 Ill. 2d 368, 385 (2004) ("[U]nder the doctrine of invited error, an accused may not request to proceed in one

manner and then later contend on appeal that the course of action was in error.' " (quoting *People v. Carter*, 208 Ill. 2d 309, 319 (2003))). At the hearing on the motion to vacate his sentence, the defendant argued that because he was improperly admonished, the court could either vacate the guilty plea or reduce the term of incarceration from 12 years to 11 years. The defendant invited the court to do exactly what it did. He cannot now seek to reverse that ruling on appeal.

¶ 16 The court's order is appropriate in this situation. The defendant was admonished that he was pleading guilty to a Class 1 felony carrying a two-year term of MSR. In a similar case, *People v. Whitfield*, 217 Ill. 2d 177 (2005), the Illinois Supreme Court held that where a defendant pleaded guilty in exchange for a 25-year sentence with no mention of a term of MSR, he was entitled to relief in the form of a reduction of his 25-year sentence to 22 years so that the total sentence, with the mandatory 3 years of MSR, was of the duration to which the defendant believed he was pleading guilty. *Id.* at 201-05. Although this case is not completely analogous to *Whitfield*, we believe it was appropriate to provide the same relief as in *Whitfield*—a reduction in the total duration of the sentence by the amount of time in the defendant's sentence that is over that to which he was admonished. Again, this is one of the forms of relief the defendant requested and what he received.

¶ 17 The other potential issue identified by OSAD is that postplea counsel's Rule 604(d) certificate was deficient. Rule 604(d) requires that counsel who represents a defendant in a motion to withdraw a guilty plea must file a certificate stating that he or she has complied with the requirements of Rule 604(d). Strict compliance with Rule

604(d) is required. *People v. Janes*, 158 Ill. 2d 27, 33 (1994). At the time of defendant's motion to vacate his guilty plea, Rule 604(d) required the postplea attorney to certify that he had "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." Ill. S. Ct. R. 604(d) (eff. Feb. 6, 2013). The Illinois Supreme Court has interpreted the "or" in Rule 604(d) to mean "and," requiring postplea counsel to certify that they conversed with the defendant regarding potential errors in the plea and sentence. *People v. Tousignant*, 2014 IL 115329, ¶ 21. There is no question that postplea counsel failed to certify that he spoke to the defendant about his contentions of error in the plea and in the sentence. The certificate is deficient. But, in the limited case where the defendant obtained the relief he requested in his posttrial motion, we need not remand for compliance with Rule 604(d). *People v. Petty*, 366 Ill. App. 3d 1170, 1177 (2006) ("If the court grants the motion, it is immaterial whether counsel filed a Rule 604(d) certificate because the defendant received the relief requested."); *People v. Bryant*, 369 Ill. App. 3d 54, 59-60 (2006) (If the court grants the motion to withdraw, however, "it is immaterial whether counsel filed a Rule 604(d) certificate because the defendant received the relief requested." (citing *Petty*, 366 Ill. App. 3d at 1177)). Since the defendant received the relief he requested, we need not remand for compliance with Rule 604(d).

¶ 18

CONCLUSION

¶ 19 The defendant cannot appeal an order granting that which he requested. Regardless, the order entered by the circuit court was a proper resolution of the issue, and

because the defendant received what he requested, we need not remand for compliance with Supreme Court Rule 604(d).

¶ 20 Motion granted; affirmed.