

No. 1-17-0469

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 14 CR 19149
)	
RICHARD A. PERSON,)	Honorable
)	Timothy J. Chambers,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE MIKVA delivered the judgment of the court.
Justices Griffin and Walker concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court’s denial of defendant’s motion to vacate his guilty plea is reversed and the case is remanded for further post-plea proceedings where defense counsel failed to strictly comply with the certification requirements of Supreme Court Rule 604(d).

¶ 2 Defendant Richard A. Person appeals from an order of the circuit court of Cook County denying his motion to vacate his guilty plea. On appeal, Mr. Person contends that his case must be remanded for new post-plea proceedings because defense counsel failed to strictly comply with the requirement in Supreme Court Rule 604(d) (eff. Mar. 8, 2016) that counsel certify that

he had reviewed the report of proceedings, when instead counsel's certificate stated that he was waiting for the transcript from the plea proceedings to be delivered. We reverse and remand for further proceedings in compliance with Rule 604(d).

¶ 3

I. BACKGROUND

¶ 4 Mr. Person was charged with two counts of stalking (720 ILCS 5/12-7.3 (West 2014)). On September 12, 2016, Mr. Person requested a plea conference pursuant to Supreme Court Rule 402 (eff. July 1, 2012). Mr. Person agreed to accept the plea offer.

¶ 5 At the plea hearing, the trial court admonished Mr. Person that, as charged, stalking was a Class 4 offense, but that based on his criminal background, he faced an extended sentence of one to six years' imprisonment. Defense counsel stated that Mr. Person wished to address the court before proceeding. Mr. Person reminded the court that his mother had passed away 19 months earlier. Mr. Person stated that his father was now "on his death bed," and asked if the State and the court would agree to a term of 45 months' imprisonment. The court and defense counsel told Mr. Person that the agreement was for 48 months. Mr. Person replied "I can't do 48 months if I want to be there for my father." The court informed Mr. Person that he was less than one month away from completing the two-year term, and advised him to speak with a social worker at the jail about visiting his father. Mr. Person expressed concern that his father could die "tomorrow," and stated that he wanted to accept the offer, but also wanted to be there for his father. The court stated that there was nothing it could do, and told Mr. Person to speak with people at the jail.

¶ 6 The court admonished Mr. Person of the possible penalties he faced and that he would be required to serve four years of mandatory supervised release (MSR). It further stated that the agreement included a lifetime order that Mr. Person have no contact with the victim. Mr. Person confirmed that he understood the agreement and pled guilty. The court verified that Mr. Person

understood that he was foregoing certain rights by pleading guilty, including the right to a trial. Mr. Person denied that anyone had forced or threatened him to plead guilty and testified that he was pleading guilty of his own free will.

¶ 7 The State provided the factual basis for the plea, stating that about 6 a.m. on September 29, 2014, M.B. was waiting at a bus stop to take a bus to school when Mr. Person approached and engaged her in conversation. Mr. Person moved closer to M.B., making her feel uncomfortable. Mr. Person twice offered M.B. money in exchange for sex, which she refused. M.B. became fearful and texted her stepfather, Albert Johnson, to come outside. Mr. Johnson went to the bus stop. After M.B. boarded her bus for school, Mr. Johnson told Mr. Person to leave M.B. alone. On October 1, as M.B. walked to the same bus stop, she observed Mr. Person standing across the street. Mr. Person crossed the street towards M.B. at a fast pace. M.B. called Mr. Johnson, who came outside. Mr. Person turned around and retreated. On October 3 at 11:30 a.m., M.B. and her mother exited a store and were walking near their home when Mr. Person crossed the street at an angle and caught up to them. When Mr. Person came within inches of M.B.'s mother, she turned around, demanded that he leave them alone, and called the police. The police arrived and toured the area with M.B. and her mother, who identified Mr. Person walking on the street. The State's witnesses would identify Mr. Person in court. Mr. Person was on parole at the time of the offense. The defense stipulated to the factual basis.

¶ 8 The trial court found that Mr. Person made his plea freely and voluntarily. The court accepted the plea and entered a guilty finding on count I. The court sentenced Mr. Person to an extended term of four years' imprisonment and four years of MSR. The court also entered a lifetime no contact order prohibiting Mr. Person from having any contact with M.B., her mother, and Mr. Johnson.

¶ 9 On October 7, 2016, Mr. Person, through counsel, filed a timely motion to vacate his guilty plea. Mr. Person asserted that at the time of his plea, he was under psychological duress due to the stress of being in jail for almost two years and his father's terminal illness.

¶ 10 On the same day, trial counsel submitted a notarized certificate pursuant to Rule 604(d). Counsel averred that he was the attorney of record for Mr. Person, and had consulted with Mr. Person in person, on the phone, and via mail to ascertain his contentions of error in the entry of the guilty plea or sentence. Counsel stated that pursuant to those consultations, in good faith he prepared the attached motion to vacate the guilty plea after having examined the court file. Counsel further stated that "a transcript of plea proceedings has been ordered and currently waiting on delivery of said transcript." Counsel also stated that he made any amendments to the motion necessary for adequate presentation of any defects in the plea proceedings.

¶ 11 On January 25, 2017, Mr. Person, through counsel, filed an amended motion to vacate his guilty plea. In addition to the grounds alleged in his initial motion, Mr. Person also asserted that the factual basis presented in court during the plea hearing did not constitute a charge of stalking under the statute. Counsel did not submit a new or amended Rule 604(d) certificate.

¶ 12 At the hearing on Mr. Person's motion to vacate his plea, while arguing that the factual basis presented did not constitute stalking, counsel stated that "[d]uring the plea, if you'd read the transcript, the information tendered as the basis of the offense doesn't – we believe doesn't rise to the level of the amended constitutional section that Mr. Person had pled guilty to the former charge." The State argued that the factual basis specifically stated what conduct made M.B. feel uncomfortable, and that after three instances, M.B. told Mr. Person to leave her alone and called the police, showing that his conduct placed M.B. in reasonable apprehension of immediate or future bodily harm or sexual assault.

¶ 13 The trial court found that there was nothing presented to show that Mr. Person had been suffering psychological distress. The court noted that Mr. Person had stated that his father was on his death bed and tried to get the State and the court to agree to a sentence of 45 months. The court found that Mr. Person used the situation as more of a “negotiating chip” rather than a psychological defense. The court further found that Mr. Person’s plea was “full and complete,” and that Mr. Person was fully aware of what was happening. Accordingly, the trial court denied Mr. Person’s motion to vacate his guilty plea.

¶ 14 **II. JURISDICTION**

¶ 15 Mr. Person’s motion to vacate his guilty plea was denied on January 25, 2017, and he timely filed his notice of appeal that same day. We have jurisdiction pursuant to article VI, section 6, of the Illinois Constitution (Ill. Const. 1970, art. VI, § 6) and Illinois Supreme Court Rules 603 (eff. Feb. 6, 2013) and 606 (eff. Dec. 11, 2014), governing appeals from final judgments of conviction in criminal cases.

¶ 16 **III. ANALYSIS**

¶ 17 On appeal, Mr. Person contends that his case must be remanded for new post-plea proceedings because defense counsel failed to strictly comply with the requirement in Rule 604(d) that counsel certify he had reviewed the report of proceedings. Instead, counsel’s certificate stated that he was waiting for the transcript from the plea proceedings to be delivered. Mr. Person argues that at the time that counsel filed his certificate, counsel had not reviewed the transcripts, and counsel never filed an amended certificate stating that he subsequently reviewed the transcripts. Mr. Person asserts that in reviewing counsel’s compliance with Rule 604(d), this court should look only to the four corners of counsel’s certificate, and not to any other information contained in the record, including the report of proceedings.

¶ 18 The State concedes that counsel’s certificate did not strictly comply with Rule 604(d). The State argues, however, that remand is not warranted because the record shows that counsel examined the transcript of the plea proceedings prior to the hearing on Mr. Person’s motion to vacate his plea. The State argues that in the amended motion to vacate the plea, counsel raised an additional allegation that the factual basis presented at the plea hearing did not constitute stalking, which shows that counsel relied on facts contained in the transcript from the plea hearing. The State also points out that while arguing about the new allegation during the hearing, counsel asked the trial court to read the facts in the transcript. The State argues that the record shows that counsel reviewed the report of proceedings, and thus, strictly complied with the requirements of Rule 604(d). The State asserts that, because Mr. Person has not argued that his motion to vacate his plea raised a viable claim or a violation of due process, remand for further proceedings would be a wasteful formality.

¶ 19 Whether counsel’s certificate complied with the requirements of Rule 604(d) presents a question of law that we review *de novo*. *People v. Easton*, 2018 IL 122187, ¶ 25. At the time defense counsel filed his certificate, Rule 604(d) provided, in relevant part:

“The defendant’s attorney shall file 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. Mar. 8, 2016).

¶ 20 Our supreme court has expressly stated “[i]t is firmly established that the certificate filed

by counsel must strictly comply with the requirements of Rule 604(d).” *Easton*, 2018 IL 122187, ¶ 26. The court further stated “[i]f the certificate fails to meet this standard, a reviewing court must remand the case to the trial court for proceedings that strictly comply with Rule 604(d).” *Id.*

¶ 21 The purpose of the certificate requirement in Rule 604(d) is to enable the trial court to ensure that counsel has reviewed the defendant’s claim and considered all of the relevant bases for the motion to withdraw the guilty plea or reconsider the sentence. *People v. Tousignant*, 2014 IL 115329, ¶ 16. In analyzing the sufficiency of the certificate, “the court is charged with evaluating counsel’s prior actions to determine whether the requirements of the rule have been satisfied. The focus is to ascertain what counsel actually did to achieve compliance with the rule.” *Easton*, 2018 IL 122187, ¶ 34.

¶ 22 The issue before us on this case is whether a remand is necessary where, as here, the record demonstrates that counsel complied with the Rule 604(d) requirements, but the Rule 604(d) certificate itself is deficient and was never amended. While our supreme court has not directly addressed this question, several appellate courts have agreed that the certificate itself must demonstrate compliance with the Rule 604(d) requirements. As the Fourth District put it:

“By promulgating Rule 604(d), the Supreme Court of Illinois has already determined the required content of the certificate, and it is the duty of this court—and the trial courts—to ensure that this supreme court mandate is followed. Thus, in this case and henceforth, the certificate itself is all that this court will consider to determine compliance with Rule 604(d).” *People v. Grice*, 371 Ill. App. 3d 813, 816 (2007).

¶ 23 The Second District noted that “a waste of judicial resources occurs when, as a result of

an attorney's deficient certificate, an appellate court must scour through the record to determine whether that attorney actually complied with Rule 604(d), even though strict compliance with that rule's certification requirements would prevent such waste." *People v. Dismuke*, 355 Ill. App. 3d 606, 609 (2005); see also *People v. Richard*, 2012 IL App (5th) 100302, ¶ 10 (following *Grice* and *Dismuke*).

¶ 24 The approach of these courts is in keeping with language that the supreme court has used in discussing Rule 604(d). In *Tousignant*, our supreme court analyzed the consultation requirement in Rule 604(d) and held that counsel was "required to certify" that he or she had consulted with the defendant as to errors in both the sentence and the entry of the guilty plea. *Tousignant*, 2014 IL 115329, ¶ 20. Subsequently, in *Easton*, when discussing its holding in *Tousignant*, the court clarified that its "construction of the rule mandates that defense counsel specify in the certificate that he or she has consulted with defendant as to both types of error." (Emphasis added.) *Easton*, 2018 IL 122187, ¶ 35.

¶ 25 Although strict compliance does not require that the certificate contain the language of the rule verbatim, the certificate itself must demonstrate that counsel performed the duties required by the rule. *People v. Richard*, 2012 IL App (5th) 100302, ¶ 10. In this case, it is undisputed that defense counsel's certificate did not show that counsel had fulfilled the requirements of Rule 604(d). The rule requires that counsel state in his certificate that he "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." Here, counsel stated that "a transcript of plea proceedings has been ordered and currently waiting on delivery of said transcript." Although counsel amended his motion, he never filed a new or amended certificate verifying that he had

examined the report of proceedings. Consequently, counsel's certificate was deficient on its face.

¶ 26 While in this particular case the State may be correct that further proceedings would be a wasteful formality, in general, as the courts recognized in *Grice* and *Dismuke*, it is a waste of judicial resources when an appellate court must scour the record to determine if an attorney, who filed a deficient certificate, actually complied with Rule 604(d). *Dismuke*, 355 Ill. App. 3d at 609. The far more efficient approach is for trial counsel and the trial court to ensure that the Rule 604(d) certificate is adequate.

¶ 27 Because defense counsel's certificate did not comply with the requirements of Rule 604(d), we must remand Mr. Person's case to the trial court for new post-plea proceedings, "including (1) the filing of a new Rule 604(d) certificate; (2) the opportunity to file a new motion to withdraw the guilty plea and/or reconsider the sentence, if counsel concludes that a new motion is necessary; and (3) a new motion hearing." *Easton*, 2018 IL 122187, ¶ 37.

¶ 28 IV. CONCLUSION

¶ 29 For these reasons, the judgment of the circuit court of Cook County is reversed and the cause is remanded for further post-plea proceedings.

¶ 30 Reversed and remanded with directions.