

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).

2020 IL App (4th) 180270-U

NO. 4-18-0270

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
July 7, 2020
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
Plaintiff-Appellee,)	Circuit Court of
v.)	Livingston County
LEROY K. DEVINE,)	No. 17CF247
Defendant-Appellant.)	
)	Honorable
)	Jennifer H. Bauknecht,
)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices DeArmond and Harris concurred in the judgment.

ORDER

¶ 1 *Held:* The record does not show strict compliance with Illinois Supreme Court Rule 604(d) (eff. July 1, 2017), and thus remand is warranted.

¶ 2 In August 2017, the State charged defendant, Leroy K. Devine, by information with two counts of delivery of a controlled substance (720 ILCS 570/401(c)(1) (West 2016)). In December 2017, the State filed an amended information charging defendant with two counts of delivery of a look-alike substance (720 ILCS 570/404(b) (West 2016)). At a January 2018 hearing, defendant pleaded guilty to the two counts of delivery of a look-alike substance. After a March 2018 hearing, the Livingston County circuit court sentenced defendant to concurrent prison terms of seven years. Defendant filed a motion for reconsideration of his sentence, which the court denied after an April 2018 hearing.

¶ 3 Defendant appeals, contending (1) his counsel failed to strictly comply with

Illinois Supreme Court Rule 604(d) (eff. July 1, 2017) and (2) the circuit court failed to properly consider factors in aggravation and mitigation in sentencing him. We vacate the circuit court's ruling on defendant's motion to reconsider his sentence and remand for further proceedings.

¶ 4

I. BACKGROUND

¶ 5 The two amended charges in this case asserted that, on July 27 and August 1, 2017, defendant knowingly delivered to a police confidential source a look-alike substance purported to be heroin. The charges noted defendant, if found guilty, could be sentenced to an extended term of up to 10 years based on his prior conviction for manufacture or delivery of a controlled substance (*People v. Devine*, No. 13-CF-2015 (Cir. Ct. Will Co.)). 720 ILCS 570/408(a) (West 2016).

¶ 6 At a January 17, 2018, hearing, defendant pleaded guilty to the two amended charges. He had no agreement with the State. After admonishing defendant pursuant to Illinois Supreme Court Rule 402 (eff. July 1, 2012) and hearing the factual basis for the plea, the circuit court accepted defendant's guilty plea. The court found defendant's plea was knowing and voluntary and a sufficient factual basis existed.

¶ 7 On March 8, 2018, the circuit court commenced defendant's sentencing hearing. The State did not present any evidence in addition to the presentence investigation report (PSI). Defendant testified on his own behalf and presented the testimony of (1) Leroy Devine Jr., his father; and (2) Megan Devine, defendant's sister. After hearing defendant's evidence, the court continued the hearing. The court resumed the hearing on March 19, 2018. The State recommended a sentence of eight years' imprisonment. It argued no mitigating factors applied in defendant's case. As to aggravating factors, the State contended defendant's conduct did cause or threaten serious harm, defendant had a history of delinquency and criminal activity,

defendant's sentence is necessary to deter others from engaging in this behavior, and defendant was on mandatory supervised release (MSR) when he committed the crimes. Defense counsel recommended a sentence of probation. He noted defendant did not have a history of violence. Defendant spoke in allocution. The court sentenced defendant to concurrent terms of seven years' imprisonment. The court first spoke generally about the opioid crisis and single parent homes. The court found defendant did not have great potential for rehabilitation because he had six adult felonies and committed these felonies while on MSR. It specifically noted the fact defendant was on MSR at the time he committed the offenses is a very strong aggravating factor. The court also found defendant's criminal history and the need to deter others were strong aggravating factors. Moreover, the court found no mitigating factors in this case.

¶ 8 On March 24, 2018, defendant filed a motion to reconsider his sentence, arguing (1) the circuit court failed to consider all mitigating factors, including the fact defendant did not contemplate his conduct would cause or threaten serious physical harm; (2) the sentence was excessive in consideration of all of the factors before the court; (3) probation would have been proper; (4) the sentence was unduly harsh and punitive in consideration of defendant's display of remorse; and (5) the court failed to sentence defendant with the objective of restoring him to useful citizenship. Additionally, defendant asserted, in pertinent part, the following:

“The circuit court relied on three aggravating factors when it sentenced Defendant: 1) the fact that he received monetary compensation when selling controlled substances; 2) the harm that drugs pose to members of the community; and 3) his prior convictions. However, the first two of these three factors are inherent in the offenses for which Defendant was convicted and should not have been considered as factors in aggravation during sentencing.

The court explained that Defendant harmed the residents of Livingston County and the State of Illinois by selling a controlled substance. It also noted that the sale of drugs posed a risk to the emergency personnel that respond to situations involving controlled substances.”

¶ 9 The circuit court held the hearing on defendant’s motion to reconsider his sentence on April 11, 2018. The court began with the follow inquiry:

“THE COURT: Do you have a 604(d) certificate with this since it was a plea?

MR. RIPLEY [DEFENSE COUNSEL]: On the motion to reconsider?

THE COURT: Yeah.

MR. RIPLEY: Doesn’t that come with the appeal?

THE COURT: I need the 604(d) certificate before the appeal or before the motion to reconsider. But here, I have one somewhere. Let me see. Double check. Do you want the code?

MR. RIPLEY: No.”

The Rule 604(d) certificate was filed on April 11, 2018. After hearing the parties’ arguments, the court denied defendant’s motion to reconsider his sentence.

¶ 10 On April 11, 2018, defendant filed a timely notice of appeal in compliance with Illinois Supreme Court Rule 606 (eff. July 1, 2017). Accordingly, this court has jurisdiction of defendant’s appeal under Rule 604(d).

¶ 11 II. ANALYSIS

¶ 12 Defendant first contends his counsel did not strictly comply with Rule 604(d)

because counsel certified he examined the transcript of the sentencing hearing before the record indicates it was transcribed and filed a motion to reconsider sentence that did not reflect the court's reasoning at the sentencing hearing. The State argues counsel did comply with Rule 604(d).

¶ 13 “Rule 604(d) governs the procedure to be followed when a defendant wishes to appeal from a judgment entered upon a guilty plea.” *In re H.L.*, 2015 IL 118529, ¶ 7, 48 N.E.3d 1071. For a defendant to appeal, the rule requires the defendant file, within 30 days of the date on which his or her sentence was imposed, in the circuit court “a motion to reconsider the sentence, if only the sentence is being challenged, or, if the plea is being challenged, a motion to withdraw the plea of guilty and vacate the judgment.” Ill. S. Ct. R. 604(d) (eff. July 1, 2017). “[A]ny issue not raised by the defendant in the motion to reconsider the sentence or withdraw the plea of guilty and vacate the judgment shall be deemed waived.” Ill. S. Ct. R. 604(d) (eff. July 1, 2017). The rule also requires defendant's attorney to file in the circuit court a certificate stating the following:

“[T]he 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. July 1, 2017).

The rule's purpose “ ‘is to ensure that before a criminal appeal can be taken from a guilty plea, the trial judge who accepted the plea and imposed sentence be given the opportunity to hear the

allegations of improprieties that took place outside the official proceedings and *dehors* the record, but nevertheless were unwittingly given sanction in the courtroom.’ ” *H.L.*, 2015 IL 118529, ¶ 9 (quoting *People v. Wilk*, 124 Ill. 2d 93, 104, 529 N.E.2d 218, 221-22 (1988)). Rule 604(d) also “ ‘enables the trial court to insure that counsel has reviewed the defendant’s claim and considered all relevant bases for the motion to withdraw the guilty plea or to reconsider the sentence.’ ” *H.L.*, 2015 IL 118529, ¶ 10 (quoting *People v. Shirley*, 181 Ill. 2d 359, 361, 692 N.E.2d 1189, 1191 (1998)).

¶ 14 Our supreme court requires strict compliance with Rule 604(d), and counsel’s failure to strictly comply requires remand to the circuit court. *People v. Janes*, 158 Ill. 2d 27, 33, 630 N.E.2d 790, 792 (1994). Here, defendant’s counsel filed his Rule 604(d) certificate on April 11, 2018, during the hearing on defendant’s motion to reconsider his sentence. Even where counsel has filed a facially valid Rule 604(d) certificate, as in this case, courts “may consult the record to determine whether [he or] she actually fulfilled [his or] her obligations under Rule 604(d).” *People v. Bridges*, 2017 IL App (2d) 150718, ¶ 8, 87 N.E.3d 441. We review *de novo* whether defense counsel complied with Rule 604(d). *People v. Grice*, 371 Ill. App. 3d 813, 815, 867 N.E.2d 1143, 1145 (2007).

¶ 15 Defendant cites *People v. Little*, 337 Ill. App. 3d 619, 621, 786 N.E.2d 636, 638 (2003), where this court found defense counsel did not comply with Rule 604(d) despite having filed a proper certificate. There, counsel filed a Rule 604(d) certificate, which was dated April 26, 2001, and filed the next day. *Little*, 337 Ill. App. 3d at 621-22, 786 N.E.2d at 638. However, a review of the record showed the transcript of the guilty plea proceeding was prepared and filed with the circuit court on May 24, 2001, which made it impossible for counsel to have reviewed the report of proceedings prior to filing his Rule 604(d) certificate. *Little*, 337 Ill. App. 3d at

622, 786 N.E.2d at 638. This court reversed and remanded for proper compliance with Rule 604(d). *Little*, 337 Ill. App. 3d at 622, 786 N.E.2d at 638.

¶ 16 This court later reached a different conclusion when the defendant argued the record suggested defense counsel was unable to read the transcript of the guilty plea proceedings before filing either the motion to reconsider sentence or counsel's Rule 604(d) certificate because the court reporter did not certify the guilty plea proceedings until after defense counsel had filed the aforementioned documents. *People v. Little*, 2011 IL App (4th) 090787, ¶ 13, 957 N.E.2d 102. This court noted the fundamental problem with the defendant's argument was he equated the preparation of the transcripts of the guilty plea and sentencing proceedings with the court reporter's certification of those proceedings. *Little*, 2011 IL App (4th) 090787, ¶ 14. We agreed with the State's assertion the date the court reporter certified the transcripts in preparation of the record on appeal was not evidence of the first date defense counsel could have reviewed the transcripts. *Little*, 2011 IL App (4th) 090787, ¶ 16. In *Little*, 2011 IL App (4th) 090787, ¶ 11, the defense counsel filed a Rule 604(d) certificate and stated in open court he had reviewed the transcript of the guilty plea and sentencing proceedings. The State asserts this case supports its contention defense did strictly comply with Rule 604(d).

¶ 17 Here, defendant argues the record does not show the reports of proceedings were provided and filed with the circuit court for defense counsel's review before the court denied defendant's motion to reconsider his sentence. Defendant also points out defense counsel was not even aware he had to file a Rule 604(d) certificate in relation to defendant's motion to reconsider his sentence. Additionally, he argues some of the statements defense counsel made in the motion to reconsider defendant's sentence are not supported by the transcript of the sentencing hearing and defense counsel did not correct the errors at the hearing on the motion to

reconsider. The State recognizes defense counsel's arguments in the motion to reconsider were "tenuous" but contends they were not completely unwarranted based on the PSI.

¶ 18 Our review of the record supports defendant's contention the motion to reconsider contained statements not supported by the transcript of the sentencing hearing. Specifically, the circuit court did not mention emergency personnel in explaining its sentencing determination. The court also explicitly found the aggravating factors of deterring others, defendant's criminal history, and the fact defendant was on MSR when he committed the crimes applied in defendant's case. The court did not mention the fact defendant received monetary compensation when selling controlled substances. While the court did discuss the opioid crisis and issues with drug dealers misrepresenting the substances sold, the court did not expressly find the harm drugs pose to members of the community was an aggravating factor.

¶ 19 In this case, our confidence in defense counsel's strict compliance with Rule 604(d) is undermined by the discrepancies between the transcript of the sentencing hearing and the assertions in the motion to reconsider and counsel's unawareness of the certificate's applicability at the motion to reconsider stage. Additionally, unlike in *Little*, 2011 IL App (4th) 090787, ¶ 11, defense counsel did not make any statements indicating he had reviewed the reports of proceedings in this case. Thus, we find new proceedings in strict compliance with Rule 604(d) are necessary.

¶ 20 When a defense counsel does not file a proper Rule 604(d) certificate, our supreme court has held the proper remedy is to remand the cause to the circuit court to allow for "(1) the filing of a 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." *People v. Lindsay*, 239 Ill. 2d 522, 531, 942 N.E.2d

1268, 1274 (2011). We find those same directions applicable when defense counsel files a proper certificate but the record does not show strict compliance with Rule 604(d). Moreover, in this case, a new motion to reconsider sentence is necessary due to the original motion's discrepancy with the transcript of the sentencing hearing. Additionally, we emphasize defense counsel needs to examine the report of proceedings for both the guilty plea and sentencing hearing as well as the circuit court's file on remand. See Ill. S. Ct. R. 604(d) (eff. July 1, 2017). Since we are remanding the cause for new Rule 604(d) proceedings, we do not address defendant's second argument.

¶ 21

III. CONCLUSION

¶ 22 For the reasons stated, we vacate the Livingston County circuit court's ruling on defendant's motion to reconsider his sentence and remand the cause for further proceedings in strict compliance with Rule 604(d).

¶ 23 Vacated and remanded with directions.