

as to sentence. On August 10, 2011, the trial court sentenced defendant to 21 years' imprisonment.

¶ 5 On August 9, 2011, defendant filed a *pro se* motion to reconsider sentence. On September 8, 2011, defendant's trial counsel filed a motion to reconsider sentence. On September 22, 2011, defendant filed *pro se* motions for reduction of sentence and to withdraw plea and vacate sentence. The motion to withdraw guilty plea stated as follows:

"Now comes the defendant, Isaac D. Phillips, pursuant to Illinois Supreme Court Rule 604((d), and Moves this Court to withdraw his guilty plea and vacate the sentence entered in the above captioned cause, and in support thereof states:

I am filing this Motion to facilitate my Motion to Reduce Sentence. I had an Open Plea but with conditions that additional charges be dropped, so I was confused as to what category this is — a negotiated plea with an agreement as to sentencing, or an open plea with no agreement? My case is (seemingly) an Open Plea with an agreement, and so did not fit either category. I seek clarification and a Sentence Reduction."

On September 23, 2011, the trial court entered a docket entry stating, "Court lacks jurisdiction pursuant to Supreme Court Rule 604(d), to address the Motion to Withdraw Guilty Plea and Vacate Sentence filed by Defendant on 9/22/11. Therefore, said motion is denied." Apparently, the court made this finding because the motion to withdraw the guilty plea was filed more than 30 days following imposition of sentence.

¶ 6 On September 12, 2012, defendant's trial counsel filed a certificate averring compliance with Rule 604(d). Counsel's certificate is a preprinted form with three separate paragraphs. The first paragraph contains an upper box for a motion to withdraw plea and the lower box for a motion to reconsider sentence. The motion-to-reconsider box states as follows:

"I have consulted with the Defendant, *in person* to ascertain his/her contentions of error in the *sentence* in the above-entitled cause.

AND/OR

I have consulted with the Defendant, *by mail* to ascertain his/her contentions of error in the *sentence* in the above-entitled cause."

(Emphases in original.)

The check boxes next to these two statements are marked.

¶ 7 In September 2012, the trial court held a hearing on defense counsel's motion to reconsider sentence and denied it. This appeal followed.

¶ 8 II. ANALYSIS

¶ 9 Supreme Court Rule 604(d) provides, 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 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."

(Emphasis added.) Ill. S. Ct. R. 604(d) (eff. July 1, 2006).

¶ 10 Defendant contends counsel's Rule 604(d) certificate is deficient for failing to certify trial counsel consulted with defendant to ascertain defendant's contentions of error in the entry of the plea of guilty. The State disagrees and asserts Rule 604(d) "is satisfied by conferring with defendant about either or both topics" because the requirement defense counsel attest to conferring with defendant about the sentence *or* the guilty plea is stated in the alternative. Further, the State contends "given the disjunctive language of Rule 604(d), when the postplea motion is limited to either the guilty plea or the sentence, defense counsel should not be faulted for only certifying he conferred with his client about the subject matter of the motion."

¶ 11 "The question of whether defense counsel complied with Rule 604(d) is subject to *de novo* review." *People v. Grice*, 371 Ill. App. 3d 813, 815, 867 N.E.2d 1143, 1145 (2007). "[S]trict compliance with Rule 604(d) is required and a reviewing court must remand in any case where counsel failed to strictly comply." *People v. Prather*, 379 Ill. App. 3d 763, 768, 887 N.E.2d 44, 47 (2008). "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, 39. "The certificate itself is all this court will consider to determine compliance with Rule 604(d)." *People v. Neal*, 403 Ill. App. 3d 757, 760, 936 N.E.2d 726, 728 (2010).

¶ 12 In this case, the trial court denied defendant's motion to withdraw his guilty plea because it stated the court no longer had jurisdiction to decide that motion. While the motion was filed more than 30 days after sentencing, defendant and defendant's counsel both filed timely motions to reconsider the sentence that were still pending, thus maintaining jurisdiction in the

trial court. In *People v. Lopez*, 223 Ill. App. 3d 520, 521, 585 N.E.2d 622, 623 (1992), the defendant filed a timely motion to withdraw his guilty plea, but failed to raise any issues regarding sentencing. Almost four months after sentencing but prior to any hearing on the motion to withdraw guilty plea, defendant filed a motion to reduce sentence. The State argued the motion to reduce was untimely and the trial court lacked jurisdiction to hear it. The appellate court disagreed, finding the motion to withdraw guilty plea timely filed, thus the trial court retained jurisdiction until it ruled on the motion. *Id.*

¶ 13 The same is true here. Since defendant filed a timely postsentencing motion, the trial court retained jurisdiction. Its decision to deny the motion to withdraw the guilty plea on the basis it lacked jurisdiction was error.

¶ 14 While the motion to withdraw the guilty plea, on its face, reflects defendant's desire only to preserve issues raised in the motion to reconsider sentence, since it was filed at a time the trial court still had jurisdiction, strict compliance with Rule 604(d) required counsel to consult with defendant about any contentions of error with respect to the guilty plea and file a certificate so stating. Defendant may well have decided to withdraw his motion to vacate the guilty plea after consulting with counsel. The court then could have made a record reflecting defendant desired only to proceed on the motion to reconsider sentence.

¶ 15 Recently, in *People v. Dryden*, 2012 IL App (2d) 110646, ¶ 9, 2012 WL 5935511 at *2, the State argued Rule 604(d)'s consultation requirement is phrased in the disjunctive and the certificate need not state counsel ascertained the defendant's contentions of error in the sentence. In that case, the defendant filed a combined motion to withdraw the guilty plea and to reconsider the sentence. *Dryden*, 2012 IL App (2d) 110646, ¶ 2, 2012 WL 5935511 at *1. In

vacating and remanding, the Second District rejected the State's argument and stated "in this context, it is clear that 'or' means 'and.'" *Dryden*, 2012 IL App (2d) 110646, ¶ 9, 2012 WL 5935511 at *2. The Second District noted it would be "absurd to suggest" where counsel files a motion to withdraw plea and reconsider the sentence "counsel may arbitrarily choose to consult with the defendant about only one type of error." *Dryden*, 2012 IL App (2d) 110646, ¶ 9, 2012 WL 5935511 at *2. Further, *Dryden* noted Rule 604(d)'s "purpose is to eliminate the need for guesswork about the 'core' of a defendant's contentions." *Dryden*, 2012 IL App (2d) 110646, ¶ 11, 2012 WL 5935511 at *2.

¶ 16 We need not decide whether Rule 604(d) requires counsel to state both grounds of error when only one motion is filed, or whether the use of the word "or" in a Rule 604(d) certificate creates ambiguity. See *Elementary School District 159 v. Schiller*, 221 Ill. 2d 130, 145, 849 N.E.2d 349, 359 (2006) (the word "or" is ordinarily disjunctive and a disjunctive connotes two different alternatives); *People v. Mineau*, 2012 IL App (2d) 110666, ¶ 16, 2012 WL 5396224, at *3 (appellate court "will not fault counsel for using the language of the rule").

¶ 17 In the instant case, counsel's certificate stated he consulted with defendant to ascertain defendant's contentions of error in the sentence. The certificate was filed prior to defendant filing his motion to withdraw guilty plea and consequently counsel's certificate does not state whether he consulted with defendant to ascertain his contentions of error in the entry of the plea of guilty. While defense counsel only filed a motion to reconsider sentence, defendant filed a *pro se* motion to withdraw guilty plea at a time the trial court retained jurisdiction. We are concerned counsel did not ascertain defendant's contentions for filing this motion. As the certificate and record provide no indication of whether counsel consulted with defendant about

the entry of the guilty plea, it does not suffice. We cannot speculate on whether counsel in fact consulted with defendant on this issue. Because we cannot determine whether counsel in fact consulted with defendant to ascertain his contentions of error in the entry of the plea of guilty, the certificate fails to strictly comply with Rule 604(d).

¶ 18

III. CONCLUSION

¶ 19 For the reasons stated, we reverse the trial court's judgment regarding Rule 604(d) compliance and remand for (1) the filing of a new postplea motion (if defendant so wishes), (2) a new hearing on defendant's postplea motion, and (3) strict compliance with Rule 604(d) requirements.

¶ 20 Reversed and remanded with directions.