

No. 1-12-0663

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 JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 11 CR 14233
)	
DONTEL COLE,)	Honorable
)	Joseph G. Kazmierski, Jr.,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE CONNORS delivered the judgment of the court.
Justices Hoffman and Cunningham concurred in the judgment.

O R D E R

¶ 1 *Held:* This case must be remanded for further proceedings on defendant's motion to withdraw his guilty plea where defendant's attorney failed to file a Supreme Court Rule 604(d) certificate; the mittimus is corrected to reflect defendant was found guilty of possession of ammunition by a felon.

¶ 2 Pursuant to a negotiated guilty plea, defendant Dontel Cole pled guilty to one count of unlawful possession of ammunition by a felon in exchange for a four-year prison sentence. On appeal, defendant contends that: (1) this case should be remanded for further proceedings on his

motion to withdraw his guilty plea where his attorney failed to file a Supreme Court Rule 604(d) (eff. Feb. 6, 2013) certificate; (2) the court should remand so that he can pursue his claims with new counsel free of any potential bias; and (3) his mittimus should be corrected to reflect the correct offense.

¶ 3 According to the factual basis presented during defendant's guilty plea hearing, Chicago police officer John Smith observed a car being driven near 6025 St. Lawrence Avenue with an unsecured license plate on August 22, 2011 around 11 p.m. Smith performed a computer check of the plate number, which revealed that it belonged to a different vehicle than the one being driven. Smith stopped the car, and as he approached he noticed defendant sitting in the front passenger seat moving his head from side to side up and down disappearing from view.

Believing that defendant had a weapon, Smith removed him from the car to pat him down. As defendant was exiting the car, live ammunition cartridge cases fell through the left leg of his shorts. Smith recovered 14 live .40 caliber cartridges and arrested defendant. Defendant was arrested after he revealed that he did not have a Firearm Owners Identification (FOID) card.

¶ 4 Defendant was charged with two counts of unlawful possession of ammunition by a felon, and pled guilty to one of those counts. The court found the plea to be knowing and voluntary. In aggravation, the State presented evidence that defendant had prior convictions for residential burglary in 2000 and aggravated use of a weapon in 2009. The court sentenced defendant to four years in prison with a recommendation of "boot camp," also known as impact incarceration, which was reflected on his mittimus.

¶ 5 Defendant then filed a *pro se* motion to withdraw his guilty plea and vacate the sentence. In the motion, defendant claimed "that his plea was induced under both his attorney and the court

assuring him acceptance to the impact incarceration program." The trial court appointed the same public defender who represented defendant during the plea proceedings to represent defendant on his motion. During a hearing on the motion, the judge reminded defendant that he never promised boot camp during the plea, only that it would be recommended. Defendant replied "[t]hat I--basically I was-- it was inadequate counsel. She told me that I was eligible for boot camp. I wasn't eligible for boot camp." Defense counsel admitted that she told defendant that he was eligible, but stated she never promised that he would be accepted into the program. On the next court date, defense counsel revealed that after following up with the Illinois Department of Corrections (IDOC), she discovered that defendant was never interviewed to determine his eligibility for boot camp. Defense counsel offered to call IDOC once more and send them a copy of defendant's mittimus. The court subsequently denied defendant's *pro se* motion.

¶ 6 On appeal, defendant contends that because defense counsel failed to file a Rule 604(d) certificate, the case must be remanded for the opportunity to file a new motion to withdraw his guilty plea and a new hearing on that motion with an attorney free of any potential bias. He also contends that his mittimus should be corrected to reflect the correct offense.

¶ 7 "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 (2007). Rule 604(d) provides:

"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." Ill. S. Ct. R. 604(d).

Defense counsel must strictly comply with the requirements of Rule 604(d). *People v. Dryden*, 2012 IL App (2d) 110646, ¶ 4. The remedy for failing to strictly comply with Rule 604(d) is to remand the matter to the circuit court for (1) filing a proper Rule 604(d) certificate, (2) the opportunity to file a new motion to withdraw the defendant's guilty plea and/or reconsider sentence, if counsel determines that a new motion is necessary, and (3) a new motion hearing. See *People v. Lindsay*, 239 Ill. 2d 522, 531 (2011).

¶ 8 In this case, a review of the record shows that defense counsel was required to comply with the requirements of Rule 604(d) when defendant filed a *pro se* motion to withdraw his guilty plea and vacate sentence. The State argues that defendant never intended to withdraw his guilty plea or that he withdrew his motion to withdraw guilty plea, reasoning that all defendant intended was to determine his eligibility for boot camp, and that the issue was resolved without withdrawing his plea. This argument is not completely without factual support in the record. Nevertheless, we find it lacking in legal support. Rule 604(d) is mandatory. See *People v. Janes*, 158 Ill. 2d 27, 35 (1994). Here, defendant filed a motion that was clearly entitled a motion to withdraw his guilty plea. If counsel determined that this title did not accurately reflect defendant's wishes or contentions of error, then she should have filed an amended motion on defendant's behalf and a certificate in compliance with Rule 604(d). The certificate requirement of Rule 604(d) helps ensure that a defendant's contentions of error are adequately presented to the trial court. We cannot accept the State's argument that compliance is optional if counsel determines that a defendant's *pro se* motion does not accurately reflect the defendant's true

intentions. Rather, we believe that under such circumstances strict compliance with the certificate requirement of Rule 604(d) is necessary to prevent exactly the sort of appeal before us now where the parties disagree about whether a defendant actually desired the relief his *pro se* petition requested. Thus, we remand the matter to the circuit court for strict compliance with Rule 604(d). See *Lindsay*, 239 Ill. 2d at 531.

¶ 9 Defendant also contends that on remand we should order the appointment of "an attorney free of any potential bias." We decline defendant's request. Defendant acknowledges that a recent case from the second district has held that the appointment of conflict free counsel is not automatic and that the trial court should conduct a preliminary inquiry pursuant to *People v. Krankle*, 102 Ill. 2d 181 (1984). See *People v. Dean*, 2012 IL App (2d) 110505. However, defendant argues that *Dean* was wrongly decided. We disagree and adhere to the holding of *Dean*. Pursuant to *Dean*, if defendant persists in his claims of ineffective assistance, on remand the trial court should conduct an inquiry to determine if the appointment of new counsel is necessary.

¶ 10 Finally, defendant contends, and the State agrees, that his mittimus must be corrected to reflect that the court imposed a single four-year sentence for possession of ammunition by a felon. Currently, the mittimus incorrectly reflects that defendant was convicted of unlawful possession of a *firearm* by a felon. Pursuant to our authority (Ill. S. Ct. R. 615(b)(1) (eff. Aug. 27, 1999); *People v. McCray*, 273 Ill. App. 3d 396, 403 (1995)), we direct the clerk of the circuit court to amend the mittimus to reflect defendant's conviction for possession of *ammunition* by a felon.

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¶ 11 For the foregoing reasons, we reverse the trial court's order denying defendant's *pro se* motion; remand the case for compliance with Rule 604(d); and order that defendant's mittimus be corrected to reflect the actual offense for which he was convicted.

¶ 12 Reversed and remanded with directions; mittimus corrected.