

FOURTH DIVISION  
June 5, 2014

No. 1-12-2645

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 08 CR 14692
	)	
RAY JOHNSON,	)	Honorable
	)	Arthur F. Hill, Jr.,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE LAVIN delivered the judgment of the court.  
Presiding Justice Howse and Justice Fitzgerald Smith concurred in the judgment.

**ORDER**

¶ 1 *Held:* Judgment affirmed over defendant's claim that counsel's Supreme Court Rule 604(d) certificate was deficient.

¶ 2 Defendant, Ray Johnson, entered a negotiated plea of guilty to aggravated criminal sexual abuse and was sentenced to six years' imprisonment. He later moved to withdraw his plea, and following a hearing, the trial court denied the motion. Defendant now appeals from that ruling. He solely contends that his cause should be remanded to the trial court for the filing of a new certificate pursuant to Illinois Supreme Court Rule 604(d) (eff. July 1, 2006), and, if necessary,

for a new motion to withdraw his guilty plea, because his counsel did not strictly comply with that rule.

¶ 3 The record shows that defendant, who was 46 years of age at the time of the offense, was charged with one count of aggravated criminal sexual abuse and three counts of criminal sexual abuse in connection with an incident wherein D.T., the 11 year old victim, awoke to find defendant's hand inside of her underwear, touching the outside of her vaginal area. The record further shows that defendant was initially represented by Elizabeth Kucaba, and later, by Catherine Moriarty, both assistant public defenders. On March 11, 2010, defendant asked the court to participate in a Supreme Court Rule 402 (Ill. S. Ct. R. 402 (eff. July 1, 1997)) conference, during which the court indicated that, given defendant's prior criminal history, it would sentence him as a Class X offender to six years' imprisonment if he pleaded guilty to aggravated criminal sexual abuse. Defendant stated that he wished to accept that offer.

¶ 4 During the plea proceedings that followed, the court informed defendant of the charges against him and the possible penalties, and also advised him of the rights he was giving up by pleading guilty. The court then ascertained from defendant that no one had forced or coerced him into pleading guilty, and that he was doing so of his own free will. The State offered a factual basis for the plea which the court found sufficient to support it. The court then specifically noted that defendant understood the nature of the charges and the possible penalties, and the nature of his constitutional rights. The court also found that defendant waived those rights freely and voluntarily, and that he had responded appropriately to the court's questions and appeared focused in all areas. The court found defendant guilty of aggravated criminal sexual abuse, and the State *nolle prossed* the remaining charges.

¶ 5 Defendant waived his right to a pre-sentence investigation report, and the parties rested on the sentencing agreement. In allocution, defendant apologized to the victim's family, indicated that he had gotten better while in custody, and thanked his attorneys, Moriarty and Kucaba for their involvement in his case. The court sentenced defendant to the agreed term, and informed him that he would be required to serve three years of mandatory supervised release (MSR) following the completion of that term.

¶ 6 On March 30, 2010, defendant filed a *pro se* motion to withdraw his guilty plea and vacate his sentence. In support of that motion, defendant alleged that he was mentally incompetent to plead guilty, that his plea was coerced because Moriarty had threatened that he would be sentenced to more than 16 years if he did not accept the agreement, and had informed him that he would have to serve only two years of MSR, not three. He further alleged that Moriarty threatened to put him "on blast" if he "mess[ed] around" with her, which he interpreted to mean that she would expose the nature of his case to other detainees in the lockup. He asserted that Kucaba had done so previously, and it had caused him to be severely beaten.

¶ 7 On July 10, 2010, defendant filed an amended motion to withdraw, further contending that there was no factual basis to support his plea, that he was not advised of the rights he was surrendering, and that he was not admonished that he would have to register as a sex offender upon his release.

¶ 8 On July 14, 2010, the court appointed post-plea counsel to represent defendant. Over the next several court dates, counsel updated the court on the status of her review, and, on October 15, 2010, counsel requested, and the court ordered, a behavioral clinical examination (BCX) to determine defendant's fitness to vacate his plea. On December 15, 2010, the court indicated that the results of the BCX showed that defendant was fit to withdraw his plea, and counsel requested

additional time to file an "amendment or supplemental motion adding in the information and the basis that [defendant] has discussed with me pursuant to my certificate requirements under the Supreme Court rules."

¶ 9 Over the next several court dates, counsel indicated that she was in the process of complying with Rule 604(d), but requested more time to investigate additional matters, to receive an outstanding subpoena, and to file an amended motion and her certificate. These requests were granted by the court.

¶ 10 On May 3, 2011, counsel requested leave to file her 604(d) certificate as a supplement to defendant's motion, in which she certified:

1. I have consulted with the defendant, Ray Johnson[,] in person and by telephone to ascertain the defendant's contentions of error in the sentence or entry of the plea of guilty.
2. I have examined the court file and trial file.
3. I have provided the defendant, Ray Johnson, with a copy of the report of the proceedings of the plea of guilty and I have examined the report of the proceedings of the plea of guilty.
4. I have consulted with the defendant, Ray Johnson, regarding [his] request to withdraw his plea because of ineffectiveness of counsel, that he felt coerced to plea, that he was not admonished that he would have to register as a sex offender, that there was no factual basis for his plea, [and] that he was confused as to the proceedings and due to his mental illness and lack of medication on the day of his plea he requests that his guilty plea to [sic] be waived.
5. I have made any amendments to the motions necessary for adequate presentation of any defects in those proceedings.

¶ 11 After filing that certificate, counsel stated:

"At this juncture though, Judge, I am asking for a short date to amend the motion. Mr. Johnson brought something to my attention that is contained within his allegations. I didn't realize I would need to subpoena a separate incident report as opposed to all

the medical reports I received. So if I may just have a short date.

If we can go 30 days, and I will subpoena the sheriff's incident reports."

The court again granted her request.

¶ 12 On May 26, 2011, counsel advised the court that, "On the last date I filed my 604 certificate and indicated for the Court that I believed I was prepared and completed my requirements under the statute. However, in speaking further to [defendant,] he informed me that there were additional documents pertaining to one of the allegations[.]" Counsel informed the court that she had sent additional subpoenas to investigate defendant's claims, and the court continued the case.

¶ 13 On September 27, 2011, defendant, through counsel, filed a "Supplemental Motion to Withdraw Plea of Guilty and Vacate Judgment." In support of the motion, defendant alleged that his "plea was not voluntary and was entered under a misapprehension as alleged in his *pro se* motion previously filed." He also contended that he felt coerced to plead guilty because of the ineffectiveness of counsel, that he was not admonished that he would have to register as a sex offender, that there was no factual basis for his plea, and that he was confused on the day he plead guilty due to his mental illness and lack of medication. On that same day, counsel informed the court that defendant had "made [her] aware of another issue he would like to bring forth in his motion to vacate his plea and is requesting that some hospital records be subpoenaed for this matter so I can satisfy my requirements under 604(b) [*sic*]."

¶ 14 On November 28, 2011, counsel stated that she had issued two subpoenas, and requested additional time to receive their compliance. Thereafter, on December 21, 2011, counsel indicated that she had received a document that morning which supported defendant's claims,

and requested leave to supplement defendant's motion with that document. The court agreed, and counsel stated that this "would bring my motion as complete under my obligations for Supreme Court Rule 604(d)." Counsel then supplemented the motion with the document on January 25, 2012, noting that she had been unable to obtain the document until the last court date.

¶ 15 On March 1, 2012, defendant filed a "*Pro Se* Motion to Modify and Correct Mittimus" and an affidavit in which he directed counsel to withdraw his motion to withdraw his guilty plea. The court denied defendant's motion to modify, finding that there was no legal basis to modify the sentence or to correct the mittimus. The court then asked defendant if he still wanted to withdraw his plea. He indicated that he did, and that there was an additional transcript that he had not yet received that he believed would support his claims. Counsel informed the court that she was having trouble obtaining this transcript because the court reporter subsequently had a stroke, but that she was working with a supervisor in the court reporter's office to obtain it.

¶ 16 On May 2, 2012, counsel informed the court that she had received the transcript, but that it did not "change what [she] had previously filed." The court held a hearing on defendant's motion on August 23, 2012, during which defendant, Kucaba, and Moriarty testified. The court denied the motion, finding that the record was clear as to the voluntariness of his plea, that Kucaba and Moriarty were "very credible" in their testimony, and that defendant's allegations regarding his attorneys were not credible.

¶ 17 In this appeal, defendant does not challenge the ruling of the court on the motion, but instead contends that the certificate filed by defense counsel fails to conform to the requirements of Rule 604(d) because she filed the certificate, then subsequently filed a supplemental motion to withdraw his plea and indicated to the court that she had not yet been able to secure a transcript

that defendant contended would support his claims. As a result, defendant contends that counsel's representation in her 604(d) certificate that she had "made all amendments to the motion necessary for the adequate presentation of any defects" in the plea and sentencing proceedings, is "belied" by the record.

¶ 18 The State responds that the delay in filing the supplemental motion was attributable "to new information defendant brought to counsel's attention after she filed the certificate," and that he should therefore be "estopped from challenging counsel's performance." The State further contends that "the record reflects that, based on all of the information known to counsel on May 3, 2011, her certifications were true and her 604(d) certificate was valid."

¶ 19 When a defendant moves to withdraw a guilty plea or to reconsider a sentence imposed following a guilty plea, Rule 604(d) requires that "[t]he 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) (eff. July 1, 2006). The question of whether defense counsel complied with Rule 604(d) is subject to *de novo* review. *People v. Tousignant*, 2014 IL 115329, ¶ 8; *People v. Neal*, 403 Ill. App. 3d 757, 760 (2010).

¶ 20 "The purpose of complying strictly with Rule 604(d) is to safeguard a defendant's right to a direct appeal, 'a right which may be forever lost under the waiver rule if any appealable issue is not properly raised because 604(d) has not been strictly followed.'" *People v. Jordan*, 2013 IL App (2d) 120106, ¶ 10. The certificate itself is all this court will consider to determine if counsel complied with Rule 604(d). *Neal*, 403 Ill. App. 3d at 760. However, where the record

impeaches the Rule 604(d) certificate, the certificate is ineffective and a remand for further proceedings is necessary. *Neal*, 403 Ill. App. 3d at 760.

¶ 21 Here, defendant does not challenge counsel's certificate on its face, but instead contends that the representations made by counsel therein are impeached by the record, showing that counsel failed to comply with the requirements of the rule. He specifically takes issue with counsel's filing of a supplemental motion after she filed her certificate, and her indication to the trial court that she had not yet secured a transcript from an earlier court date.

¶ 22 We find nothing in the record to show that counsel had not complied with the requirements of 604(d) at the time she filed the certificate. In the certificate filed on May 3, 2011, counsel indicated that she had consulted with defendant in person and by telephone to ascertain his contentions of error in the sentence or entry of the guilty plea; examined the court file and report of proceedings of the guilty plea; and made any amendments necessary for an adequate presentation of any defects in those proceedings. She also specifically asserted that she had consulted with defendant regarding his claims of the "ineffectiveness of counsel, that he felt coerced to plea, that he was not admonished he would have to register as a sex offender, that there was not a factual basis for his plea, that he was confused as to the proceedings and [that] due to his mental illness and lack of medication on the day of his plea he requests that his guilty plea \*\*\* be vacated."

¶ 23 Having done so, counsel asked for a short date to amend the motion, based on something defendant had brought to her attention and that was contained in his allegations. She informed the court that she did not realize she would have to subpoena a separate incident report as opposed to the other medical reports she had received.



¶ 24 On the following court date, counsel stated that she "believed she was prepared and [had] completed [her] requirements under the statute" at the time the certificate was filed. However defendant subsequently informed her that there were "additional documents pertaining to one of the allegations." It appears that defendant repeatedly added allegations and asserted additional ways that his claims could be supported, even after counsel filed her certificate, and that counsel diligently followed through on his additional claims over the course of the next year, eventually amending defendant's motion. Under such circumstances, we find that counsel satisfied the requirements of Rule 604(d).

¶ 25 Counsel's representation on March 1, 2012, that she had not yet received one transcript does not alter our conclusion. Counsel informed the court that defendant indicated to her that the transcript may have been supportive of his claim that his previous counsel had informed other inmates of the nature of his offense. However, there is nothing in the record to show that defendant had made counsel aware of this transcript at any point prior to the filing of her certificate, and the transcript defendant requested was for a court date at a time when he was represented by Kucaba, who did not represent defendant at his plea proceedings. Rule 604(d) requires counsel to review the "trial court file and the report of proceedings of the plea of guilty." Ill. S. Ct. R. 604(d) (eff. July 1, 2006). Counsel certified that she had done so, and we find nothing in the record to indicate that she did not.

¶ 26 In so holding, we find *Neal*, 403 Ill. App. 3d 757, and *People v. Turner*, 403 Ill. App. 3d 753 (2010), relied on by defendant in contending that counsel failed to comply with the requirements of the rule, distinguishable from the case at bar. In *Neal*, 403 Ill. App. 3d at 759, counsel submitted a 604(d) certificate, stating that he had examined the report of the sentencing hearing and discussed with defendant the issues raised in the motion to reconsider sentence.

Counsel did not, however, include any reference to either reviewing the guilty plea hearing transcript or consulting with his client about his contentions of error in the entry of the guilty pleas. *Neal*, 403 Ill. App. 3d at 759. The court also noted that the sentencing transcript was not prepared by the court reporter in this case until three months after counsel filed his certificate, undermining his representation that he had reviewed that transcript. *Neal*, 403 Ill. App. 3d at 760. The fourth district thus determined, and the State conceded, that the certificate was deficient and that remand was necessary. *Neal*, 403 Ill. App. 3d at 760.

¶ 27 In *Turner*, the record contained an undated and un-file stamped 604(d) certificate of counsel in which he asserted that he had consulted with defendant, and examined the court file and the report of proceedings. *Turner*, 403 Ill. App. 3d at 755. Counsel did not, however, certify that he had made any amendments necessary for an adequate presentation of any defects in the proceedings. *Turner*, 403 Ill. App. 3d at 755. The fourth district appellate court further determined that counsel had filed a motion to reconsider sentence before he had reviewed the report of proceedings of the guilty plea. *Turner*, 403 Ill. App. 3d at 755. The court similarly concluded, and the State conceded, that the certificate was deficient and that remand was necessary. *Turner*, 403 Ill. App. 3d at 756-57.

¶ 28 Unlike *Neal* and *Turner*, there are no deficiencies on the face of counsel's certificate in this case, and we find nothing in the record to cast doubt on her certification. Instead, the record shows that counsel complied with the requirements of Rule 604(d), filed a certificate, and thereafter continued to investigate defendant's claims as he brought them to her attention while cognizant of her duties under Rule 604(d). Although the timing of the filing in this case is at odds with the usual procedure, we find as did the fourth district in *People v. Montag*, 2014 IL

App (4th) 120993, ¶ 25, that remand to allow counsel to file another certificate would be a *pro forma* activity, and serve no substantive purpose.

¶ 29 As the State points out, defendant does not articulate that he was deprived of a fair opportunity to present his claims of error in the guilty plea and sentence, or what purpose a remand would serve. As previously stated, the purpose of Rule 604(d) is to safeguard defendant's right to appeal any issues regarding his sentence or plea by requiring counsel to avert the forfeiture of such issues. *Jordan*, 2013 IL App (2d) 120106, ¶ 10. Defendant does not claim to have forfeited any issue as a result of counsel's failures, and, to the contrary, it appears that counsel's continued zealous advocacy of defendant ensured that all of his claims were properly raised. The formalistic interpretation of Rule 604(d) that defendant suggests would not serve the true purpose of the Rule, and we find his argument to the contrary unpersuasive on this record. *Montag*, 2014 IL App (4th) 120993, ¶ 25.

¶ 30 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 31 Affirmed.