2012 IL App (2d) 110556-U
No. 2-11-0556
Order filed October 24, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. RAUL ARELLANO-JAIMES, Defendant-Appellant.	)))))))))))	Appeal from the Circuit Court of Lake County. No. 07-CF-1596 Honorable Daniel B. Shanes and Victoria A. Rossetti, Judges, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Zenoff and Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant was entitled to new proceedings under Rule 604(d): in violation of the rule, although defendant nominally had counsel, counsel refused to represent him on his postplea motions, and despite defendant's indigence the trial court did not grant his request to appoint counsel who would represent him.

¶ 2 Defendant, Raul Arellano-Jaimes, pleaded guilty to attempted first-degree murder (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2006)) and was sentenced to 14 years' imprisonment. Defendant moved to withdraw his plea and to reconsider the sentence. The trial court denied the motion and defendant

appeals. He contends that he must receive new hearings on his motions because his retained attorney essentially refused to represent him. We reverse and remand.

¶ 3 Defendant was charged with attempting to murder Yolanda Castellanos. A private attorney, David Pugh, appeared for defendant on June 18, 2007. Pugh withdrew his appearance in October because defendant could not pay him. However, in December, Pugh reentered his appearance. Pugh expressed doubts about defendant's fitness to stand trial and, at his request, the trial court ordered a psychological evaluation. The report showed that defendant had "borderline intellectual functioning," with an IQ of 75.

¶ 4 In May 2009, Pugh told the court that defendant would agree to an *Alford* plea on count I (attempted murder) with additional counts dismissed. The trial court, per Judge Daniel B. Shanes, began to admonish defendant about the plea but stopped when defendant expressed uncertainty about pleading guilty. After a recess, the court started the admonitions again, but stopped when defendant said he wanted a trial. A jury was selected.

¶ 5 The following morning, defendant changed his mind again. Despite contending that his confession was involuntary, he stipulated that the evidence would be sufficient to convict him, and he pleaded guilty. The factual basis showed that Castellanos would testify that defendant entered her apartment and got on top of her. He stabbed her four times, saying, "I'm going to kill you." A police witness would testify that defendant confessed to the crime. The trial court, per Judge Shanes, accepted the plea and transferred the case to Judge Victoria A. Rossetti for sentencing.

¶ 6 At sentencing, the trial court noted that the victim was not seriously injured. The State, while agreeing that defendant had no serious criminal history, asserted that the offense was extremely

violent. The court sentenced defendant to 14 years' imprisonment, with credit for 837 days in pretrial custody.

¶ 7 Defendant, acting *pro se*, moved to withdraw the plea. Defendant later filed a *pro se* motion to reconsider the sentence. He asked the court to appoint counsel. At an October 29, 2009, hearing, Pugh informed the court that he was counsel of record, but that he had not read defendant's *pro se* motions, did not concur in them, and would not proceed on either one.

¶ 8 Following several continuances, Pugh filed a certificate under Illinois Supreme Court Rule 604(d) (eff. July 1, 2006). He told the trial court that the motions were not his, but that defendant could address the court if he wished. Defendant argued his motions through an interpreter. The court denied the motions and defendant appealed. This court remanded the cause because Pugh's certificate did not comply with Rule 604(d). *People v. Arellano-Jaimes*, No. 2-10-0443 (2010) (unpublished order under Supreme Court Rule 23).

¶ 9 Following remand, Pugh referred to defendant's *pro se* motions, but told the court that he would "in no way adopt them." Nevertheless, he filed a new Rule 604(d) certificate, "almost as a bystander" and "as an officer of the court."

¶ 10 Defendant told the trial court that he wanted to pursue his motions, but needed legal advice about amending them. The court replied that Pugh was his attorney, but it would give defendant "a chance to file whatever you want." Pugh advised the court that he was "tainted" as counsel because defendant had filed a complaint against him with the Attorney Registration and Disciplinary Commission. The court told defendant he could hire whatever attorney he wanted and asked if he was hiring Pugh. Defendant replied, "No. I would like you to assign me a Public Defender." Defendant stated that he "had no money" to hire another lawyer.

¶ 11 The trial court stated that it had not heard the merits of defendant's motions yet. After a further exchange, defendant stated that he would like to consult with Pugh for a few minutes. After the recess, Pugh said that he was not asking to withdraw, but that he was not adopting defendant's *pro se* motions. He asked the court to give defendant additional time to prepare any new *pro se* motions; the court gave him 29 days.

¶ 12 Defendant filed new *pro se* motions and Pugh filed another Rule 604(d) certificate, noting on it that the motions were filed by defendant *pro se*. In response to the trial court's inquiry, Pugh reiterated that he was not adopting defendant's motions, but had consulted with defendant to ascertain his contentions of error.

¶ 13 The trial court, per Judge Shanes, denied the motion to withdraw the guilty plea. The court, per Judge Rossetti, denied the motion to reconsider the sentence. Defendant timely appealed.

¶ 14 Defendant contends that he should receive new hearings on his postplea motions. He argues that Pugh, his nominal attorney, did not represent him, repeatedly refusing to adopt or argue defendant's *pro se* motions, file amended motions, or withdraw, and that the trial court ignored defendant's request to assign him a public defender.

¶ 15 Rule 604(d) provides that a defendant who pleads guilty and wishes to challenge his conviction or sentence must first file, as appropriate, a motion to withdraw the plea or to reconsider the sentence or both. The rule further provides that the trial court "shall then determine whether the defendant is represented by counsel, and if the defendant is indigent and desires counsel, the trial court shall appoint counsel." Ill. S. Ct. R. 604(d) (eff. July 1, 2006). The defendant's attorney must then file a certificate stating that he 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." *Id.*

¶ 16 Rule 604(d) was violated here. The rule requires that the trial court "determine whether the defendant is represented by counsel" and, if not, appoint counsel if the defendant is indigent and so desires. *Id.* Here, although Pugh had filed an appearance as defendant's attorney, it is clear that he did not represent defendant in any meaningful way. He repeatedly refused to either argue defendant's *pro se* motions or file amended motions that he believed were more appropriate. Indeed, his statements that he was filing a Rule 604(d) certificate as a "bystander" or as an "officer of the court" were inconsistent with any notion that he was acting as defendant's advocate.

¶ 17 In *People v. Adams*, 74 Ill. App. 3d 727 (1979), the defendant's assistant public defender told the court that he could not represent the defendant. Although the assistant public defender "prepared" an amended postplea motion, the preparation consisted of transcribing what the defendant had told him. The trial court never ruled on the defendant's motion to appoint a new attorney but proceeded to deny defendant's postplea motion on the merits. On appeal, the reviewing court reversed the denial and remanded for the appointment of an attorney who would actively represent the defendant. *Id.* at 731-32.

¶ 18 The present case is like *Adams* in that Pugh stated that he would not present defendant's motions and the trial court did not act on defendant's request to appoint the public defender, despite defendant's assertion that he lacked funds. The State insists that *Adams* is distinguishable because here the "specter of ineffective assistance was raised but did not rise to a level that concerned the court or where Mr. Pugh was unable to represent the defendant." The State's argument is circular.

Defendant's contention is that Pugh did *not* represent him in any meaningful sense and that the trial court should have been more concerned about it. As noted, Rule 604(d) requires the appointment of "counsel" who will "represent" a defendant, not merely someone who has nominally filed an appearance on his behalf.

¶ 19 Defendant recognizes that Pugh might have been justified in refusing to present his *pro se* motions if they were frivolous, but asserts that they were not. At this stage, we agree, at least with regard to the motion to reconsider the sentence. Arguably, Pugh might have been aware of facts outside the record that would have made it frivolous to argue defendant's motion to withdraw the plea, but the same cannot be said of the motion to reconsider the sentence. That motion essentially argued that defendant should have received a shorter sentence given that he had a minimal criminal history (consisting of traffic violations) and had held a steady job before the offense and that the victim was not seriously injured. These are legitimate mitigating factors with support in the record. Thus, at a minimum, Pugh could have filed a nonfrivolous motion to reconsider the sentence. On the present record, a nonfrivolous motion to withdraw the plea could have been filed as well. Of course, we express no opinion on the merits of any such motions.

¶ 20 Finally, we note that a second remand for compliance with Rule 604(d) is generally not required. *People v. Shirley*, 181 Ill. 2d 359, 369 (1998). Here, however, defendant has not had a "fair opportunity" to present his postplea motions, and thus a second remand is warranted. See *People v. Love*, 385 Ill. App. 3d 736, 739 (2008).

¶ 21 The judgment of the circuit court of Lake County is reversed and the cause remanded for new proceedings on defendant's postplea motions, in accordance with Rule 604(d).

¶ 22 Reversed and remanded.