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2013 IL App (3d) 120355-U

Order filed July 3, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

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|--------------------------------------|---------------------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, |) Appeal from the Circuit Court |
| |) of the 12th Judicial Circuit, |
| Plaintiff-Appellee, |) Will County, Illinois, |
| |) |
| v. |) Appeal No. 3-12-0355 |
| |) Circuit No. 10-CF-2408 |
| PAUL J. EVANS III, |) |
| |) Honorable |
| Defendant-Appellant. |) Amy Bertani-Tomczak, |
| |) Judge, Presiding. |

JUSTICE LYTTON delivered the judgment of the court.
Presiding Justice Wright and Justice O'Brien concurred in the judgment.

ORDER

- ¶ 1 *Held:* (1) The cause is remanded for further postsentence proceedings in strict compliance with Illinois Supreme Court Rule 604(d); and (2) defendant's DNA analysis fee is vacated.
- ¶ 2 Defendant, Paul J. Evans III, appeals the denial of his motion to reconsider sentence. On appeal, defendant argues that we should: (1) remand the cause for new postsentence proceedings in strict compliance with Illinois Supreme Court Rule 604(d) (eff. July 1, 2006); and (2) vacate his deoxyribonucleic acid (DNA) analysis fee. We affirm in part, vacate in

part, and remand for further postsentence proceedings.

¶ 3

FACTS

¶ 4

On November 19, 2010, defendant was charged by indictment with two counts of home invasion (720 ILCS 5/12-11(a)(1), (2) (West 2010)) and one count each of residential burglary (720 ILCS 5/19-3(a) (West 2010)), aggravated battery of a senior citizen (720 ILCS 5/12-3.05(d)(1) (West 2010)), and aggravated battery (720 ILCS 5/12-3.05 (West 2010)). The trial court appointed the public defender's office to represent defendant. On November 9, 2011, defendant appeared with an assistant public defender and entered an open plea of guilty to the charge of home invasion in exchange for the *nolle prosequi* of the remaining charges. At sentencing, the trial court made a finding of great bodily harm and sentenced defendant to 12 years' imprisonment. The court also entered an order directing defendant to submit to and pay for a \$200 DNA analysis.

¶ 5

On December 1, 2011, counsel filed, on defendant's behalf, a motion to reconsider sentence. The motion argued that defendant's sentence was excessive, the trial court had not given adequate consideration to the factors in mitigation, and its great bodily harm finding was against the weight of the evidence. The trial court denied the motion, and defendant filed a notice of appeal.

¶ 6

On direct appeal, we remanded the cause for further postplea proceedings because defense counsel failed to file a Rule 604(d) certificate. *People v. Evans*, No. 3-11-0887 (2012) (unpublished order under Supreme Court Rule 23).

¶ 7

On remand, the same attorney filed a "Certificate Pursuant to Supreme Court Rule 604(d)." The certificate stated:

"1. Counsel has consulted with the Defendant in person to ascertain her contentions of error in the entry of the sentence in the above cause.

2. Counsel has examined the Trial Court file and was the original counsel at both the admission to the Petition to Revoke, the Resentencing Hearing, and the hearing on the Motion to Reconsider.

3. Counsel has made any amendments to the Motion to Reconsider necessary for adequate presentation of any defects in those proceedings."

At the hearing, counsel stood on the arguments from his original motion to reconsider sentence. The trial court denied the motion, and defendant appealed.

¶ 8 ANALYSIS

¶ 9 I. Rule 604(d) Certificate

¶ 10 Defendant argues that we should remand the cause for new postsentence proceedings because defense counsel filed a noncompliant Rule 604(d) certificate that was impeached by the record.

¶ 11 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." Ill. S. Ct. R. 604(d) (eff. July 1, 2006).

Defense counsel must strictly comply with Rule 604(d)'s certificate requirement. *People v. Love*,

385 Ill. App. 3d 736 (2008). Where counsel fails to strictly comply with the rule, the case must be remanded to the trial court for proceedings in compliance with the rule. *Id.* However, Rule 604(d) should not be applied "so mechanically as to require Illinois courts to grant multiple remands and new hearings following the initial remand hearing." *People v. Shirley*, 181 Ill. 2d 359, 369 (1998). In *Love*, 385 Ill. App. 3d 736, the court recognized an exception to the bar against repeated remands. The *Love* court recognized that a second remand was required where the record impeached the statements in the Rule 604(d) certificate. *Id.*

¶ 12 In the instant case, the record conflicts with the statements in counsel's Rule 604(d) certificate. First, the certificate incorrectly refers to defendant with a feminine pronoun. The certificate also cites an admission to a petition to revoke probation and resentencing proceedings, but the record contains no reference to such proceedings. We also note that the certificate failed to attest to a review of the report of proceedings as required by Rule 604(d). While this omission by itself is generally not sufficient to warrant a successive remand, its combination with the other errors causes us to question whether counsel fulfilled his duties under Rule 604(d) to examine the report of proceedings. See *People v. Wilson*, 295 Ill. App. 3d 228 (1998). As a result, we remand the cause for further postsentence proceedings in strict compliance with Rule 604(d).

¶ 13 II. DNA Analysis Fee

¶ 14 Defendant asks this court to vacate his DNA analysis order because his DNA was on file from a prior felony conviction. The State concedes this issue.

¶ 15 Section 5-4-3 of the Unified Code of Corrections (730 ILCS 5/5-4-3(j) (West 2010)) authorizes the trial court to order the taking, analysis and indexing of a defendant's DNA, and

the payment of the analysis fee, only where a defendant is not currently registered in the DNA database. *People v. Marshall*, 242 Ill. 2d 285 (2011). Although defendant's presentence investigation report does not indicate that his DNA was already on file, it states that defendant was convicted of a felony in September 2010. Additionally, defendant provided written confirmation from the Illinois State Police that his DNA had been previously registered. On the basis of this evidence, we will assume that defendant's DNA is registered. Therefore, we affirm defendant's sentence and vacate the part of the trial court's order requiring defendant to pay for and submit to a DNA assessment.

¶ 16 CONCLUSION

¶ 17 For the foregoing reasons, the judgment of the circuit court of Will County is affirmed in part and vacated in part, and the cause is remanded for further postsentence proceedings in strict compliance with Rule 604(d).

¶ 18 Affirmed in part and vacated in part; remanded with directions.