NOTICE
This Order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

2023 IL App (4th) 220635-U

NO. 4-22-0635

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
May 16, 2023
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Lee County
ORLANDO GATES,	)	No. 19CF31
Defendant-Appellant.	)	
	)	Honorable
	)	Jacquelyn D. Ackert,
	)	Judge Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Presiding Justice DeArmond and Justice Cavanagh concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court granted appellate counsel's motion to withdraw, concluding no meritorious issues existed for counsel to raise on appeal.

¶ 2 In June 2021, defendant, Orlando Gates, accepted a partially negotiated plea agreement that included an agreed sentencing range of 15 to 25 years. The trial court imposed a 25-year prison sentence and gave defendant admonishments consistent with Illinois Supreme Court Rule 605(b) (eff. Oct. 1, 2001). Defendant filed a motion to reconsider his sentence, which the trial court denied. Defendant appealed, and the Second District Appellate Court remanded the matter for compliance with Illinois Supreme Court Rules 605(c) and 604(d) (eff. July 1, 2017). On remand, defendant moved to withdraw his plea, asserting it was not knowing and voluntary. The court denied the motion, and defendant again appealed. This court appointed appellate counsel to represent defendant.

¶ 3 On appeal, appellate counsel seeks to withdraw her representation pursuant to the procedure in *Anders v. California*, 386 U.S. 738 (1967), contending that any argument she might make would be meritless. We grant counsel's motion to withdraw and affirm the trial court's judgment.

¶ 4 I. BACKGROUND

¶ 5 The State originally charged defendant with armed robbery by use of a firearm (720 ILCS 5/18-2(a)(2) (West 2018)), aggravated robbery (720 ILCS 5/18-1(b)(1) (West 2018)), conspiracy to commit aggravated robbery (720 ILCS 5/8-2(a), 18-1(b)(1) (West 2018)), and unlawful restraint (720 ILCS 5/10-3(a) (West 2018)). All charges related to a February 11, 2019, incident at a US Cellular store located in Dixon.

¶ 6 On June 3, 2021, the parties told the trial court they had reached a plea agreement. The State agreed to dismiss the lesser charges and to amend the information to avoid subjecting defendant to a 15-year sentencing enhancement based on the use of a firearm. The parties also agreed to a sentencing range. The State explained:

> "In exchange for a plea of guilty [to armed robbery] with the *** conditions that the Defendant would ask for no less than *** 15 years in the Illinois Department of Corrections and the State would ask for no more than 25 years in the Illinois Department of Corrections. The State would then move to dismiss [the other counts]."

The court asked defendant if he understood "both parties have agreed to minimum and maximum sentences." Defendant confirmed he did. He also said he understood the State was agreeing not to seek an enhanced sentence based on defendant's use of a firearm. The court advised defendant of the maximum and minimum sentence possible for the armed robbery count as amended and

explained the trial rights defendant was waiving.

¶ 7 The State set out the following factual basis. The Dixon police, responding to a report of an armed robbery, learned two armed men entered the U.S. Cellular store, zip-tied two employees together and placed them in a bathroom, and took an unspecified number of phones. One employee could identify defendant. The police, tracking the location of one phone, learned it was "in a vehicle traveling on Interstate 88." The police attempted a traffic stop based on the location information. The driver did not stop, and a multiple-vehicle collision ensued. Two people, one of whom was defendant, fled on foot but were captured.

¶ 8 Thereafter, the trial court accepted defendant's plea agreement.

¶ 9 Following a sentencing hearing during which the State presented evidence, the trial court, stressing defendant's extensive criminal record, imposed a 25-year prison sentence. The court then advised defendant that, to preserve his right to appeal, he needed to either file a motion asking the court to reconsider his sentence or a motion seeking to withdraw his plea. Defendant later filed a motion for reconsideration of his sentence. The court denied it, and defendant appealed.

¶ 10 The Second District Appellate Court remanded the matter on the unopposed motion of defendant's appellate counsel, who noted that, because defendant's guilty plea was negotiated, Rule 605(c) required the court to advise defendant he could appeal only if he moved to withdraw his plea. The Second District's mandate specified:

> "The circuit court shall admonish appellant in strict compliance with Rule 605(c). Thereafter, if he so chooses, appellant shall move within 30 days to withdraw his plea. If appellant files that motion, the circuit court shall proceed pursuant to Rule 604(d), including obtaining a proper certificate from appellant's counsel." *People v. Gates*, 2-21-0663 (Feb. 18, 2022).

¶ 11 On remand, defendant's attorney filed a motion to withdraw the plea containing a bare allegation the plea was not knowing and voluntary. Defendant's equally conclusory affidavit accompanied the motion.

¶ 12 The trial court held an evidentiary hearing on the motion. Defendant, called by his attorney, testified that, because the State's original plea offer had been for a 25-year sentence, he had believed his sentence under the agreement for a 15-to-25-year range would be lower. He admitted he knew "the Judge could have sentenced [him] anywhere between 15 and 25 years," but he believed the court would never give him the maximum sentence. He said he accepted the plea agreement "to get it over with." The court stated it would deny the motion.

¶ 13 Proceedings then paused while defendant's attorney filed his certificate pursuant to Rule 604(d). At his attorney's request, defendant confirmed he understood the certificate and agreed its contents were correct.

¶ 14 During this pause, the trial court recognized the remand order required it to admonish defendant in conformity with Rule 605(c):

> "THE COURT: ***Just off-the-record for a minute.
>
> (Whereupon an off the record discussion was had.)
>
> THE COURT: Back on the record. So after reviewing the direction from the Appellate Court *** that the Circuit Court shall admonish Appellant in strict compliance with Rule 605(c). So I'm going to do that at this time because I don't see in the record that that's been done since this has been returned to the trial court."

The court gave the Rule 605(c) admonishments in standard form. The court then asked defendant whether he understood his appeal rights. Defendant said he did.

¶ 15 After the trial court gave the admonishments, the State suggested defendant and his

attorney should confer:

> MR. BRIM [(The State)]: Your Honor, I would ask Mr. Whitcombe [(defense counsel)] to take a minute to confer with his client to see if he still wants to go forward with Mr. Whitcombe's motion to withdraw his *** guilty plea even though I know we've just gone through it but after having heard his appeal rights, give him that opportunity.
>
> THE COURT: Attorney Whitcombe?
>
> MR. WHITCOMBE: Sure.
>
> Yes, we would like to proceed.
>
> THE COURT: You may."

¶ 16 The trial court then heard testimony from defendant once again, as well as argument on the motion to withdraw the plea. The court denied the motion. It next heard and denied the motion to reconsider the sentence. Defendant filed a timely notice of appeal.

¶ 17 This appeal followed.

¶ 18 II. ANALYSIS

¶ 19 On appeal, appellate counsel moves for leave to withdraw. In her motion, counsel states she read the record and found no issue of arguable merit. She further states she has given defendant notice of her motion to withdraw. Defendant has not filed a response.

¶ 20 Appellate counsel supports her motion with a memorandum of law providing a statement of facts and a discussion of what she deems to be the only two categories in which an issue of merit might occur. Appellate counsel argues, under the line of cases interpreting Rule 604(d), which our supreme court summarized in *People v. Johnson*, 2019 IL 122956, ¶¶ 34-57, a defendant who accepts a plea agreement with a sentencing cap may not challenge a sentence within

the agreed range as excessive. She thus concludes any issue of merit would have to fall into one of two categories, namely (1) whether the court erred in denying defendant's motion to withdraw the plea and (2) whether any procedural error occurred. She concludes neither category includes any issue of potential merit.

¶ 21 We consider appellate counsel's motion to withdraw under the procedure set out in *Anders*. After examining the record and the possible issues on appeal, we agree any nonfrivolous issue would fall into the two categories described above. (We note the *Anders* court required only that appellate counsel's brief in support of withdrawal must "refer[ ] to anything in the record *that might arguably support* the appeal." (Emphasis added.) *Anders*, 386 U.S. at 744. Appellate counsel thus need not address issues manifestly incapable of supporting a meritorious appeal.) We further conclude appellate counsel could not make any nonfrivolous argument within either category. We therefore grant counsel's motion to withdraw and affirm the trial court's judgment.

¶ 22 A. Counsel Cannot Argue the Court Erred by Denying the Motion to Withdraw the Plea

¶ 23 Appellate counsel argues it would be frivolous to argue the trial court erred in denying defendant's motion to withdraw his plea. She addresses two potential issues: (1) whether it would be frivolous to argue the court's admonishments to defendant were inadequate and (2) whether it would be frivolous to argue defendant's plea was not knowing and voluntary. She concludes arguing either on appeal would be frivolous. She cites *People v. Whitfield*, 217 Ill. 2d 177, 184 (2005), which states, under the rule set out by the United States Supreme Court in *Boykin v. Alabama*, 395 U.S. 238 (1969), "for a guilty plea to be valid under the due process clause, the record must affirmatively show the plea was entered intelligently and with full knowledge of its consequences." She notes Illinois Supreme Court Rule 402 (eff. July 1, 2012) incorporated the principles of *Boykin* into Illinois law. Rule 402(a) requires the trial court to advise a defendant of

matters bearing on his or her knowledge of the nature of a guilty plea before accepting a plea of guilty. Rule 402(b) requires the trial court to establish that the plea is voluntary and, if the plea is the result of an agreement, that the defendant understands the agreement.

¶ 24 1. *Counsel Cannot Argue the Preplea Admonishments Were Faulty*

¶ 25 Substantial compliance with Rule 402(a) satisfies the due process requirements of *Boykin* for accepting a guilty plea. See *People v. Burt*, 168 Ill. 2d 49, 64 (1995) ("[S]ubstantial compliance with the rule is sufficient to satisfy due process."). Whether there has been compliance with a supreme court rule is an issue of law and thus subject to *de novo* review. See *People v. Gorss*, 2022 IL 126464, ¶ 10 (stating whether a defendant's attorney has complied with Rule 604(d) is a legal question and thus reviewed *de novo*).

¶ 26 We agree it would be frivolous to argue the trial court did not substantially comply with Rule 402(a). First, we agree with appellate counsel that defendant forfeited that argument. "[A]ny issue not raised by the defendant in the motion to *** withdraw the plea of guilty and vacate the judgment shall be deemed waived." Ill. S. Ct. R. 604(d) (eff. July 1, 2017); see also *People v. Irrelevant*, 2021 IL App (4th) 200626, ¶ 41 (using the more precise term "forfeited" rather than "waived"). Defendant's only claim in his motion to withdraw the plea was he did not understand he could receive a 25-year sentence under the plea agreement. He did not argue the court's Rule 402(a) admonishments were improper and thus forfeited the issue.

¶ 27 Forfeiture aside, the record shows the trial court substantially complied with Rule 402(a). The rule requires the court advise a defendant of (1) the nature of the charge, (2) the full possible range of applicable sentences, (3) the right to plead guilty or not guilty and to persist in a plea, and (4) the nature of his or her trial rights and the loss of those right by pleading guilty. Ill. S. Ct. R. 402(a) (eff. July 1, 2012). The court read the amended information charging defendant

with armed robbery, thus advising him of the nature of the charge. It advised defendant of the Class X sentencing range, including the extended Class X range, thus advising him of the full possible range of sentences. It also noted the agreement precluded imposition of the 15-year firearms enhancement. Thus, the court informed defendant of the full range of applicable sentences. Further, the court advised defendant of his rights in a trial, including the right to plead not guilty. It substantially complied with the requirement it inform defendant both of his right to decide how to plead and of the rights he was giving up by pleading guilty. Accordingly, we agree any argument appellate counsel could make that the court failed to substantially comply with Rule 402(a) would be frivolous.

¶ 28 2. *Counsel Cannot Argue that the Court Should Have Found the Plea to be not Knowing and Voluntary*

¶ 29 Appellate counsel maintains it would be frivolous to argue defendant showed his plea was not knowing and voluntary and the trial court should have allowed him to withdraw the plea as a result. Appellate counsel is correct. Defendant's only basis for claiming his plea was not knowing and voluntary was his assertion he did not understand he could receive a 25-year sentence. But, during the hearing on his motion to withdraw the plea, defendant admitted to the State he understood the agreement allowed the court to give him "anywhere between 15 and 25 years." Defendant conceded that he understood such a sentence was possible under the agreement. Moreover, lest defendant suggest he believed the sentence could be up to 25 years, but not 25 years, we point out, when he pled guilty, he told the court he understood the maximum sentence was 25 years. Substantial compliance with Rule 604(b) is sufficient to satisfy the due process requirement that the record show a defendant's plea of guilty was knowing and voluntary. See *People v. Colin*, 2015 IL App (1st) 132264, ¶ 22 (holding substantial compliance with Rule 604(b)

is sufficient for the record to affirmatively show "the plea was made voluntarily and intelligently"). The court asked defendant whether he understood that, under the agreement, the maximum sentence would be 25 years. Defendant said he did. The court also asked defendant whether he had been forced to plead guilty and whether anyone had promised him anything in return for his plea that was not a part of the formal plea agreement. Defendant answered "no" to both questions. As such, it would be frivolous to argue the court failed to substantially comply with Rule 604(b) or defendant did not understand he could receive a 25-year sentence.

¶ 30 B. Counsel Cannot Argue There Were Procedural Errors Requiring a Second Remand

¶ 31 Appellate counsel notes that, even when no basis exists to argue the trial court erred in denying the motion to withdraw the guilty plea, this court may remand a case when the court or counsel violated a supreme court rule. She argues no procedural defects require a remand here. We agree.

¶ 32 1. *Counsel Cannot Argue the Rule 605(c) Admonishments Were Insufficient*

¶ 33 The Second District Appellate Court summarily remanded this matter because the trial court gave improper admonishments under Rule 605(c), advising defendant he could preserve his right to appeal by filing either a motion to withdraw his plea or, incorrectly, a motion to reconsider the sentence. However, we agree with appellate counsel the court corrected that error on remand by giving defendant the complete admonishments required by the rule, including telling him (1) he had a right to appeal; (2) before appealing, he would have to file a motion to withdraw his guilty plea; (3) should the court grant the motion, he would stand trial on the charge to which he pled guilty and to any charges dismissed as part of the plea the State might seek to reinstate; and (4) any issue he did not raise in the motion to withdraw the plea would be forfeited on appeal. Ill. S. Ct. R. 605(c) (eff. Oct. 1, 2001).

¶ 34 Moreover, after giving the correct admonishments, the trial court allowed defendant to consult with his attorney and then conducted a second hearing on the motion to withdraw the plea, with defendant again testifying. The court then heard the motion to reconsider sentence. Thus, it would be frivolous to argue on appeal there were any procedural irregularities.

¶ 35 2. *Counsel Cannot Argue the Rule 604(d) Certificate Was Insufficient*

¶ 36 Appellate counsel argues defense counsel's Rule 604(d) certificate of compliance was in strict conformity with the rule and it would thus be frivolous to seek a remand based on a violation of the certificate requirement. See *Gorss*, 2022 IL 126464, ¶ 19 (holding a defendant's attorney must strictly comply with all portions of Rule 604(d)). We agree. Rule 604(d) provides that, in conjunction with the filing of a postplea motion:

> "The defendant's attorney shall file with the trial court a certificate stating that the attorney has consulted with the defendant either by phone, mail, electronic means or in person to ascertain defendant's contentions of error in the sentence and the entry of the plea of guilty, has examined the trial court file and both the report of proceedings of the plea of guilty and the report of proceedings in the sentencing hearing, 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, 2017).

Defendant's attorney filed a certificate with language closely following that of Rule 604(d), stating she had done everything the rule required. It would thus be frivolous to argue the certificate did not comply with Rule 604(d). We note that, although a facially valid Rule 604(d) certificate can be rebutted by evidence in the record showing a defendant's attorney did not do all the rule requires (*People v. Curtis*, 2021 IL App (4th) 190658, ¶ 36), the record here is consistent with the

certificate. Indeed, defendant confirmed to the trial court he agreed with the portions of the certificate describing his contacts with his attorney.

¶ 37 III. CONCLUSION

¶ 38 For the reasons stated, we grant appellate counsel's motion to withdraw and affirm the trial court's judgment.

¶ 39 Affirmed.