

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).

2022 IL App (4th) 210476-U

NO. 4-21-0476

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

March 17, 2022

Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
Plaintiff-Appellee,)	Circuit Court of
v.)	Sangamon County
HERNANDO P. WILSON,)	No. 14CF459
Defendant-Appellant.)	
)	Honorable
)	Adam Giganti,
)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Holder White and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held:* The record does not show strict compliance with Illinois Supreme Court Rule 604(d) (eff. July 1, 2017), and thus remand is warranted.

¶ 2 On remand for proceedings in strict compliance with Illinois Supreme Court Rule 604(d) (eff. July 1, 2017), counsel for defendant, Hernando P. Wilson, filed a new motion to withdraw defendant's guilty plea and a Rule 604(d) certificate. The State filed a memorandum in opposition to defendant's motion to withdraw. After a June 2021 hearing, the Sangamon County circuit court denied defendant's motion to withdraw his guilty plea.

¶ 3 Defendant appeals, contending his counsel failed to strictly comply with Illinois Supreme Court Rule 604(d) (eff. July 1, 2017). We vacate the denial of defendant's motion to withdraw his guilty plea and remand the cause with directions.

¶ 4 I. BACKGROUND

¶ 5 In May 2014, a grand jury indicted defendant with one count of unlawful delivery of a controlled substance (720 ILCS 570/401(d) (West 2014)). The indictment alleged, on March 13, 2014, defendant committed unlawful delivery of a controlled substance by knowingly delivering to a confidential source less than one gram of a substance containing cocaine. Defendant was first represented by the public defender's office but, in October 2014, Michael Drake entered his appearance on defendant's behalf. Defendant's case was continued numerous times.

¶ 6 On March 27, 2017, the matter was on the trial call and both the State and defendant's counsel announced ready for trial. The docket entry for March 27, 2017, states defendant was present at the trial call. The transcript of the March 27, 2017, hearing also indicates defendant was present in court on March 27, 2017. The circuit court announced defendant was present with his attorney, and the court told defendant the following: "Be here tomorrow. If you fail to appear, this trial will go on without you. I know you're good about being here, but I need to tell you that." Additionally, on March 27, 2017, defendant signed a notice of trial with a trial date of March 28, 2017.

¶ 7 On March 28, 2017, the circuit court began addressing pretrial issues and the court admonished defendant he was subject to Class X sentencing based on his criminal record. After that, defendant indicated he had a question, and the court referred him to his counsel. A discussion off the record between defense counsel and defendant took place. Afterwards, defense counsel indicated defendant desired to plead guilty to the charge with a sentence cap of 12 years' imprisonment. After admonishing defendant pursuant to Illinois Supreme Court Rule 402 (eff. July 1, 2012) and hearing the factual basis for the plea, the circuit court accepted defendant's guilty plea. The court found defendant's plea was knowing and voluntary and a

sufficient factual basis existed.

¶ 8 In April 2017, defendant filed a *pro se* motion to withdraw his guilty plea, asserting several claims of ineffective assistance of counsel. One of the allegations was counsel allowed defendant to plead guilty to a crime of which counsel knew defendant was innocent. Defendant failed to appear at his sentencing hearing, and the circuit court eventually issued a bench warrant for defendant. In April 2019, defendant was arrested. On June 7, 2019, the circuit court held a joint hearing. Defendant's counsel, Lindsay Evans, had filed a Rule 604(d) certificate before the hearing. The court found no factual basis for defendant's ineffective assistance of counsel claims, denied defendant's motion to withdraw his guilty plea, and sentenced defendant to 12 years' imprisonment. Defendant filed a motion to reconsider, which the circuit court denied. Defendant appealed, and this court allowed defendant's motion for agreed summary remand because defendant's counsel's Rule 604(d) certificate did not strictly comply with Rule 604(d). *People v. Wilson*, No. 4-19-0380 (2020) (unpublished summary order under Illinois Supreme Rule 23(c)).

¶ 9 On remand, the circuit court appointed defendant new counsel, Paul Appleton. Appleton filed a Rule 604(d) certificate and a motion to withdraw defendant's guilty plea. In the motion, defendant asserted his plea counsel was ineffective for, *inter alia*, allowing defendant to plead guilty with the knowledge defendant was under the influence of drugs and alcohol. In support of that claim, the motion further asserted defendant was under the assumption the March 28, 2017, court date would result in a continuance, as had been done 20 times before. The motion did not assert defendant was not present in court on March 27, 2017. Attached to the motion was defendant's affidavit; the affidavit of his brother, Flin Wilson; and the affidavit of Runnie Bay, a friend of Flin's. The affidavits stated defendant had been drinking and partying

until the early hours of March 28, 2017. The State filed a memorandum in opposition to defendant's motion to withdraw his guilty plea. In its memorandum, the State noted on March 27, 2017, both Drake, defendant's counsel at the plea hearing, and the assistant state's attorney answered ready for trial in defendant's presence. The memorandum also noted defendant showed no signs of intoxication on March 28, 2017.

¶ 10 On July 1, 2021, the circuit court held a hearing on defendant's motion to withdraw his guilty plea. The court heard testimony from Flin, Bay, defendant, and Drake.

¶ 11 Flin testified defendant had a drinking problem and was drinking at Flin's house on March 27, 2017. When Flin woke up the next morning, he noticed defendant had court at 9 a.m. Defendant was hungover, and Flin called Bay to give them a ride to court. Flin had been to court with defendant every time he had a court date. Flin testified defendant was "pretty buzzed" at the courthouse before his trial. Defendant did not seem to understand what went on in court. On cross-examination, the State asked Flin if he was in court with defendant on March 27, 2017. Flin responded in the affirmative and noted he was present at all of defendant's court dates. He recalled something about a trial but nothing more. On redirect examination, counsel asked Flin if defendant was present in court on March 27, 2017, and Flin answered he thought defendant was present. Counsel then asked if defendant was possibly in the hospital. At first, Flin said no but described a time he took court papers to defendant at the hospital. Counsel then asked if that was on March 27, and Flin replied in the affirmative.

¶ 12 Bay testified, on March 28, 2017, he got a call from Flin asking if he wanted to make a few dollars by taking defendant to court. Bay questioned Flin as to why they were going through that again after defendant had been drinking. Bay explained he did so because once before defendant had been in the hospital for drinking and they had to get a doctor's excuse and

bring it to the judge. Bay did not want to spend all day dealing with defendant's court date again, and Flin assured him it would only take a few minutes because the case would be continued. Bay agreed and picked up defendant and Flin. Bay testified defendant was still intoxicated from the night before. Defendant was sweaty, staggering, and stuttering. At the courthouse, defendant's counsel asked him if he was ready for trial, and both Bay and Flin replied defendant was not ready. Bay did not go into the courtroom but took defendant home afterwards. When Bay asked defendant what happened in the courtroom, defendant indicated he pleaded guilty to something. According to Bay, defendant was still under the influence. Bay testified defendant could not have possibly understood what he did in court.

¶ 13 Defendant testified he had a hard time comprehending what the judge was saying on March 28, 2017, because he was intoxicated. Defendant thought he was going to get probation. Defendant further testified he was not in court on March 27, 2017, because he was in the hospital. Defendant testified, if he knew his case was going to trial on March 28, he would have prepared himself better. He admitted drinking from noon until late at night on March 27 and was still intoxicated on the morning of March 28. Defendant thought it was a regular court date and was not in any condition to stand trial. Defendant testified Drake, his trial attorney, told defendant he smelled like alcohol. When the circuit court asked Appleton what day the State's plea offer was explained to defendant, the following dialogue took place:

“THE COURT: But what I'm asking is what date is he saying that this was explained to him, the 27th or the 28th?

MR. APPLETON [(DEFENDANT'S ATTORNEY)]: On the 28th, the day of court.

THE COURT: And not on the 27th?

MR. APPLETON: No, Your Honor, he wasn't present on the 27th.

THE COURT: He was not in court on the 27th?

MR. APPLETON: My client was not present; his counsel was.

THE COURT: On March 27th?

MR. APPLETON: From my understanding.”

¶ 14 On cross-examination, the State noted the transcript for the March 27, 2017, hearing begins with the circuit court noting defendant was present with counsel and asked defendant to explain. Defendant stated he was not in court that day and the dates must be incorrect. Defendant later admitted to being in court when presented with a document dated March 27, 2017, and signed by him, which promised he would be in court the next day.

¶ 15 Drake testified he was not aware of any time he met defendant while defendant was under the influence of drugs or alcohol. Drake did not smell alcohol on defendant on March 28, 2017. He could not tell defendant was not acting like himself.

¶ 16 After hearing the parties' arguments, the circuit court denied defendant's motion to withdraw his guilty plea.

¶ 17 On August 26, 2021, defendant sought leave to file a late notice of appeal in compliance with Illinois Supreme Court Rule 606 (eff. July 1, 2017), which this court granted. Accordingly, this court has jurisdiction of defendant's appeal under Rule 604(d).

¶ 18 II. ANALYSIS

¶ 19 Defendant contends his counsel did not strictly comply with Rule 604(d) because counsel elicited testimony at the hearing on the motion to withdraw his guilty plea that was expressly refuted by the record and which undermined defendant's credibility. The State argues the record does not positively rebut the presumption postplea counsel strictly complied with Rule

604(d).

¶ 20 “Rule 604(d) governs the procedure to be followed when a defendant wishes to appeal from a judgment entered upon a guilty plea.” *In re H.L.*, 2015 IL 118529, ¶ 7, 48 N.E.3d 1071. For a defendant to appeal, the rule requires the defendant file, within 30 days of the date on which his or her sentence was imposed, in the circuit court “a motion to reconsider the sentence, if only the sentence is being challenged, or, if the plea is being challenged, a motion to withdraw the plea of guilty and vacate the judgment.” Ill. S. Ct. R. 604(d) (eff. July 1, 2017). “[A]ny issue not raised by the defendant in the motion to reconsider the sentence or withdraw the plea of guilty and vacate the judgment shall be deemed waived.” Ill. S. Ct. R. 604(d) (eff. July 1, 2017). The rule also requires the defendant’s attorney to file in the circuit court a certificate stating the following:

“[T]he 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).

The rule’s purpose “ ‘is to ensure that before a criminal appeal can be taken from a guilty plea, the trial judge who accepted the plea and imposed sentence be given the opportunity to hear the allegations of improprieties that took place outside the official proceedings and *dehors* the record, but nevertheless were unwittingly given sanction in the courtroom.’ ” *H.L.*, 2015 IL 118529, ¶ 9 (quoting *People v. Wilk*, 124 Ill. 2d 93, 104, 529 N.E.2d 218, 221-22 (1988)). Rule

604(d) also “ ‘enables the trial court to insure that counsel has reviewed the defendant’s claim and considered all relevant bases for the motion to withdraw the guilty plea or to reconsider the sentence.’ ” *H.L.*, 2015 IL 118529, ¶ 10 (quoting *People v. Shirley*, 181 Ill. 2d 359, 361, 692 N.E.2d 1189, 1191 (1998)).

¶ 21 Our supreme court requires strict compliance with Rule 604(d), and counsel’s failure to strictly comply requires remand to the circuit court. *People v. Janes*, 158 Ill. 2d 27, 33, 630 N.E.2d 790, 792 (1994). Here, defendant’s counsel filed a Rule 604(d) certificate on April 6, 2021. Even where counsel has filed a facially valid Rule 604(d) certificate, as in this case, courts “may consult the record to determine whether [he or] she actually fulfilled [his or] her obligations under Rule 604(d).” *People v. Bridges*, 2017 IL App (2d) 150718, ¶ 8, 87 N.E.3d 441. We review *de novo* whether defense counsel complied with Rule 604(d). *People v. Grice*, 371 Ill. App. 3d 813, 815, 867 N.E.2d 1143, 1145 (2007).

¶ 22 Defendant cites *People v. Love*, 385 Ill. App. 3d 736, 739, 896 N.E.2d 1062, 1066 (2008), where the reviewing court concluded the record impeached counsel’s Rule 604(d) certificate regarding the duty to examine the report of proceedings and thus the reviewing court remanded the cause for further proceedings. There, counsel made a comment about needing to review the transcript of the plea before she filed a motion to withdraw the defendant’s guilty plea. *Love*, 385 Ill. App. 3d at 737, 896 N.E.2d at 1065. In viewing that remark in a larger context, the reviewing court was left with the distinct impression the defense counsel had not examined the transcript when counsel filed her Rule 604(d) certificate. *Love*, 385 Ill. App. 3d at 737, 896 N.E.2d at 1065. The court further found unacceptable a Rule 604(d) certificate filed merely in anticipation of compliance with the rule’s substantive requirements. *Love*, 385 Ill. App. 3d at 738, 896 N.E.2d at 1065. Last, the reviewing court rejected the State’s argument the

defendant was not entitled to any relief. *Love*, 385 Ill. App. 3d at 738-39, 896 N.E.2d at 1066.

The court explained it could not comfortably say the defendant had a fair opportunity on remand to challenge his guilty plea and thus it did not believe a second remand would be an empty and wasteful formality. *Love*, 385 Ill. App. 3d at 738-39, 896 N.E.2d at 1066.

¶ 23 Here, Appleton, defendant's counsel on remand, filed a motion to withdraw defendant's guilty plea with a Rule 604(d) certificate. Appleton's motion alleged a new allegation of ineffective assistance of plea counsel, Drake. Specifically, paragraph 23 of the motion asserted Drake allowed defendant to involuntarily plead guilty when Drake was aware defendant was still intoxicated from the night before. The next paragraph asserted the following: "Defendant was under the assumption that the March 28, 2017, court date would result in a continuance as had been done 20 times before by and through his attorneys."

However, that assertion is contradicted by the court file. The court file contains the March 27, 2017, docket entry, noting defendant's presence in court and the setting of defendant's trial for 9 a.m. on March 28, 2017. It also has the trial notice, which states defendant's trial was set for 9 a.m. on March 28, 2017, and is signed by defendant. Such extensive contradictory evidence calls into question whether Appleton even reviewed the court file in drafting the motion to withdraw.

¶ 24 Appleton's error was further compounded by his questioning at the hearing on the motion to withdraw. In its response to the motion to withdraw, the State had noted defendant's assumption of a continuance was contradicted by the transcript of March 27, 2017, trial call, at which the State announced ready for trial in defendant's presence. Despite the State's response, Appleton elicited testimony at the hearing on the motion to withdraw from Flin and defendant that defendant was not present at the March 27, 2017, hearing because he was in the hospital.

Upon questioning by the circuit court, Appleton himself noted defendant was not in the courtroom on March 27, 2017. As defendant argues, Appleton's actions at the hearing made his client and witnesses look like liars and undermined their credibility regarding defendant being drunk on March 28, 2017.

¶ 25 The State attempts to downplay Appleton's actions by noting his motion to withdraw did not assert defendant was not present at the March 27, 2017, hearing. However, as previously explained, Appleton's assertion in his motion to withdraw was defendant assumed his case would be continued on March 28, 2017, which is completely refuted by what took place in court on March 27, 2017. The State's response noted defendant was in court on March 27, 2017, when court was set for March 28, 2017. Thus, the response gave Appleton notice his argument defendant thought his case would be continued was contradicted by the record and Appleton still elicited testimony inconsistent with the record. The State suggests Appleton was "fooled mid-hearing by defendant's contrived hospital claim." However, it was Appleton who first mentioned the hospital in questioning Flin, his first witness, during redirect examination. Moreover, the State suggests defendant's hospital testimony did not completely destroy defendant's credibility. Regardless, the circuit court found defendant was lying about being drunk. Before reaching that conclusion, the court noted several things, including defendant had signed the trial notice on March 27, 2017.

¶ 26 In this case, our confidence in defense counsel's strict compliance with Rule 604(d) is undermined by the discrepancy between the continuance assertion in the motion to withdraw and the record, as it suggests Appleton did not review the trial court file. Moreover, Appleton's inclusion in his motion to withdraw of an allegation contradicted by the trial court file calls into question he fulfilled his duty to make amendments to the motion necessary for

adequate presentation of any defects in the plea hearing. Thus, as in *Love*, we are not comfortable in finding defendant had a fair opportunity on remand to challenge his guilty plea proceedings. Accordingly, remand for strict compliance with Rule 604(d) is necessary.

¶ 27 When a defense counsel does not file a proper Rule 604(d) certificate, our supreme court has held the proper remedy is to remand the cause to the circuit court to allow for “(1) the filing of a Rule 604(d) certificate; (2) the opportunity to file a new motion to withdraw the guilty plea and/or reconsider the sentence, if counsel concludes that a new motion is necessary; and (3) a new motion hearing.” *People v. Lindsay*, 239 Ill. 2d 522, 531, 942 N.E.2d 1268, 1274 (2011). We find those same directions applicable when defense counsel files a proper certificate but the record does not show strict compliance with Rule 604(d). Moreover, in this case, a new motion to withdraw is necessary due to the discrepancy between the allegation defendant assumed his case would be continued on March 28, 2017, and the trial court file. Given the damage to defendant’s credibility by Appleton’s actions, the proceedings on remand should be before a different circuit court judge with new counsel appointed for defendant.

¶ 28 III. CONCLUSION

¶ 29 For the reasons stated, we vacate the Sangamon County circuit court’s ruling on defendant’s motion to withdraw his guilty plea and remand the cause for further proceedings in strict compliance with Rule 604(d).

¶ 30 Vacated and remanded with directions.