2016 IL App (2d) 140480-U
No. 2-14-0480
Order filed October 14, 2016

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. RAUL SAUCEDO-CERVANTES, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Kane County. No. 08-CF-2910 Honorable Susan Clancy Boles, Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices McLaren and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: Defense counsel's original and amended Rule 604(d) certificates, read together, were valid: they tracked the preamendment language of the rule, which was in effect at the time, and, even if the postamendment language applied, they established strict compliance with the rule's substantive requirements; the strict-compliance standard did not extend to the rule's formal requirements.

¶ 2 On March 14, 2013, defendant, Raul Saucedo-Cervantes, entered a negotiated plea of guilty to a single count of first degree murder (720 ILCS 5/9-1(a)(3) (West 2008)). In exchange for his plea, he was sentenced to a 20-year prison term. Defendant moved to reconsider his sentence, and the trial court appointed counsel to represent him in connection with the motion.

Counsel filed an amended motion, which sought to withdraw defendant's guilty plea. The trial court denied the motion. Defendant argues on appeal that, because counsel failed to properly certify compliance with the requirements of Illinois Supreme Court Rule 604(d) (eff. March 8, 2016), the case must be remanded for further proceedings. We affirm.

¶ 3 When defendant entered his plea, Rule 604(d) provided, in pertinent part, as follows:

> "No appeal from a judgment entered upon a plea of guilty shall be taken unless the defendant, within 30 days of the date on which sentence is imposed, files in the trial 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. *** The trial court shall *** determine whether the defendant is represented by counsel, and if the defendant is indigent and desires counsel, the trial court shall appoint counsel. *** 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. Feb. 6, 2013).

It is well established that the attorney's certificate must strictly comply with the requirements of Rule 604(d). See *People v. Janes*, 158 Ill. 2d 27, 35 (1994). If the certificate does not satisfy this standard, a reviewing court must remand the case to the trial court for proceedings that strictly comply with Rule 604(d). *Id.* at 33.

¶ 4 The amended motion filed by counsel was accompanied by a certificate stating, in pertinent part, "counsel has consulted either in person or by mail with the defendant and has

ascertained that there are no additional allegations of error which counsel believes should be raised, other than those which have already been raised in the Amended Motion to Withdraw Guilty Plea[.]" Counsel later filed an amended certificate stating, in pertinent part, "counsel has consulted both in person and by mail with the defendant to ascertain the defendant's contentions of error in the sentence *or* the entry of the plea of guilty." (Emphasis added.) Defendant argues that, in order to strictly comply with Rule 604(d), the certificate must expressly state that the attorney consulted with the defendant to ascertain his or her contentions of error in the sentence *and* the entry of the plea of guilty.

¶ 5 As seen, Rule 604(d) formerly used the same language that counsel used in his amended certificate. The rule required counsel to certify that he or she "consulted with the defendant *** to ascertain defendant's contentions of error in the sentence *or* the entry of the plea of guilty." (Emphasis added.) Ill. S. Ct. R. 604(d) (eff. Feb. 6, 2013) In *People v. Tousignant*, 2014 IL 115329, the State argued that, because the word "or" is disjunctive, Rule 604(d) does not require consultation about both plea errors *and* sentencing errors. In the State's view, the type of motion filed by the defendant (there, a motion to reconsider the sentence, as opposed to a motion to withdraw the guilty plea) governed the scope of the consultation requirement. Four members of court disagreed, concluding that, in the portion of the rule in question, "or" should be taken to mean "and." *Tousignant*, 2014 IL 115329, ¶ 20 (plurality op.); *id.* ¶ 26 (Thomas, J., specially concurring). The majority reasoned that to do otherwise would undermine Rule 604(d)'s objective of ensuring that, prior to an appeal from a conviction entered on a guilty plea, the trial court is fully apprised of all possible errors that might be raised in that appeal.

¶ 6 In a special concurrence, Justice Thomas advocated amending the rule "to more accurately reflect this court's intent." *Id.* ¶ 27 (Thomas, J., specially concurring). Justice

Thomas offered the following illustration of the potential for confusion under the existing language of the rule:

> "Consider Attorney A, who conscientiously consults with the defendant about both his guilty plea and sentence, determines that defendant wants to raise issues concerning his sentence only, and certifies that he consulted with the defendant about his contentions of error in his sentence. Now consider Attorney B, who consults with the defendant about his sentence only, and certifies, truthfully, that he consulted with the defendant about his contentions of error in the plea or sentence. A court will reverse and remand in the first case and not the second, even though, unbeknownst to the court, it is Attorney B who clearly has not fulfilled his obligation." *Id.*

¶ 7 Counsel in *Tousignant* certified only that he consulted with the defendant to ascertain his contentions of error in the sentence. Because the certificate in *Tousignant* made no mention of errors in the defendant's plea, it was clear that it did not strictly comply with Rule 604(d). In contrast, in *People v. Mineau*, 2014 IL App (2d) 110666-B, we held that a certificate that tracked the language of the rule was sufficient to establish that counsel had consulted with the defendant to ascertain contentions of error both in the entry of the guilty plea and in sentencing. We reasoned that "or" had the same meaning in the certificate as it did in the rule itself. We observed that, in his special concurrence in *Tousignant*, Justice Thomas "implicitly found that using 'or' complies with the rule as presently written." *Id.* ¶ 19 (citing *Tousignant*, 2014 IL 115329, ¶ 27 (Thomas, J., specially concurring)). Justice Jorgensen specially concurred in *Mineau*. Although she agreed that "or" should be read as "and" in the certificate as well as the rule, she believed that the better practice would be for counsel to "use *only* 'and' (as opposed to

'or' or 'and/or') to certify that he or she has consulted with the defendant on *both* issues (plea and sentence)." (Emphasis in original.) *Id*. ¶ 24 (Jorgensen, J., specially concurring).

¶ 8 As defendant notes, the Third District and the Fourth District have declined to follow *Mineau*. See *People v. Hobbs*, 2015 IL App (4th) 130990, ¶ 37; *People v. Mason*, 2015 IL App (4th) 130946, ¶ 13; *People v. Scarborough*, 2015 IL App (3d) 130426, ¶¶ 37-38. The *Scarborough* court reasoned as follows:

> "The plain language of the rule appears to require defense counsel to file a certificate stating that: he or she has consulted with the defendant either (*choose one*) by mail *or* in person to ascertain defendant's contentions of error in (*choose as many as apply*) the sentence *or* the entry of the guilty plea (*or both*), *and* 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. To simply recite the language of the rule verbatim *** leaves the certificate singularly devoid of the very information it should be imparting. (Emphases in original.) *Scarborough*, 2015 IL App (3d) 130426, ¶ 38.

¶ 9 The *Mason* court acknowledged that "[u]sually ***, the utilization of a rule's exact language is the best way to comply with a rule's requirement." *Mason*, 2015 IL App (4th) 130946, ¶ 13. The court explained, however, that "[s]ince *Tousignant* did not apply the ordinary meaning of 'or,' the use of the word 'or' in a Rule 604(d) certificate does not really indicate what counsel actually did regarding the ascertainment of contentions of error related to both the defendant's guilty plea and sentence." *Id.* Subsequent to these decisions, our supreme court amended Rule 604(d), replacing "or" with "and." Ill. S. Ct. R. 604(d) (eff. Dec. 3, 2015). The amended rule also states that the certificate "shall" be in a prescribed form stating, in pertinent

part, "I have consulted with the Defendant in person, by mail, by phone or by electronic means to ascertain the defendant's contentions of error in the entry of the plea of guilty and in the sentence." *Id.*

¶ 10 Defendant filed his initial brief shortly before the rule was amended. He urged us to revisit the issue decided in *Mineau* and to join the Third and Fourth Districts in holding that a certificate tracking the exact language of the rule was noncompliant. We find the reasoning in *Scarborough* to be perplexing inasmuch as the court, after invoking the "plain language" of the rule, immediately proceeded to restate what the rule "appear[ed] to require." *Scarborough*, 2015 IL App (3d) 130426, ¶ 38. In the process, the *Scarborough* court essentially rewrote the rule, applying a gloss of parenthetical explanatory language to better express the rule's meaning (as clarified in *Tousignant*). In contrast, the *Mason* court seems to have viewed the decision in *Tousignant* as a departure from the plain meaning of the rule. Accordingly, with respect to cases governed by the preamendment language of Rule 604(d), we see no reason to depart from our conclusion in *Mineau* that a certificate tracking the language of the rule satisfied the strict-compliance standard.

¶ 11 Were it undisputed that the preamendment language of Rule 604(d) governed this case, our inquiry would be complete. However, defendant argues in his reply brief that counsel's compliance with the rule must be determined with reference to the *current* language of the rule. Ordinarily, arguments may not be raised for the first time in a reply brief. However, defendant could not have raised this argument in his initial brief, which was filed before the rule change. Defendant maintains that, because the amendment is procedural and our supreme court did not expressly give it prospective-only operation, it applies to cases that were pending on appeal

when the amendment took effect. See generally *In re Marriage of Duggan*, 376 Ill. App. 3d 725, 727-34 (2007).

¶ 12 Assuming for the sake of argument that the amendment governs counsel's duties, we nonetheless conclude that counsel sufficiently certified compliance with the rule's consultation requirement. Counsel filed two Rule 604(d) certificates. The original certificate stated, in pertinent part, "Counsel has consulted with the defendant either in person or by mail and has ascertained that there are no additional allegations of error which counsel believes should be raised, other than those which have already been raised in the Amended Motion to Withdraw Guilty Plea." That certificate "include[d] no language limiting the scope of the consultation to a particular category of error." *People v. Luna*, 2015 IL App (2d) 140983, ¶ 6. "The natural import of the certificate's unqualified language is that the consultation broadly encompassed both types of error that postplea proceedings were designed to redress." *Id.* However, the original certificate did not clearly indicate whether counsel sought to ascertain *defendant's* contentions of error. It is clear, however, from the amended certificate that counsel did so. Together, the certificates establish strict compliance with Rule 604(d)'s substantive requirements that counsel review certain portions of the record, consult with the defendant to ascertain his or her contentions of error, and amend the postplea motion to adequately present those contentions of error. See *People v. Wyatt*, 305 Ill. App. 3d 291, 297 (1999) (certificate need not recite the rule's requirements verbatim).

¶ 13 The question that remains is whether further proceedings in the trial court are necessary simply because the certificates are not in the precise form prescribed in the current rule. Given the confusion that had previously arisen concerning the contents of a proper certificate, the value of standardizing the certificate's format is clearly evident. It is not clear, however, that the

standard of strict compliance necessarily extends to the form of the certificate. Our supreme court has not adopted a unitary rule of strict compliance with Rule 604(d)'s various requirements. The requirement that the defendant file a proper postplea motion is subject to the strict-compliance standard because the language of the rule makes filing a proper postplea motion a condition precedent to an appeal from a conviction entered on a guilty plea. *Janes*, 158 Ill. 2d at 34. Although compliance with the rule's other requirements is not a condition precedent to the appeal (*id.*), the *Janes* court adopted a strict-compliance standard for the certificate requirement as a matter of policy, reasoning that " '[a]dherence to a rule of strict compliance with the certificate requirement will not place an onerous burden on defense counsel, and, significantly, it will eliminate unnecessary appeals.' " *Id.* at 35 (quoting *People v. Dickerson*, 212 Ill. App. 3d 168, 171 (1991)). The court added, "[c]onversely, a rule that counsel need not strictly comply merely generates disputes on review, like the instant one, over whether *the record* shows that there has been substantial compliance with the provisions of Rule 604(d)." (Emphasis added.) *Id.*

¶ 14 If defendant is correct that the current Rule 604(d) applies to cases pending on appeal when the amended rule took effect, then *Janes* would compel us to consider the burden to counsel of requiring strict compliance with a requirement that did not even exist when compliance was required. Clearly, the calculus here is not the same as in *Janes*, where the court considered the burden of requiring strict compliance with a requirement that was already in existence. Furthermore, in cases like *Janes*, where the record did not show that *any* certificate had been filed, the alternative to requiring strict compliance with the certificate requirement would be a potentially wide-ranging examination of the record to determine whether counsel fulfilled his or her substantive duties under Rule 604(d). In contrast, disputes about whether

compliance can be gleaned from the face of a technically defective certificate are likely to be well circumscribed. Lastly, we note that our supreme court has exhibited a general disinclination to apply the strict-compliance standard in a mechanical manner that leads to unnecessary remands. *Cf. People v. Shirley*, 181 Ill. 2d 359, 369 (1998) ("We reject defendant's implicit premise that the strict compliance standard of [*Janes*] must be applied so mechanically as to require Illinois courts to grant multiple remands and new hearings following the initial remand hearing."). Thus, we do not extend that standard to the form of the certificate.

¶ 15 For the foregoing reasons, the judgment of the circuit court of Kane County is affirmed. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2014); see also *People v. Nicholls*, 71 Ill. 2d 166, 179 (1978).

¶ 16 Affirmed.