

2017 IL App (1st) 143969-U

No. 1-14-3969

Order filed February 24, 2017

Sixth Division

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

| | | |
|--------------------------------------|---|-------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from the |
| |) | Circuit Court of |
| Plaintiff-Appellee, |) | Cook County |
| |) | |
| v. |) | No. 14 CR 1579 |
| |) | |
| DANIEL ORTIZ, |) | Honorable |
| |) | James B. Linn, |
| Defendant-Appellant. |) | Judge, Presiding. |

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Rochford and Delort concurred in the judgment.

ORDER

¶ 1 *Held:* Where the trial court denied the defendant’s postplea motion without appointing counsel for him, or determining whether he wanted to waive this right, pursuant to Rule 604(d), we reverse the trial court’s order denying the defendant’s postplea motion and remand for further postplea proceedings and to appoint the defendant counsel.

¶ 2 Pursuant to a negotiated plea agreement, the defendant, Daniel Ortiz, pled guilty to the offense of armed habitual criminal and was sentenced to 20 years in prison. The trial court denied the defendant’s postplea “Motion for Reduction of Sentence.” On appeal, the defendant

argues that the trial court did not properly admonish him pursuant to Supreme Court Rule 605(c) (eff. Oct. 1, 2001) and did not appoint him counsel pursuant to Supreme Court Rule 604(d) (eff. Feb. 6, 2013). The defendant requests that we reverse the trial court's denial of his postplea motion and remand for further postplea proceedings.

¶ 3 On January 22, 2014, the defendant was charged with one count of the offense of armed habitual criminal, one count of aggravated unlawful use of a weapon, and two counts of unlawful use or possession of a weapon by a felon. On September 4, 2014, the defendant requested, and the trial court held, a Rule 402 conference, during which a plea offer of 20 years was made to the defendant. On September 18, 2014, the defendant informed the trial court that he wanted to take the plea offer of 20 years in prison and to plead guilty to the offense of armed habitual criminal.

¶ 4 Thereafter, the trial court informed the defendant that the offense of armed habitual criminal is a Class X felony, which would carry a sentencing range of 6 to 30 years in prison and at least 3 years of mandatory supervised release. The trial court informed the defendant of the rights he was giving up by pleading guilty. The defendant acknowledged that he understood the rights he was giving up and that no one forced him or promised him anything to get him to give up his rights. The trial court indicated that the defendant was knowingly and voluntarily giving up his right to a trial, trial by jury, and a presentence investigation report.

¶ 5 The parties stipulated that, if this case went to trial, the State would prove the allegations in Count 1, armed habitual criminal, beyond a reasonable doubt. The State presented a factual basis for the plea. On December 19, 2013, the defendant was with his girlfriend, Rosie Padilla, at a residence located at 5305 South Talman Avenue, in Chicago. During the day in question, Padilla exchanged text messages with Salvador Diaz and another person. Later that evening,

Diaz and another individual, Vidal Morales, came to the residence. The defendant feared for his safety, so he went to the front porch with a handgun. He discharged the handgun and struck Diaz. The defendant fled into the house and was later arrested. The police recovered a .357 revolver from inside the house. After the defendant received *Miranda* warnings, he admitted to possessing and shooting the gun, and he stated that he shot the gun from the front porch because he feared for his life.

¶ 6 The State explained that the defendant had a prior conviction from 1991 for murder, where he received a 20-year prison sentence, and a prior conviction from 2009 for the offense of “drugs, manufacture and delivery of narcotics,” which was a Class 1 offense. The State concluded that the trial court would have found the defendant guilty of Count 1, armed habitual criminal. The defendant stipulated that the foregoing would be the testimony. The trial court found a factual basis for the plea and found the defendant guilty of the offense of armed habitual criminal. The State *nolle prossed* the other counts.

¶ 7 Based on the plea offer, the trial court sentenced the defendant to 20 years in prison, including 3 years mandatory supervised release. Thereafter, the trial court admonished the defendant as follows:

“Sir, though you pled guilty and have been sentenced, you have a right to appeal everything that happened on the case. To do that, you would have to file a motion to withdraw your plea. You may also file a motion to modify your sentence. Whatever you file would have to be filed in writing within 30 days. Anything not stated in the filings would be waived for purposes of appeal. If you can’t afford lawyers or transcripts, they will be provided free of charge.”

¶ 8 The record contains a preprinted “Notification of Motion” form, indicating that a *pro se* “Motion to reconsider or reduce sentence” was received by the Clerk of the Circuit Court on October 14, 2014, 26 days after the defendant entered his guilty plea. The record also contains a preprinted *pro se* form entitled “Motion for Reduction of Sentence,” which was received by the Clerk of the Circuit Court on the same day. The motion alleges, in handwriting, “inadequate counsel” and “promised 6 to 10 years and got 20 years by counsel.” A hearing on the defendant’s motion was held on October 28, 2014. Neither the defendant nor defense counsel were present. At the hearing, the trial court stated, “He brings his *pro se* motion now to reduce his sentence. It’s [*sic*] little more than 30 days, but I’ll rule on this motion.” Thereafter, the trial court discussed the plea hearing and then denied the defendant’s motion. This appeal followed.

¶ 9 On appeal, the defendant argues that the trial court did not properly admonish him pursuant to Rule 605(c). He asserts that the trial court “affirmatively misled” him that he could file a “motion to modify [the] sentence,” even though after a negotiated guilty plea, he was required to file a motion to vacate the judgment and withdraw the guilty plea and that the trial court did not “impart entire subsections” contained in Rule 605(c). The defendant’s second contention on appeal is that the trial court denied his postplea motion without addressing the ineffective-assistance-of-counsel allegations contained in it and without appointing him counsel pursuant to Rule 604(d). The defendant requests that we reverse the trial court’s denial of his postplea motion and remand this case so he can receive proper admonishments pursuant to Rule 605(c).

¶ 10 In response, the State does not address the defendant’s argument that the trial court did not properly admonish him pursuant to Rule 605(c). However, the State agrees with the

defendant that the trial court failed to comply with Rule 604(d) because it denied the defendant's postplea motion without appointing him counsel to assist him in preparing or presenting his motion and without determining whether he wanted to waive this right. The State concedes that we should reverse the trial court's denial of the defendant's postplea motion and remand this case for further postplea proceedings and the appointment of counsel. We agree.

¶ 11 Rule 604(d) sets forth the requirements that a defendant must follow when appealing a judgment that was entered on a plea of guilty. *People v. Dunn*, 342 Ill. App. 3d 872, 876 (2003). Rule 604(d), in pertinent part, states 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. No appeal shall be taken upon a negotiated plea of guilty challenging the sentence as excessive unless the defendant, within 30 days of the imposition of sentence, files a motion to withdraw the plea of guilty and vacate the judgment.” Ill. S. Ct. R. 604(d) (eff. Feb. 6, 2013).

Additionally, pursuant to Rule 604(d), when the postplea motion is filed, “[t]he 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. Feb. 6, 2013).

¶ 12 A defendant's right to the appointment of counsel under Rule 604(d) is “automatically triggered” when a defendant notifies the trial court that he or she wishes to withdraw the guilty

plea and appeal. *People v. Smith*, 365 Ill. App. 3d 356, 359 (2006). Unless the trial court finds that a defendant knowingly waived the right to the appointment of counsel, the trial court must appoint counsel in postplea proceedings, even when a defendant does not make a specific request. *People v. Hinton*, 362 Ill. App. 3d 229, 234 (2005). “[B]ecause of the strict waiver requirements of Rule 604(d), fundamental fairness requires that a defendant be afforded a full opportunity to explain his allegations and that he have assistance of counsel in preparing the motion.” *People v. Ledbetter*, 174 Ill. App. 3d 234, 237-38 (1988). Whether a trial court complied with a Supreme Court rule is reviewed *de novo*. *Hinton*, 362 Ill. App. 3d at 232.

¶ 13 As an initial matter, the defendant notes that, at the October 28, 2014, hearing on his postplea motion, the trial court incorrectly determined that his motion was not timely filed. The record indicates that the Clerk of the Circuit Court received the defendant’s “Notification of Motion” form and “Motion for Reduction of Sentence” on October 14, 2014, which was within 30 days of the September 18, 2014, judgment date. Therefore, as recognized by the State, the defendant’s postplea “Motion for Reduction of Sentence” was timely filed.

¶ 14 With respect to the merits of the defendant’s appeal, we find that the trial court did not comply with Rule 604(d). At the plea hearing, after the defendant entered into the plea of guilty, the trial court informed him that, to appeal, he could file “a motion to withdraw your plea” or a “motion to modify your sentence.” Pursuant to these instructions, the defendant timely filed a *pro se* “Motion for Reduction of Sentence.” At the October 28, 2014, hearing on the defendant’s motion, the defendant was not present, and the trial court denied the motion without appointing him counsel and without determining whether he knowingly waived his right to counsel. Therefore, the trial court did not comply with Rule 604(d). *People v. Barnes*, 291 Ill. App. 3d 545, 550 (1997) (“It is well settled that a defendant has the right to the aid of an attorney in the

preparation and presentation of a motion pursuant to Rule 604(d), and such a motion should not be denied until that representation has been obtained.”); *People v. Velasco*, 197 Ill. App. 3d 589, 591 (1990) (“It would be contrary to the purpose of the rule to draw a conclusion about the legal basis of the defendant's motion before he has had an opportunity to consult with an attorney to insure that there is legally ‘adequate presentation of any defects’ [citation] in his guilty plea proceedings.”).

¶ 15 Accordingly, because the defendant timely filed a postplea motion after he entered his guilty plea and because the trial court did not appoint him counsel pursuant to Rule 604(d), we reverse the trial court’s denial of the defendant’s “Motion for Reduction of Sentence” and remand for further postplea proceedings. Given our disposition, we need not address the defendant’s argument that the trial court did not properly admonish him pursuant to Rule 605(c).

¶ 16 Reversed and remanded for further postplea proceedings and to appoint counsel for the defendant.