

2017 IL App (2d) 150777-U  
No. 2-15-0777  
Order filed October 13, 2017

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

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of Du Page County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 15-CF-750
	)	
MARK V. MALCHERT,	)	Honorable
	)	John J. Kinsella,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE BIRKETT delivered the judgment of the court.  
Justices Zenoff and Jorgensen concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* Because the attorney who represented defendant at the hearing on his postplea motion did not file a Rule 604(d) certificate, we vacated the denial of the motion and remanded the cause.
- ¶ 2 Defendant, Mark V. Malchert, pleaded guilty to retail theft (720 ILCS 5/16-25(a)(1) (West 2014)) and was sentenced to 30 days in jail and 24 months' probation. He moved to withdraw his plea and vacate the judgment. The assistant public defender who filed the motion recused herself. After an evidentiary hearing at which defendant was represented by another assistant public defender, the trial court denied the motion. Defendant timely appealed.

¶ 3 Defendant argues that he is entitled to new postjudgment proceedings because the attorney who represented him at the hearing did not file a certificate of compliance with Illinois Supreme Court Rule 604(d) (eff. July 1, 2017). We vacate the order denying defendant's motion and remand the cause for postjudgment proceedings in compliance with Rule 604(d).

¶ 4 On April 14, 2015, defendant was charged by complaint with committing retail theft by taking 12 beer bottles, valued at \$9.99, from a supermarket. On April 28, 2015, at a hearing to review bail, defendant appeared with Robert Gifford, an assistant public defender. Gifford told the court that he was appearing "on behalf of Ruth Walstra, who represent[ed] [defendant]." Gifford stated that, if called to testify, defendant would indicate that he did not have the \$3,000 to post for bond against his bail of \$30,000. Gifford also called James Court, who testified that he would attempt to raise bond money and could post at least \$300 or \$400. Gifford requested that the court release defendant on a recognizance bond, with the condition that he abstain from alcohol. After admonishing defendant, the judge reduced his bond to \$400, with the no-alcohol condition.

¶ 5 On April 30, 2015, defendant was indicted for retail theft, a Class 3 felony because of his prior convictions (725 ILCS 5/16-25(f)(2) (West 2014)). On May 11, 2015, defendant, represented by Walstra, entered a negotiated plea of guilty. Per the parties' agreement, the court sentenced him to 30 days in jail and 24 months' probation.

¶ 6 On May 27, 2015, defendant filed a *pro se* "Application to Sue or Defend as an Indigent Person." On June 2, 2015, defendant appeared in court with Walstra. Gifford did not appear. The judge asked defendant whether he was seeking to withdraw his plea. Defendant responded that he wanted to file an appeal. The hearing continued as follows:

“THE COURT: Well, you first would have to ask to withdraw your plea and that’s what you’re asking; is that right?

DEFENDANT MALCHERT: Yes.

THE COURT: Do you have an attorney that’s going to represent you in connection with that request?

DEFENDANT MALCHERT: I’ve had a public defender.

THE COURT: You had a public defender initially. All right.

Well, I’ll go ahead and appoint the public defender. \*\*\* I’ll appoint the public defender to meet with the defendant and \*\*\* as of today there is an oral motion to withdraw the plea and public defender appointed.”

Based on Walstra’s request, the judge set June 10, 2015, for “hearing or status on the motion to withdraw [the] plea.”

¶ 7 On June 10, 2015, defendant appeared with Walstra. Gifford did not appear. At Walstra’s request, the court continued the hearing on the motion to July 22, 2015.

¶ 8 On June 30, 2015, Walstra filed a motion to withdraw defendant’s guilty plea and vacate the judgment. The motion alleged that defendant had pleaded guilty without understanding the consequences; that he had done so at Court’s insistence; that Court had not allowed Walstra to speak privately with him; and that he had later told Walstra that Court had coerced him. Walstra filed a Rule 604(d)-compliant certificate with the motion.

¶ 9 On July 22, 2015, the court heard defendant’s motion. Gifford represented defendant. Walstra was a defense witness. After hearing the evidence, the court denied defendant’s motion. Defendant filed a timely notice of appeal.

¶ 10 At no time in the case did Gifford ever file a certificate of compliance with Rule 604(d).

¶ 11 On appeal, defendant contends that, because Gifford never filed a Rule 604(d) certificate, the postjudgment order must be vacated and the cause must be remanded so that he may file a new motion if desired and the court may conduct proceedings in compliance with Rule 604(d). Defendant contends that, under *People v. Herrera*, 2012 IL App (2d) 110009, Walstra’s certificate of compliance did not satisfy the rule, because a certificate was required also from Gifford, the sole attorney who represented him at the hearing. We agree.

¶ 12 In *Herrera*, the defendant, represented by an assistant public defender, David Kliment, entered an open guilty plea to two counts of aggravated driving under the influence of alcohol. He was sentenced to 10 years’ imprisonment. *Id.* ¶ 4. Kliment filed a motion to reconsider the sentence and a Rule 604(d) certificate. However, before the trial court heard the motion, Kliment became a judge. Another assistant public defender, Julie Yetter, took over for him. At the hearing on the motion, she told the court that she had met with the defendant that morning, had reviewed the record, and had filed a Rule 604(d) certificate. She had not amended the motion. After hearing arguments on the motion, the court denied it. *Id.* ¶ 5.

¶ 13 On appeal, the defendant argued that the postjudgment order should be vacated because neither Kliment’s nor Yetter’s certificate complied with Rule 604(d). The State conceded that Yetter’s certificate had been deficient. This court granted the defendant the requested relief. We did not consider whether Kliment’s certificate had complied with Rule 604(d). We reasoned that, even if it had, Yetter had had an independent obligation to file a sufficient certificate. *Id.* ¶ 11.

¶ 14 We explained that, in *People v. Ritchie*, 258 Ill. App. 3d 164, 167 (1994), a case with indistinguishable facts, we had held that the purpose of Rule 604(d), which is to ensure that the defendant has the assistance of counsel “in preparing *and presenting* his motion” (emphasis in

original), would be frustrated if a certificate by an attorney who no longer represented the defendant were deemed adequate to comply with the rule, regardless of the new attorney's lack of compliance. *Herrera*, 2012 IL App (2d) 110009, ¶ 11. The absence of a proper certificate from the attorney who presented the motion would require new proceedings, so as to ensure that that attorney also "ha[d] a grasp of the record and the defendant's contentions of error." *Id.* We held that, because Yetter's certificate had not complied with Rule 604(d), the cause must be remanded for new postplea proceedings. *Id.* ¶¶ 12-15.

¶ 15 We agree with defendant that *Herrera* controls this case. Here, as in *Herrera*, the certificate filed by the attorney who prepared the postjudgment motion did not satisfy Rule 604(d) in the absence of a proper certificate filed by the attorney who presented the motion at the hearing. In *Herrera*, the second attorney filed a deficient certificate; here, the second attorney filed no certificate at all. Therefore, we must vacate the postjudgment order and remand the cause for new proceedings, including the opportunity for defendant to file a new postjudgment motion and to receive representation that complies strictly with Rule 604(d).

¶ 16 The State makes two attempts to distinguish *Herrera*. First, it notes that Walstra's certificate strictly complied with Rule 604(d). This simply ignores the plain holding of *Herrera*. There, we assumed that the first attorney's certificate had been compliant, but we did not affirm.

¶ 17 The State's second attempt to avoid *Herrera* requires more discussion. The State contends that, under *People v. Mineau*, 2014 IL App (2d) 110666-B, Walstra's certificate was sufficient even absent any certificate from Gifford, because Walstra and Gifford conferred about presenting defendant's contentions of error to the court and because Walstra testified for defendant at the hearing. The State misconstrues *Mineau*.

¶ 18 In *Mineau*, the defendant pleaded guilty to unlawful possession of a stolen motor vehicle and was sentenced to eight years' imprisonment. *Id.* ¶ 3. Erin Hannigan, the assistant public defender who had represented him from the start of the case, filed a motion to withdraw the plea or reduce the sentence. Shortly afterward, she told the court that the defendant's case was being reassigned to a new assistant public defender, David Doll. Nonetheless, Hannigan filed an amended motion and a Rule 604(d) certificate. *Id.* ¶ 4. At the hearing on the motion, both Hannigan and Doll appeared for the defendant, although Doll questioned him and argued on his behalf. The trial court denied the motion. *Id.* ¶ 5.

¶ 19 On appeal, the defendant contended that new postjudgment proceedings were required because Doll had not filed a Rule 604(d) certificate. *Id.* ¶ 6. We held that nothing in Rule 604(d) "requires that, when a defendant is simultaneously represented by multiple attorneys from the same office, each attorney must file a certificate." *Id.* ¶ 9. We distinguished *Herrera* and *Ritchie* by pointing out that the crucial problem in those cases was not present, because Hannigan had continued to represent the defendant and filed an amended motion, appeared at the hearing, and filed the notice of appeal. *Id.* ¶ 12. Thus, it was "simply not reasonable to assume that Hannigan, *while continuing to represent [the] defendant*, assigned Doll substantial responsibility for the file but did not discuss with him [the] defendant's contentions of error that were the basis of Doll's questioning at the hearing." (Emphasis added.) *Id.*

¶ 20 We agree with defendant that the crucial consideration in *Mineau* is missing here. By the time of the hearing on defendant's motion, Walstra no longer represented him. She had withdrawn because she was going to be a witness at the hearing. See Ill. Rs. Prof'l Cond. R. 3.7(a) (eff. Jan. 1, 2010). Regardless of her reasons, she simply was not defendant's attorney at the hearing on the motion. The State cannot seriously contend that her presence as a *witness* for

defendant was the equivalent of Hannigan's appearance at the counsel table in *Mineau*. Obviously, Walstra did not assist Gifford at the hearing with presenting defendant's contentions of error. And we shall not speculate about what Gifford might have discussed with Walstra or defendant between the filing of the motion and its presentation. The purpose of Rule 604(d)'s certification requirement is to avoid such speculation about whether the attorney who represents a defendant has done what he or she must under the rule.

¶ 21 The State notes that Gifford had represented defendant at the bond hearing. That is of no consequence here. Gifford's representation of defendant at a hearing before defendant even pleaded guilty did not excuse his failure to certify that he performed his obligations relating to defendant's challenge to the plea. There is no indication in the record that Gifford had any involvement in the plea negotiations, the entry of the plea, or the preparation of the motion to withdraw the plea. We cannot simply assume that Gifford complied with his very specific obligations under Rule 604(d). The purpose of the rule would be undercut were we to require so little of the sole attorney to represent a defendant in the presentation of his postjudgment motion,

¶ 22 For the foregoing reasons, we vacate the order denying defendant's postjudgment motion, and we remand the cause for "(1) the filing of a [valid] 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 (2011).

¶ 23 Vacated and remanded.