

2017 IL App (2d) 151095-U
No. 2-15-1095
Order filed November 30, 2017

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Winnebago County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 10-CF-3550
)	
JUAN T. GILBERT,)	Honorable
)	John R. Truitt,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Presiding Justice Hudson and Justice Zenoff concurred in the judgment.

ORDER

- ¶ 1 *Held:* Because the record showed that, contrary to our mandate, the proceedings on a prior remand did not comply with Rule 604(d), we remanded the cause for such compliance.
- ¶ 2 Defendant, Juan T. Gilbert, appeals from the denial of his motion to withdraw his plea of guilty to aggravated criminal sexual assault (720 ILCS 5/12-14(a)(2) (West 2010)). He argues that the trial court erred in denying his *pro se* claim that his trial counsel was ineffective. For the reasons that follow, however, we hold that the record establishes that, contrary to our mandate in

a prior appeal, the proceedings did not comply with Illinois Supreme Court Rule 604(d) (eff. July 1, 2017). Accordingly, we vacate and remand

¶ 3

I. BACKGROUND

¶ 4 On December 5, 2010, defendant (along with five codefendants) was indicted on two counts of aggravated criminal sexual assault (720 ILCS 5/12-14(a)(2), (a)(4) (West 2010)), two counts of aggravated kidnapping (720 ILCS 5/10-2(a)(3) (West 2010)), one count of conspiracy to commit aggravated kidnapping (720 ILCS 5/8-2(a), 10-2(a)(3) (West 2010)), and one count of aggravated battery (720 ILCS 5/12-4(a) (West 2010)).

¶ 5 On July 9, 2012, defendant pleaded guilty to one count of aggravated criminal sexual assault (720 ILCS 5/12-14(a)(2) (West 2010)). In return, the State agreed to dismiss the remaining charges. There was no agreement as to the sentence. On August 17, 2012, following a sentencing hearing, the trial court sentenced defendant to 25 years in prison.

¶ 6 On September 5, 2012, defendant filed a motion to reconsider the sentence, arguing that the sentence was excessive in light of defendant's prior record, defendant's rehabilitative potential, and the sentences imposed on codefendants. Defendant also argued that the sentence failed to take into account the failing health of his mother. The motion was denied on September 14, 2012. Defendant timely appealed.

¶ 7 On November 12, 2013, we reversed and remanded the case to the trial court because defense counsel failed to file a certificate under Rule 604(d). *People v. Gilbert*, No. 2-12-1107 (Nov. 12, 2013) (minute order). Our mandate provided as follows:

“The circuit court shall afford the defendant, after consultation with counsel, the opportunity to file a new motion pursuant to Supreme Court Rule 604(d). The court shall

then hear and resolve that motion only after the defendant's attorney files a certificate in strict compliance with Rule 604(d)." *Id.*

¶ 8 On remand, on April 10, 2014, defendant filed a *pro se* motion to vacate the judgment and withdraw his guilty plea. He alleged that, after pleading guilty, he learned that defense counsel was aware that the victim had signed an exculpatory statement, that there were medical reports that were inconsistent with the victim's allegations, and that there were no fingerprints recovered from the scene. He claimed that had he known this information he would not have pleaded guilty. He also alleged that defense counsel told him to plead guilty because a codefendant was getting probation, that there was no way of knowing what the codefendant would testify to in return for probation, and that the court would sentence him to no less than 45 years if he were found guilty at trial. He further alleged that defense counsel did not tell him that, in order for defendant to be found guilty, the "principal" must first be found guilty. Finally, defendant alleged that he was denied the effective assistance of counsel at sentencing when counsel failed to present certain medical evidence about defendant.

¶ 9 On May 15, 2014, defense counsel and the State appeared for a status call. The State noted the *pro se* motion filed by defendant. The court asked the parties how they wished to proceed, and defense counsel responded:

"Judge, here is what I would request. I would request [defendant] be remanded here. Could we set it your next status date? I want to go over the motion he filed, see what he wishes to do with that, and I do have the transcript so I would be in a position. I want to talk to him about the *pro se* motion that was filed, see what he would like to do."

The parties agreed to continue the matter to May 21, 2014.

¶ 10 On May 21, 2014, defense counsel advised the trial court that he spoke with defendant. Counsel stated that, because defendant's *pro se* motion made allegations concerning counsel's ineffectiveness, new counsel should be appointed to represent him. The court disagreed, noting that under *People v. Krankel*, 102 Ill. 2d 181 (1984), the court must first determine whether defendant was entitled to new counsel. The court stated: "I am willing to set this for a Krankel, and then the decision would be made whether or not to appoint different counsel." The court further stated: "Depending upon the result of the Krankel hearing, the Defendant may or may not be entitled to new counsel. Then we will go from that. If he isn't, we roll into the 604(d) certificate."

¶ 11 On May 23, 2014, at the outset of the proceedings, the trial court stated that it had reviewed the file and that it had "some serious questions as to the propriety of even considering this as a Motion to Withdraw Guilty Plea." The trial court reviewed this court's mandate, noting that the matter had been remanded for compliance with Rule 604(d). The court stated:

"The Second District reversed and remanded and indicated 'the Circuit Court shall afford the Defendant, after consultation with counsel, the opportunity to file a new motion pursuant to Supreme Court Rule 604(d). The Court shall then hear and resolve that motion only after the Defendant's attorney files a certificate in strict compliance with 604(d).' So the issue is if that mandate means either amending or standing on your earlier Motion for Reconsideration of Sentence and the filing of a 604(d) certificate, then the Defendant's Motion to Withdraw Guilty Plea isn't timely.

He was admonished at the time of the sentence on a purely open plea that he had 30 days in which to either file a Motion to Reconsider the Sentence or to have the Judgment vacated and for leave to withdraw his guilty plea, setting forth the grounds or

the reasons for the motion. He was properly admonished under Supreme Court Rule 605. So if the case is back for the limited purpose of a Motion to Reconsider Sentence, along with a 604(d) certificate, a Motion to Withdraw Guilty Plea filed April 10, 2014, simply isn't timely."

¶ 12 The State agreed with the trial court's interpretation of our mandate. Defense counsel made no comment on the propriety of the trial court's ruling and stated that he "would follow the court's orders." Defense counsel advised the court that he intended to file a new motion to reconsider the sentence. The trial court continued the matter for counsel to file a Rule 604(d) certificate and a new motion to reconsider the sentence.

¶ 13 On May 29, 2014, counsel filed an amended motion to reconsider the sentence, essentially raising the same arguments raised in the initial motion. Counsel also filed a Rule 604(d) certificate stating that he consulted with defendant to ascertain defendant's contentions of error in the entry of the plea of guilty and in the sentence, that he examined the trial court file and report of proceedings from the guilty plea and sentencing, and that he made any amendments to the motion necessary for the adequate presentation of any defects in those proceedings. See Ill. S. Ct. R. 604(d) (eff. July 1, 2017).

¶ 14 Following arguments on defendant's amended motion to reconsider the sentence, the trial court denied the motion. Defendant timely appealed.

¶ 15 On appeal, on the State's confession of error, we reversed the dismissal of defendant's *pro se* motion to withdraw his guilty plea and "remanded for a preliminary inquiry into defendant's allegations of ineffective assistance of counsel and further proceedings if necessary." *People v. Gilbert*, No. 2-14-0621 (June 24, 2015) (minute order).

¶ 16 On remand, on October 30, 2015, defendant filed a supplemental motion to vacate the judgment and withdraw his guilty plea, adding the allegation that he told counsel “many times” to file a motion to withdraw his guilty plea and that counsel’s failure to do so prevented him from preserving issues for appeal. He argued that his guilty plea was the product of ineffective assistance of counsel.

¶ 17 At the hearing, the trial court questioned defense counsel and defendant as to each allegation raised by defendant in his initial *pro se* motion to withdraw his plea and in his supplemental *pro se* motion to withdraw his plea. The court found that defendant’s allegations lacked merit or involved matters of trial strategy. As to defendant’s claim that he asked counsel “many times” to file a motion to withdraw his plea, the following colloquy took place:

“THE COURT: ***

You filed a motion to reconsider sentence, if I recall correctly.

[DEFENSE COUNSEL]: I did.

THE COURT: How about a motion to withdraw guilty plea? Did you have conversations with your client post-sentencing with regard to his options at that point?

[DEFENSE COUNSEL]: Judge, at some stage we did. This went through a process. I can’t honestly recall, but I did file a timely motion to reconsider the sentence.

At a certain stage I believe [defendant] after that had requested a motion to withdraw the guilty plea, but I didn’t believe that would be timely at the time. I did file a timely motion to reconsider his sentence.

THE COURT: At what point did he ask you to file a motion to withdraw guilty plea? Before or after the running of the 30 days after the sentence?

[DEFENSE COUNSEL]: Judge, I cannot honestly recall. [Defendant] was sent to the department of corrections. I filed a motion to—a motion to reconsider the sentences brought back. I argued it. I think at that stage he indicated that he wanted a motion to withdraw his guilty plea. I think he submitted it at that time. That’s my recollection, but I honestly cannot say I have memory per se.

THE COURT: You think it was after the denial to reconsider sentence?

[DEFENSE COUNSEL]: I believe so.”

At this point, defendant interjected, stating, “No, it wasn’t. The moment I signed that guilty plea in the courtroom, I told him when we were going back that I didn’t even want to plead guilty to that.” The court found defendant’s claim to be incredible. The court went on to discuss with defendant the admonishments that it had given to defendant when he had pleaded guilty. The court stated that “this is nothing more than a case of buyer’s remorse.”

¶ 18 The court concluded, “[B]ased on the Krankel inquiry, the motion to vacate judgment and withdraw guilty plea is denied.”

¶ 19 Defendant timely appealed.

¶ 20 **II. ANALYSIS**

¶ 21 In his *pro se* supplemental motion to withdraw his guilty plea, defendant alleged that he told counsel that he wanted to withdraw his guilty plea “many times” but that counsel failed to do so, moving only to reconsider his sentence. On appeal, defendant argues that counsel’s failure to move to withdraw the plea presents a colorable claim that counsel was ineffective and that therefore the trial court should have appointed counsel under *Krankel* to argue the ineffectiveness claim. However, regardless whether defendant has shown colorable ineffectiveness, defendant’s argument preliminarily establishes that counsel’s failure to move to

withdraw the plea violated Rule 604(d) and this court's prior mandate for such compliance. On that basis, we vacate and remand.

¶ 22 Rule 604(d) governs appeals from convictions entered on guilty pleas. Before pursuing an appeal, the defendant must file an appropriate postplea motion. The attorney representing the defendant in connection with the motion must file with the trial court a certificate stating that he “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 purpose of complying strictly with Rule 604(d) is to safeguard a defendant's right to a direct appeal, ‘a right which may be forever lost under the waiver rule if any appealable issue is not properly raised because Rule 604(d) has not been strictly followed.’ ” *People v. Heinz*, 259 Ill. App. 3d 709, 711-12 (1994) (quoting *People v. Davis*, 255 Ill. App. 3d 647, 649 (1994)); see also Ill. S. Ct. R. 604(d) (eff. July 1, 2017) (“Upon appeal any 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.”). Defense counsel must strictly comply with Rule 604(d)'s certificate requirement, and, when counsel fails to do so, the case must be remanded to the trial court for proceedings in compliance with the rule. *People v. Janes*, 158 Ill. 2d 27, 35 (1994).

¶ 23 Here, in *Gilbert*, No. 2-12-1107, we remanded for compliance with Rule 604(d). On remand, defendant filed a *pro se* motion to withdraw his plea. The trial court ruled that such a motion was beyond the scope of our mandate. Specifically, the trial court ruled that, because

defendant had previously filed only a motion to reconsider his sentence, he was limited to that type of motion on remand. This was error. Our mandate was that defendant could file, after consultation with counsel, “a new motion pursuant to Supreme Court Rule 604(d).” Thus, defendant was free to file “a new motion to withdraw the guilty plea and/or reconsider the sentence,” raising any and all claims revealed by counsel’s consultation. See *People v. Lindsay*, 239 Ill. 2d 522, 531 (2011). Because of the trial court’s misinterpretation of our mandate, defense counsel filed only an amended motion to reconsider the sentence, failing to incorporate defendant’s contentions about his plea. As a result, counsel’s Rule 604(d) certificate, stating that he had ascertained defendant’s contentions of error in the entry of the plea and had made all necessary amendments to the motion to adequately present any defects in those proceedings, is refuted by the record. See *People v. Love*, 385 Ill. App. 3d 736, 739 (2008) (the record can impeach a Rule 604(d) certificate). In sum, then, the proceedings on that remand did not comply with Rule 604(d) and our mandate.

¶ 24 We acknowledge that we did not address this violation in the most recent appeal (*Gilbert*, No. 2-14-0621), when we remanded the cause for a preliminary inquiry into defendant’s ineffectiveness claim. However, in that appeal, defendant sought only that relief, and the State confessed error. In *this* appeal, defendant specifically attacks counsel’s failure to move to withdraw his plea. Although defendant packages that claim as a claim of ineffectiveness, his argument, as noted, has revealed the lack of compliance with our mandate in the earlier appeal. As the trial court did not comply with that mandate—and, indeed, as it lacked jurisdiction to do anything other than comply with it (see *McDonald v. Lipov*, 2014 IL App (2d) 130401, ¶ 44 (“[A] reviewing court’s mandate vests the trial court with jurisdiction only to take action that

complies with the mandate.”))—we must vacate the court’s order on the most recent remand and must remand the cause again for compliance with Rule 604(d).¹

¶ 25 On remand, the trial court shall reappoint counsel for defendant. Counsel shall consult with defendant to ascertain his claims of error in both his guilty plea and his sentence. Counsel then shall file a new Rule 604(d) motion incorporating all of those claims of error, supported by a new certificate under that rule. The court then shall hear and resolve that motion.

¶ 26 III. CONCLUSION

¶ 27 For the reasons stated, the order of the circuit court of Winnebago County is vacated, and the cause is remanded.

¶ 28 Vacated and remanded.

¹ We note that this jurisdictional issue is not subject to forfeiture and that, indeed, we have an independent duty to correct jurisdictional errors. See *People v. Thompson*, 209 Ill. 2d 19, 27 (2004).