2017 IL App (2d) 160574-U
No. 2-16-0574
Order filed March 20, 2017

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of De Kalb County.
Plaintiff-Appellee,	)	
v.	)	No. 13-CF-524
JASMINE WINSTON,	)	Honorable Robbin J. Stuckert,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices McLaren and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: Although defense counsel's Rule 604(d) certificate was not refuted by the record, the hearing on defendant's Rule 604(d) motion was inadequate, and thus, despite defendant's absence, we vacated the denial of defendant's motion and remanded for a new hearing.

¶ 2 Defendant, Jasmine Winston, was charged with two counts of aggravated battery (720 ILCS 5/12-3.05(c) (West 2012)), one of which was based on the allegation that defendant "threw a bottle and books at the face of Khadijah Puckett, knowing Khadijah Puchett [*sic*] to be pregnant." Defendant entered a negotiated plea of guilty to that count and was sentenced to a two-year term of conditional discharge. Defendant moved to withdraw her guilty plea. The trial

court denied the motion and defendant appealed. Because the attorney who represented defendant in connection with her postplea motion failed to properly certify compliance with Illinois Supreme Court Rule 604(d) (eff. Feb. 6, 2013), we remanded 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. Winston*, No. 2-15-0133 (Feb. 8, 2016) (minute order) (quoting *People v. Lindsay*, 239 Ill. 2d 522, 531 (2011)). On remand the trial court again denied defendant's motion to withdraw her guilty plea. In this appeal, defendant argues, firstly, that the record refutes the facially valid Rule 604(d) certificate filed on remand and, secondly, that the hearing held on remand was inadequate. We disagree with the first argument, but we agree with the second. We therefore vacate and remand for further proceedings.

¶ 3 Defendant was arrested on July 31, 2013. She was initially unable to post bond but was released on a recognizance bond on August 19, 2013. She missed several court appearances, however, and when she failed to appear on June 26, 2014, the trial court issued a bench warrant and set bail at $10,000. On July 17, 2014, while in custody, defendant agreed to plead guilty in exchange for a sentence of two years' conditional discharge. As the factual basis for the plea, the prosecutor stated, "If this matter were to proceed to trial, the State would present facts in evidence that the testimony of Khadijah Puckett who would testify that on or about July 31, 2013, the person she identified as being the defendant *** committed a battery on her in that she threw a bottle and books in the face of Khadijah Puckett, Khadijah Puckett to be [*sic*] pregnant at the time ***."

¶ 4 Defendant moved to withdraw her guilty plea and the trial court appointed counsel to represent her in connection with the motion. Counsel filed an amended motion to withdraw defendant's guilty plea on the basis that, "[a]t the time of the entry of the plea Defendant did not fully understand the ramifications of the plea and sentence." According to the motion, defendant's felony conviction "resulted in denial of employment opportunities and rejection of student loan programs." Furthermore, according to the motion, defendant "felt pressured to enter into the plea agreement due to the likelihood of further incarceration in the DeKalb County Jail should she have set the matter for trial. She would not have been able to post the bond to secure her release[.]" At the hearing on the motion, defendant testified that she was 18 years old when she entered her guilty plea. At that time, she was enrolled in a class to prepare for the GED test. Defendant testified that she had class and was scheduled to work the day she entered her plea. She felt pressured to plead guilty in order to be released from custody. Had she remained in custody, she would have lost employment opportunities.

¶ 5 As noted, the trial court denied defendant's motion, defendant appealed, and we remanded the cause to the trial court with instructions that counsel properly certify compliance with Rule 604(d), that counsel be given the opportunity to file a new postplea motion, and that the trial court conduct a new hearing on the motion. On May 18, 2016, defense counsel appeared before the trial court. Counsel stated, "I have not spoken with [defendant] since the motion to withdraw her guilty plea had been denied." Counsel advised the trial court that defendant was "on warrant status on a domestic battery" that was pending before a different judge. The trial court continued the hearing to June 28, 2016, directing that notice be sent to defendant at her last known address.

¶ 6 Defendant was absent from court on June 28, 2016. Defense counsel indicated that he had mailed defendant a copy of the order continuing the case. After reiterating that defendant was on "warrant status" in a domestic battery prosecution, counsel stated, "I have not spoken to [defendant] since the last court date when her original motion was denied, so I don't have any additional contentions or arguments." The record indicates that the trial court reviewed a transcript from July 17, 2014, when defendant entered her guilty plea. While doing so, the court remarked, "I'm looking to see what the original basis was for withdrawing her guilty plea." Defense counsel responded, "If I recall, Judge, the original basis was she did not fully understand the ramifications of the felony convictions in regards to student loans and employment opportunities." After summarizing the proceedings at which defendant entered her plea, the court denied the motion to withdraw.

¶ 7 When defendant entered her 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).

¶ 8 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. We previously remanded this case to the trial court because, although counsel's original certificate stated that counsel had "spoken with the Defendant in person about her contention and desire to withdraw her guilty plea," there was nothing to indicate whether counsel had consulted with defendant about sentencing errors. On remand, counsel filed a new certificate, which stated, "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[.]"

¶ 9 Defendant acknowledges that the certificate filed on remand, which recites the language of Rule 604(d) nearly verbatim, is valid on its face. Nonetheless, defendant argues that the record undermines or belies counsel's certification that he consulted with defendant about sentencing errors. Defendant notes that, when counsel filed the certificate, he had not been in contact with defendant since the first hearing on the motion. Although counsel apparently did not consult with defendant *while the case was on remand*, we are aware of no authority that counsel was required to do so. We remanded because counsel's certificate did not establish that counsel had consulted with defendant about sentencing errors. But "absence of evidence is not evidence of absence." *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 725 F.3d 244, 254 (D.C. Cir. 2013). Thus, the defective certificate was not evidence that counsel had neglected to consult with defendant about sentencing errors. If counsel had not consulted with defendant

about sentencing errors before filing the original Rule 604(d) certificate, counsel was required to do so before filing a new certificate. However, if a proper consultation took place and the original certificate was simply incomplete, counsel could properly correct the defect in the certificate without the need for further consultation with defendant. Because the record does not show that counsel failed to consult defendant properly before filing the original certificate, we cannot say that the record belies the statements in the new certificate.

¶ 10 Having concluded that we may rely on the certificate filed on remand, we now consider whether the *hearing* that occurred on remand was adequate. Like the case before us now, *People v. Porter*, 258 Ill. App. 3d 200 (1994), *People v. Oliver*, 276 Ill. App. 3d 929 (1995), *overruled in part on other grounds by Lindsay*, 239 Ill. 2d 522, and *People v. Tejada-Soto*, 2012 IL App (2d) 110188, were appeals following remands for compliance with Rule 604(d). On remand in *Porter* counsel obtained leave from the trial court to file a Rule 604(d) certificate and then stated, " 'I guess I'm asking basically to file that and then that all the evidence that was heard therein be considered; and again make that motion to withdraw the plea based upon the motion I previously filed.' " *Porter*, 258 Ill. App 3d at 202. The trial court then asked whether counsel was renewing his request that a notice of appeal be filed. *Id.* Counsel said that he was and added, "I'm asking that notice be based on the fact we had a prior hearing and everything was brought forth in that hearing except I failed to file the certificate of merit before that hearing; but I had done everything necessary before that hearing but failed to specifically file the certificate under [Rule 604(d)]." *Id.* We concluded that the original hearing on the defendant's Rule 604(d) motion was a "nullity," inasmuch as "it was tainted by the failure to follow the certification procedure" (*id.* at 204), and that, on remand, it was therefore improper for counsel and the trial

court "merely to rely on matters determined in defendant's prior hearing on his Rule 604(d) motion" (*id.* at 203).

¶ 11 In *Oliver*, we concluded that the proceedings on remand were defective where counsel orally renewed the Rule 604(d) motion but, instead of offering testimony, asked the trial court to rely on the testimony presented at the original hearing. We did not categorically condemn the reliance on prior testimony. We noted, however, that counsel made no effort to restate the prior testimony and that the hearing on remand was treated as nothing more than a formality that would enable the defendant to obtain appellate review. *Oliver*, 276 Ill. App. 3d at 932. Accordingly, we concluded that the hearing was inadequate.

¶ 12 In *Tejada-Soto*, 2012 IL App (2d) 110188, ¶ 14, we cited *Porter* and *Oliver* for the proposition that, on remand for compliance with Rule 604(d), a defendant is entitled to a hearing that is "not a mere charade performed for the purpose of reinstating an appeal." The hearing on remand in *Tejada-Soto* was sufficient even though counsel did not present evidence at the hearing on remand. We observed:

> "Defendant's *** attorney not only submitted a new motion, but offered argument on the motion that referred to defendant's testimony at the prior hearing. Moreover, the trial court indicated that it 'had the opportunity to review the file in its entirety, to review the transcripts.' The court also explained in some detail the basis for its ruling on the motion filed by defendant's *** attorney." *Id.* ¶ 14.

¶ 13 The present case more closely resembles *Porter* and *Oliver* than *Tejada-Soto*. After indicating that he had no *new* arguments to offer in support of defendant's motion, counsel offered an exceedingly brief, incomplete, and unenlightening summary (which was based on counsel's recollection) of the grounds for the original motion. Counsel did not summarize the

evidence offered at the first hearing, and there is nothing to indicate that the trial court recalled or considered *that* evidence. Counsel even failed to acknowledge the additional insufficiency of the evidence argument he put forth orally at the first hearing that had not been part of his written motion to withdraw defendant's guilty plea. To the contrary, the trial court appears to have based its decision solely on review of the hearing at which defendant entered her plea. As in *Porter* and *Oliver*, the proceedings on remand did not reflect the appropriate focus and consideration of defendant's motion.

¶ 14 The State argues, however, that because defendant absented herself from the hearing, we should not undertake review of the adequacy of the hearing. The State relies on our decision in *People v. Wicklund*, 363 Ill. App. 3d 1045 (2006). In that case, the defendant had evidently become a fugitive while the appeal from the denial of his Rule 604(d) motion to reconsider his sentence was pending. This court remanded the case because the assistant public defender representing him had failed to properly certify compliance with Rule 604(d). On remand that attorney was no longer employed by the public defender's office, but she prepared a Rule 604(d) certificate. The defendant's new attorney filed that certificate, but did not file a certificate of her own. The trial court again denied the motion. The defendant argued on appeal, *inter alia*, that counsel's failure to file her own Rule 604(d) certificate necessitated yet another remand. We dismissed the appeal, reasoning as follows:

> "[D]efendant's status as a fugitive makes unobtainable the very relief that he seeks. [Counsel] cannot speak to defendant in order to file a Rule 604(d) certificate, nor can she file a new motion to reconsider sentence, because such actions of necessity require conversation with defendant. Without the ability to communicate with defendant, [counsel] is unable to provide the type of hearing that defendant claims he should have

> received, and the trial court is unable to seriously reconsider the sentence originally imposed in this case.
>
> This court will not allow defendant to use his self-imposed absence as a sword and a shield in this case. A defendant may not impede the administration of justice by absenting himself and then claim benefit from his failure to present himself. [Citation.] It is well established that an appellate court may dismiss the appeal of a criminal defendant who is a fugitive from justice during the pendency of his appeal. [Citation.] Under the 'disentitlement' theory, a defendant's flight during the pendency of an appeal is construed as tantamount to waiver or abandonment of his claims [citation] and ' "disentitles the defendant to call upon the resources of the Court for determination of his claims" ' [citation]. Defendant has impeded the course of this case, *** asking this court for relief that cannot be properly granted in his absence. We find this to be an appropriate case for application of the fugitive dismissal rule[.]" *Id.* at 1047-48.

¶ 15 The decision to dismiss a fugitive's appeal is committed to the reviewing court's discretion. *People v. Taylor*, 247 Ill. App. 3d 321, 323 (1993). In the case before us, defendant listed a home address in De Kalb at the time of her arrest in August 2013. She listed the same address on paperwork filed with the trial court in May 2014. On remand, in May and June 2016, counsel advised the trial court that defendant's whereabouts were unknown. We note, however, that the docketing statement for this present appeal, filed July 19, 2016, lists a Springfield address for defendant. Thus, it is not clear that defendant's whereabouts are *still* unknown, as was the case in *Wicklund*. Furthermore, unlike her counterpart in *Wicklund*, defendant does not complain of an error that was the inevitable result of her absence. As discussed, it appears that counsel had consulted with defendant before losing touch with her. Furthermore, defendant's

absence would not have prevented counsel from presenting a meaningful argument in June 2016 on defendant's motion to withdraw her plea. The circumstances militate against exercising our discretion to dismiss the appeal.

¶ 16 For the foregoing reasons, we vacate the order of the circuit court of De Kalb County denying defendant's motion to withdraw her guilty plea. We remand for a new hearing on the motion.

¶ 17 Vacated and remanded.