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2017 IL App (3d) 150212-U

Order filed July 21, 2017

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2017

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 13th Judicial Circuit, La Salle County, Illinois,
Plaintiff-Appellee,)	
v.)	Appeal No. 3-15-0212
)	Circuit No. 14-CF-264
WILLIAM J. MILIAN,)	
Defendant-Appellant.)	Honorable H. Chris Ryan, Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justice O'Brien concurred in the judgment.
Justice Schmidt dissented.

ORDER

- ¶ 1 *Held:* The March 2016 amendment to Illinois Supreme Court Rule 604(d) (eff. Mar. 8, 2016) applies retroactively, and, therefore, counsel's certificate is deficient.
- ¶ 2 Defendant, William J. Milian, appeals from the denial of his motion to reconsider sentence, arguing that a new Illinois Supreme Court Rule 604(d) certificate needs to be filed and new postplea proceedings held as the filed certificate was not compliant with the amended rule.

We vacate the trial court’s decision on the motion to reconsider and remand for new postplea proceedings.

¶ 3

FACTS

¶ 4

Defendant entered a blind guilty plea to attempted first degree murder (720 ILCS 5/8-4(a), 9-1(a) (West 2014)) and was sentenced to 22 years’ imprisonment. Defense counsel filed a motion to reconsider sentence on February 13, 2015, which was denied on March 27, 2015. Defense counsel filed a Rule 604(d) certificate, which stated:

“I have consulted with the Defendant, *in person* to ascertain his/her contentions of error in the entry of his/her *plea of guilty* in the above-entitled cause.

I have consulted with the Defendant, *in person* to ascertain his/her contentions of error in the *sentence* in the above-entitled cause.

I have examined the trial court file and report of proceedings of the plea of guilty.

I have made any amendments to the motion necessary for adequate presentation of any defects in those proceedings.” (Emphasis in original.)

¶ 5

ANALYSIS

¶ 6

On appeal, defendant argues that defense counsel failed to strictly comply with the certification requirements of Rule 604(d) and requests that we remand the case for new postplea proceedings. Specifically, defendant contends that counsel’s certificate is deficient because it fails to verify that counsel examined the report of proceedings for the sentencing hearing. Defendant admits that the version of the rule in place at the time the certificate was filed did not contain this requirement, but requests that the current version of Rule 604(d) be applied

retroactively. We find that Rule 604(d) is procedural in nature, does not impair a vested right, and does apply retroactively. Because we find that the amendment to Rule 604(d) applies retroactively, we remand for new postplea proceedings as counsel’s certificate does not strictly comply with the amended version of Rule 604(d).

¶ 7 Illinois Supreme Court Rule 604(d) governs the procedures to be followed when a defendant wishes to appeal after pleading guilty. One requirement of Rule 604(d) is that counsel file a certificate averring that he or she has consulted with the defendant about any contentions of error and has reviewed the transcripts. Rule 604(d) demands strict compliance with each element of the certification requirement. *People v. Gonzalez*, 2017 IL App (3d) 160183, ¶ 13; *People v. Janes*, 158 Ill. 2d 27, 33 (1994).

¶ 8 At the time counsel’s certificate was filed, Rule 604(d) stated, in pertinent part:

“The defendant’s attorney shall file with the trial court a certificate stating that the attorney ***, *has examined the trial court file and report of proceedings of the plea of guilty*, ***.” (Emphasis added.) Ill. S. Ct. R. 604(d) (eff. Dec. 11, 2014).

The current version of the rule states:

“The defendant’s attorney shall file with the trial court a certificate stating that the attorney ***, *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*, ***.” (Emphasis added.) Ill. S. Ct. R. 604(d) (eff. Mar. 8, 2016).

In sum, the current version of the Rule 604(d) requires averring that counsel has examined the transcripts of both the plea of guilty and the sentencing hearing, while the rule in effect at the time the certificate was filed only required counsel to aver he or she had examined the transcripts of the plea of guilty.

¶ 9 To determine whether the amended rule applies retroactively, we first consider whether the supreme court stated an explicit intent regarding retroactivity. *People v. Easton*, 2017 IL App (2d) 141180, ¶ 14. As the court did not do so, we next determine whether the rule is procedural or substantive in nature. Statutory amendments and supreme court rules that are procedural in nature and do not impair a vested right may be applied retroactively. *Allegis Realty Investors v. Novak*, 223 Ill. 2d 318, 331 (2006); *People ex rel. Madigan v. Petco Petroleum Corp.*, 363 Ill. App. 3d 613, 621 (2006). A procedural rule “prescribes a method of enforcing rights or involves pleadings, evidence and practice.” *Schweickert v. AG Services of America, Inc.*, 355 Ill. App. 3d 439, 442 (2005).

¶ 10 The Rule 604(d) amendment at issue here added that the attorney had to certify that he or she had examined the report of proceedings from the sentencing hearing. The amendment is clearly procedural, as it dictates the practices a defense attorney must follow when filing a Rule 604(d) certificate. See *People v. Evans*, 2017 IL App (3d) 160019, ¶ 17; *Gonzalez*, 2017 IL App (3d) 160183, ¶ 11; *Easton*, 2017 IL App (2d) 141180, ¶ 17. Further, the amendment does not impair a vested right, but “expand[s] the protections afforded to defendants challenging their sentences.” *Evans*, 2017 IL App (3d) 160019, ¶ 17. Therefore, we find that the amendment may be applied retroactively.

¶ 11 Further, we find the amended Rule 604(d) should be applied retroactively. The supreme court has held that courts should consider whether applying an amendment retroactively would have “inequitable consequences.” *Novak*, 223 Ill. 2d at 331. Applying the amendment, here, would not result in inequitable consequences, but would provide more protection to defendant without requiring too much from counsel.

¶ 12 Our retroactive application of the amended Rule 604(d), here, is consistent with our decisions in *Evans*, 2017 IL App (3d) 160019, and *Gonzalez*, 2017 IL App (3d) 160183. The State attempts to distinguish these cases on a factual basis. We agree with the State that *Evans* and *Gonzalez* concerned slightly different facts in regard to the stage of the proceedings when the amendment was made effective. In *Evans*, defense counsel filed a Rule 604(d) certificate averring that counsel had examined the report of proceedings for the plea of guilty, as we have here. *Evans*, 2017 IL App (3d) 160019, ¶ 7. Rule 604(d) at the time the certificate was filed only required a certificate if a motion to withdraw guilty plea was filed. *Id.* ¶ 13; see Ill. S. Ct. R. 604(d) (eff. Dec. 3, 2015). At the time of appeal, the current version of the rule was in effect, which removed the clause limiting the certification requirement to withdrawal of guilty pleas and added the requirement of examination of the report of proceedings from the sentencing hearing. *Id.* ¶ 17. This court determined that the current version of the rule applied retroactively. *Id.* In *Gonzalez*, defense counsel filed a Rule 604(d) certificate with a motion to reconsider, but Rule 604(d) was amended before the motion to reconsider was heard. *Gonzalez*, 2017 IL App (3d) 160183, ¶¶ 5-8. Relying on our decision in *Evans*, we held that Rule 604(d) applied retroactively and counsel was required to file a new certificate. *Id.* ¶¶ 13-15. Here, Rule 604(d) was amended during the pendency of defendant's direct appeal. Regardless of the differing factual scenarios in each case, the legal principle of the retroactive application of the rule applies equally. Stated another way, having determined that the rule itself applies retroactively, it does not matter when the original certificate was filed or when the amendment was made effective in relation to the stage of the proceedings.

¶ 13 In coming to this conclusion, we reject the State's reliance on *People v. Yarbor*, 383 Ill. App. 3d 676 (2008), for the proposition that retroactive application of Rule 604(d) would impose

new duties on a completed criminal prosecution. The second district rejected the same argument in *People v. Easton*, 2017 IL App (2d) 141180, ¶¶ 16-17. In *Easton*, the court considered the same issue of whether to apply the amended version of Rule 604(d) retroactively on direct appeal. *Id.* ¶ 13. The court considered *Yarbor* and stated that the amendment in question in that case “would [have] impose[d] significant new duties on the State in that all jury verdicts pending on appeal would potentially be subject to reversal and retrial.” *Id.* ¶ 16 (citing *Yarbor*, 383 Ill. App. 3d at 684). The court noted that applying the amended Rule 604(d) retroactively would require “no undertakings of the scale contemplated in *Yarbor*.” *Id.* The rule in *Yarbor* also had a delayed effective date, which indicated that it should be applied prospectively, unlike the amended Rule 604(d), which was effective immediately. *Id.* The court further noted that “the amended rule is purely procedural, and the State cannot plausibly claim to have a vested interest in the continuation of the old rule.” *Id.* ¶ 17. We adopt this same reasoning in rejecting the State’s argument here.

¶ 14 Accordingly, under the amended rule, counsel’s certificate is deficient as it does not state that counsel examined the report of proceedings for the sentencing hearing. Therefore, we remand the cause for “(1) the filing of a [compliant] 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).

¶ 15 Finally, we note that defendant originally argued that *People v. Tousignant*, 2014 IL 115329, “make[s] clear that the Illinois Supreme Court’s intent in drafting Rule 604(d) was to not only require that counsel certify that he consulted with the defendant about errors in the plea and sentence, but that he read the report of proceedings from both the guilty plea and

sentencing.” After our decisions in *Evans* and *Gonzalez* were released, the parties filed supplemental briefs regarding their application. Based on our above holding, we need not consider defendant’s *Tousignant* argument.

¶ 16

CONCLUSION

¶ 17

The judgment of the circuit court of La Salle County is vacated and remanded with instructions.

¶ 18

Vacated and remanded with instructions.

¶ 19

JUSTICE SCHMIDT, dissenting.

¶ 20

Counsel’s certificate strictly complied with the rule in effect at the time it was filed. If the majority is correct, “it does not matter when the original certificate was filed or when the amendment was made effective in relation to the stage of the proceedings.” (*supra* ¶ 12), then the floodgates are open!

¶ 21

I would affirm.