2017 IL App (4th) 150033-U

NO. 4-15-0033

FILED
May 17, 2017
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
MIKAL K. WASHINGTON,	)	No. 12CF2040
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas J. Difanis,
	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Turner and Justice Appleton concurred in the judgment.

ORDER

¶ 1 *Held*: Defense counsel failed to comply with Illinois Supreme Court Rule 604(d) (eff. Dec. 11, 2014).

¶ 2 Defendant, Mikal K. Washington, pleaded guilty but mentally ill to aggravated battery with a firearm (720 ILCS 5/12-3.05(e)(1) (West 2012)) in exchange for a 10-year prison sentence and the dismissal of a charge of attempt (first degree murder) (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2012)). Defendant appealed, and the office of the State Appellate Defender (OSAD) was appointed to represent him. On appeal, OSAD seeks to withdraw as appellate counsel pursuant to *Anders v. California*, 386 U.S. 738 (1976), asserting the appeal presents no meritorious issues for review. OSAD has identified six possible issues for review, including whether defense counsel complied with Illinois Supreme Court Rule 604(d) (eff. Dec. 11, 2014)

when defendant sought to withdraw his guilty plea. Based on our review of the record, we disagree with OSAD and find defense counsel failed to comply with Rule 604(d). We reverse and remand with directions.

¶ 3 I. BACKGROUND

¶ 4 In December 2012, the State charged defendant with attempt (first degree murder) (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2012)) (count I) and aggravated battery with a firearm (720 ILCS 5/12-3.05(e)(1) (West 2012)) (count II). Defendant waived his right to a jury trial in June 2014, and he later pleaded guilty but mentally ill to count II. As part of the fully negotiated plea deal, the State agreed to a 10-year prison sentence and dismissed count I.

¶ 5 During the October 2014 plea hearing, the State provided the following factual basis:

> "Back on December 9, 2012, [defendant] and [his wife] Ms. Femi Fletcher Washington were *** in the process of separating. At about 9:15 p.m. on that night[,] Ms. Washington was giving [defendant] a ride home in her minivan. During the ride home, the defendant brandished a .22 caliber revolver and fired at Ms. Washington[,] striking her in the right side and the right arm."

¶ 6 As part of the factual basis, the parties stipulated to the contents of three mental health evaluations from a psychiatrist and two psychologists. In all three evaluations, the mental health professionals found defendant suffered from multiple disorders, including severe post-traumatic stress disorder stemming from his military service in Iraq and Kuwait. One of the medical evaluations stated defendant was suffering from a "brief psychotic disorder" when he

shot his wife. Another indicated defendant thought he was shooting at a "demon-looking clown," not his wife.

¶ 7 At the conclusion of the plea hearing, the trial court accepted the negotiated plea agreement and sentenced defendant to 10 years' incarceration. The next month, defendant *pro se* filed a "motion to withdraw guilty plea and vacate sentence," stating "there [was] no factual basis to support [a] plea[;] in fact the evidence shows [defendant] was insane at the time of the incident." Following the appointment of counsel, defendant's attorney filed an "amended motion to withdraw plea." In the motion, defendant claimed that his "plea was not voluntary, knowing, and intelligently entered into" and he received "ineffective assistance of counsel." Defendant's attorney attached an undated Rule 604(d) certificate to the "amended motion to withdraw plea." The certificate did not reflect that counsel had consulted with defendant to ascertain contentions of error in the sentencing hearing as required by Rule 604(d).

¶ 8 In January 2015, the trial court held a hearing on defendant's motion to withdraw his guilty plea. During the hearing, the court asked defense counsel for "another" 604(d) certificate, and in response, defense counsel explained "I have a new one *** [that] is word for word out of the rule, so I hope it passes muster." The court accepted the amended 604(d) certificate, stating on the record, "I think [it] will pass muster." Defense counsel's amended 604(d) certificate provides:

> "I, *** appointed counsel for the defendant, hereby certify that I have consulted with the defendant by mail to ascertain contentions of error in the entry of the plea or contentions of error in the sentence, and have examined the trial court file and the 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."

¶ 9 After the trial court accepted the certificate, defense counsel called defendant to testify about his motion to withdraw his guilty plea. Defendant stated that his former attorney, Alfred Ivy, pressured him to "just take a plea." He informed Ivy that he wanted to "take the plea" because "it was [defendant's] understanding that it was going to be a Class 2 versus a Class X." Defendant further explained that he was "rushed to court," and "while the judge was talking," defendant was attempting to "figure out exactly what *** [he] was pleading to."

¶ 10 By contrast, Ivy testified that he never threatened or coerced defendant into accepting a guilty plea. To the contrary, if defendant had asked to proceed to trial, Ivy "probably would have [taken] a deep breath and went to trial." Ivy further testified that he asked the State to reduce the charge from a Class X offense, but the State refused. Ivy also stated he relayed the State's offers to defendant and explained the possible sentence. Ivy confirmed defendant understood—and agreed to—the terms of the plea agreement.

¶ 11 The trial court denied defendant's motion to withdraw his guilty plea, stating that the transcript of the plea hearing belied defendant's claim that he "didn't know what was going on." The court explained, "Ivy is right," there is a "big chance going to trial." The court characterized Ivy's representation as "superb" and observed that he negotiated a "very advantageous sentence for this defendant."

¶ 12 On appeal, OSAD seeks to withdraw, alleging the case presents no meritorious issues for review. OSAD has attached a brief to its motion to withdraw, and the record shows service on defendant. This court granted defendant leave to file additional points and authorities,

but he has not done so.

¶ 13 II. ANALYSIS

¶ 14 On appeal, OSAD identifies six potential issues for review, including whether defense counsel complied with Rule 604(d) when defendant sought to withdraw his guilty plea. Because we find the 604(d) certificate at issue was deficient, we need not address the other issues raised by OSAD.

¶ 15 With respect to the certificate, OSAD contends defense counsel "fully complied with Rule 604(d)." We disagree. The record is clear that defense counsel failed to certify that he consulted with defendant about his contentions of error relating to both his guilty plea *and* his sentence, as required by our supreme court in *People v. Tousignant*, 2014 IL 115329, ¶ 20, 5 N.E.3d 176.

¶ 16 When defense counsel filed the amended Rule 604(d) certificate in January 2015, Rule 604(d) required, in pertinent part:

> "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." (Emphasis added.) Ill. S. Ct. R. 604(d) (eff. Dec. 11, 2014).

¶ 17 Defendant's amended certificate states as follows:

> "I, *** appointed counsel for the defendant, hereby certify that I have

> consulted with the defendant by mail to ascertain contentions of error in the entry of the plea *or* contentions of error in the sentence, and have examined the trial court file and the 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 added.)

¶ 18 Though defense counsel's amended certificate tracks the language of Rule 604(d) in effect at the time, our supreme court had interpreted the language in such a way that mirroring the phrasing of the rule in a certificate results in a deficient certificate. See *Tousignant*, 2014 IL 115329, ¶ 20, 5 N.E.3d 176. In *Tousignant*, the court held that the word "or" in Rule 604(d) is considered to mean "and." *Id.* Put differently, in this limited context, "or" assumed the conjunctive meaning of the word "and." *Id.* ¶ 20. Based on the court's interpretation of the rule, "counsel is required to certify that he has consulted with the defendant to ascertain defendant's contentions of error in the sentence *and* the entry of the plea of guilty." (Emphasis in original.) (Internal quotation marks omitted.) *Id.* ¶ 20. The court observed that "the rule's certificate requirement is meant to enable the trial court to ensure that counsel has reviewed the defendant's claim and considered *all* relevant bases for the motion to withdraw the guilty plea or to reconsider the sentence." (Emphasis in original.) *Id.* ¶ 16.

¶ 19 Based on *Tousignant*, this court has held that Rule 604(d) certificates that state counsel has ascertained defendant's contentions of error in the sentence *or* the entry of the plea of guilty are deficient. See *People v. Hobbs*, 2015 IL App (4th) 130990, ¶¶ 33-34, 42 N.E.3d 471; see also *People v. Mason*, 2015 IL App (4th) 130946, ¶ 13, 37 N.E.3d 927. We note that Rule 604(d) has since been amended to reflect the supreme court's interpretation in *Tousignant*,

with the replacement of "or" with "and." See Ill. S. Ct. R. 604(d) (eff. Mar. 8, 2016).

¶ 20 We conclude defendant's amended Rule 604(d) certificate is deficient. As discussed, it states that counsel consulted with defendant to ascertain only "contentions of error in the sentence *or* the entry of the plea of guilty." Instead, the certificate must state that counsel consulted with defendant regarding contentions of error in the sentence *and* the entry of the guilty plea. Accordingly, we reverse and remand with directions.

¶ 21 III. CONCLUSION

¶ 22 For the reasons stated, we reverse the trial court's denial of the motion to withdraw defendant's guilty plea and remand this case with directions (1) for defense counsel to file a new Rule 604(d) certificate; (2) to allow defendant the opportunity to file a new motion to withdraw his guilty plea and/or reconsider the sentence; and (3) for a new hearing on defendant's postplea motion.

¶ 23 Reversed, cause remanded with directions.