

NOTICE

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

FILED

November 30, 2017
Carla Bender
4th District Appellate
Court, IL

2017 IL App (4th) 170116-U

No. 4-17-0116

IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Macon County
WILLIAM J. BRUNO,)	No. 14CF138
Defendant-Appellant.)	
)	Honorable
)	Thomas E. Griffith Jr.,
)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Harris and Appleton concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court remanded for compliance with Illinois Supreme Court Rule 604(d) (eff. Feb. 6, 2013).

¶ 2 Defendant, William J. Bruno, appeals from the trial court’s denial of his motion to reduce his sentence, arguing the matter must be remanded for new postplea proceedings as his counsel failed to properly certify compliance with Illinois Supreme Court Rule 604(d) (eff. Feb. 6, 2013). We agree and remand.

¶ 3 I. BACKGROUND

¶ 4 In January 2014, the State charged defendant by information with aggravated domestic battery (720 ILCS 5/12-3.3 (West 2012)). In March 2014, defendant entered an open plea of guilty. Following an April 2014 sentencing hearing, the trial court sentenced defendant to

12 years' imprisonment.

¶ 5 In May 2014, defendant filed a motion to reduce his sentence, which was later amended. Defendant's counsel did not file a certificate of compliance with Illinois Supreme Court Rule 604(d) (eff. Feb. 6, 2013). Following a hearing, the trial court denied defendant's amended motion to reduce his sentence. Defendant appealed.

¶ 6 In October 2014, this court granted defendant's agreed motion for summary remand for compliance with Illinois Supreme Court Rule 604(d) (eff. Feb. 6, 2013).

¶ 7 In November 2014, defendant, on remand, filed a motion to reduce his sentence. Defendant's counsel filed a Rule 604(d) certificate, which averred, in part, he "[c]onsulted with *** [d]efendant either by mail or in person to ascertain [d]efendant's contentions of error in the sentence or entry of plea of guilty." Following a hearing, the trial court denied defendant's motion to reduce his sentence. No appeal was filed.

¶ 8 In July 2016, defendant filed a *pro se* postconviction petition. In his petition, defendant alleged, in part, (1) his counsel failed to explain the need to file an appeal after the proceedings on remand concluded, and (2) the Rule 604(d) certificate filed on remand was deficient under *People v. Tousignant*, 2014 IL 115329, ¶ 20, 5 N.E.3d 176. Due to these errors, defendant requested "[t]he reinstatement of [his] direct appeal."

¶ 9 In August 2016, the trial court appointed counsel to assist defendant. At a status hearing, the court suggested it "might be easier to resolve this situation for the State to agree to the late filing for then the sentence to go up on appeal again."

¶ 10 At a September 2016 status hearing, defendant's appointed counsel indicated he spoke with the State regarding an "agreed appeal" but was concerned with such an approach as

“it would go back up and come right back” due to the noncompliant Rule 604(d) certificate. The trial court suggested a new Rule 604(d) certificate be filed and then it would direct the circuit clerk to file a late notice of appeal. In response, defense counsel noted: “Something along that line or agreed post[]conviction with a late appeal as the remedy so that it would go up.”

¶ 11 In October 2016, defendant, through appointed counsel, filed an amended postconviction petition. In his petition, defendant argued, in part, his counsel provided ineffective assistance by failing to file both a proper Rule 604(d) certificate and a notice of appeal from the denial of his motion to reduce his sentence. Defendant requested, citing *People v. Ross*, 229 Ill. 2d 255, 271, 891 N.E.2d 865, 875-76 (2008), he be granted “leave to file a late notice of appeal.”

¶ 12 At a February 6, 2017, status hearing, the State informed the trial court: “[W]e are going to be in agreement with the amended petition for post[]conviction relief so that [defendant] can file a late notice of appeal.” Following the State’s statement, the court stated:

“So let’s try this for a docket entry. *** Based on the agreement of counsel, the defendant’s amended petition for post[]conviction relief is allowed to the extent the defendant shall be allowed to appeal his sentence to the Illinois Appellate Court. Show: Circuit clerk directed to file written notice of appeal on defendant’s behalf within 30 days of today’s date.”

The court then inquired as to whether defense counsel had anything to add, and defense counsel stated: “No. That’s what the petition had requested, Your Honor. I’ve spoken with my client, and that’s all he is asking for is for the Appellate Court to be able to look at it.”

¶ 13 On February 7, 2017, the circuit clerk filed a notice of appeal on defendant's behalf. The notice of appeal provided the nature of the order appealed from was the "[s]entence." On February 24, 2017, defendant, through appellate counsel, filed an amended notice of appeal. The amended notice of appeal provided the nature of the order appealed from was the "[c]onviction, [s]entence, and [r]uling on [p]ost[] [c]onviction [p]etition." The State did not object to the filing of the amended notice of appeal.

¶ 14 This appeal followed.

¶ 15 II. ANALYSIS

¶ 16 On appeal, defendant contends we should remand for additional postplea proceedings as his counsel failed to properly certify compliance with Illinois Supreme Court Rule 604(d) (eff. Feb. 6, 2013).

¶ 17 A. Jurisdiction

¶ 18 The State initially asserts this court lacks jurisdiction to order a Rule 604(d) remand. Specifically, the State contends defendant's (1) postconviction remedy was limited to appealing his sentence; and (2) February 24, 2017, amended notice of appeal is a nullity because it was not filed within 30 days of the imposition of his sentence or within the 30-day period after the end of the tolling prompted by the denial of his motion to reduce his sentence on remand.

¶ 19 The State asserts defendant's postconviction remedy was limited to appealing his sentence. In *Ross*, 229 Ill. 2d at 271, 891 N.E.2d at 876, our supreme court held a proper remedy where a defendant demonstrates his counsel was ineffective for failing to file a notice of appeal is to grant leave to file a late notice of appeal. The court concluded such a remedy protects a defendant's constitutional right to the direct review of his or her conviction and sentence by an

appellate panel. *Id.* at 269, 891 N.E.2d at 874; see also Ill. Const. 1970, art. VI, § 6. Here, it is undisputed defendant was precluded from a direct review of his conviction and sentence. In his amended postconviction petition, defendant requested leave to file a late notice of appeal from the denial of his motion to reduce his sentence. The State indicated it was in “agreement with the amended petition for post[.]conviction relief so that [defendant] can file a late notice of appeal.” The record does not show any agreed limitation to, or waiver of, the issues defendant could raise on appeal. Rather, defendant was, in effect, placed back in the position he would have been had a notice of appeal properly been filed following the denial of his motion to reduce his sentence. We find the trial court’s comment after the parties agreed to the late filing of a notice of appeal insufficient to serve as an intended restriction to defendant’s constitutional right to a direct review of his conviction and sentence by an appellate panel.

¶ 20 The State also asserts the February 24, 2017, amended notice of appeal is a nullity. The State does not dispute, however, the February 7, 2017, notice of appeal was sufficient to serve as a late notice of appeal from the denial of defendant’s motion to reduce his sentence. Because the amended notice of appeal was filed within 30 days of the trial court’s order allowing defendant leave to file a late notice of appeal, we find it was timely filed and sufficient to confer jurisdiction over any issue relating to defense counsel’s Rule 604(d) certificate. See Ill. S. Ct. R. 606(b) (eff. Jan. 1, 2015); Ill. S. Ct. R. 303(b)(2) (eff. Jan. 1, 2015).

¶ 21 In sum, we conclude we have jurisdiction to consider the denial of defendant’s motion to reduce his sentence and all matters associated with that ruling, including compliance with the certification requirement of Illinois Supreme Court Rule 604(d) (eff. Feb. 6, 2013).

¶ 22 B. Defense Counsel’s Rule 604(d) Certificate

¶ 23 Defendant contends, and the State does not dispute, his counsel’s Rule 604(d) certificate is deficient. We agree. The Rule 604(d) certificate fails to indicate counsel consulted with defendant to ascertain his contentions of error in both his sentence *and* his guilty plea. See *People v. Tousignant*, 2014 IL 115329, ¶ 20, 5 N.E.3d 176 (“[C]ounsel 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.)); *People v. Hobbs*, 2015 IL App (4th) 130990, ¶ 34, 42 N.E.3d 471 (finding *Tousignant* requires “defense counsel to certify he or she has discussed with a defendant his or her contentions of error in the sentence *and* the entry of the plea of guilty” (Emphasis in original.)); *People v. Mason*, 2015 IL App (4th) 130946, ¶ 13, 37 N.E.3d 927 (“Rule 604(d)’s verbatim language *** does not precisely show compliance with Rule 604(d) as explained by our supreme court in *Tousignant*.”).

¶ 24 C. Second Remand

¶ 25 Despite defense counsel’s deficient Rule 604(d) certificate, the State contends defendant is not entitled to a second remand under *People v. Shirley*, 181 Ill. 2d 359, 369, 692 N.E.2d 1189, 1194 (1998). Specifically, the State asserts (1) defendant’s postconviction remedy is limited to appealing his sentence, and (2) he already received two full chances to have his sentence reduced. For the reasons addressed above, we reject the State’s suggestion the record shows any limitation was placed on defendant’s constitutional right to a direct review of his conviction and sentence by an appellate panel. Further, unlike the situation in *Shirley*, we cannot say another remand would amount to an empty and wasteful formality where counsel’s Rule 604(d) certificate fails to establish he consulted with defendant regarding his contentions of error

in the sentence *and* the entry of the plea of guilty. We find it necessary for the matter to be remanded for compliance with Rule 604(d).

¶ 26

III. CONCLUSION

¶ 27 We remand the matter for (1) the opportunity to file a new motion to withdraw the guilty plea and/or reconsider the sentence, (2) the filing of a corrected Rule 604(d) certificate, and (3) a new hearing on defendant's postplea motion.

¶ 28

Cause remanded with directions.