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).

2018 IL App (4th) 160362-U

NO. 4-16-0362

FILED
June 5, 2018
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Coles County
PAUL A. TART,	)	No. 16CF6
Defendant-Appellant.	)	
	)	Honorable
	)	Teresa Kessler Righter
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices DeArmond and Cavanagh concurred in the judgment.

ORDER

¶ 1 *Held*: The office of the State Appellate Defender's motion to withdraw as counsel on appeal pursuant to *Anders v. California*, 386 U.S. 738 (1967), is allowed, and defendant's conviction and sentence are affirmed.

¶ 2 In March 2016, defendant, Paul A. Tart, entered an open guilty plea to the State's charge of theft by deception of more than $10,000 (720 ILCS 5/16-1(a)(2) (West 2014)). On April 1, 2016, the trial court sentenced defendant to six years in prison to be served consecutively to defendant's sentence in case No. 13-CF-391. This appeal followed.

¶ 3 The office of the State Appellate Defender (OSAD) filed a motion for leave to withdraw as defendant's counsel on appeal pursuant to *Anders v. California*, 386 U.S. 738 (1967), arguing any request for review in this case is meritless. This court notified defendant of OSAD's motion to withdraw and granted defendant leave to file a response to OSAD's motion by March 23, 2018. Defendant did not file a response. We grant OSAD's motion to withdraw as

counsel on appeal and affirm defendant's conviction and sentence.

¶ 4 I. BACKGROUND

¶ 5 On January 6, 2016, the State charged defendant by information with one count of theft by deception of over $10,000 (720 ILCS 5/16-1(a)(2) (West 2014)) from Thomas Logue, Sr. The information indicated this was a Class 2 felony and any sentence would be consecutive to defendant's sentence in Coles County case No. 13-CF-391.

¶ 6 On January 11, 2016, the trial court held a joint hearing on case Nos. 16-CF-6 and 13-CF-391. Logue, Sr., the alleged victim in case No. 16-CF-6, was present at the hearing. Logue, Sr., who is an attorney, had been representing defendant in case No. 13-CF-391. The court noted Logue, Sr., had filed a motion for leave to withdraw as defendant's counsel in case No. 13-CF-391, which the court granted. The court then appointed the public defender to represent defendant in both cases.

¶ 7 On March 7, 2016, defendant's attorney noted defendant would be entering an open guilty plea in case No. 16-CF-6. The court admonished defendant he would be pleading guilty to a Class 2 felony, which had a possible sentence of three to seven years in prison to run consecutively to any sentence imposed in case No. 13-CF-391 and carried a fine of up to $25,000. The court also told defendant he could still have either a jury or bench trial where the State would be required to prove his guilt beyond a reasonable doubt. At trial, he would be represented by counsel, could confront witnesses against him, present evidence in his defense, and call witnesses on his behalf. The court also told defendant he had the right to testify but could not be forced to do so. Defendant stated he understood his rights and was voluntarily waiving those rights by pleading guilty.

¶ 8 The State offered the following factual basis for defendant's guilty plea:

> "[F]rom July through December of last year, [defendant] approached the victim in this case, Tom Logue, Sr., on multiple occasions to request a loan of money. He informed Mr. Logue, Sr., that [defendant's] father had recently passed away and [defendant] would be receiving a large inheritance, but he just needed a little bit of money to buy time until he could get that inheritance. This continued over a period of almost six months. In total, bank records have shown the amount of $30,711.70, having been loaned to [defendant] on several occasions in various sums.
>
> Officers investigating learned then that not only was [defendant] not due a large inheritance, but [defendant's] father is, in fact, alive and well currently, at this time. Investigators have spoken with [defendant's] father.
>
> When speaking to [defendant] during this investigation, [defendant] did admit that there was no inheritance coming and that what he had done was quote [']morally wrong,['] and that the line that he had given to Mr. Logue, Sr., in order to get the loan was—in [defendant's] words—[']bullshit.['] And I think that's the basis, Your Honor."

Defense counsel stated his client stipulated the amount at issue was over $10,000, which meant he was guilty of the charge, but did not reach $30,000. The court found a factual basis for the guilty plea existed.

¶ 9 In response to the trial court's questions, defendant stated his guilty plea was not the result of force, threats, or promises, and he was not on any kind of medication that affected his ability to understand the proceedings or his ability to make decisions. Defendant stated he was 34, had gone to college for two years, and could read and write. He also stated his plea was

voluntary and understood he could continue to plead not guilty. Defendant indicated he still wished to plead guilty and entered a guilty plea in case No. 16-CF-6. The court accepted defendant's plea.

¶ 10 The trial court then questioned defendant regarding his prior guilty plea in case No. 13-CF-391 because he was now represented by a different attorney. Defendant noted he had an opportunity to confer with his new attorney about the prior guilty plea and was comfortable with the prior plea. Defendant stated he was not planning to file anything directed toward the guilty plea in case No. 13-CF-391.

¶ 11 The trial court held defendant's sentencing hearing on April 1, 2016. The parties had an agreement as to restitution in both this case ($29,883.45) and case No. 13-CF-391 ($2,407.54). The parties also agreed defendant was entitled to 253 days' credit for time served. The court sentenced defendant to five years in prison with credit for 253 days served in case No. 13-CF-391 and imposed a $1,265 fine plus court costs and restitution in the amount of $2,407.54. The court specifically ordered defendant to pay a $100 VCVA fine, a $5 drug court fine, and a $30 CASA fee. In this case (case No. 16-CF-6), the court sentenced defendant to a consecutive six years in prison and ordered defendant to pay court costs, a $100 VCVA fine, a $5 drug court fine, a $30 CASA fee, and $29,883.45 in restitution.

¶ 12 On April 12, 2016, defendant filed a motion to reconsider sentence. On May 4, 2016, defendant's attorney filed an Illinois Supreme Court Rule 604(d) certificate. See Ill. S. Ct. R. 604(d) (eff. Mar. 8, 2016). On May 9, 2016, the trial court denied the motion to reconsider sentence

¶ 13 This appeal followed.

¶ 14 II. ANALYSIS

¶ 15 OSAD noted it considered several potential issues to raise on appeal prior to filing its motion to withdraw in this case, including the following: (1) whether it was proper for Thomas Logue, Sr., to testify in aggravation at defendant's sentencing hearing; (2) whether the court failed to give sufficient weight to mitigating factors at sentencing; and (3) whether post-plea counsel strictly complied with Supreme Court Rule 604(d). Based on our examination of the record, we conclude, as has OSAD, that an appeal in this cause would be meritless.

¶ 16 A. Attorney Logue's Testimony

¶ 17 We first consider whether an argument on the propriety of Attorney Thomas Logue, Sr., testifying at defendant's sentencing hearing would be frivolous. As previously stated, Attorney Logue, Sr., was the victim in case No. 16-CF-6 and was representing defendant in case No. 13-CF-391 at the time of the offense in this case. After the charges were filed in this case, Logue, Sr., moved to withdraw as defendant's counsel in case No. 13-CF-391, which the trial court allowed.

¶ 18 Appellate counsel stated any argument Logue, Sr., should not have testified at defendant's sentencing hearing would be frivolous because Logue, Sr., had no *per se* conflict of interest and did not reveal any confidential information. Our supreme court has stated a *per se* conflict of interest exists where (1) defense counsel had a contemporary or prior association with the victim, the prosecution, or an entity assisting the prosecution, (2) contemporaneously represented a prosecution witness, or (3) as a former prosecutor had been personally involved in prosecuting the defendant. *People v. Fields*, 2012 IL 112438, ¶ 18, 980 N.E.2d 35. It does not appear Logue, Sr., was ever defendant's attorney in this case, and Logue, Sr., withdrew from representing defendant in case No. 13-CF-391 within five days of defendant being charged in this case. When Logue, Sr., testified against defendant at the sentencing hearing, he was no

longer defendant's attorney in any case, only offered testimony about defendant's misconduct against him, and did not reveal any confidential information he may have acquired while representing defendant. We agree with appellate counsel this potential argument has no merit.

¶ 19 B. Mitigating Factors in Sentencing

¶ 20 We next consider whether an argument regarding the trial court's consideration of mitigating factors in this case would be fruitless. Absent contrary evidence, trial courts are presumed to have considered mitigating factors presented to the court. *People v. Payne*, 294 Ill. App. 3d 254, 260, 689 N.E.2d 631, 635 (1998). In this case, the court noted it had considered all the statutory factors in aggravation and mitigation. Further, the court did not sentence defendant to the statutory maximum. We agree with appellate counsel this argument would be fruitless.

¶ 21 C. Supreme Court Rule 604(d)

¶ 22 We next consider whether a meritorious argument could be made defendant's postplea counsel failed to strictly comply with Illinois Supreme Court Rule 604(d) (eff. Mar. 8, 2016). Rule 604(d) requires postplea counsel to certify he or she

> "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).

We agree this argument would be fruitless as defendant's postplea counsel filed his certificate of compliance, which met the requirements of Rule 604(d), prior to defendant's notice of appeal. *In re H.L.*, 2015 IL 118529, ¶ 25, 48 N.E.3d 1071.

¶ 23 III. CONCLUSION

¶ 24 For the reasons stated, we grant counsel's motion to withdraw and affirm the trial court's judgment.

¶ 25 Affirmed.