

NOTICE
Decision filed 09/13/18. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2018 IL App (5th) 160076-U

NO. 5-16-0076

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	St. Clair County.
)	
v.)	No. 09-CF-1299
)	
MICHAEL WILLIAMS,)	Honorable
)	John Baricevic,
Defendant-Appellant.)	Judge, presiding.

JUSTICE OVERSTREET delivered the judgment of the court.
Justices Welch and Moore concurred in the judgment.

ORDER

- ¶ 1 *Held*: Cause remanded for further proceedings where trial counsel failed to strictly comply with Supreme Court Rule 604(d)'s certificate requirement.
- ¶ 2 In November 2009, the State charged the defendant, Michael Williams, with two counts of armed robbery (720 ILCS 5/18-2(a)(4) (West 2008)) and two counts of aggravated battery with a firearm (*id.* § 12-4.2(a)(1)). The charges stemmed from an incident during which the defendant and an accomplice both shot and injured a Cahokia man after stealing his wallet. The State later dismissed one of the two armed robbery counts.

¶ 3 In March 2011, the defendant entered a fully negotiated plea of guilty to both counts of aggravated battery with a firearm. In exchange for the defendant's plea, the State dismissed the remaining armed robbery count and recommended that consecutive 10-year sentences be imposed on the defendant's convictions. Before entering his plea, the defendant was fully admonished pursuant to Illinois Supreme Court Rule 402(a) (eff. July 1, 1997). After accepting the plea, the trial court sentenced the defendant in accordance with the parties' agreement.

¶ 4 The defendant subsequently filed a timely *pro se* motion to withdraw guilty plea. See Ill. S. Ct. R. 604(d) (eff. July 1, 2006). The motion alleged, *inter alia*, that trial counsel had coerced the defendant into pleading guilty. The trial court denied the defendant's *pro se* motion following a hearing at which the defendant represented himself. In August 2012, we vacated the trial court's judgment and remanded the cause for further proceedings on the grounds that the court had failed to advise the defendant that he had the right to have counsel represent him on his motion and had failed to inquire as to whether he wished to waive that right. *People v. Williams*, 2012 IL App (5th) 110144-U.

¶ 5 In February 2013, appointed counsel filed a motion to withdraw guilty plea on the defendant's behalf and an Illinois Supreme Court Rule 604(d) certificate. See Ill. S. Ct. R. 604(d) (eff. Feb. 6, 2013). The motion alleged that the defendant's plea had been involuntarily entered due to trial counsel's ineffectiveness. Following a hearing, the trial court entered a written order denying the motion. In July 2013, we vacated the trial court's judgment and remanded the cause for further proceedings on the grounds that

appointed counsel's 604(d) certificate was defective. *People v. Williams*, No. 5-13-0148 (2013) (unpublished summary order under Illinois Supreme Court Rule 23(c)). Specifically, we remanded for "(1) the filing of a [new] Rule 604(d) certificate, (2) the filing of a new motion to withdraw the guilty plea and/or reconsider the sentence, if [the defendant] so wishes or if counsel concludes that a new motion is necessary, and (3) a hearing on any new motion." *Id.* ¶ 9.

¶ 6 In August 2015, appointed counsel filed a new motion to withdraw guilty plea on the defendant's behalf and a new 604(d) certificate. See Ill. S. Ct. R. 604(d) (eff. Dec. 11, 2014). The 604(d) certificate stated, in pertinent part, that counsel had "consulted with the defendant either by mail or in person to ascertain the defendant's contentions of error in the sentence *and/or* plea of guilty." (Emphasis added.)

¶ 7 In November 2015, the trial court denied the defendant's new motion to withdraw guilty plea following a hearing. On appeal from that judgment, the defendant argues that the cause must be remanded again because appointed counsel's new 604(d) certificate was defective given its use of the phrase "and/or." We agree.

¶ 8 Counsel must strictly comply with Illinois Supreme Court Rule 604(d)'s certificate requirement. *People v. Janes*, 158 Ill. 2d 27, 35 (1994). Here, under the version of Rule 604(d) that was in effect when appointed counsel filed his certificate in August 2015, counsel was required to certify that he had consulted with the defendant "to ascertain defendant's contentions of error in the sentence *or* the entry of the plea of guilty." (Emphasis added.) Ill. S. Ct. R. 604(d) (eff. Dec. 11, 2014). In *People v. Tousignant*, 2014 IL 115329, however, our supreme court held that despite the rule's use of the word

“or,” strict compliance required counsel to certify that “he ha[d] 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.) *Id.* ¶ 20. The court explained that requiring counsel to certify that he had consulted with the defendant about “*both* types of error” would better ensure that counsel had considered all relevant bases for the defendant’s motion, thus “enabling the trial court to address and correct any improper conduct or errors of the trial court that may have produced the guilty plea.” (Emphasis in original.) *Id.* ¶ 19. This requirement applies regardless of whether a defendant’s plea was fully negotiated. See *People v. Martell*, 2015 IL App (2d) 141202, ¶ 19; *People v. Gillespie*, 2017 IL App (1st) 152351, ¶¶ 10-12.

¶ 9 Although Rule 604(d) has since been amended to reflect the supreme court’s holding in *Tousignant* (see Ill. S. Ct. R. 604(d) (eff. Dec. 3, 2015) (replacing “or” with “and”)), *Tousignant* was nevertheless controlling precedent when appointed counsel filed his new 604(d) certificate in the present case (see, e.g., *People v. Jordan*, 2016 IL App (3d) 140262, ¶ 11; *People v. Mason*, 2015 IL App (4th) 130946, ¶ 13). Because “and/or” is ambiguous (see *In re Marriage of Lima*, 265 Ill. App. 3d 753, 757 (1994)), counsel did not certify that he had consulted with the defendant about “*both* types of error” (*Tousignant*, 2014 IL 115329, ¶ 19). As a result, counsel’s certificate does not strictly comply with *Tousignant*’s “and” requirement, and we must again vacate the trial court’s judgment and remand for (1) the filing of a new Rule 604(d) certificate; (2) the opportunity to file a new motion to withdraw the guilty plea and/or reconsider sentence, if the defendant wishes or if counsel concludes that a new motion is necessary; and (3) a

hearing on any new motion. See *People v. Lindsay*, 239 Ill. 2d 522, 531 (2011). “The certificate of counsel shall be prepared by utilizing, or substantially adopting the appearance and content of, the form provided in the Article VI Forms Appendix.” Ill. S. Ct. R. 604(d) (eff. July 1, 2017).

¶ 10 Order vacated; cause remanded with directions.