2019 IL App (2d) 180140-U
No. 2-18-0140
Order filed February 1, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. MARK V. MALCHERT, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 15-CF-750 Honorable John J. Kinsella, Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices McLaren and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: On our initial Rule 604(d) remand, there was a sufficient "hearing" on defendant's motion to withdraw his plea: the parties stipulated to the evidence and the arguments at the first hearing, and the trial court, evidently conversant with the transcript of that hearing, entered a new (though consistent) ruling.

¶ 2 Defendant, Mark V. Malchert, pleaded guilty to retail theft (720 ILCS 5/16-25(a)(1) (West 2014)) and was sentenced to 30 days in jail and 24 months' probation. He moved to withdraw his plea and vacate the judgment. The assistant public defender who filed the motion recused herself. After an evidentiary hearing at which defendant was represented by another assistant public defender, the trial court denied the motion. On appeal, we held that defendant

was entitled to new postjudgment proceedings because the attorney who represented him at the hearing did not file a certificate of compliance with Illinois Supreme Court Rule 604(d) (eff. July 1, 2017). We vacated the order denying defendant's motion and remanded the cause for postjudgment proceedings in compliance with Rule 604(d). *People v. Malchert*, 2017 IL App (2d) 150777-U.

¶ 3 On remand, defendant's attorney filed a Rule 604(d) certificate and a postjudgment motion that duplicated the earlier one. Both parties declined to argue the motion, and the trial court denied it. Defendant timely appealed.

¶ 4 On appeal, defendant contends that a second remand is required because the proceedings on remand were insufficient. We affirm.

¶ 5 I. BACKGROUND

¶ 6 Defendant was charged with committing retail theft by taking 12 bottles of beer, valued at $9.99, from a supermarket. The charge was a Class 3 felony because of his prior convictions (725 ILCS 5/16-25(f)(2) (West 2014)). On April 28, 2015, at a hearing to review bail, defendant appeared with Robert Gifford, an assistant public defender. Gifford said that he was appearing "on behalf of Ruth Walstra who represent[ed] [defendant]." On May 11, 2015, defendant entered a negotiated plea of guilty. Per the agreement, the court sentenced him to 30 days in jail and 24 months' probation.

¶ 7 On June 30, 2015, Walstra moved to withdraw defendant's guilty plea and vacate the judgment. The motion alleged that defendant had pleaded guilty without understanding the consequences. Walstra filed a Rule 604(d)-compliant certificate. Gifford did not file a Rule 604(d) certificate.

¶ 8 On July 22, 2015, the court heard defendant's motion. Gifford represented defendant. After hearing several witnesses, the court denied the motion. Defendant filed a timely appeal.

¶ 9 On appeal, we held that defendant was entitled to new postjudgment proceedings because Gifford, who had represented him at the hearing on his motion, had not filed a certificate of compliance with Rule 604(d). We vacated the order denying defendant's postjudgment motion, and we remanded the cause for " '(1) the filing of a [valid] 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.' " *Malchert*, 2017 IL App (2d) 150777-U, ¶ 22 (quoting *People v. Lindsay*, 239 Ill. 2d 522, 531 (2011)).

¶ 10 On remand, the following occurred. On December 19, 2017, at a hearing, the judge indicated that he had read our order, and Gifford requested a continuance to draft the new motion. On February 6, 2018, Gifford filed a motion to withdraw the guilty plea and vacate the judgment, accompanied by a Rule 604(d) certificate. The motion was essentially identical to the one that Walstra had filed. The record shows that Gifford attached copies of transcripts from prior proceedings, including the July 22, 2015 hearing to the motion. The record also shows that the notice of motion was sent to the trial court on February 6, 2018.

¶ 11 On February 23, 2018, the court held a hearing. Gifford briefly summarized the history of the case and stated that it had been remanded "for the sole purpose of proper compliance with [Rule 604(d)]." He added that he had filed the new motion and the Rule 604(d) certificate "after [he] had a conversation with [defendant]" and had "also attached copies of previous transcripts, including the hearing that took place in front of this Court previously." Gifford requested that, unless the State objected, he be allowed to file the motion, "which allege[d] the same bases that were previously alleged," and the court "proceed to [a] hearing on that motion by way of

stipulation to the prior hearing." The court allowed Gifford to file the motion and the Rule 604(d) certificate stating that he had seen the new 604(d) certificate "in the packet I have before me." The hearing continued:

"THE COURT: Now we are in compliance with the procedural requirements.

The same issue is then back before me on the motion to withdraw. The [Rule] 604(d) certificate does not change any of the facts or circumstances, presumably I will entertain any arguments that either side make [*sic*]. I am presuming that I will rule consistent [*sic*] with my ruling in the past.

MR. GIFFORD: Right.

MR. CATIZONE [assistant state's attorney]: The parties would agree with that, Judge.

THE COURT: All right. Do you wish to make any additional argument in support of your motion to withdraw the plea?

MR. GIFFORD: I do not, Judge. Every argument that I chose to make I made at the prior hearing, and it's included in that transcript.

THE COURT: Does the State want to the [sic] offer any response?

MR. CATIZONE: No additional argument. We would rest on the argument in the transcript, Judge.

THE COURT: Consistent with my previous ruling and now in compliance with [Rule] 604(d), the Court will deny the motion and inform the defendant that he has the right to appeal that ruling."

Defendant timely appealed.

¶ 12 III. ANALYSIS

¶ 13 On appeal, defendant contends that the proceedings on remand were too "perfunctory" to comply with several opinions of this court. See *People v. Fricks*, 2017 IL App (2d) 160493; *People v. Tejada-Soto*, 2012 IL App (2d) 110188; *People v. Whitmore*, 313 Ill. App. 3d 117 (2000); *People v. Oliver*, 276 Ill. App. 3d 929 (1995), *overruled in part*, *Lindsay*, 239 Ill. 2d 522; *People v. Porter*, 258 Ill. App. 3d 200 (1994). He argues that these opinions require a trial court on a Rule 604(d) remand to consider the defendant's postjudgment motion *de novo* on its merits and not to treat the proceeding as "merely a formality to facilitate review by this court" (*Oliver*, 276 Ill. App. 3d at 932) of the contentions that he had raised in the original hearing. For the reasons that follow, we disagree that these opinions require a remand here.

¶ 14 Compliance with a supreme court rule is reviewed *de novo*. *People v. Herrera*, 2012 IL App (2d) 110009, ¶ 10.

¶ 15 We summarize the pertinent case law on Rule 604(d) remands. In *Porter*, on remand, the defendant's attorney filed a Rule 604(d) certificate and then asked the trial court to reconsider the original postjudgment motion in light of the evidence at the hearing thereon. The defendant was not present. The court summarily denied the motion and ascertained that the defendant's attorney wished to appeal. *Porter*, 258 Ill. App. 3d at 202. We held that this "rather perfunctory proceeding" (*id.*) did not fulfill our mandate or the rule; because the defects in the original postjudgment proceeding made it a "nullity," the court and the parties "should not have relied on matters determined in the prior hearing" (*id.* at 204). Therefore, we remanded the cause and ordered the court to allow the defendant both to file a new postjudgment motion and to have a new hearing (and to decide whether the defendant's presence would be required). *Id.* at 204-05.

¶ 16 In *Oliver*, on remand, the defendant's attorney told the court that he would stand on the original postjudgment motion, and the parties stipulated to the evidence that had been heard on that motion. Citing *Porter*, this court reversed the order denying the motion and remanded the cause. We held that the defendant was entitled to both the filing of a new motion and a new hearing. *Oliver*, 276 Ill. App. 3d at 932. On the latter, we explained that, although we declined to hold that "live testimony must be presented in every instance," in that case "no effort was made to restate for the court's benefit the evidence from the previous hearing, which occurred more than two years earlier, or to argue inferences from the evidence." *Id.*

¶ 17 In *Whitmore*, on remand, the parties stipulated to the evidence and the arguments that they had presented at the first hearing. The judge stated that he had reviewed the transcript of the first hearing, and he explained in some depth why he was denying the motion. *Whitmore*, 313 Ill. App. 3d at 118. On appeal, we held that the proceedings had been sufficient. We explained that, on remand, defense counsel filed a new motion and did not merely orally renew the previous one. *Id.* at 119. Further, although the parties had stipulated to the testimony from the previous hearing, the defendant's counsel had also provided the judge with the transcript so that the judge could, and did, read it and enter "a new (though identical) resolution of the merits." *Id.* at 120. This distinguished the case from *Oliver*, in which the defendant's attorney had "sought and received merely a blind denial of his motion." *Id.*

¶ 18 In *Tejada-Soto*, on remand, the defendant's attorney filed a new postjudgment motion and asked the court to take judicial notice of the proceedings on the first motion. She then argued the merits of the motion at some length. The judge noted that he had reviewed the entire file and that he recollected well the case and the pertinent evidence. He then explained why he was denying the motion. *Tejada-Soto*, 2012 IL App 2d 110188, ¶¶ 7-8. On appeal, we held that

the proceedings had been sufficient, and we affirmed. We reasoned that on remand a defendant "is entitled to a hearing that is *meaningful*, but only in the very limited sense that it is not a mere charade performed for the purpose of reinstating an appeal." (Emphasis in original.) *Id.* ¶ 14. In that case, the hearing on remand had not been a "purely formal exercise." *Id.* The new attorney had submitted a new motion and had offered argument that referred to the evidence at the prior hearing, and the judge had indicated that he had reviewed the entire file and then explained his decision in some detail. *Id.*

¶ 19 Finally, we come to *Fricks*. There, on remand, the defendant's attorney filed a new motion to withdraw the guilty plea. The court denied the motion. The attorney stood on the original motion to reduce the sentence and told the court that it had already ruled on that motion. The court stated that the ruling would stand. The attorney did not ask to be heard on the motion to reduce the sentence. *Fricks*, 2017 IL App (2d) 160493, ¶ 1.

¶ 20 On appeal, we reversed the denial of the motion to reduce the sentence and remanded for a new hearing thereon. We observed first that in *Lindsay*, the supreme court held, contrary to *Oliver*, that on a Rule 604(d) remand, a new motion is "optional." *Id.* ¶ 5. However, we held that under *Lindsay* a new hearing is required. *Id.* ¶ 6. In *Fricks*, there had been no hearing on remand on the motion to reduce the sentence. The motion was not "considered anew." *Id.* ¶ 7. The defendant's attorney "merely acceded to the trial court's previous ruling, which the trial court merely reiterated." *Id.* The trial court did not review the record of the previous hearing, and the defendant's attorney did not summarize that record for the court's benefit. Thus, what had occurred on the motion was a " 'mere charade.' " *Id.* (quoting *Tejada-Soto*, 2012 IL App (2d) 110188, ¶ 14).

¶ 21 We now apply the foregoing case law. We conclude that another remand is not required.

¶ 22 We note first that Gifford filed a new motion after consultation with defendant. Although the motion was identical to the original one, Gifford had no obligation to raise arguments that he did not see as potentially meritorious; as far as can be said, defendant had no expressed interest in having him raise new arguments. Thus, the motion itself was not deficient.

¶ 23 We turn to the hearing. The parties stipulated to the evidence from the first hearing. Although the first hearing took place 31 months earlier, Gifford had attached the transcript of it to his motion. He told the judge that he would rely on his arguments in "that transcript," and Catizone stated similarly that he would also "rest on the argument in the transcript." Thus, the parties and the judge were conversant with the record from the first hearing, which was a full one on the merits of the original motion. The judge did not detail the reasons for his decision, but there was no reason to do so: those reasons were evident. The absence of a detailed explanation is not surprising and does not mean that the judge treated the hearing as a formality. The judge was familiar with the issues and decided to rule consistently with his original decision. The record shows that the judge had received a copy of the transcript. While the better practice is for the trial court to state that he or she has read the transcript, it is presumed that the trial court read the documents in its possession that are "cogent to his decision." *Watson v. South Shore Nursing and Rehabilitation Center, LLC*, 2012 IL App (1st) 10373, ¶ 54.

¶ 24 We note that this case was not complex, and the judge and the parties were not obligated to go beyond the facts and issues that the first hearing raised, given that there was no need to do so. Defendant does not contend that the denial of his motion was incorrect on the merits or suggest that a fuller consideration of his motion might have changed the result. In any event, he received the hearing to which he was entitled, and there is no basis for a second remand.

¶ 25 III. CONCLUSION

¶ 26 The judgment of the circuit court of Du Page County is affirmed. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2018); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 27 Affirmed.