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2019 IL App (3d) 180191-U

Order filed May 9, 2019

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2019

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois,
Plaintiff-Appellee,)	
v.)	Appeal Nos. 3-18-0191 and 3-18-0192 Circuit Nos. 16-CF-101 and 12-CF-953
CHARLES A. ARMSTRONG,)	Honorable
Defendant-Appellant.)	John P. Vespa, Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Justices Carter and Holdridge concurred in the judgment.

ORDER

¶ 1 *Held:* The court did not provide the required Illinois Supreme Court Rule 605(c) admonishments before defendant filed his postplea motions, and postplea counsel did not file the certificate required by Illinois Supreme Court Rule 604(d).

¶ 2 Defendant, Charles A. Armstrong, appeals following this court's remand for *de novo* postplea proceedings, and the circuit court's subsequent denial of his postplea motions. Defendant argues a second remand is required for new postplea proceedings because the court failed to properly admonish him in accordance with Illinois Supreme Court Rule 605(c) (eff. Oct.

1, 2001) and postplea counsel did not file a certificate in compliance with Illinois Supreme Court Rule 604(d) (eff. July 1, 2017). We reverse and remand.

¶ 3

I. BACKGROUND

¶ 4

In case No. 12-CF-953, defendant pled guilty to one charge of aggravated unlawful use of a weapon (AUUW) (720 ILCS 5/24-1.6(a)(1), (a)(3)(C) (West 2012)). In exchange for defendant's plea, the State dismissed two other charges and capped its sentence request to five years' imprisonment. In case No. 16-CF-101, defendant pled guilty to one count of unlawful possession with intent to deliver a controlled substance (720 ILCS 570/401(c)(2) (West 2016)). In exchange for defendant's plea in that case, the State dismissed three other charges and capped its sentence request to 10 years' imprisonment. As part of defendant's guilty pleas, the State also dismissed the charges against defendant in case No. 13-CF-436.

¶ 5

After conducting a sentencing hearing, the circuit court sentenced defendant to 4 years' imprisonment for AUUW and 10 years' imprisonment for unlawful possession with intent to deliver a controlled substance. The court then admonished defendant that prior to filing a notice of appeal, defendant must file within 30 days of the sentence a written motion to "reconsider the sentence or to have the judgment vacated and for leave to withdraw the plea of guilty[.]" Thereafter, public defender Derek Asbury filed on defendant's behalf a motion to reconsider sentence. Asbury did not file a Rule 604(d) certificate. The court denied the motion, and defendant appealed.

¶ 6

On appeal, we granted defendant's unopposed motion to remand the cause to the circuit court for additional postplea proceedings under Supreme Court Rules 605(c) and 604(d). *People v. Armstrong*, No. 3-16-0673 (2017) (unpublished minute order).

¶ 7 On remand, defendant made the following *pro se* filings: a complaint for an order of *mandamus*, an amended complaint for an order of *mandamus*, and a petition for relief from judgment. Additionally, Asbury, who still represented defendant, filed a new motion to withdraw defendant’s guilty plea in both cases and a Rule 604(d) certificate. Asbury’s motion alleged that defendant’s pleas had not been made knowingly and voluntarily because defendant was not informed by the court at the time of the plea hearing that if defendant received the benefit of the sentencing cap he could not appeal the length of the sentence imposed. On the same date, Asbury filed a motion to withdraw as counsel because defendant claimed that Asbury provided ineffective assistance.

¶ 8 On August 23, 2017, the court found that Asbury had filed a compliant Rule 604(d) certificate. The court then granted Asbury’s motion to withdraw as counsel for defendant and appointed new counsel to represent defendant. The court readmonished defendant of his appeal rights stating

“[p]rior to taking an appeal, you must file in the trial court within 30 days of the date on which sentence is imposed a written motion asking to have the trial court reconsider the sentence, although in your case it would only be regarding defects in the sentencing hearing, not the sentencing amount, and for leave to withdraw the plea of guilty setting forth the grounds in the motion.”

¶ 9 On December 6, 2017, public defender David Rumley appeared before the court on behalf of defendant. Rumley adopted defendant’s *pro se* amended complaint for an order of *mandamus* and the motion to withdraw guilty plea that Asbury had filed. Rumley did not file a Rule 604(d) certificate. At a subsequent hearing, Rumley stated that he had reviewed the transcript of the plea hearing and sentencing hearing, as well as the transcript of the motion to

reconsider sentence hearing, the charging instrument, the presentence investigation report, correspondence with defendant, defendant's *pro se* motion, and the appellate court mandate. Rumley said that on remand, "[w]ith 604(d), there was a representation made by Mr. Asbury and a certificate was filed and the Court pronounced that the Court was satisfied that those issues had been put to rest, and I would agree with that." Rumley also stated that the August 23, 2017, hearing was intended to resolve the Rule 604(d) and 605(c) issues, but he was "[n]ot sure that that was achieved with 605(c)." Rumley said that while the court had admonished defendant of the appeal procedure at the August 23, 2017, hearing, the plea hearing, and the sentencing hearing, these admonishments were inaccurate as they did not apply to a partially negotiated plea agreement. The court found its admonishment to be sufficient.

¶ 10 At a February 1, 2018, hearing, defendant filed a *pro se* motion to quash arrest and suppress evidence. Rumley adopted defendant's *pro se* motion and subsequently filed a memorandum in support of the motion. The court denied defendant's motion.

¶ 11 Defendant filed a notice of appeal from the court's denial of his motion to withdraw guilty plea and motion to quash arrest and suppress evidence.

¶ 12 II. ANALYSIS

¶ 13 Defendant argues the cause should be remanded a second time for *de novo* postplea proceedings because, on the first remand, the circuit court did not provide the correct Rule 605(c) admonishments and Rumley did not file a Rule 604(d) certificate. The State concedes that remand is required for Rule 604(d) compliance but argues the court's admonishments substantially complied with Rule 605(c). Upon review of the record, we accept the State's concession as to the Rule 604(d) certificate. We further find that remand is required for Rule

605(c) compliance as the appeal admonishments given by the court did not substantially comply with the rule and this rule is a necessary prerequisite to preserving defendant's right to appeal.

¶ 14

A. Rule 604(d)

¶ 15

Rule 604(d) requires, in relevant part, that defendant's attorney

“[S]hall file with the trial court a certificate stating that the attorney has 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 amendment to the motion necessary for adequate presentation of any defects in those proceedings.” Ill. S. Ct. R. 604(d) (eff. July 1, 2017).

Rule 604(d) ensures that any improper conduct or alleged improprieties that may have resulted in the entry of a guilty plea are brought to the court's attention before an appeal is taken. *People v. Tousignant*, 2014 IL 115329, ¶ 16. “Toward that end, 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 sentence.” (Emphasis in original.) *Id.* To effectuate the intent of Rule 604(d), counsel must certify that he has consulted with defendant “to ascertain defendant's contentions of error in the sentence *and* the entry of the plea of guilty.” (Emphasis in original.) *Id.* ¶ 20. Defense counsel must strictly comply with this certificate requirement. *People v. Janes*, 158 Ill. 2d 27, 33 (1994). Where counsel fails to strictly comply with the rule, remand is required for new postplea proceedings including the filing of a new motion to withdraw guilty plea or to reconsider sentence and a new motion hearing. *Id.*

¶ 16 Here, Rumley did not file a Rule 604(d) certificate. Instead, Rumley thought that this issue had been resolved when defendant’s former attorney, Asbury, filed a compliant Rule 604(d) certificate. However, this certificate only covered Asbury’s postplea representation of defendant. Rumley needed to file a new Rule 604(d) certificate that verified that he, and not Asbury, had: (1) consulted with 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, (2) 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 (3) made any amendment to the motion necessary for adequate presentation of any defects in those proceedings. See *People v. Ritchie*, 258 Ill. App. 3d 164 (1994) (finding the purpose of Rule 604(d) is frustrated if a certificate by an attorney who no longer represents defendant is deemed adequate compliance with the rule). Therefore, remand is required for new postplea proceedings including the filing of a Rule 604(d) certificate.

¶ 17 B. Rule 605(c)

¶ 18 We further find that remand is required due to the court’s incorrect Rule 605(c) admonishments. Rule 605(c) states

“In all cases in which a judgment is entered upon a negotiated plea of guilty, at the time of imposing sentence, the trial court shall advise the defendant substantially as follows:

(1) that the defendant has a right to appeal;

(2) that prior to taking an appeal the defendant must file in the trial court, within 30 days of the date on which sentence is imposed, a written motion asking

to have the judgment vacated and for leave to withdraw the plea of guilty, setting forth the grounds for the motion;

(3) that if the motion is allowed, the plea of guilty, sentence and judgment will be vacated and a trial date will be set on the charges to which the plea of guilty was made;

(4) that upon the request of the State any charges that may have been dismissed as a part of a plea agreement will be reinstated and will also be set for trial;

(5) that if the defendant is indigent, a copy of the transcript of the proceedings at the time of the defendant's plea of guilty and sentence will be provided without cost to the defendant and counsel will be appointed to assist the defendant with the preparation of the motions; and

(6) that in any appeal taken from the judgment on the plea of guilty any issue or claim of error not raised in the motion to vacate the judgment and to withdraw the plea of guilty shall be deemed waived." Ill. S. Ct. R. 605(c) (eff. Oct. 1, 2001).

¶ 19 Rule 605(c) provides the applicable admonishments that follow the entry of a negotiated guilty plea. As a result, Rule 605(c) is a necessary companion to Rule 604(d), which prescribes the appeal requirements. *People v. Little*, 318 Ill. App. 3d 75, 79 (2001). Moreover, because strict compliance with Rule 604(d) is a condition precedent to defendant's right to appeal, fundamental fairness requires that a defendant receive proper notice, *i.e.*, admonishments, of the procedure required by the rule. See *id.*

¶ 20 The court admonished defendant that he “must file *** within 30 days of the date on which sentence is imposed a written motion asking to have the trial court reconsider the sentence.” The court thought that a motion to reconsider sentence was appropriate in this case so long as the motion only challenged “defects in the sentencing hearing, not the sentencing amount.” However, Rule 605(c) required the court to admonish defendant that his only postsentence recourse, and appeal prerequisite, was to file a motion to withdraw his guilty plea.

¶ 21 Recently, in *People v. Johnson*, 2019 IL 122956, ¶¶ 43, 47, the supreme court made clear that where a plea agreement includes sentencing concessions from the State or the dismissal of charges, defendant’s only postplea recourse is to move to withdraw the plea. The supreme court specifically held that where Johnson received a sentence in the range that he agreed to with the State, he could not challenge the court’s consideration of erroneous aggravating factors, and his only recourse was to move to withdraw the guilty plea. *Id.* ¶¶ 38-43; see also *People v. Rademacher*, 2016 IL App (3d) 130881, ¶¶ 58-60 (recognizing that following the entry of a partially negotiated guilty plea there is no practical difference between an excessive sentence challenge and a challenge to the court’s alleged consideration of an improper sentencing factor).

¶ 22 In light of *Johnson*, the court’s postsentence admonishment of the appeal procedure was incorrect. Defendant was required to move to withdraw his guilty plea and could not file a motion to reconsider sentence.

¶ 23 The State argues that the court’s admonishments substantially complied with Rule 605(c). However, *Johnson* established that the court’s admonishment that defendant could challenge the sentencing procedure, but not the length of the sentence in a motion to reconsider sentence constituted a misstatement of the law. *Supra* ¶ 21. The procedure prescribed by the court to defendant would deprive defendant of his right to appeal his conviction because that procedure

did not comply with the appeal requirements of Rule 604(d). *Supra* ¶ 19. Therefore, the court's affirmative misstatement of the law does not constitute substantial compliance with Rule 605(c). Accordingly, we find that fundamental fairness requires that we remand the cause for compliance with Rule 605(c), as well as Rule 604(d). On remand, we direct the court to first admonish defendant in accordance with Rule 605(c) before defendant proceeds on any new postplea motions.

¶ 24

III. CONCLUSION

¶ 25

The judgment of the circuit court of Peoria County is reversed and remanded with directions.

¶ 26

Reversed and remanded with directions.