

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).

2019 IL App (4th) 170187-U

NO. 4-17-0187

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

February 15, 2019
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
JOSEPH L. COTTON,)	No. 16CF359
Defendant-Appellant.)	
)	Honorable
)	Thomas J. Difanis,
)	Judge Presiding.

JUSTICE DeARMOND delivered the judgment of the court.
Justices Steigmann and Cavanagh concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court vacated and remanded with directions, finding defense counsel failed to strictly comply with Illinois Supreme Court Rule 604(d) (eff. Mar. 8, 2016).

¶ 2 In June 2016, defendant, Joseph L. Cotton, pleaded guilty to the offense of residential burglary. The trial court sentenced him to eight years in prison. In September 2016, defendant filed a motion to withdraw his guilty plea, which the court denied.

¶ 3 On appeal, defendant argues defense counsel failed to strictly comply with the requirements of Illinois Supreme Court Rule 604(d) (eff. Mar. 8, 2016). We vacate and remand with directions.

¶ 4 I. BACKGROUND

¶ 5 In March 2016, the State charged defendant by information with one count of residential burglary (720 ILCS 5/19-3 (West 2016)), alleging he knowingly and without

authority entered into the dwelling place of the victim with the intent to commit therein a theft.

¶ 6 In June 2016, defendant pleaded guilty to the Class 1 felony of residential burglary, and the State agreed to cap its sentence recommendation at 10 years in prison. Following a factual basis, the trial court accepted defendant's guilty plea.

¶ 7 At the August 2016 sentencing hearing, the prosecutor noted defendant was 19 years old and had a "pretty extensive" criminal history. Defendant committed the residential burglary while he was out on bond for possession of a stolen credit card. Evidence also indicated defendant admitted using cocaine and participated in the filming of the sexual assault of an unconscious 17-year-old girl before he carried her out of his house and dropped her off at her parents' residence. The State requested a sentence of 10 years in prison.

¶ 8 Defense counsel stated defendant had "made some poor life decisions" and asked the trial court to sentence defendant to eight years in prison with a recommendation for impact incarceration. In his statement of allocution, defendant apologized for his mistake.

¶ 9 The trial court stated it considered the presentence report, the statutory factors in aggravation and mitigation, the arguments of counsel, and defendant's statement. The court sentenced defendant to eight years in prison and found he met the eligibility requirements for possible placement in the impact incarceration program. The court noted it could not direct prison authorities to put defendant in boot camp, but it was giving him the opportunity.

¶ 10 On September 1, 2016, defense counsel filed a motion to withdraw defendant's guilty plea and vacate the judgment. As the basis for the motion, counsel claimed the Illinois Department of Corrections denied defendant's request to participate in the impact incarceration program. The next day, defendant filed a *pro se* motion to reduce his sentence, asking the trial court to reduce his eight-year sentence because the Department of Corrections "didn't give [him]

boot camp,” which he claimed was part of the plea agreement.

¶ 11 On January 24, 2017, defense counsel filed a certificate pursuant to Illinois Supreme Court Rule 604(d) (eff. Mar. 8, 2016). In the certificate, defense counsel stated as follows:

“1[.] I have consulted with the defendant in person, by mail, by phone or by electronic means to ascertain the Defendant’s contentions of error in the entry of the plea of guilty and in the sentence,

2[.] I have examined the trial court file and report of proceedings of the plea of guilty and the report of proceedings in the sentencing hearing, and

3[.] I have made any amendments to the motion necessary for the adequate presentation of any defects in those proceedings.”

¶ 12 On March 3, 2017, the trial court conducted a hearing on the motion to withdraw the guilty plea. The court noted defense counsel had filed a Rule 604(d) certificate. Defense counsel declined to add anything to the motion. The court found defendant signed a consent form to participate in the impact incarceration program, which indicated participation in the program was not guaranteed. The court also stated “it’s always up to the Department of Corrections as to whether or not an individual is eligible for—is going to be allowed to participate in the impact incarceration program.” The court denied the motion to withdraw the guilty plea. This appeal followed.

¶ 13

II. ANALYSIS

¶ 14 Defendant argues defense counsel failed to strictly comply with Illinois Supreme

Court Rule 604(d) (eff. Mar. 8, 2016) because counsel certified he examined the transcript of the sentencing hearing before the record indicated it was completed and failed to attach an affidavit to verify facts that were not part of the record. We agree, and the State concedes.

¶ 15 “Rule 604(d) governs the procedure to be followed when a defendant wishes to appeal from a judgment entered upon a guilty plea.” *In re H.L.*, 2015 IL 118529, ¶ 7, 48 N.E.3d 1071. The purpose of the rule “ ‘is to ensure that before a criminal appeal can be taken from a guilty plea, the trial judge who accepted the plea and imposed sentence be given the opportunity to hear the allegations of improprieties that took place outside the official proceedings and *dehors* the record, but nevertheless were unwittingly given sanction in the courtroom.’ ” *H.L.*, 2015 IL 118529, ¶ 9, 48 N.E.3d 1071 (quoting *People v. Wilk*, 124 Ill. 2d 93, 104, 529 N.E.2d 218, 221-22 (1988)). Moreover, the rule “ ‘enables the trial court to insure that counsel has reviewed the defendant’s claim and considered all relevant bases for the motion to withdraw the guilty plea or to reconsider the sentence.’ ” *H.L.*, 2015 IL 118529, ¶ 10, 48 N.E.3d 1071 (quoting *People v. Shirley*, 181 Ill. 2d 359, 361, 692 N.E.2d 1189, 1191 (1998)).

¶ 16 Our supreme court has held strict compliance with Rule 604(d) is required, and counsel’s failure to strictly comply requires remand to the trial court. *People v. Janes*, 158 Ill. 2d 27, 33, 630 N.E.2d 790, 792 (1994). Even where counsel has filed a facially valid certificate, courts “may consult the record to determine whether [he or] she actually fulfilled [his or] her obligations under Rule 604(d).” *People v. Bridges*, 2017 IL App (2d) 150718, ¶ 8, 87 N.E.3d 441. We review *de novo* whether defense counsel’s certificate complied with Rule 604(d). *People v. Grice*, 371 Ill. App. 3d 813, 815, 867 N.E.2d 1143, 1145 (2007).

¶ 17 In the case *sub judice*, defense counsel filed his certificate of compliance with Rule 604(d) on January 24, 2017. At that time, Rule 604(d) stated, in pertinent part, as follows:

“The defendant’s attorney shall 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 amendments to the motion necessary for adequate presentation of any defects in those proceedings.” Ill. S. Ct. R. 604(d) (eff. Mar. 8, 2016).

¶ 18 In *People v. Little*, 337 Ill. App. 3d 619, 621, 786 N.E.2d 636, 638 (2003), this court found defense counsel did not comply with Rule 604(d). Counsel filed a Rule 604(d) certificate, stating he consulted with the defendant in person to ascertain his contentions of error in the sentence, examined the trial court file and the report of the guilty plea proceedings, and made any amendments necessary for the adequate presentation of any defects in those proceedings. *Little*, 337 Ill. App. 3d at 621, 786 N.E.2d at 638. This court found counsel’s certificate was dated April 26, 2001, and filed the next day. *Little*, 337 Ill. App. 3d at 621-22, 786 N.E.2d at 638. However, a review of the record showed the transcript of the guilty plea proceeding was prepared and filed with the trial court on May 24, 2001, which made it impossible for counsel to have reviewed the report of proceedings prior to filing his Rule 604(d) certificate. *Little*, 337 Ill. App. 3d at 622, 786 N.E.2d at 638. This court reversed and remanded for proper compliance with Rule 604(d). *Little*, 337 Ill. App. 3d at 622, 786 N.E.2d at 638.

¶ 19 Here, counsel’s Rule 604(d) certificate, filed on January 24, 2017, represented he reviewed both the report of proceedings of the plea of guilty and the sentencing hearing.

However, the transcript of the sentencing hearing was not filed with the trial court until May 4, 2017, with the court reporter certifying its accuracy on March 21, 2017. Thus, the record shows defense counsel's Rule 604(d) certificate stating counsel examined "the report of proceedings in the sentencing hearing" preceded the preparation of the sentencing hearing transcript. While we recognize defense counsel could have procured an unofficial copy of the sentencing hearing transcript from the court reporter in preparation for the hearing on the motion to withdraw the guilty plea, counsel did not mention doing so in his certificate. Accordingly, considering the filing of the official transcript of the sentencing hearing, defense counsel's certificate was inaccurate and deficient.

¶ 20 Defendant also argues counsel failed to attach an affidavit to verify factual averments made in his motion that were not a part of the record. Rule 604(d) states "[w]hen the motion is based on facts that do not appear of record it shall be supported by affidavit." Ill. S. Ct. R. 604(d) (eff. Mar. 8, 2016); see also *Bridges*, 2017 IL App (2d) 150718, ¶ 9, 87 N.E.3d 441 (stating counsel failed to support facts appearing outside of the record with an affidavit substantiating the allegations).

¶ 21 Here, at the time defense counsel filed the motion to withdraw the guilty plea and certified he made the necessary amendments to the motion, there was no evidence in the record, other than defendant's unverified allegation in his *pro se* motion to reduce his sentence, that would indicate the Department of Corrections denied defendant's participation in the impact incarceration program. Thus, counsel would have had to provide an affidavit or other evidentiary support to sustain the factual allegations not contained in the record. See *Bridges*, 2017 IL App (2d) 150718, ¶ 9, 87 N.E.3d 441. By failing to do so, defendant's claim was not adequately presented to the trial court.

¶ 22

III. CONCLUSION

¶ 23 For the reasons stated, we vacate the trial court's judgment regarding Rule 604(d) compliance and remand for (1) the opportunity to file a new motion to withdraw the guilty plea and/or reconsider the sentence, if counsel concludes a new motion is necessary; (2) a new hearing on defendant's postplea motion; and (3) the filing of a new certificate in compliance with Rule 604(d).

¶ 24 Vacated; cause remanded with directions.