

Illinois Official Reports

Appellate Court

People v. Diaz, 2021 IL App (2d) 191040

Appellate Court
Caption

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v.
JORGE DIAZ, Defendant-Appellant.

District & No.

Second District
No. 2-19-1040

Filed

September 30, 2021

Decision Under
Review

Appeal from the Circuit Court of Kane County, No. 08-CF-2908; the
Hon. Kathryn D. Karayannis, Judge, presiding.

Judgment

Affirmed.

Counsel on
Appeal

James E. Chadd, Douglas R. Hoff, and Christofer R. Bendik, of State
Appellate Defender's Office, of Chicago, for appellant.

Jamie L. Mosser, State's Attorney, of St. Charles (Patrick Delfino,
Edward R. Psenicka, and Barry W. Jacobs, of State's Attorneys
Appellate Prosecutor's Office, of counsel), for the People.

Panel

JUSTICE SCHOSTOK delivered the judgment of the court, with
opinion.
Justices Hutchinson and Birkett concurred in the judgment and
opinion.

OPINION

¶ 1 At issue in this appeal is whether postplea counsel, Ron Dolak, who filed a facially valid certificate under Illinois Supreme Court Rule 604(d) (eff. July 1, 2017), nevertheless failed to comply with Rule 604(d) when he did not amend the *pro se* motion to withdraw the guilty plea filed by defendant, Jorge Diaz, to include a claim that the record rebutted. We determine that Dolak was not required under Rule 604(d) to add that claim. Accordingly, we affirm.

¶ 2 I. BACKGROUND

¶ 3 In October 2008, defendant was charged with several offenses related to a shooting that arose during an illegal-drug robbery. These charges included first degree murder (720 ILCS 5/9-1(a)(3) (West 2008)), armed robbery (*id.* § 18-2(a)(3)), armed violence (*id.* § 33A-2), and unlawful possession of a controlled substance with the intent to deliver (720 ILCS 570/401(a)(2)(D) (West 2008)).

¶ 4 In 2012, defendant agreed to plead guilty to first degree murder. At the guilty plea proceedings, where defendant had a Spanish interpreter's assistance, the State recited the plea agreement the parties had reached. In doing so, the State asserted:

“[D]efendant would be sentenced to serve 23 years in the Illinois Department of Corrections plus 15 years mandatory add on for a total of 38 years in the Illinois Department of Corrections.”¹

Both defendant and his counsel, Gus Santana, concurred that this was part of the parties' agreement.

¶ 5 The trial court explained that if defendant were convicted of first degree murder, the baseline sentencing range would be 20 to 60 years in prison and the extended-term range would be 60 to 100 years. The court also said, “There is a statutory add[-]on of 15 years for possession of a firearm.” The court explained the constitutional rights that defendant was foregoing by pleading guilty and the consequences of such a plea. Defendant asserted that he understood the court's admonishments. The court then asked defendant whether he wished to plead guilty. Defendant indicated that he did not understand, and the court reiterated its admonishments. Defendant then told the court that he wished to “plead guilty today. Guilty.” After defendant assured the court that he knowingly executed the guilty plea form, the following exchange occurred:

“THE COURT: Mr. Santana speaks Spanish. He has been your lawyer for some time. He has answered your questions. He has explained the law to you. You are satisfied with his legal services?

THE DEFENDANT: Yes.

THE COURT: Do you feel that you understand what you are doing?

THE DEFENDANT: Yes.

THE COURT: Has anyone forced or coerced you to plead guilty?

THE DEFENDANT: No.

¹The mandatory 15-year term was imposed because defendant was armed with a firearm when the murder occurred. See 730 ILCS 5/5-8-1(a)(1)(d)(i) (West 2008).

THE COURT: Has anyone threatened you or promised you anything to plead guilty?

THE DEFENDANT: No.”

After hearing a factual basis for the plea, the trial court accepted the negotiated plea, finding it knowingly and voluntarily made.

¶ 6 Less than a month later, defendant sent a letter to the trial court.² In this letter, defendant asked to withdraw his guilty plea. Defendant claimed that he had “ineducate [*sic*] representation” and felt “[p]ressured” and “confused.” Defendant asserted that Santana “hurried [him] to take a cop-out” and never did what defendant asked him to do. Several weeks after that, defendant sent another letter to the court, again advising the court that he wanted to move to withdraw his guilty plea.³ In that letter, defendant admitted that he pleaded guilty in exchange for 38 years’ imprisonment. However, he claimed that he “did not wish to do that but, was coerced by [his] attorney, [Santana],” whom defendant accused of providing “inadequate representation” and “[in]effective counseling.”

¶ 7 The trial court appointed Dolak, an assistant public defender, to represent defendant. At a subsequent hearing, the court found that defendant’s letters constituted a timely motion to withdraw his guilty plea. Dolak filed a Rule 604(d) certificate, asserting that “[he has] not amended the motion to withdraw the guilty plea as *** there is no way to adequately present [defendant’s] contentions of error that would entitle him to the relief requested.”

¶ 8 In October 2014, the trial court held a hearing on defendant’s motion to withdraw his guilty plea. Defendant testified that Santana was ineffective because he “didn’t do the job that he should have done.” Specifically, Santana “should have filed a motion for a Class X or something and he never did anything.” Although defendant indicated that he was confused “[w]ith the time that they were going to give [him] if [he] lost the trial,” “[t]hat’s the only thing [he was] confused about.” Defendant stated that “[Santana] told [him] that they gave [him] 23 years for the death and 10 years for armed violence—15.” That is, “[w]hen [he] pled guilty, [he] knew [he was] getting 38 years.” Defendant testified that (1) he talked with Santana about pleading guilty in exchange for 38 years in prison, (2) Santana answered his questions about the plea agreement, (3) he understood what Santana told him, and (4) he knew that there would be no trial if he pleaded guilty.

¶ 9 Santana’s testimony was consistent with defendant’s. Santana, who spoke Spanish fluently, stated that (1) he talked to defendant about the deals the State offered, (2) defendant agreed to plead guilty in exchange for 38 years’ imprisonment, and (3) defendant knew that there would be no trial if he pleaded guilty. Santana also asserted that he “explain[ed] to [defendant] *** there was a mandatory *** 15-year add-on as it related to him being armed with a firearm during the commission of [murder].”

¶ 10 The trial court denied defendant’s motion to withdraw his guilty plea. The court noted that it had admonished defendant about the mandatory 15-year sentence to be served consecutively with the 23-year sentence and that defendant had indicated that he understood.

²This letter was dated December 1, 2012, and file-stamped January 23, 2013.

³This letter was dated December 28, 2012, and file-stamped January 8, 2013. Another copy of the letter was file-stamped January 23, 2013.

¶ 11 Defendant appealed. This court vacated the denial of the motion to withdraw the guilty plea and remanded the cause for further proceedings because Dolak’s Rule 604(d) certificate complied with neither the new nor the old version of the rule. See *People v. Diaz*, No. 2-14-1230 (2014) (unpublished summary order under Illinois Supreme Court Rule 23(c)).

¶ 12 On remand, after Dolak was reappointed, defendant filed, on July 30, 2018, a new *pro se* motion to withdraw his guilty plea. He asked the court to appoint an attorney other than the public defender. In the motion, defendant claimed that Santana misled him and that he did not understand that the 15-year “enhancement” was “on top of the 23[-]year murder sentence.” “[Defendant thought that] they ran together when he entered the plea.” Defendant reasserted that he pleaded guilty based on Santana’s advice; his plea was the direct result of Santana’s ineffective assistance; and he pleaded guilty only because he was coerced, scared, and intimidated.

¶ 13 The trial court denied defendant’s request that an attorney other than the public defender be appointed. After defendant was unable to secure private counsel, Dolak filed a Rule 604(d) certificate. In that certificate, Dolak asserted that:

“1. [He] *** 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. [He] *** 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. [He] *** made any amendments to the motion necessary for the adequate presentation of any defects in those proceedings.”

Dolak adopted defendant’s January 2013 *pro se* motion to withdraw the guilty plea (the two letters comprised one motion) but made no amendments to that motion. Dolak did not adopt the July 2018 *pro se* motion to withdraw the guilty plea.

¶ 14 On October 24, 2019, the trial court held its second hearing on the January 2013 motion to withdraw (the first hearing was held in October 2014). Defendant testified that Santana provided “inadequate representation” because he told defendant that he would receive a 23-year sentence and did not mention that he would serve a 15-year sentence consecutively to the 23-year sentence. Thus, defendant’s understanding going into the guilty plea hearing was that he would plead guilty in exchange for a 23-year sentence, not a 38-year sentence. He admitted that the trial court informed him at the hearing that, if convicted of first degree murder, the baseline sentencing range would be 20 to 60 years’ imprisonment and that the extended-term range would be 60 to 100 years’ imprisonment. However, defendant did not recall the court mentioning a 15-year add-on. Defendant admitted acknowledging the trial court’s admonishments, but he claimed that he was nervous and scared and did not know that he could talk in front of the judge.

¶ 15 Santana also testified at the October 2019 hearing on the January 2013 motion. His testimony was consistent with his testimony at the October 2014 hearing. Santana confirmed that he and defendant discussed the State’s offer before defendant pleaded guilty, Santana talked with defendant about the mandatory 15-year add-on sentence, and he told defendant that the offer was for 38 years’ imprisonment, not 23 years.

¶ 16 The trial court denied defendant’s motion to withdraw his guilty plea. After finding defendant not credible and Santana credible, the court noted that the transcripts from the guilty

plea proceedings rebutted defendant's claims that Santana was ineffective and that defendant's guilty plea was not knowingly and voluntarily made. Specifically, in reaching that conclusion, the court noted that defendant assured the court at the guilty plea hearing that Santana answered defendant's questions and explained the law to him, including that defendant was subject to a mandatory 15-year add-on sentence. Defendant also assured the court at those proceedings that he understood what he was doing in pleading guilty. Accordingly, the court determined that Santana's representation did not fall below an objective standard of reasonableness.

II. ANALYSIS

At issue in this appeal is whether Dolak, who filed a facially valid certificate under Rule 604(d), nevertheless failed to comply with Rule 604(d) when he did not amend defendant's 2013 *pro se* motion to withdraw the guilty plea to include a claim that Santana was ineffective for failing to explain to defendant that a 15-year add-on sentence would be imposed consecutive to the 23-year sentence for murder. Defendant argues that Dolak should have amended the 2013 motion by including an allegation that Santana misled him about the agreed sentence. In making this argument, defendant notes that "[he] included in his 2018 *pro se* motion[] an allegation that [Santana] misled [him] during the plea negotiations such that [defendant] 'did not understand that the 15 year gun enhancement was on top of the 23 year murder sentence' and that [defendant] 'though[t] they ran together when he entered the plea.'" Further, defendant observes that, "at the 2019 motion to withdraw guilty plea hearing, [defendant] repeatedly testified to his confusion and that Santana had only told him he would have to serve 23 years in prison versus the 38 years [defendant] is currently serving." Yet, despite defendant alleging that Santana provided ineffective assistance by misadvising defendant that he would have to serve only 23 years in prison, "Dolak failed to comply with Rule 604(d) when he did not incorporate these allegations into the previously-filed *pro se* 2013 motion to withdraw guilty plea." Defendant argues that, to properly present the ineffectiveness claim, Dolak should have (1) amended defendant's *pro se* 2013 motion by alleging facts that Santana misadvised defendant, (2) attached an affidavit from defendant attesting to defendant's interaction with Santana, and (3) advanced arguments why defendant was prejudiced by Santana's deficient performance.

Rule 604(d) governs the resolution of this appeal. "It is well established that strict compliance with Rule 604(d) is required." *People v. Bridges*, 2017 IL App (2d) 150718, ¶ 6. We review *de novo* if there was strict compliance with Rule 604(d). *People v. Easton*, 2018 IL 122187, ¶ 25.

Rule 604(d) provides " 'the procedure to be followed when a defendant wishes to appeal from a judgment entered upon a guilty plea.' " *People v. Curtis*, 2021 IL App (4th) 190658, ¶ 29 (quoting *In re H.L.*, 2015 IL 118529, ¶ 7). One component of the procedure requires a defendant to "file[] in the trial court a motion to reconsider the sentence, if only the sentence is being challenged, or, if the plea is being challenged, a motion to withdraw the plea of guilty and vacate the judgment." Ill. S. Ct. R. 604(d) (eff. July 1, 2017). "Where the defendant fails to file the proper motion, the appeal must be dismissed." *Bridges*, 2017 IL App (2d) 150718, ¶ 6.

Here, because defendant pleaded guilty in return for a specific sentence, he was required to file a motion to withdraw his guilty plea before an appeal. See *People v. Evans*, 174 Ill. 2d 320, 332 (1996) ("[F]ollowing the entry of judgment on a negotiated guilty plea, even if a

defendant wants to challenge only his sentence, he must move to withdraw the guilty plea and vacate the judgment ***.”). There is no dispute that defendant filed the proper motion. Thus, the dismissal rule does not apply.

¶ 22 Rule 604(d) also requires that the defendant’s attorney file a certificate with the trial court. The attorney must assert in that certificate that:

“1. [He] *** 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. [He] *** 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. [He] *** made any amendments to the motion necessary for the adequate presentation of any defects in those proceedings.” Ill. S. Ct. Rs. Art. VI Forms Appendix R. 604(d).

Unlike the rule requiring the appeal’s dismissal when a defendant fails to file the proper motion, “the proper remedy for [an attorney’s] failure to strictly comply with Rule 604(d)’s [certification] requirements is ‘a remand to the [trial] court for the [opportunity to file] a new motion to withdraw guilty plea or to reconsider sentence and a new hearing on the motion.’ ” *Bridges*, 2017 IL App (2d) 150718, ¶ 6 (quoting *People v. Janes*, 158 Ill. 2d 27, 33 (1994)).

¶ 23 Here, even a cursory examination reveals that Dolak filed a facially valid Rule 604(d) certificate. While that fact may seem to end our inquiry, it does not. “[E]ven when the certificate is valid on its face, a remand will be necessary if the record refutes the certificate.” *People v. Winston*, 2020 IL App (2d) 180289, ¶ 14.

¶ 24 We cannot conclude that the record refutes Dolak’s certificate and demonstrates that he failed, as defendant claims, to strictly comply with Rule 604(d). Nothing in the record prior to defendant’s 2018 *pro se* motion to withdraw his guilty plea indicates that defendant wanted to raise a claim that Santana improperly advised him about the mandatory 15-year add-on sentence running consecutively to the 23-year sentence for murder. Indeed, the record reveals the exact opposite. The transcript from the guilty plea hearing reflects that defendant, whose plea the trial court found was knowing and voluntary, was properly admonished. The State advised the trial court that, in exchange for pleading guilty, defendant would receive a 23-year sentence and a consecutive 15-year add-on sentence. Defendant himself assured the court that this was the parties’ agreement. It is well settled that a defendant must alert the court at the guilty plea proceeding if his decision to plead guilty was influenced by something counsel told him that differed from the terms of the plea as described in court. See *People v. Krantz*, 58 Ill. 2d 187, 194-95 (1974) (“Rule 402 [requiring that the trial court give specific admonishments before accepting a guilty plea] was designed to insure properly entered pleas of guilty, not to provide for merely an incantation or ceremonial.”); *People v. Robinson*, 157 Ill. App. 3d 622, 629 (1987) (“If a plea of guilty is to have any binding effect or is to be given any subsequent weight, the extensive and exhaustive admonitions given by the circuit court in this case and acknowledged by petitioner must be held to overwhelm petitioner’s current assertion that he entered his plea involuntarily.”). We cannot disregard the court’s admonishments and defendant’s acquiescence here.

¶ 25 Moreover, in his 2013 *pro se* motion to withdraw his guilty plea, defendant admitted that he pleaded guilty in exchange for a 38-year sentence. At the October 2014 hearing on the 2013

motion, defendant testified that he knew that he would have to serve 38 years, consisting of 23 years for murder and a consecutive term of 15 years. Not until July 2018, in proceedings on remand from his first appeal, did defendant contend that Santana never advised him that he would have to serve a 23-year term for murder and a consecutive 15-year term. We cannot conclude that Dolak was required to amend defendant's 2013 motion to include this new and completely contradictory allegation that Santana was ineffective for failing to advise defendant that he would have to serve a 23-year term and a consecutive 15-year term. See *People v. Strickland*, 363 Ill. App. 3d 598, 607 (2006) (claims of ineffective assistance of counsel that the record refutes cannot succeed).

¶ 26 Defendant contends that, because he claimed in his 2018 *pro se* motion that Santana misadvised him about the terms of his sentence, Dolak was required to raise and support that claim in an amended motion to withdraw the guilty plea. We disagree. Postplea counsel is not obligated under Rule 604(d) to adopt just any *pro se* allegation. As shown, the record refutes defendant's *pro se* allegation of ineffectiveness. See *Robinson*, 157 Ill. App. 3d at 629. It would be illogical to find that this specious allegation refuted Dolak's facially valid Rule 604(d) certificate.

¶ 27 In reaching our conclusion, we find instructive *Curtis*, 2021 IL App (4th) 190658. There, the defendant pleaded guilty to two drug offenses, and the State dismissed several other charges brought against him, including armed habitual criminal and unlawful possession of a weapon by a felon. *Id.* ¶¶ 4-5. Evidence presented at the defendant's sentencing hearing revealed that he possessed firearms and had traded illegal drugs for a gun. *Id.* ¶¶ 10-11. The defendant's attorney objected to any testimony regarding the weapons; that objection was denied; and the trial court sentenced the defendant, noting that it did not place substantial weight on the fact that the defendant traded illegal drugs for a firearm. *Id.* ¶¶ 12, 16-17. The defendant filed a *pro se* motion to withdraw his guilty plea and reconsider his sentence, taking issue with the fact that evidence of his weapons possession was presented at the sentencing hearing. *Id.* ¶ 18. The defendant was appointed counsel, who filed a Rule 604(d) certificate and an amended motion alleging that the defendant would not have pleaded guilty if he knew that the weapons charges would be used against him at sentencing. *Id.* ¶¶ 19, 21. At the hearing on the amended motion, the defendant testified that he pleaded guilty only because plea counsel told him that the weapons charges would not be used against him. *Id.* ¶ 22. The trial court denied the motion. *Id.* ¶ 25.

¶ 28 The defendant appealed, arguing that, although his postplea counsel filed a facially valid Rule 604(d) certificate, the record refuted postplea counsel's "certification that [counsel] made the amendments necessary to [the] defendant's *pro se* filing to adequately present defects in the guilty plea proceedings." *Id.* ¶ 37. Specifically, the defendant argued that postplea counsel "should have, but failed, to allege [that] withdrawal of [the defendant's] pleas was warranted due to [plea counsel's] ineffectiveness in giving 'affirmative misadvice' regarding the use of evidence relating to [the] defendant's dismissed weapons charges." *Id.*

¶ 29 The appellate court determined that the record did not refute postplea counsel's certification. *Id.* The court found nothing in the record to support the defendant's testimony at the motion hearing that plea counsel improperly advised him about the effect of the dismissed weapons charges. *Id.* ¶ 38. Moreover, before that testimony, there was no indication that defendant believed that plea counsel gave him improper or erroneous advice about pleading guilty. *Id.* For instance, "[t]he transcript of the guilty plea hearing reflect[ed] only that

defendant was properly admonished and his pleas were knowing and voluntary.” *Id.* The appellate court concluded that postplea counsel strictly complied with Rule 604(d). *Id.* ¶¶ 38, 41.

¶ 30 Although its facts are different from this case, *Curtis* stands for the proposition that a facially valid Rule 604(d) certificate cannot be rebutted solely by a defendant’s spurious claim that counsel misadvised him before he pleaded guilty when the record reflects something completely contrary. On that point, this case is even stronger than *Curtis*, as the court here admonished defendant about the terms of his sentence with which he now takes issue, and defendant indicated clearly on several occasions that he was well aware of those terms.

¶ 31 Citing our decisions in *Bridges* and *Winston*, defendant argues that the trial court’s denial of his motion to withdraw his guilty plea must be vacated and this case remanded for new proceedings on defendant’s motion. We find *Bridges* and *Winston* distinguishable.

¶ 32 In *Bridges*, the defendant’s postplea counsel amended the defendant’s *pro se* motion to withdraw his plea to include a detailed allegation that, because acts of violence were threatened against the defendant’s mother, the defendant was coerced to plead guilty. *Bridges*, 2017 IL App (2d) 150718, ¶ 2. No affidavits substantiating that claim accompanied the motion. *Id.* ¶ 1. We held that, because counsel did not submit such affidavits, his facially valid Rule 604(d) certificate ultimately did not comply with Rule 604(d). *Id.* ¶ 9. We further held that the hearing on the motion failed to satisfy Rule 604(d) because counsel did not offer any argument or evidence to support the motion. *Id.* ¶¶ 10-11.

¶ 33 In *Winston*, the defendant moved to withdraw her guilty plea, and postplea counsel filed an amended motion and a facially valid Rule 604(d) certificate. *Winston*, 2020 IL App (2d) 180289, ¶¶ 3-4. At a hearing on the motion, the defendant testified that the evidence was insufficient to prove her guilt beyond a reasonable doubt, and counsel attempted to admit four handwritten statements to support this claim. *Id.* ¶¶ 4-9. Counsel neither included this claim in the amended motion to withdraw the guilty plea nor supported the claim with affidavits. *Id.* ¶¶ 3, 15. The trial court refused to admit the statements and denied the motion to withdraw the guilty plea. *Id.* ¶¶ 9-10.

¶ 34 We determined that postplea counsel’s failure to raise and support the insufficiency-of-the-evidence claim in the amended motion refuted counsel’s Rule 604(d) certificate. *Id.* ¶ 16. We observed that, in *Bridges*, counsel had neither adequately raised the issue in the amended motion nor provided evidence at the hearing to support the claim. *Id.* (citing *Bridges*, 2017 IL App (2d) 150718, ¶¶ 9-10). We emphasized that each of counsel’s two failures in *Bridges* was sufficient in itself to require a remand. *Id.* Thus, even though counsel in *Winston* attempted to raise the insufficiency-of-the-evidence claim at the hearing, that effort did not cure the failure to raise the issue with supporting evidence in the amended motion. *Id.*

¶ 35 This case is similar to *Bridges* and *Winston* in that Dolak failed to file an amended motion raising and supporting defendant’s claim that Santana was ineffective. The parallels end there. The record, including defendant’s admissions, shows that he was well aware of and agreed to a plea deal that called for the imposition of a 23-year sentence for murder plus a mandatory consecutive sentence of 15 years. Unlike the bases for withdrawing the pleas in *Bridges* and *Winston*, here defendant’s allegation of ineffectiveness is rebutted by the record and, thus, efforts to develop it would have been futile. Thus, if we were to conclude—as defendant urges—that Dolak’s certificate failed to comply with Rule 604(d) because he chose not to adopt defendant’s *pro se* allegation that Santana misadvised him about the terms of his agreed

sentence, we would be placing form over substance in enforcing Rule 604(d)'s certificate requirement. We will not do this.

¶ 36

III. CONCLUSION

¶ 37

For the reasons stated, we affirm the judgment of the circuit court of Kane County.

¶ 38

Affirmed.