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2019 IL App (4th) 170300-U
NO. 4-17-0300
IN THE APPELLATE COURT
OF ILLINOIS

FILED
September 20, 2019
Carla Bender
4th District Appellate
Court, IL

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	DeWitt County
THOMAS J. ATCHISON,)	No. 17CF3
Defendant-Appellant.)	
)	Honorable
)	Karle E. Koritz,
)	Judge Presiding.

PRESIDING JUSTICE HOLDER WHITE delivered the judgment of the court. Justices Steigmann and DeArmond concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court reversed, concluding the trial court failed to comply with Illinois Supreme Court Rule 604(d).

¶ 2 In January 2017, defendant, Thomas J. Atchison, pleaded guilty to non-consensual dissemination of private sexual images (720 ILCS 5/11-23.5(b)(1) (West 2016)), and the De Witt County circuit court sentenced him to 30 months in prison. In March 2017, defendant filed a timely *pro se* motion to withdraw his guilty plea, which the trial court denied without appointing counsel or securing a knowing and intelligent waiver of counsel.

¶ 3 Defendant appeals, contending he is entitled to a remand for new postplea proceedings because the trial court failed to comply with Illinois Supreme Court Rule 604(d) (eff. Mar. 8, 2016). We reverse and remand.

¶ 4

I. BACKGROUND

¶ 5 On January 9, 2017, the State charged defendant by information with non-consensual dissemination of private sexual images (720 ILCS 5/11-23.5(b)(1) (West 2016)). At the arraignment hearing, the trial court admonished defendant regarding the nature of the charge against him and his right to counsel. Defendant waived his right to counsel and indicated he wished to plead guilty. After being fully admonished by the court, defendant entered a plea of guilty.

¶ 6 On February 28, 2017, the trial court conducted defendant's sentencing hearing. The court engaged in the following dialogue with defendant:

“[THE COURT:]Mr. Atchison, before we proceed further, you have been representing yourself at every step of the way and at every step in the way the Court has asked you if you wish to reconsider that and ask for Court-appointed counsel. The Court will ask you once again before we proceed with a sentencing hearing do you wish to ask the Court for Court-appointed counsel for purpose of your sentencing hearing, Mr. Atchison?”

THE DEFENDANT: No, sir.”

The court sentenced defendant to 30 months in prison, consecutive to the sentence imposed in De Witt County case No. 16-CF-101. The court admonished defendant regarding his right to appeal in accordance with Illinois Supreme Court Rule 605(b) (eff. Oct. 1, 2001), stating in part: “If you are indigent *** counsel will be appointed to assist you in preparation of your motion.”

¶ 7 On March 29, 2017, defendant filed a *pro se* motion to withdraw his plea of guilty and vacate judgment, alleging he pleaded guilty because he assumed the court would be lenient and he was overwhelmed by his multiple court cases. He further alleged the image was posted in

self-defense, with consent, and was not actually an image of his wife. Finally, defendant alleged he was unclear about the charge because the law books in the De Witt and Piatt county jails were 20 years old. Defendant did not attach an affidavit or exhibit to his motion.

¶ 8 On April 13, 2017, the trial court held a hearing on defendant’s motion to withdraw his guilty plea. Defendant appeared *pro se*. The court addressed defendant, stating: “[Defendant], it’s your motion. Do you wish to provide any evidence or argument in support of your motion?” Defendant proceeded *pro se* and after hearing the parties’ arguments, the court denied defendant’s motion. In denying the motion, the court stated:

“You continuously rejected Court-appointed counsel. I recall—I suppose begging is too, too, too exaggerated of a word—but I implored you at every step of the way that it would be in your best interest to ask for counsel. I indicated to you at every step of these proceedings that I would be more than happy to appoint counsel for you, and you refused to have counsel appointed for you.”

Defendant indicated he wished to appeal, and the court asked if defendant desired an appointment from the Office of the State Appellate Defender (OSAD). Defendant requested counsel. The court found defendant indigent and appointed OSAD to represent defendant on appeal.

¶ 9 This appeal followed.

¶ 10 II. ANALYSIS

¶ 11 On appeal, defendant argues the trial court failed to comply with Rule 604(d) where the court failed to appoint counsel or secure a valid waiver of his right to counsel regarding his motion to withdraw his guilty plea.

¶ 12 A. Standard of Review

¶ 13 Defendant contends our standard of review is *de novo* because we are reviewing the trial court's compliance with a supreme court rule. *People v. Breedlove*, 213 Ill. 2d 509, 512, 821 N.E.2d 1176, 1178 (2004). The State argues we are reviewing whether defendant waived his right to counsel, which is a determination by the trial court and "that decision will not be reversed absent an abuse of discretion." *People v. Jackson*, 228 Ill. App. 3d 868, 874, 593 N.E.2d 760, 764 (1992). We find the issue in this case to be a question of compliance with Rule 604(d), and thus, our review is *de novo*.

¶ 14 B. Right to Counsel

¶ 15 Illinois Supreme Court Rule 604(d) (eff. Mar. 8, 2016) provides that after a defendant files a motion to withdraw his plea of guilty, "[t]he trial court shall then determine whether the defendant is represented by counsel, and if the defendant is indigent and desires counsel, the trial court shall appoint counsel."

¶ 16 The protections afforded by Rule 604(d) are automatic. "Once a *pro se* defendant notifies the circuit court that he wishes to withdraw his guilty plea and appeal, the protections offered by Rule 604(d), *i.e.*, the appointment of counsel *** are automatically triggered." *People v. Edwards*, 197 Ill. 2d 239, 256, 757 N.E.2d 442, 452 (2001). "Because of the 'strict waiver requirements of Rule 604(d), fundamental fairness requires that a defendant be afforded a full opportunity to explain his allegations and that he have assistance of counsel in preparing the motion.' " *People v. Velasco*, 197 Ill. App. 3d 589, 591-92, 554 N.E.2d 1094, 1096 (1990) (quoting *People v. Ledbetter*, 174 Ill. App. 3d 234, 237-38, 528 N.E.2d 375, 377 (1988)).

¶ 17 Illinois Supreme Court Rules 604(d) (eff. Mar. 8, 2016) and 605(b) (eff. Oct. 1, 2001) must be read together. *People v. Hinton*, 362 Ill. App. 3d 229, 232, 839 N.E.2d 124, 126 (2005) (citing *People v. Wilk*, 124 Ill. 2d 93, 103-04, 529 N.E.2d 218, 222 (1988)). Rule 605(b)

states the trial court must give certain admonishments at the time of sentencing to a defendant who has pleaded guilty. Ill. S. Ct. R. 605(b) (eff. Oct. 1, 2001). Among those admonishments, the trial court must advise the defendant “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 trial court reconsider the sentence or to have the judgment vacated and for leave to withdraw the plea of guilty” and “that if the defendant is indigent *** counsel will be appointed to assist the defendant with the preparation of the motions.” *Id.* When read together, Rules 604(d) and 605(b) require a trial court to appoint counsel to an indigent defendant in postplea proceedings even where the defendant has not requested counsel, unless the defendant knowingly and intelligently waives the right to counsel. *Hinton*, 362 Ill. App. 3d at 232-33 (citing *Ledbetter*, 174 Ill. App. 3d at 238).

¶ 18 Defendant does not argue his admonishments under Rule 605(b) were insufficient. After defendant was sentenced, the trial court informed defendant, “[i]f you are indigent, *** counsel *will be appointed* to assist you with the preparation of your motion.” (Emphasis added). Once defendant filed his *pro se* motion to withdraw his guilty plea, the trial court was obligated either to appoint counsel, even without a specific request from defendant, or obtain defendant's knowing and intelligent waiver of his right to counsel. See *Hinton*, 362 Ill. App. 3d at 233.

¶ 19 C. Prior Waiver of Counsel

¶ 20 The State contends defendant's waiver of counsel from his plea proceedings extends to his postplea motion to withdraw his guilty plea. The State cites *People v. Baker*, 92 Ill. 2d 85, 440 N.E.2d 856 (1982), and *People v. Redd*, 173 Ill. 2d 1, 670 N.E.2d 583 (1996), for the claim that “a competent waiver of counsel by a defendant once made before the court carries

forward to all subsequent proceedings unless defendant later requests counsel or there are circumstances which suggest that the waiver was limited to a particular stage of the proceedings.” *Baker*, 92 Ill. 2d at 91-92. In both *Baker* and *Redd*, our supreme court found a waiver of counsel made during pretrial proceedings extends to the sentencing hearing, barring a significant change in circumstances. *Baker*, 92 Ill. 2d at 91-92; *Redd*, 173 Ill. 2d at 24-25. These two cases, however, did not concern guilty plea proceedings, Rule 605(b) admonishments, Rule 604(d) requirements, and postplea motion proceedings, and thus, are procedurally distinguishable. See *Hinton*, 362 Ill. App. 3d at 233. The requirements imposed on the trial court by Rule 605(b)—to inform defendant he will be appointed counsel if indigent—and Rule 604(d)—to appoint counsel or secure a knowing and intelligent waiver of counsel—significantly change the circumstances so that a prior waiver can no longer apply. Therefore, we cannot agree defendant’s prior waiver of counsel extended to his postplea motion to withdraw his guilty plea.

¶ 21

D. Postplea Waiver of Counsel

¶ 22

The State further contends defendant knowingly waived his right to counsel, citing *People v. Cunningham*, 294 Ill. App. 3d 702, 690 N.E.2d 1389 (1997). In *Cunningham*, the defendant indicated prior to plea proceedings he wished to proceed *pro se*. *Cunningham*, 294 Ill. App. 3d at 703. After the defendant submitted to a psychological evaluation to determine he was capable of knowingly and intelligently waiving his right to counsel, the trial court accepted the defendant’s waiver. *Id.* Three days after entering into a plea agreement with the State, the defendant sent a letter to the trial court stating he wished to withdraw his guilty plea. *Id.* In his letter, “the defendant asked the court to ‘send [him] a copy of the motion the attorneys have to file when there’s a motion to withdraw a guilty plea.’ ” *Id.* The defendant further stated in his letter, “ ‘Im [*sic*] going to be the attorney on this ***.’ ” *Id.* The defendant filed a motion to

withdraw his guilty plea after receiving additional time from the court. *Id.* at 703-04. At the hearing on the defendant's motion, held three months after the defendant entered into his plea agreement, a previously appointed attorney appeared as standby counsel for the *pro se* defendant. *Id.* at 704.

¶ 23 The State argues *Cunningham* is analogous to the present case where defendant elected to proceed *pro se* during his initial plea and confirmed his desire to proceed *pro se* at his sentencing hearing. The State further argues defendant indicated in his motion he intended to represent himself and had a similarly short time period between his initial waiver and the hearing on the motion to withdraw his guilty plea. The State clarifies that because defendant's motion was *pro se* and he stated he was "sending a subpoena" to Facebook, defendant was indicating to the trial court his intent to proceed *pro se* during postplea proceedings.

¶ 24 It is " 'well settled' that waiver of counsel must be clear and unequivocal, not ambiguous." *People v. Baez*, 241 Ill. 2d 44, 116, 946 N.E.2d 359, 401 (2011) (citing *People v. Burton*, 184 Ill. 2d 1, 21, 703 N.E.2d 49, 59 (1998)). Defendant's statements are not the explicit declaration of intent given by the defendant in *Cunningham*. The *pro se* motion cannot itself represent intent to waive counsel or there would be no need for the court to determine under Rule 604(d) if a defendant is represented. Further, defendant's statement he was "sending a subpoena" also fails to constitute a waiver of counsel. Unlike the defendant in *Cunningham*, defendant never made a "clear and unequivocal" statement expressing his intent to represent himself in postplea proceedings.

¶ 25 Here, the circumstances are similar to those in *Hinton*. In *Hinton*, the defendant proceeded *pro se*, pleading guilty to three charges. *Hinton*, 362 Ill. App. 3d at 231. At sentencing, the trial court admonished the defendant that " '[i]f you are indigent, *** [a]n

attorney would be appointed *** to assist you in the preparation of [a postplea] motion.’ ” *Id.* Eight days after sentencing, the defendant filed a *pro se* document with the court requesting to withdraw his guilty plea. *Id.* The court did not appoint counsel or obtain a knowing and intelligent waiver from the defendant before a hearing on the motion and the defendant’s motion was denied. *Id.* On appeal, the court determined the defendant did not indicate to the trial court that he wished to proceed *pro se* and, after admonishing the defendant under Rule 605(b), “[t]he trial judge was obligated to appoint counsel in the postplea proceedings, even without a specific request from the defendant, absent a finding defendant had knowingly waived the right to appointed counsel.” *Id.* at 234.

¶ 26 In this case, as in *Hinton*, the trial court properly admonished under Rule 605(b) that counsel would be appointed if he wished to file a motion to withdraw his guilty plea. Defendant at no point indicated to the trial court his intention to proceed *pro se*, thus, there was no clear, unequivocal, and unambiguous waiver of counsel in the postplea proceedings. The court was obligated to determine if defendant was represented by counsel and either appoint counsel to represent defendant or obtain a knowing and intelligent waiver of counsel. See *Hinton*, 362 Ill. App. 3d at 234; see also *People v. Smith*, 365 Ill. App. 3d 356, 360, 847 N.E.2d 865, 869 (2006). Therefore, we find the trial court erred as a matter of law by failing to comply with Rule 604(d). We reverse the trial court’s denial of defendant’s motion to withdraw his guilty plea and remand for further postplea proceedings pursuant to Rule 604(d). On remand, the trial court shall determine whether defendant is represented by counsel and if defendant is indigent and desires counsel. If defendant is indigent and desires counsel, the court shall appoint counsel. In the event defendant wishes to represent himself, the court shall obtain a waiver of

counsel. Finally, the court shall provide defendant a new hearing on his motion to withdraw his guilty plea.

¶ 27

III. CONCLUSION

¶ 28 For the reasons stated, we reverse the judgment of the De Witt County circuit court denying defendant's motion to withdraw his guilty plea and remand the case for further proceedings.

¶ 29 Reversed and remanded.