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2012 IL App (3d) 100282-U

Order filed June 4, 2012

IN THE
APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of the 14 th Judicial Circuit
)	Rock Island County, Illinois.
Plaintiff-Appellee,)	
)	Appeal Nos. 3-10-0282, 3-10-0283
v.)	Circuit Nos. 07-CF-576, 09-CF-586
)	
WILLIE M. JOHNSTON, SR.,)	The Honorable
)	Walter D. Braud,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Presiding Justice Schmidt and Justice Holdridge concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err by failing to admonish the defendant pursuant to Illinois Supreme Court Rule 401(a) after the defendant requested to proceed *pro se* during a portion of his trial because the court appointed standby counsel to assist the defendant and the record indicates that the defendant was aware of the information contained in Rule 401(a).

¶ 2 A jury convicted Willie M. Johnston, Sr., the defendant, of unlawful possession of a controlled substance. After this conviction, the court revoked the defendant's probation in another case, and sentenced him to concurrent six-year terms of imprisonment. The defendant appeals, contending that his conviction and the revocation of his probation must be reversed, and the cause remanded for a new trial, because the court did not admonish him pursuant to Illinois Supreme Court Rule 401(a) (eff. July 1, 1984) before it permitted him to proceed *pro se* at trial. We affirm.

¶ 3 FACTS

¶ 4 In May 2008, in Rock Island County case No. 07-CF-576, the defendant entered a negotiated plea of guilty to unlawful possession of a controlled substance. 720 ILCS 570/402© (West 2006). Pursuant to the plea agreement, the court sentenced the defendant to a 24-month term of probation. The terms of the defendant's probation included provisions that he refrain from committing criminal offenses and from consuming illegal drugs.

¶ 5 On July 2, 2009, in Rock Island County case No. 09-CF-586, the State charged the defendant with unlawful delivery of a controlled substance in violation of section 570/401(c)(1) of the Criminal Code of 1961 (the Criminal Code) (720 ILCS 570/401(c)(1) (West 2008)). The record indicates that at the first appearance on this charge, the court "[a]dvised [the defendant] of charges, rights and penalties[,]” and appointed the public defender to represent the defendant. The record also contains an initial appearance order signed by the defendant indicating that he understood that he had the right to counsel, and that if he were indigent, the public defender could be appointed to represent him.

¶ 6 The State subsequently filed an amended indictment, and charged the defendant with unlawful possession with the intent to deliver a controlled substance in violation of section

570/401(c)(1) of the Criminal Code (720 ILCS 570/401(c)(1) (West 2008)). The court conducted a preliminary hearing on the amended indictment, and defendant appeared with counsel. At this hearing, the trial court specifically informed the defendant that the “amended information *** basically clean[ed] up some of the language, it [did not] change anything, nor [did] it change the possible penalties that were admonished to [him] at the time of the hearing.” The court subsequently arraigned the defendant on this offense. Shortly thereafter, the State filed a petition to revoke or modify the defendant’s probation in case No. 07-CF-576, alleging that the defendant committed the aforementioned criminal offense, and also that the defendant used heroin while on probation.

¶ 7 On October 13, 2009, the court conducted a hearing on the State’s petition to revoke the defendant’s probation. At this hearing, Derrick Hendricks, a Rock Island county probation officer, testified that the defendant complied with some of the terms of his probation by testing negative for drug use and attending a treatment program. However, the defendant had admitted to using heroin while he was on probation. The defendant also testified, and acknowledged that he had used heroin while he was on probation. The court delayed ruling on this petition until after the trial on the new criminal charge.

¶ 8 Immediately following the hearing, the cause proceeded to trial in case No. 09-CF-586, and on that first day, the parties engaged in jury selection, opening arguments, and one witness testified for the State. Before jury selection began, the court advised potential jurors of the specifics of the charge against defendant. This reading did not include the maximum and minimum sentences available upon conviction. The defendant was actually represented by appointed counsel on this first day. On the second day of trial, the defendant presented a *pro se* motion to continue the trial, which the court denied. The defendant then requested that the court

allow him to discharge his attorney and proceed *pro se*. The defendant indicated that “[he] wanted a trial[,]” but he “d[id]n’t need [named counsel] as an attorney.” The court opined that counsel's performance had been sufficient and expressed concern about a change of attorneys in the middle of a case.

¶ 9 After the defendant and defense counsel conferred off the record, defense counsel indicated that the defendant wanted to represent himself. Based on the defendant’s prior involvement in felony trials, counsel believed that defendant could adequately represent himself, but did not think that such a decision was wise. The court asked the defendant if he intended to cross-examine witnesses, to which he replied in the affirmative. Without providing the defendant with any of the information required by rule 401, the court allowed the defendant to “go ahead *pro se*, but [the court was] going to have counsel stay here as standby.” The court then directed the defendant and counsel to switch seats at the defense table.

¶ 10 During the course of the defendant’s trial, he conferred with standby counsel on five occasions, and sought his advice on polling the jury. The court also permitted standby counsel to assist the defendant at the jury instruction conference.

¶ 11 The jury convicted the defendant of unlawful possession of a controlled substance with intent to deliver. The defendant then indicated that he desired the assistance of counsel for the rest of the case – presumably the probation revocation and sentencing. The court acquiesced and reappointed counsel.

¶ 12 The court found that the defendant had violated his probation in case No. 07-CF-576 by (1) committing the offense of unlawful possession with intent to deliver a controlled substance that had served as the basis for his conviction in case No. 09-CF-586, and (2) using heroin during his term of probation.

¶ 13 On April 5, 2010, the court conducted a sentencing hearing. In preparation for this hearing, the Rock Island County Probation Department filed a presentence investigation report (PSI). The PSI indicated that the defendant had three prior convictions for either possession or unlawful delivery of illegal drugs, two of which were felony offenses. One 2003 felony conviction was specifically for the offense of unlawful possession with intent to deliver a controlled substance. The court sentenced the defendant to concurrent six-year terms of imprisonment, one term for the immediate conviction and the other for the earlier conviction following revocation of probation. The defendant appealed.

¶ 14 ANALYSIS

¶ 15 On appeal, the defendant contends solely that his conviction and the revocation of his probation must be reversed, and the cause remanded for a new trial, because the trial court did not admonish him pursuant to Illinois Supreme Court Rule 401(a) (eff. July. 1, 1984) before it permitted him to proceed *pro se* at trial. The defendant failed to preserve this issue for review because he neither made a timely objection to the court's failure to admonish him nor raised the issue in a post trial motion. Both actions are required; the defendant did neither. This claim is, therefore, forfeited. *People v. Munson*, 206 Ill. 2d 104 (2002); *People v. Enoch*, 122 Ill. Wd 176 (1988).

¶ 16 The defendant asserts, however, that because the right to counsel is fundamental, plain error review is warranted. Despite this claim, he has not advanced a plain error argument in this court. Even so, we will consider plain error because the right to counsel is, indeed, fundamental. See *People v. Herring*, 327 Ill. App 3d 259 (2002).

¶ 17 Plain error is a narrow and limited exception to the rule of forfeiture. *People v. Hillier*, 237 Ill. 2d 539 (2010). The plain error doctrine does not require a reviewing court to consider

all forfeited errors, as it is not a general savings clause preserving for review all errors affecting substantial rights notwithstanding whether the errors were brought to the attention of the trial court. *People v. Herron*, 215 Ill. 2d 167 (2005). Rather, under plain error, a reviewing court may review a forfeited sentencing error where: (1) the evidence at the sentencing hearing was closely balanced; or (2) the error was so egregious that the defendant was denied a fair sentencing hearing. *People v. Hall*, 195 Ill. 2d 1 (2000). Before we can consider whether the trial court committed plain error, we must first determine if the trial court erred, as there can be no finding of plain error if the trial court did not err. See *People v. Johnson*, 218 Ill. 2d 125 (2005).

¶ 18 Supreme Court Rule 401(a) provides that:

“[a]ny waiver of counsel shall be in open court. The court shall not permit a waiver of counsel by a person accused of an offense punishable by imprisonment without first, by addressing the defendant personally in open court, informing him of and determining that he understands the following:

- (1) the nature of the charge;
- (2) the minimum and maximum sentence prescribed by law, including, when applicable, the penalty to which the defendant may be subjected because of prior convictions or consecutive sentences; and
- (3) that he has a right to counsel and, if he is indigent, to have counsel appointed for him by the court.”

¶ 19 The purpose of Rule 401(a) is to provide a procedure that eliminates any doubt that the defendant understands the nature of the charges against him and their consequences before a trial

court accepts his waiver of the right to counsel, and to stop a defendant from waiving the right to counsel without full knowledge and understanding of this action. *People v. Smith*, 133 Ill. App. 3d 574 (1985). A court, however, need not strictly comply with Rule 401(a) (*People v. Coleman*, 129 Ill. 2d 321 (1989)), and reviewing courts have excused strict compliance in instances where the record indicates that the defendant was otherwise aware of information contained in Rule 401(a), had the assistance of standby counsel, and had prior experience in the criminal legal system. *People v. Eastland*, 257 Ill. App. 3d 394 (1993).

¶ 20 Specifically, in *People v. Nieves*, 92 Ill. 2d 452 (1982), the supreme court held that where a trial court permitted a defendant to proceed *pro se* at trial, but granted the defendant the technical assistance of an attorney by appointing standby counsel who was present during trial, the defendant need not be given all of the Rule 401(a) admonishments. In that case, the supreme court also noted that the record indicated that the defendant knew the nature of the charge against him and the potential sentence he could receive because that case was the last in a series of several related cases involving the defendant. Thus, “it was unnecessary for the trial court to give the specific admonishments set forth in Rule 401(a).” *Nieves*, 92 Ill. 2d at 467.

¶ 21 Relying on *Nieves*, another district of this appellate court concluded that “[that] case [was] different than those cases where a slavish adherence to a reading of Rule 401(a) was required in that [t]here the defendant had been arraigned and had proper admonitions as to (1) the nature of the charges; (2) the minimum and maximum sentence prescribed by law, and (3) defendant was afforded counsel at trial. Finally, the defendant was afforded standby counsel at sentencing who was obviously completely familiar with his case.” *People v. Larson*, 158 Ill. App. 3d 135, 140 (1987).

¶ 22 In cases where a *pro se* defendant proceeds with the technical assistance of standby counsel, whether or how much the defendant avails himself of the assistance of the standby attorney is not relevant in the context of Rule 401(a). *People v. Bliey*, 232 Ill. App. 3d 606 (1992). Rather, a defendant who seeks to represent himself with the advice of counsel at hand has the freedom to defend himself and decide his own strategies, while retaining the expertise of a legal advisor with training. *Eastland*, 257 Ill. App. 3d 394. Thus, “such [a] defendant should not be heard to complain on appeal of improprieties pertaining to admonishments about proceeding *pro se*. [Citations].” *Eastland*, 257 Ill. App. 3d at 400.

¶ 23 In this case, the record reveals that the trial court did not provide the defendant with the Rule 401(a) admonishments at or reasonably close to the time it granted his request to proceed *pro se*. However, here, as in *Nieves*, a remand is not necessary because the defendant had the assistance of standby counsel and he was otherwise aware of the information contained in Rule 401(a).

¶ 24 First, the trial court ordered defense counsel to remain as standby counsel before it permitted the defendant to proceed *pro se*. Specifically, the record indicates that when the court accepted the defendant’s request to proceed *pro se*, it directed defense counsel to remain as the defendant’s standby counsel, and then ordered counsel and the defendant to switch seats at the defense table. Thus, the defendant had the benefit of “technical assistance” of counsel during the portion of the trial that the defendant proceeded *pro se*. See *Nieves*, 92 Ill. 2d at 466. Although this factor is not critical to our conclusion, the record clearly indicates that the defendant actually used standby counsel on a number of occasions.

¶ 25 Additionally, the defendant had the benefit of appointed counsel at his pretrial proceedings; at trial during jury selection, opening arguments, and the examination of one of the

State's witnesses; and at sentencing. Given these facts, the record sufficiently indicates that the defendant was aware of his right to counsel.

¶ 26 The record also indicates that the defendant was aware of the nature of the charges against him, and the possible penalties, because the court arraigned him. In fact, the defendant participated in a preliminary hearing, a first appearance, and an arraignment on his alleged violation of section 570/401(c)(1) of the Criminal Code (720 ILCS 570/401(c)(1) (West 2008)). Unfortunately, none of these hearings was contemporaneous with the defendant's decision to proceed *pro se*, but that deficiency is offset by the appointment of standby counsel. We also note that the defendant had previous experience in the criminal legal system, as the PSI indicated that the defendant had three prior convictions involving illegal drugs, one of which was for the offense of unlawful possession with intent to deliver a controlled substance. We are, however, loathe to conclude that this experience qualifies him for the practice of criminal law.

¶ 27 This court recognizes that Illinois Supreme Court Rules have the effect of law and it is presumed that courts will obey them. *People v. Houston*, 226 Ill. 2d 135 (2007). We also recognize the binding effect of Supreme Court precedent on this court. *People v. Artis*, 232 Ill. 2d 156 (2009) (supreme court decisions are binding on lower courts). Thus, while the rule required that the trial court admonish the defendant before it permitted him to proceed *pro se*, we find that *Nieves* requires us to conclude that, because the court appointed standby counsel and the record indicates that the defendant was generally aware of the information contained in the Rule 401(a) admonishments, the court committed no error before the defendant was allowed to proceed *pro se*. In the absence of error, there can be no finding of plain error.¹

¹ In this case, the defendant has failed to make even the most rudimentary argument in

¶ 28 Finally, in light of our conclusion that the court committed no error in the proceedings in case No. 09-CF-586, we find that the trial court properly revoked the defendant's probation due to his conviction of the charged offense. See 730 ILCS 5/5-6-4(e) (West 2008) (if the court determines that a defendant has violated any term of his probation, it may impose any other sentence that was originally available to the court for the commission of the underlying offense).

¶ 29 **CONCLUSION**

¶ 30 For the foregoing reasons, the judgment of the circuit court of Rock Island County is affirmed.

¶ 31 Affirmed.

support of a plain error finding. The defendant does not delineate under which prong of the plain error rule this court should have considered the matter, nor does he apply the jurisprudence of the plain error rule to the facts of this case. The burden to prove plain error is on him, and the proposition cannot be proven without applying the law to the facts of the case. *People v. Naylor*, 229 Ill. 2d 584 (2008). We remind all counsel practicing before us that the appellate court is not a depository where they may dump the burden of research and argument. *People v. Hood*, 210 Ill. App. 3d 743 (1991).