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2012 IL App (3d) 100542-U

Order filed November 16, 2012

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
Plaintiff-Appellee,	)	Peoria County, Illinois,
	)	
v.	)	Appeal No. 3-10-0542
	)	Circuit No. 09-CF-828
	)	
LORENZO MITCHELL,	)	Honorable
	)	Michael E. Brandt,
Defendant-Appellant.	)	Judge, Presiding.

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

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**ORDER**

¶ 1 *Held:* The trial court failed to substantially comply with Illinois Supreme Court Rule 401(a). Therefore, defendant did not knowingly waive his right to counsel, and such error is reversible.

¶ 2 Following a jury trial, defendant, Lorenzo Mitchell, was convicted of two counts of aggravated battery of a child (720 ILCS 5/12-4.3(a-5) (West 2008)) and sentenced to two consecutive nine-year terms of imprisonment. Defendant appeals, arguing that: (1) the trial court failed to properly admonish him when he waived his right to counsel and further erred when it

refused to reappoint counsel before trial; (2) he was denied the right to confrontation when the jury, during deliberations, was allowed to listen to telephone calls that were not played in open court; and (3) the trial court erred by imposing consecutive sentences. We vacate defendant's convictions and remand the cause for a new trial.

¶ 3

### FACTS

¶ 4 On August 4, 2009, defendant was charged by indictment with two counts of aggravated battery of a child. On August 13, 2009, a public defender was appointed to represent defendant. Defendant pled not guilty to the charges.

¶ 5 On October 13, 2009, defendant informed the court that he wished to represent himself. The trial judge advised defendant about the nature of the charges and that he was eligible for extended-term sentencing. The trial judge stated that the maximum sentence would be a determinate term of two to ten years' imprisonment, which would be followed by one year of mandatory supervised release. The trial court also informed defendant that he had a right to counsel.

¶ 6 Defendant indicated that he understood the admonishments. Defendant informed the court that he was 31 years old, had a General Educational Diploma, could read and write, and had not received mental health treatment in the past. In 2000, defendant represented himself at a federal court trial, with standby counsel. The trial judge stated that he would not appoint standby counsel for defendant, and defendant agreed. The trial judge accepted defendant's waiver of counsel and discharged the public defender.

¶ 7 At a hearing on November 9, 2009, the State informed the court that defendant was willing to enter into a plea of guilty on both counts. The plea agreement was for a 4½-year

sentence on each count, to be served concurrently. In response to the court's questions, defendant indicated that he was not aware that he was being charged with two counts of aggravated battery. The court informed defendant that there was a count for each child. After further questioning, defendant decided to proceed to trial because the court was unable to guarantee that the children involved with this case would be returned to their mother if defendant pled guilty.

¶ 8 On November 13, 2009, defendant filed a motion to appoint counsel. Defendant claimed that he did not knowingly waive his right to counsel because he was not informed of the maximum sentence he could receive. Specifically, defendant alleged that he was not informed of his eligibility for extended-term sentencing or that he would have to serve 85% of his sentence.

¶ 9 Trial was scheduled for November 16, 2009. At the outset of proceedings, defendant argued his motion for appointment of counsel. The trial court found that defendant was properly admonished as to extended-term sentencing, and that the court was not required to admonish as to good conduct credit. The court further found defendant's motion untimely because it was made on the eve of trial. Defendant's motion was denied, and the cause proceeded to a jury trial. At the close of the case, the jury found defendant guilty on both counts.

¶ 10 On December 1, 2009, defendant filed a *pro se* motion for a new trial, alleging he was denied a fair trial. On December 9, 2009, defendant filed a supplemental *pro se* motion for new trial, alleging he did not knowingly waive his right to counsel. Defendant claimed that at the time he waived counsel, he was not admonished of the possibility for extended-term sentencing. Defendant subsequently filed several other *pro se* motions for a new trial, but they did not relate to his waiver of counsel.

¶ 11 On December 11, 2009, the trial court granted defendant's motion for appointment of

posttrial counsel. On April 1, 2010, posttrial counsel filed a supplemental motion for new trial. The motion did not allege that defendant did not knowingly waive his right to counsel, but it did adopt and incorporate defendant's previously filed posttrial motions. Following argument on the motion, it was denied by the trial court.

¶ 12 The trial court sentenced defendant to two consecutive nine-year terms of imprisonment. Defendant's subsequent motion to reconsider both the denial of a new trial and his sentence was denied. Defendant appeals.

¶ 13 ANALYSIS

¶ 14 Defendant argues that he did not knowingly waive his right to counsel because the trial court failed to substantially comply with the admonishment requirements of Illinois Supreme Court Rule 401(a) regarding consecutive sentences. Ill. S. Ct. R. 401(a) (eff. July 1, 1984). Defendant also argues that because he did not make a knowing waiver of his right to counsel, the trial court erred by denying his motion to appoint counsel before trial. The State contends that defendant has forfeited both of these issues.

¶ 15 Generally, a defendant who fails to raise an alleged error in a posttrial motion forfeits the issue for appellate review. *People v. Enoch*, 122 Ill. 2d 176 (1988). In this case, defendant's posttrial motion did not preserve the issues, but instead only alleged he did not make a knowing waiver because he was not admonished as to extended-term sentencing. See *Enoch*, 122 Ill. 2d 176. We do not believe this contention put the trial court on notice of the issues defendant is appealing, because this argument differs from those raised on appeal, and defendant was properly admonished as to extended-term sentencing. Nevertheless, defendant argues that this court should address the issue under the plain error doctrine.

¶ 16 The plain error doctrine allows for the review of a forfeited issue if error in fact occurred and: (1) the evidence was closely balanced; or (2) the error was so substantial that it deprived defendant of a fair trial. *People v. Herron*, 215 Ill. 2d 167 (2005). Before addressing whether defendant's claim satisfies the plain error doctrine, defendant must first show that a clear or obvious error occurred. *People v. Hillier*, 237 Ill. 2d 539 (2010).

¶ 17 The sixth amendment of the United States Constitution entitles a defendant to counsel. U.S. Const., amends. VI, XIV; see also *People v. Hughes*, 315 Ill. App. 3d 86 (2000). A defendant may waive this right and proceed without counsel only if he "voluntarily and intelligently elects to do so." *People v. Baker*, 92 Ill. 2d 85, 90 (1982); see also Ill. S. Ct. R. 401 (eff. July 1, 1984). Under Illinois Supreme Court Rule 401(a) (eff. July 1, 1984), a trial court shall not permit a waiver of counsel by a defendant accused of an offense punishable by imprisonment without first addressing defendant in open court and informing him of and determining that he understands: (1) the nature of the charge; (2) the minimum and maximum sentence prescribed by law, including the penalty to which 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. In the instant case, the trial court did not admonish defendant in accordance with Rule 401(a) because at the time defendant waived counsel, he had not been informed that he could receive consecutive sentences.

¶ 18 However, under limited circumstances, substantial compliance with Rule 401(a) is sufficient to effectuate a valid waiver of counsel where: (1) the absence of a detail did not impede defendant from giving a knowing and intelligent waiver; or (2) defendant possessed a degree of knowledge or sophistication that excused the lack of admonition. *People v. Koch*, 232 Ill. App.

3d 923 (1992). Here, even though defendant was correctly informed as to extended-term sentencing, this admonishment was not enough to find substantial compliance with Rule 401(a). Defendant was informed that he could receive a sentence between two and ten years' imprisonment due to extended-term sentencing. However, the maximum defendant actually faced was 20 years, and the sentence he received—18 years—far exceeded the maximum stated by the court. See *Koch*, 232 Ill. App. 3d 923 (when a defendant is given a sentence in excess of the maximum he was informed of, defendant's waiver of counsel is not valid).

¶ 19 Moreover, after defendant spoke with the State regarding a plea agreement, defendant indicated that he was unaware he was being charged with two counts. This statement further shows that defendant was unaware that he could be sentenced consecutively. Four days after defendant learned he faced two charges, he asked for appointment of counsel. His request was denied, and he was forced to proceed to trial *pro se*. Under these circumstances, where defendant was never told of the proper sentencing range and he had other misconceptions about the case, we hold that the court's failure to properly admonish him and forcing him to proceed *pro se* was error. See *Koch*, 232 Ill. App. 3d 923.

¶ 20 Having found that the trial court committed error, we review defendant's case under the plain error doctrine. *People v. Vazquez*, 2011 IL App (2d) 091155. The second prong of the plain error doctrine permits reversal when a trial court's error is structural, such that it erodes the integrity of the judicial process and undermines the fairness of defendant's trial. *People v. Glasper*, 234 Ill. 2d 173 (2009). The right to counsel is fundamental, and deprivation of this right, due to an ineffective waiver, is plain error. *People v. Black*, 2011 IL App (5th) 080089; *People v. Vernon*, 396 Ill. App. 3d 145 (2009). Therefore, we find that the trial court's failure to

comply with Rule 401(a) was reversible error, and because this issue is dispositive of the case, it is unnecessary to address defendant's remaining arguments. Accordingly, we vacate defendant's convictions and remand the cause for a new trial.

¶ 21

#### CONCLUSION

¶ 22 For the foregoing reasons, the judgment of the circuit court of Peoria County is vacated, and the cause is remanded for a new trial.

¶ 23 Vacated and remanded.