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2012 IL App (3d) 100669-U

Order filed May 29, 2012

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 13th Judicial Circuit,
)	La Salle County, Illinois,
Plaintiff-Appellee,)	
)	Appeal No. 3-10-0669
v.)	Circuit No. 06-CF-39
)	
)	Honorable
JOHNATHAN PINNEY,)	Judge Howard C. Ryan and
)	Cynthia M. Raccuglia,
Defendant-Appellant.)	Judges, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justice Holdridge concurred in the judgment.
Justice McDade specially concurred.

ORDER

- ¶ 1 *Held:* The trial court did not comply with Illinois Supreme Court Rule 401(a) before allowing defendant to waive his right to appointed counsel and proceed *pro se*.
- ¶ 2 Defendant, Johnathan Pinney, was originally convicted in 2008 of aggravated battery (720 ILCS 5/12-4(b)(6) (West 2006)), and sentenced to 180 days in jail and 2½ years conditional discharge. In May 2010, defendant represented himself during a hearing on a pending petition to

revoke his conditional discharge. Following the hearing, the trial court revoked defendant's conditional discharge and sentenced him to 4½ years in prison. Defendant appeals the revocation of his conditional discharge. We reverse.

¶ 3

FACTS

¶ 4 In February 2006, defendant voluntarily admitted himself into the Community Hospital of Ottawa, indicating he was suicidal. Defendant became agitated when hospital personnel attempted to remove his cape, and police were called to assist. Defendant bit one of the officers, was charged with aggravated battery, and the court appointed counsel to represent defendant.

¶ 5 In September 2006, a jury determined that defendant was unfit to stand trial, but in June 2007, the State advised the court that the Department of Human Services had determined that defendant had been restored to fitness. Before trial, defendant and defense counsel disagreed over trial strategy, and defendant asked to represent himself. The court cautioned defendant against representing himself, but allowed him to proceed *pro se* for a short period of time until defendant's conduct caused the trial court to once again question defendant's fitness to stand trial.

¶ 6 In August 2007, the court ordered a second fitness evaluation. Dr. Robin Watkins' report later opined that defendant was unfit to stand trial. On November 26, 2007, Judge Cynthia Raccuglia presided over a second jury trial pertaining to the issue of defendant's fitness to stand trial. Following this trial, the jury determined defendant was unfit to stand trial.

¶ 7 On February 7, 2008, the State advised Judge Howard Ryan that defendant had been recently re-evaluated, and the evaluator, Tony Fletcher, concluded that defendant was now fit to stand trial. Defense counsel stipulated to this report and, without objection, the court set the matter for a jury trial on the pending criminal charge.

¶ 8 On February 21, 2008, defendant appeared before Judge William Balestri for a status hearing before the jury trial on the criminal charge. During this status hearing defendant informed Judge Balestri that defendant desired to represent himself because his previous request for the appointment of private counsel had been denied. The court advised defendant against representing himself but did not advise defendant of the minimum and maximum sentences before discharging the public defender and granting defendant's request to proceed *pro se*.

¶ 9 In May 2008, defendant represented himself during a jury trial conducted before Judge Raccuglia. The jury found defendant guilty of aggravated battery. On June 20, 2008, the court sentenced defendant to serve 2½ years conditional discharge and 180 days in jail.

¶ 10 In March 2010, the State filed a petition to revoke defendant's conditional discharge and the court appointed the public defender because it had "some concerns as to [defendant's] mental state." Pursuant to an agreement negotiated with the assistance of appointed defense counsel, defendant was resentenced to the same period of conditional discharge that was ordered on June 20, 2008, and was ordered to serve an additional 34 days in jail, with credit for time served.

¶ 11 Within weeks, the State filed another petition to revoke defendant's conditional discharge. This second petition filed in 2010, alleged that defendant had been arrested for criminal trespass to state supported land. On April 26, 2010, Judge Ryan informed defendant of the nature of the charge and advised defendant that if he was convicted of violating the order of conditional discharge, he faced between 3 and 7 years in prison, or 3 to 14 years in prison if he was extended-term eligible. During this arraignment, the court asked defendant if he wanted the public defender appointed or wished to hire his own attorney. Defendant replied "[n]o, represent myself." Judge Ryan stated "[t]hat's fine, you can do so[,]" and set the case for status.

¶ 12 At the May 7, 2010, status hearing, Judge Raccuglia made a finding that defendant was capable of representing himself and set a date for the hearing on the State's petition. At the hearing, defendant appeared *pro se* and the court found defendant guilty of violating the terms of his conditional discharge. The court revoked defendant's conditional discharge and sentenced defendant to 4½ years in prison. Defendant filed a *pro se* motion to reconsider which the court denied. Defendant appeals.

¶ 13 ANALYSIS

¶ 14 Defendant argues he did not receive the required Rule 401(a) admonishments before electing to represent himself on the second 2010 petition to revoke his conditional discharge. Ill. S. Ct. R. 401(a) (eff. July 1, 1984). Therefore, defendant contends his conviction for the violation of conditional discharge must be reversed and he is entitled to a new hearing.

¶ 15 The State argues that defendant waived review of this issue regarding an informed waiver of his right to counsel before the hearing on the second petition alleging a violation of conditional discharge. Alternatively, the State argues the trial court's admonitions substantially comply with Rule 401(a) and any omission was inconsequential because appointed counsel represented defendant in previous proceedings in this case, thus any error resulting from the lack of strict compliance with Rule 401(a) was harmless.

¶ 16 The record reveals defendant did not object to the court's failure to strictly comply with Rule 401(a) at trial and did not include that issue in his posttrial motion. The plain error rule bypasses the forfeiture principle when an error occurred and: (1) the evidence was so closely balanced that the error alone threatened to tip the scales of justice against defendant; or (2) that the error was so serious that it affected the fairness of defendant's trial and challenged the

integrity of the judicial process. *People v. Thompson*, 238 Ill. 2d 598 (2010). The first step of plain error review is determining whether the trial court erred. *People v. Walker*, 232 Ill. 2d 113 (2009).

¶ 17 The sixth amendment of the United States Constitution entitles a defendant to counsel. U.S. Const., amends. VI, XIV. A defendant may waive this right only if he voluntarily, knowingly, and intelligently elects to do so. *People v. Campbell*, 224 Ill. 2d 80 (2006). A court shall not permit a waiver of counsel by a defendant accused of an offense punishable by imprisonment without addressing defendant in open court and ensuring defendant understands the nature of the charge, the minimum and maximum sentence prescribed by law, that he has a right to counsel, and if he is indigent, the court will appoint counsel for him. Ill. S. Ct. R. 401(a) (eff. July 1, 1984); see also *People v. Roberts*, 56 Ill. App. 3d 126 (1978) (Rule 401(a) admonishments apply to probation revocation proceedings).

¶ 18 In this case, Judge Ryan allowed defendant's request to proceed *pro se* without carefully informing defendant of the right to have counsel appointed if defendant was indigent. Thus, the trial court erred when it did not strictly comply with the requirements of Rule 401(a).

¶ 19 The State contends that this omission was inconsequential. In support of this contention, the State points out that under some circumstances, the supreme court has applied harmless error review to certain rule violations. See *Thompson*, 238 Ill. 2d 598. Although defendant previously accepted appointed counsel, we reject the State's contention that the error in this case was harmless because our supreme court has held that violations involving the right to counsel involve structural error which are not subject to a harmless error analysis. *People v. Baez*, 241 Ill. 2d. 44 (2011). Furthermore, a court should indulge in every reasonable presumption against

the waiver of the right to counsel. *Brewer v. Williams*, 430 U.S. 387 (1977).

¶ 20 Nonetheless, the State argues that in very limited circumstances, other courts have upheld a defendant's election to waive counsel when the trial court did not strictly comply Rule 401(a). *People v. Koch*, 232 Ill. App. 3d 923 (1992). In that instance, the absence of a single detail was considered not to impede a defendant's otherwise knowing and intelligent waiver of counsel. See *People v. Johnson*, 119 Ill. 2d 119 (1987) (admonitions failed to state the minimum sentence). In another case, defendant possessed a degree of legal knowledge or intellectual sophistication that excused the lack of admonition. See *People v. Houston*, 174 Ill. App. 3d 584 (1988) (defendant displayed knowledge and training as a paralegal, excusing admonition).

¶ 21 We consider these cases distinguishable. Here, unlike a situation where the court explained the range of punishment but omitted a discussion of the minimum sentence, Judge Ryan completely failed to mention that defendant had the right to appointed counsel. This omission was understandable since Judge Ryan was conducting a first appearance on defendant's second petition to revoke conditional discharge. See 725 ILCS 5/113-1 (West 2006). However, we note that defendant was not properly admonished of his right to appointed counsel by any other judge before the hearing on the merits. See 725 ILCS 5/113-3 (West 2006).

¶ 22 Further, this defendant did not demonstrate a degree of legal knowledge or intellectual sophistication. Rather, defendant suffered from fragile mental health, having twice been found unfit by a jury. In light of these circumstances, Judge Ryan should have made it very clear to defendant that it would be unwise to proceed *pro se* and explained that appointed counsel would be available to assist defendant in this case.

¶ 23 Even though Judge Raccuglia acknowledged that defendant desired to represent himself

and found that defendant was capable of proceeding *pro se* during the May 7, 2010, status hearing, Judge Raccuglia obviously believed Judge Ryan provided the proper admonishments as required by Rule 401(a) on April 26, 2010. Thus, Judge Raccuglia did not re-admonish defendant pursuant to Rule 401(a).

¶ 24 We note that competence to waive counsel is measured by the same standard as competence or fitness to stand trial. *People v. Redd*, 173 Ill. 2d 1 (1996). The issue in this case is not whether defendant was capable of understanding the Rule 401(a) admonitions he received by Judge Ryan. Rather, the issue in this appeal is whether Judge Ryan, or later Judge Raccuglia, provided complete admonitions as required by Rule 401(a). We conclude that defendant did not receive admonitions which substantially complied with the requirements of Rule 401(a) before electing to proceed without counsel. Moreover, this error was plain error as it affected defendant's fundamental right to counsel. See *People v. Silagy*, 101 Ill. 2d 147 (1984) (right of a defendant to represent himself is as fundamental as his right to be represented by counsel when his choice is intelligently made). Defendant had the right to represent himself, but the record indicated that he could not intelligently make this decision without a complete admonition.

¶ 25 **CONCLUSION**

¶ 26 For the foregoing reasons, the judgment of the circuit court of La Salle County is reversed and remanded for further proceedings.

¶ 27 Reversed and remanded.

¶ 28 JUSTICE McDADE, specially concurring:

¶ 29 I agree with the decision of the majority and concur in the judgment.

¶ 30 I write separately to suggest that, given the defendant's erratic history of fitness to stand

trial, more may be needed from the trial court on remand than a simple recitation of the statutory admonitions. The finding that defendant was fit to stand trial was made on stipulation of counsel to the recommendation of an "evaluation," *supra* ¶7, apparently without independent assessment by the court.

¶ 31 A finding of fitness to stand trial is made when it is shown that a defendant is capable of understanding the charges against him and assisting counsel in presenting a defense. *People v. Johnson*, 206 Ill. 2d 348 (2002). This is a far cry from representing oneself in mounting a defense against those charges.

¶ 32 Clearly, a defendant has a constitutional right to waive counsel and to proceed *pro se*. *People v. Lego*, 168 Ill. 2d 561 (1995). However, when, as here, the defendant's "fragile mental health" is a recurring matter of record, *supra* ¶22, it would be prudent, albeit not mandatory, to (1) make sure, on the record, that defendant clearly understands what assistance will and will not be available to him if he chooses to represent himself or (2) consider the appointment of stand-by counsel, and, perhaps, (3) remind the defendant that his earlier *pro se* representation resulted in his conviction and that a finding of guilty in this case will likely result in the revocation of his conditional discharge and his incarceration in the Department of Corrections. This latter point seems important to me since the earlier petition to revoke only yielded an add-on of 34 days in jail. If he still persists in refusing counsel, at least the court has made every reasonable effort, consistent with his constitutional right to self-representation, to ensure that his waiver is actually knowing and voluntary.