

No. 1-11-2269

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County
)	
v.)	No. 09 CR 12710
)	
IELIOT JACKSON,)	Honorable
)	Maura Slattery Boyle,
Defendant-Appellant.)	Judge Presiding.

JUSTICE EPSTEIN delivered the judgment of the court.
Presiding Justice Lavin and Justice Fitzgerald Smith concurred in the judgment.

ORDER

- ¶ 1 *Held:* Where trial court's admonitions regarding defendant's posttrial waiver of counsel did not substantially comply with Illinois Supreme Court Rule 401(a), we vacate defendant's sentence and remand this cause for further proceedings.
- ¶ 2 Following a jury trial, defendant Ieliot Jackson was found guilty and convicted of delivery of a controlled substance within 1,000 feet of a school. The trial court denied defendant's *pro se* posttrial motions. Defendant was sentenced to 13 years in the Illinois Department of

Corrections. The trial court denied defendant's *pro se* motion to reconsider the sentence. On appeal, defendant contends that his conviction should be reversed and this case remanded for a new trial because the trial court's admonitions to the prospective jurors did not comply with Illinois Supreme Court Rule 431(b) (eff. May 1, 2007) and constituted plain error where the evidence was closely balanced. Defendant alternatively requests that we vacate his sentence and remand for further posttrial proceedings and argues that the trial court failed to substantially comply with Illinois Supreme Court Rule 401(a) (eff. July 1, 1984) before permitting him to proceed *pro se* on his posttrial motions and motion to reconsider sentence. For the reasons that follow, we vacate defendant's sentence and remand for further proceedings.

¶ 3 BACKGROUND

¶ 4 Defendant was charged by indictment with delivery of a controlled substance and delivery of a controlled substance within 1,000 feet of a school. Defendant exercised his right to a jury trial.

¶ 5 Admonition to Jury

¶ 6 During jury selection, the trial judge informed the jurors in relevant part as follows:

“The charge in this case is contained in what's called an indictment. You must remember that an indictment is not to be considered as any evidence against Mr. Jackson, nor does the law allow you to infer any presumption of guilt against Mr. Jackson simply because he has been named in an indictment. The indictment is merely the formal way in which a person is placed on trial.

Under the law, a defendant is presumed to be innocent of the charges

against him. This presumption remains with him throughout every stage of the trial and during your deliberations on the verdict and is not overcome unless from all the evidence you are convinced beyond a reasonable doubt that a defendant is guilty.

The State has the burden of proving the guilt of the defendant beyond a reasonable doubt, and that burden remains on the State.

The defendant, Mr. Jackson, is not required to prove his innocence nor is he required to present any evidence on his own behalf.

You are the judges of the facts in this case. That is you and only you will determine which witnesses are to be believed and how much weight is to be given to their testimony. It is my job to determine the law in the case and what evidence you may hear and consider.

It will be your sworn duty to follow the law as I give it to you. If you are convinced beyond a reasonable doubt from all the evidence in the case that Mr. Jackson is guilty as charged in the indictment, it will be your duty to find him guilty.

On the other hand, if after hearing all the evidence you are not convinced beyond a reasonable doubt of Mr. Jackson's guilt, it will be your duty to find him not guilty.

* * *

I just want to find out from the parties and the venire – and this includes

everyone out there as well. There are some basic principles of the American criminal justice system, and I need to make sure that everybody has the ability to follow that.

One of the basic principles and founding principles is that a person is innocent until proven guilty. Is there anyone in this venire, not only sitting in the courtroom but outside, who does not believe that they could follow that basic principle of American criminal justice?

Let the record reflect that none of the venire has raised their hand.

Another basic principle is that the burden is upon the State, that Mr. Jackson is not required to prove anything nor does he need to testify.

Is there anyone in the venire who could not follow or understand that principle of law as well?

Let the record reflect no one in the venire has raised their hand.”

¶ 7 Evidence at Trial

¶ 8 The State presented four witnesses at trial: Chicago police officer Clark Eichman, an undercover narcotics officer; Chicago police officer Charlie Person, a surveillance officer; Mary Ember, an investigator; and Lenetta Watson, a forensic scientist.

¶ 9 Officer Eichman testified that he first met the defendant on May 30, 2009 on the 4800 block of West Superior in Chicago. The encounter lasted no more than a minute. Officer Eichman was parked on the north side of the street in the middle of the block in a covert vehicle. Defendant was on a BMX bicycle. Defendant asked Officer Eichman for his telephone number

and his name. Officer Eichman gave defendant his number and told him that his name was “Ike.” Defendant entered the information into a cell phone. Officer Eichman then drove away.

¶ 10 Defendant called him after he drove away. At that time, Officer Eichman did not recognize the telephone number. Officer Eichman testified that the voice was that of defendant who told Officer Eichman to call him if he needed anything. Officer Eichman saved the number to his cell phone and labeled it BMX, so he would remember it was the number belonging to the person on the BMX bicycle. He testified that he did not create any written documentation of this interaction. He told some of his team members who also did not document it. Officer Eichman testified that an officer, either Officer Williams or Officer Calvo, created a contact card for defendant that day.

¶ 11 Two weeks later, on June 13, 2009, at approximately 9 a.m., Officer Eichman was with a team of surveillance officers and undercover officers to make a controlled purchase of narcotics. Officer Eichman's role was going to be the undercover purchasing officer. Also present was his supervisor, Sergeant Santos, who was going to be a surveillance officer, as well as Officer Person, the primary surveillance officer and Officer Fleming, the secondary surveillance officer. There were also two enforcement officers present, Officer Williams and Officer Calvo.

¶ 12 At 9:19 a.m., Officer Eichman received a call on his cell phone from “BMX.” When he answered, a male voice said, “Ike, you good.” Officer Eichman responded no and told the caller that he needed to get “hooked up” which he testified was a street term meaning he needed to get, or purchase, narcotics. The caller told Officer Eichman to go to the area of 4800 West Superior. Officer Eichman told the caller he was 30 minutes away. After finishing the phone call, Officer

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Eichman told his team members, who were all with him at the time, that he had just received a call from BMX, so that they could go set up the block where they believed the purchase would take place. Once set up, the surveillance team contacted Officer Eichman, who then called BMX at 9:39 a.m. Officer Eichman testified that the person who answered the telephone had the same voice as the person he had spoken to ten minutes earlier. Officer Eichman told him that he was 5 minutes away and the caller asked how many “blows” he needed. Officer Eichman explained that “blow” is a street term for heroin. Officer Eichman told the caller that he needed four “blows.”

¶ 13 Officer Eichman drove to the area of 4800 West Superior in an unmarked vehicle. He was alone in his vehicle and turned off his police radio before he arrived. He parked on the north side of the street at 4856 West Superior, a block away from Nash Grammar School. He saw Officer Person parked approximately two houses or 50 feet away, on the south side of the block. At 9:46 a.m., Officer Eichman called back the BMX telephone number. The person who answered had the same voice as the individual that Officer Eichman had spoken with earlier. When Officer Eichman told him that he was on the block, the person said “is that you at the end of the block.” Officer Eichman said yes, hung up, and began looking for the person using his side and rearview mirrors. Officer Eichman testified that he then saw defendant walking towards his vehicle and, as he received closer, recognized him as the individual whom he had met on May 30th and whom he had called “BMX.” He recognized defendant's distinctive beard.

¶ 14 Officer Eichman testified that he spoke to defendant through his open window and defendant gave him four small Ziploc bags with blue tint on one side and an “S” logo, each of

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which contained white powder. Officer Eichman gave defendant \$40 of pre-recorded funds, which defendant placed in his pocket, and Officer Eichman drove away. He then contacted his team members via the police radio that a narcotics transaction had taken place and gave a physical description of defendant including his clothing and last known location. Officer Eichman then returned to the police station at Homan Square.

¶ 15 Once at the Homan Square station, Officer Eichman identified defendant from a photo array. He also inventoried the items he had purchased. Officer Eichman testified that he learned that defendant had been arrested 11 days later, on June 24, 2010, on the 4800 block of West Superior.

¶ 16 Officer Charlie Person, the surveillance officer, testified that he was parked in an undercover vehicle at 4849 West Superior approximately 30 feet from Officer Eichman, on the opposite side of the street. Officer Person saw defendant walk down the street approximately four or five minutes after Officer Eichman arrived. Defendant passed by the passenger side of Officer Person's vehicle, giving him a side view of defendant. Officer Person testified that he saw defendant walk to Officer Eichman's driver side window and have a conversation. He then saw defendant tender items to Officer Eichman in exchange for money. Officer Person stated that he could not hear the conversation nor could he see what the items were. He did not use any audio or video devices to record the transaction, nor did he take any photographs. Following the transaction, he saw Officer Eichman drive away. Officer Eichman then came into radio contact with the narcotics team and Officer Person proceeded to the Homan Square station.

¶ 17 Illinois State Police Forensic Specialist Lenetta Watson testified that the contents of one

of the bags tested positive for heroin. Cook County State's Attorney's Office Investigator Mary Ember testified that she measured the distance between Nash Grammar School and 4856 West Superior Street and to be 732 feet. At trial, defendant did not present any evidence.

¶ 18 Jury Deliberations

¶ 19 The jury began deliberating at 2:47 p.m. At 4:10 p.m., the jury sent a note and asked the following three questions:

- (1) "Why was the phone not admitted as evidence?"
- (2) "Why did I Eichman [*sic*] park where he did?"
- (3) "Why didn't Person take any pictures of the transaction?"

The court responded: "You have heard all the evidence. You have the exhibits and the instructions. Continue to deliberate." The trial judge signed this order at 4:24 p.m. and it was tendered to the jurors.

¶ 20 At 4:45 p.m., the jury sent another note and asked:

"We are locked 11 to 1, what happens next?"

The trial judge replied: "Continue to deliberate. Your verdict must be unanimous. Judge Boyle. 4:51 p.m."

¶ 21 Shortly after 5:00 p.m., the jury reached a verdict. It found defendant guilty of delivery of a controlled substance within 1,000 feet of a real property comprising a school.

¶ 22 Posttrial Hearings

¶ 23 Sentencing began on August 4, 2010. Defense counsel informed the court that, although she had filed a posttrial motion and was ready to proceed on argument on the motion for a new

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trial, defendant was interested in proceeding *pro se* at that point. The following colloquy occurred:

“THE COURT: So you no longer need the assistance of the Public Defenders?

DEFENDANT: No, ma'am, your Honor.

THE COURT: Did you go to law school?

DEFENDANT: No, ma'am.

THE COURT: How far did you go in school?

DEFENDANT: A little college.

THE COURT: So you don't have a law degree?

DEFENDANT: No, ma'am.

THE COURT: So you are of the opinion that you have an expertise in which you could represent yourself?

DEFENDANT: On a matter that I want to present to the court, yes, ma'am, your Honor.

THE COURT: What is the matter?

DEFENDANT: Motion for Reconsideration and a motion --

THE COURT: For me to reconsider the jury verdict?

DEFENDANT: Yes.

THE COURT: With new evidence? New evidence?

DEFENDANT: Yes, ma'am.

THE COURT: What new evidence?

DEFENDANT: You know, we wasn't [*sic*] presented the photo array until trial, but it's a selective procedure that --

THE COURT: I'm sorry, was not a copy of that tendered to defense?

DEFENDANT: At trial?

THE COURT: Did you see that before?

ASSISTANT PUBLIC DEFENDER: Your Honor, I did see the photo array before trial.

DEFENDANT: I didn't -- we never seen [*sic*] it before trial. I didn't.

THE COURT: I asked if all parties were ready. They said they were ready. Either you're going to represent yourself on the sentencing -- I'm not going to have this dual motions [*sic*], so it's one or the other. So you, in regards to this Motion to Reconsider and Sentencing, you want to represent yourself?

DEFENDANT: Yes, ma'am, your Honor.

THE COURT: Okay. Pro se on that matter? Are you ready to proceed on those?"

This was the entirety of the discussion regarding defendant's waiver of counsel. The court then granted defendant an extension of time to prepare his *pro se* motion.

¶ 24 On August 18, 2010, defendant appeared *pro se* and informed the court that he did not have his motion because he had not been given access to the law library. The court continued the matter.

¶ 25 On September 17, 2010, defendant appeared *pro se* before the court, informed the court he needed additional time to file his motion, and reaffirmed that he wished to proceed *pro se*. The court again continued the matter.

¶ 26 On October 7, 2010, defendant appeared *pro se* before the court and submitted a motion for appointment of counsel other than the public defender's office. The court denied the motion. Defendant refused the court's offer to have a different attorney appointed from the public defender's office. The court then granted defendant's request for a three week continuance to allow him one final opportunity to prepare his motion for a new trial.

¶ 27 In November 9, 2010, defendant appeared *pro se* and filed two motions, one for ineffective assistance of counsel and one for a new trial. The court allowed defendant's motion for a copy of the trial transcripts, and continued the matter.

¶ 28 On December 13, 2010, defendant appeared *pro se* and argued his motion for a new trial and for ineffective assistance of counsel. Both were denied.

¶ 29 On March 30, 2011, defendant was sentenced to 13 years in the Illinois Department of Corrections. Defendant's *pro se* motion to reconsider his sentence was subsequently denied. This appeal followed.

¶ 30 ANALYSIS

¶ 31 Defendant first argues that his conviction should be reversed because the trial court failed to comply with Illinois Supreme Court Rule 431(b) (eff. May 1, 2007). Defendant also argues that the trial court failed to substantially comply with Illinois Supreme Court Rule 401(a) (eff. July 1, 1984) before permitting him to proceed *pro se* on his posttrial motions and requests that

we vacate his sentence and remand for further posttrial proceedings on defendant's posttrial motions and sentencing. We shall address this second argument first because it is a threshold issue.

¶ 32 Supreme Court Rule 401(a) states:

“(a) Waiver of Counsel. Any 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.” Supreme Court Rule 401(a) (eff. July 1, 1984)

The admonition given by the trial court on August 4, 2010 in response to defendant's request to proceed without counsel did not substantially comply with Rule 401(a). Moreover, the State has acknowledged that the trial court's admonitions did not sufficiently comply with Rule 401(a) and the matter should be remanded for further proceedings. We therefore vacate defendant's sentence and remand this matter for proper admonitions to defendant under Rule 401(a), for posttrial motions, and, if they are not successful, for sentencing. In view of our decision, it would be premature to address defendant's argument that, because the trial court failed to comply with

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Illinois Supreme Court Rule 431(b), his conviction must be reversed. See *People v. Hughes*, 315 Ill. App. 3d 86, 96 (2000) (noting it would be premature to address other issues raised by defendant where cause was remanded based on trial court's failure to appoint counsel to represent defendant during posttrial proceedings).

¶ 33 CONCLUSION

¶ 34 In accordance with the foregoing, we vacate defendant's sentence and remand the case for further proceedings. On remand, defendant shall receive either the assistance of counsel or a proper admonishment and waiver under Supreme Court Rule 401(a) before proceeding on his posttrial motions.

¶ 35 Sentence vacated and cause remanded with directions.