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2013 IL App (3d) 120519-U

Order filed August 7, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2014

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. 3-12-0519
)	Circuit No. 11-CF-249
JOSIAH GAMBLE,)	
)	Honorable Stephen Kouri,
Defendant-Appellant.)	Judge Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justices Holdridge and Schmidt specially concurred.

ORDER

¶ 1 *Held:* Where the record does not reveal the trial court complied with Illinois Supreme Court Rule 401(a) before allowing defendant to proceed *pro se* during a bench trial, defendant is entitled to a new trial.

¶ 2 Defendant, Josiah Gamble, appeals from his convictions of aggravated battery and resisting a peace officer. On appeal, defendant argues he is entitled to a new trial because the trial court failed to properly admonish him in accordance with Illinois Supreme Court Rule

401(a) (eff. July 1, 1984) before allowing him to represent himself during the bench trial. We vacate defendant's convictions and remand the cause for a new trial.

¶ 3

FACTS

¶ 4

On March 29, 2011, the State charged defendant by superseding indictment with one count of aggravated battery (720 ILCS 5/12-4(b)(18) (West 2010)) and one count of resisting a peace officer (720 ILCS 5/31-1(a-7) (West 2010)). On August 15, 2011, as a result of the prosecutor's absence due to an illness, the trial court continued the matter to the following day. Defendant informed the court that if the matter should be continued more than one day, he would elect to proceed *pro se*.

¶ 5

The next day, on August 16, 2011, defendant waived his right to a jury trial. The prosecutor requested Judge Risinger to allow a short continuance because the prosecutor present in court was filling in for the prosecutor assigned to defendant's case. Defense counsel, William Loeffel, informed the court defendant intended to proceed to a bench trial *pro se*. Loeffel stated defendant "has not been pleased" with Loeffel's handling of the case because he misplaced defendant's file, but had since reconstructed the file. Defendant stated to the court he believed Loeffel showed him "complete ineffectivity" and "incompetence in the fullest form." Defendant indicated he had "no second thoughts" about dismissing Loeffel and representing himself *pro se*.

¶ 6

Judge Risinger informed defendant he had the right to be represented by an attorney and that, if defendant desired to relinquish that right, defendant must state on the record that he is freely and voluntarily giving up that right. The trial court then asked defendant if he wished to have the public defender's office dismissed from representing him. Defendant responded, "Yes." The court asked defendant if this decision constituted a "free and voluntary act." Defendant responded by stating, "Free and voluntary act."

¶ 7 The court questioned defendant regarding his level of education, including his ability to read and write English, and made inquiries concerning defendant's mental and physical health. Judge Risinger asked defendant if anything was clouding his mind and affecting his judgment when asking the court to dismiss the public defender. Defendant responded, "the prolonged stay in the County Jail, the mental abuse from me feeling, you know, that I have been completely just treated unfairly due to the whole matter." The court then indicated, based on defendant's statement, it would be inclined to deny defendant's request to dismiss the public defender. Thereafter, the court asked defendant again if anything was clouding his judgment, to which defendant responded, "No." After defendant again stated he wanted to represent himself, the court dismissed the public defender without advising defendant of the range of punishment he faced if convicted.

¶ 8 While discussing housekeeping matters on the record, defendant stated to the court that "this is the first time I ever did something like this, I don't really have too much knowledge of it, you know, and it scares me, to be honest, but I'm trying to have courage here. I want to know if I can ask for any assistance." The court denied defendant's request for standby counsel, reiterating that defendant just requested the court to dismiss the public defender. The court entered a written order stating "[defendant] requests to proceed *pro se*. [Defendant's] request granted after admonition. P/D is released."

¶ 9 During a status hearing on September 6, 2011, Judge Kouri confirmed defendant wanted to proceed at his bench trial *pro se*. Judge Kouri informed defendant that "presenting a defense is not a simple matter. It requires compliance with certain technical rules that govern the conduct of a trial." Judge Kouri explained that proceeding *pro se* would preclude defendant from arguing on appeal he did not have competent representation during trial. In addition, the

court advised defendant he may be unaware of certain defenses due to his lack of legal training and suggested an attorney would be able to assist defendant with legal research and the process of subpoenaing witnesses. Judge Kouri indicated he would not assist defendant during trial. Defendant affirmatively acknowledged each of these propositions. Without advising defendant of the range of punishment he would be facing in the event of a conviction, Judge Kouri confirmed defendant's desire to proceed without counsel on the record. The court's written order states "Ct. conducted further admonishments re: *pro se* status, [defendant] still wishes to represent himself."

¶ 10 On September 22, 2011, the date scheduled for the bench trial, Judge Kouri again asked defendant if he wanted to represent himself, knowing he has the right to an attorney. Defendant responded affirmatively. At the conclusion of the trial, Judge Kouri found defendant guilty of aggravated battery and resisting a peace officer.

¶ 11 On September 29, 2011, defendant filed a *pro se* motion for new trial, but did not raise an argument concerning his waiver of counsel. During the hearing on defendant's motion for new trial conducted on November 4, 2011, defendant asked the court about the possible range of penalties. The prosecutor responded defendant was "extendible" and "non-probationable." Defendant stated he did not "understand how I'm non-probationable when I've been accepted for intense probation, and a Class 2 and a Class 4 felony is probationable." Judge Kouri informed defendant he was eligible to receive a sentence between 3 to 14 years' imprisonment, two years of mandatory supervised release, and up to \$25,000 in fines.

¶ 12 On December 2, 2011, the court denied defendant's motion for a new trial and sentenced defendant to a 14-year term of imprisonment for the class 2 felony offense of aggravated battery. The trial court also imposed a concurrent one-year term of imprisonment for the class 4 felony

offense of resisting a peace officer. After defendant filed a *pro se* motion for reduction of sentence, the trial court appointed the public defender to represent defendant on December 27, 2011. Defense counsel, Thomas Penn, filed a motion to reconsider sentence dated January 6, 2012, which adopted defendant's *pro se* motion. That same date, defendant filed a *pro se* motion requesting appointment of an attorney other than the public defender. On February 10, 2012, Judge Kouri denied defendant's request for appointment of an attorney other than the public defender. Thereafter, Judge Kouri allowed defendant's request to proceed *pro se*.

¶ 13 On April 3, 2012, defendant filed a *pro se* motion to reconsider his sentence. On June 15, 2012, the trial court heard defendant's motion to reconsider his sentence and, after taking the matter under advisement, the court reduced defendant's sentence to 11 years of imprisonment on June 20, 2012. Defendant timely appeals.

¶ 14 ANALYSIS

¶ 15 On appeal, defendant contends this court should remand for a new trial because the trial court failed to properly admonish him with respect to the range of punishment prior to trial as required by Rule 401(a). Ill. S. Ct. R. 401(a) (eff. July 1, 1984). Conceding he waived this issue by not raising it in the trial court, defendant argues, and we agree, the court's error is subject to our review based on the second prong of plain error because defendant's right to counsel is a fundamental right. See Ill. S. Ct. R. 615(a) (eff. Aug. 27, 1999); *People v. LeFlore*, 2013 IL App (2d) 100659, ¶ 51; *People v. Vazquez*, 2011 IL App (2d) 091155, ¶ 14.

¶ 16 The State persuasively argues strict compliance with Rule 401(a) prior to trial would not have affected defendant's desire to refuse representation by the office of the public defender in favor of self-representation. The State argues that substantial compliance occurred because Judge Kouri recited the range of punishment prior to sentencing and, after receiving this

information, defendant elected to continue his self-representation during both the sentencing hearing and subsequent postsentencing hearings.

¶ 17 This court reviews *de novo* whether the trial court complied with Rule 401(a). *People v. Bahrs*, 2013 IL App (4th) 110903, ¶ 13. Rule 401(a) provides that 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: (1) the nature of the charge; (2) the minimum and maximum sentence prescribed by law, including penalties which defendant may be subject due to prior convictions; and (3) he has a right to counsel and, if he is indigent, to have counsel appointed for him by the court. Ill. S. Ct. R. 401(a) (eff. July 1, 1984). The purpose of this rule is to ensure a defendant knowingly and intelligently makes a waiver of counsel. *LeFlore*, 2013 IL App (2d) 100659, ¶ 52.

¶ 18 We recognize that Judge Kouri had no reason to know the previous judge failed to properly admonish this defendant pursuant to Rule 401(a) prior to trial. The previous order entered by Judge Risinger indicated defendant had been admonished prior to waiving counsel.

¶ 19 However, Judge Kouri became justifiably concerned during defendant's sentencing hearing when defendant informed Judge Kouri he was confused about the reason he was ineligible for probation. Due to defendant's confusion at the sentencing hearing, Judge Kouri then carefully advised defendant of the applicable range of penalties. However, this admonition did not cure Judge Risinger's failure to inform defendant of the range of punishment prior to trial.

¶ 20 Substantial compliance with Rule 401(a) is sufficient to effectuate a valid waiver of counsel where a particular defendant possessed a degree of knowledge or sophistication that excused the lack of admonition. *People v. Black*, 2011 IL App (5th) 080089, ¶ 20. In this case, defendant's confusion during the sentencing hearing suggests this defendant did not have

accurate information from his prior experiences to allow this court to conclude substantial compliance took place prior to trial, in the case at bar. Consequently, Judge Risinger's incomplete admonishments, prior to defendant's waiver of counsel, require a remand for a new trial.

¶ 21 We recognize this result seems to allow this defendant, who clearly desired to proceed without the representation of a public defender, to "game the system" and obtain a new trial based on a procedural technicality. However, the right to counsel is a fundamental constitutional right of great significance. We observe the burden is slight for a judge to consult the language of Rule 401(a) and comply with those requirements *before* allowing defendant to waive a constitutional right to counsel prior to a trial on the merits.

¶ 22 Based on the mandates of Rule 401(a), and the absence of substantial compliance prior to trial, we conclude the second prong of plain error applies and vacate defendant's convictions. We remand the cause to the trial court for proper Rule 401(a) admonishments and a new trial.

CONCLUSION

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

¶ 24 Vacated and remanded.

¶ 25 JUSTICE HOLDRIDGE, specially concurring:

¶ 26 I concur with Justice Wright's judgment and analysis. I write separately to clarify one point raised therein. Justice Wright correctly notes that Judge Kouri's admonishments during the sentencing hearing "did not cure Judge Risinger's failure to inform [the] defendant of the range of punishment prior to trial." *Supra* ¶ 19. That is true, but not because of any error by Judge Kouri. There was nothing that Judge Kouri could have done under the law to cure the reversible error made by Judge Risinger. Judge Risinger accepted the defendant's waiver of counsel

without informing him of the extended sentence he faced and his ineligibility for parole. That was a clear violation of Supreme Court Rule 401(a). Ill. S. Ct. R. 401(a) (eff. July 1, 1984). Because there is no evidence of substantial compliance with Rule 401(a)'s requirements in this case, Judge Risinger's failure to properly admonish the defendant under that Rule amounted to reversible plain error. By the time Judge Kouri became aware of the need for further admonishments, the defendant's waiver of counsel had already been accepted, the defendant had been convicted, and the reversible error had already occurred. No amount of further admonishments could have cured the error at that point.

¶ 27 JUSTICE SCHMIDT, specially concurring:

I concur in the judgment.