

No. 1-14-1134

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. 13 CR 20953
)	
BERTRAM DAVIES,)	Honorable
)	Michael McHale,
Defendant-Appellant.)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Hoffman and Justice Delort concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's conviction affirmed over his contention that the trial court failed to properly admonish him about the maximum possible sentence he faced before waiving his right to counsel. Cause remanded for further posttrial proceedings where trial court refused to allow defendant to revoke his waiver of counsel after he requested counsel for posttrial proceedings.

¶ 2 Following a jury trial, defendant Bertram Davies was found guilty of theft and sentenced to six years' imprisonment. On appeal, defendant contends that (1) his waiver of his right to counsel was not knowingly and voluntarily made because the trial court failed to admonish him that his criminal background made him eligible for an extended-term sentence and (2) the trial

court abused its discretion when it refused to allow him to revoke his waiver of counsel after he requested counsel for posttrial proceedings. We affirm defendant's conviction, but remand for further posttrial proceedings.

¶ 3 After the State charged defendant with theft of a bicycle, the trial court appointed the public defender to represent him. On December 9, 2013, an assistant public defender informed the court that defendant wanted to represent himself. The court asked defendant if he had a law degree, to which defendant responded that he did not. The court further inquired if defendant knew the rules of evidence or how to enter a document into evidence. Defendant responded "I'mma [*sic*] learn." The court told defendant that he was charged with a Class 3 felony with a sentencing range of three to seven years' imprisonment. The court additionally stated "I don't know what your criminal background is, but you might be extendable, which you'd be up to fourteen years." The public defender interjected, informing the court that the sentencing range for the offense was between two and five years' imprisonment. The court corrected itself and told defendant the sentencing range was between two and five years' imprisonment, and "possibly ten years *** depending on your background." The court advised defendant that he was not "in any position to represent" himself. Defendant disagreed, and the court told him he was "making a huge mistake." The court allowed the public defender to withdraw and defendant to represent himself.

¶ 4 The following court date, the trial court stated it wanted to discuss defendant's self-representation again. The court informed defendant as follows:

"You're charged with one count of theft, that's a Class 3 felony. The possible range of sentences are 2 to 5 years in prison. I

don't know what your background is but if you are extend[a]ble based on prior criminal history you could get up to 10 years on this charge. Do you understand that?"

Defendant confirmed his understanding and acknowledged his right to court-appointed representation. The court and defendant discussed discovery in his case, and defendant stated: "[the] [l]ast time I defended myself they gave me my transcript and police report automatically when I said that I'm going *pro se*." The State subsequently tendered discovery to defendant.

¶ 5 The following court date, the trial court asked defendant if he still wanted to represent himself and told him:

"This is a Class 3 felony theft. It carries with it a sentencing range of 2 to 5 years in prison. I don't know what your criminal background is but if it is something that makes you extend[a]ble you could receive an extended term sentence of 5 to 10 years in [prison]. *** Do you understand that?"

Defendant confirmed his understanding and reiterated he wanted to represent himself.

¶ 6 The case proceeded to a jury trial. The evidence showed that on September 18, 2013, Robert Richard, the victim, reported to Reginald Sneed, the executive director of security for the Chicago Board of Trade building, that his bicycle worth approximately \$8,000 had been stolen from a bicycle rack outside the building. Sneed then watched surveillance video from earlier in the day. In the video, he saw Richard lock his bicycle to the front of the bicycle rack and leave. Ninety minutes later, a man, subsequently identified as defendant, wearing a black baseball hat, white pullover and carrying a messenger bag, rode a bicycle to the far end of the bicycle rack,

placed the bicycle there and adjusted something inside his bag. Defendant walked to Richard's bicycle, removed the lock and rode the bicycle away.

¶ 7 On October 21, 2013, Sneed was watching live surveillance video when he observed defendant ride a bicycle past the building. Defendant wore the same clothing as before and had a messenger bag. Later in the day, Sneed again saw defendant on the live video and, as a result, posted security officers outside of the building. Sneed observed defendant place his bicycle on the bicycle rack, lock it and walk toward a sandwich shop near the building. Defendant then turned around and walked back to the bicycle rack, where he attempted to cut a lock to a different bicycle. The security officers arrested defendant, who had in his possession yellow cable cutters.

¶ 8 Chicago Police Detective Chris Blum interviewed defendant after giving him *Miranda* warnings. Blum showed defendant still photographs taken from the video surveillance of both September 18 and October 21, 2013. Defendant admitted he was in some of the photographs but denied he was in others.

¶ 9 The jury found defendant guilty of theft.

¶ 10 The following court date, defendant informed the trial court that he wanted to file a posttrial motion but did not "have the right tools." The following colloquy occurred:

"THE COURT: Well, you have to do something within 30
days.

[THE DEFENDANT]: I need you to give me an attorney to file this motion.¹

THE COURT: Give you an attorney?

THE DEFENDANT: Yes.

THE COURT: No. You are representing yourself."

Defendant replied that he understood he chose to represent himself but he was "a mental patient" and had been "in a mental institution since [he] got into incarceration." The court reviewed a document provided by defendant in support of his claim. The court found the document did not "indicate any issues for fitness for trial" and noted it had "no *bona fide* doubt" as to defendant's fitness.

¶ 11 The court informed defendant that 28 days had elapsed since the jury found him guilty. Defendant responded that he did not "have no help to file the papers." The court told defendant he could either file a posttrial motion within two days or simply make an oral motion. Defendant asked if an oral motion would "be good enough" because he did not "have the stuff to file the motion" and did not "know how to file a motion." The court responded that such issues demonstrate the "perils" of self-representation and noted that, on two separate occasions, he discussed those problems with defendant.

¶ 12 Defendant made an oral motion for a new trial, arguing he was bipolar, suffered from schizophrenia, had two personalities and that he was unfit for trial. He asserted that he should

¹Although the transcript states "THE COURT" said this, it is clear from the context it was actually defendant.

have received a mental health evaluation. The court denied the motion, noting that defendant represented himself in a rational manner, and it had no doubt about his fitness to stand trial.

¶ 13 Prior to defendant's sentencing hearing, the court stated defendant's oral motion for a new trial based on his fitness was "simply a delaying tactic" and, while he made a poor decision to represent himself, "[p]oor judgment does not equal unfitness." At sentencing, the court observed that defendant was "a career thief" with several prior felony convictions and eligible for an extended-term sentence. It sentenced defendant to an extended-term sentence of six years' imprisonment.

¶ 14 After defendant's sentencing, he informed the court that he needed an attorney and could not afford one. The court appointed the public defender to represent defendant for the purposes of filing a motion to reconsider sentence and a notice of appeal. An assistant public defender filed a motion to reconsider sentence, which the court denied. This appeal followed.

¶ 15 Defendant first contends that his conviction should be reversed and the cause remanded for a new trial because the trial court failed to properly admonish him pursuant to Illinois Supreme Court Rule 401(a) (eff. July 1, 1984) before his waiver of counsel. He argues his waiver of counsel was therefore not knowingly and voluntarily made.

¶ 16 Initially, we note defendant concedes that he failed to preserve his claim of error for review but asserts that we may address it as plain error. Generally, an issue is forfeited if it is not raised both at trial and in a posttrial motion (*People v. Leach*, 2012 IL 111534, ¶ 60), which is the case here. The plain-error doctrine, however, allows us to bypass a party's forfeiture if the error is clear or obvious, and either (1) "the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the

error" or (2) "that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). Defendant bears the burden of persuasion on both prongs of the doctrine. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). However, only if there is error can there be plain error. *People v. Bannister*, 232 Ill. 2d 52, 79 (2008). Therefore, we must first determine whether an error occurred. *People v. Eppinger*, 2013 IL 114121, ¶ 19. Accordingly, we turn to the issue of whether the trial court properly admonished defendant before he waived his right to counsel.

¶ 17 A defendant has the constitutional right to represent himself. *People v. Baez*, 241 Ill. 2d 44, 115 (2011). However, to represent himself, the defendant must "knowingly and intelligently" waive his right to counsel. *Id.* at 115-16. To ensure such a waiver, the trial court must admonish defendant pursuant to Illinois Supreme Court Rule 401(a) (eff. July 1, 1984) before allowing him to waive his right to counsel. *People v. Campbell*, 224 Ill. 2d 80, 84 (2006) (citing *People v. Haynes*, 174 Ill. 2d 204, 241 (1996)). Under Rule 401(a), the trial court must inform the defendant of and determine that he understands:

- "(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." Ill. S. Ct. R. 401(a) (eff. July 1, 1984).

Only the second admonishment is at issue in this appeal.

¶ 18 The purpose of the admonishments is to eliminate any doubt that the defendant appreciates the nature and consequences of the charges against him, and to prevent him "from waiving the right to counsel without full knowledge and understanding." *People v. Meeks*, 249 Ill. App. 3d 152, 171-72 (1993). Strict compliance with the Rule 401(a) admonishments is not required. *Haynes*, 174 Ill. 2d at 236. Substantial compliance with the admonishments will suffice when "the record indicates that the waiver was made knowingly and voluntarily, and the admonishment the defendant received did not prejudice his rights." *Id.* Whether the trial court properly admonished defendant is a question of law that we review *de novo*. *People v. Pike*, 2016 IL App (1st) 122626, ¶ 114.

¶ 19 The defendant in this case argues the trial court failed to comply with the second admonishment required by Rule 401(a) because it did not tell him that his criminal background made him eligible for an extended-term sentence, and therefore, he did not know the true maximum sentence he faced before waiving his right to counsel. The State responds that the court substantially complied with Rule 401(a) when it told defendant he could be sentenced to an extended-term sentence. The parties do not dispute that, due to his criminal background, defendant was eligible to be sentenced to an extended term of between 5 and 10 years' imprisonment on his Class 3 felony theft charge. See 730 ILCS 5/5-4.5-40(a) (West 2012).

¶ 20 Assuming *arguendo* that the trial court did not strictly comply with Rule 401(a) when it told defendant he *might* be eligible for an extended-term sentence instead of that he *was* eligible, we find the court's admonishments nevertheless substantially complied with the rule. Prior to allowing defendant to represent himself, the trial court informed him of the possible consequences of his offense. It told him he faced between two and five years' imprisonment and "possibly ten years *** depending on [his] background." During defendant's two subsequent court appearances, the court confirmed that defendant wanted to represent himself and again told him he could face up to 10 years' imprisonment depending on his criminal background.

¶ 21 The court's admonishments to defendant clearly informed him that he could be sentenced to as little as 2 years' imprisonment and as much as 10 years' imprisonment, the latter dependent on whether his criminal background subjected him to an extended-term sentence. The record therefore belies any notion that the court did not substantially inform defendant of the "maximum sentence prescribed by law," as required by Rule 401(a). Ill. S. Ct. R. 401(a) (eff. July 1, 1984). In light of this fact, defendant knowingly and voluntarily waived his right to counsel and the court's admonishment that he *might* be eligible for an extended-term sentence instead of that he *was* eligible for an extended-term sentence did not prejudice his rights. Consequently, the court substantially complied with Rule 401(a). See *Haynes*, 174 Ill. 2d at 236; see also *People v. Herndon*, 2015 IL App (1st) 123375, ¶ 33 (trial court substantially complied with Rule 401(a) when it told the defendant that he was eligible to be sentenced as a Class X offender, but not that he would actually be sentenced as a Class X offender).

¶ 22 Defendant's analogy to *People v. Bahrs*, 2013 IL App (4th) 110903 is unpersuasive. In *Bahrs*, the trial court allowed the defendant to represent himself during sentencing, but did not

first admonish him that one of his sentences would run consecutively to the others. *Id.* ¶¶ 5-7. As a result, the defendant received a sentence in excess of the maximum of which he was informed at the time he waived counsel. *Id.* ¶¶ 10, 14. Finding the court's omission "was a failure to explicitly inform [defendant] of the true maximum penalty he faced," the appellate court reversed his sentences and remanded the matter to the trial court for a new sentencing hearing with either the appointment of counsel or proper Rule 401(a) admonishments. *Id.* ¶¶ 14, 59. Unlike in *Bahrs*, defendant here was well aware that 10 years' imprisonment was the true maximum sentence he faced depending on his criminal background, as the trial court had informed him of that fact on three separate occasions.

¶ 23 Because the trial court substantially complied with Rule 401(a) when admonishing defendant about his maximum possible sentence, no error occurred. See *Herndon*, 2015 IL App (1st) 123375, ¶ 33. As the trial court committed no error, there cannot be plain error. See *Bannister*, 232 Ill. 2d at 79.

¶ 24 Defendant next contends that the trial court abused its discretion when it refused to allow him to revoke his waiver of counsel after he requested counsel for posttrial proceedings. Although defendant concedes he failed to preserve this claim of error for review, he urges us to review it as plain error, specifically under the second prong of the doctrine based on the seriousness of the error. As with defendant's first contention, we must first decide whether an error occurred. See *Eppinger*, 2013 IL 114121, ¶ 19.

¶ 25 A defendant has the constitutional right to the assistance of counsel. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8; *Haynes*, 174 Ill. 2d at 235. The right to counsel applies at all critical stages of the criminal proceedings, including posttrial matters. *People v. Vernon*, 396 Ill.

App. 3d 145, 153 (2009); *People v. Abdullah*, 336 Ill. App. 3d 940, 950 (2002) ("The posttrial motion was a critical part of the criminal proceeding, and defendant had a right, under the sixth amendment, to the assistance of counsel in preparing and arguing the motion.") As discussed, a defendant similarly has the constitutional right to represent himself. *Baez*, 241 Ill. 2d at 115.

¶ 26 Under the continuing waiver rule, a valid waiver of counsel generally continues to be valid throughout subsequent proceedings, including posttrial proceedings. *People v. Baker*, 92 Ill. 2d 85, 91-92 (1982); *People v. Ware*, 407 Ill. App. 3d 315, 342 (2011). There are two exceptions, however: (1) if, after the initial waiver, the defendant requests counsel or (2) the circumstances of the initial waiver suggest it was limited to a particular stage of proceedings. *Baker*, 92 Ill. 2d at 91-92; *Ware*, 407 Ill. App. 3d at 342. "Thus, even when a defendant executes a competent waiver of counsel at some earlier stage of the proceedings, this waiver may end if defendant alters his or her stand and requests counsel at a later stage." *People v. Cleveland*, 393 Ill. App. 3d 700, 705 (2009), *overruled on other grounds in People v. Jackson*, 2011 IL 110615. We review the trial court's decision to deny a defendant's revocation of his waiver to the right of counsel for an abuse of discretion. *People v. Pratt*, 391 Ill. App. 3d 45, 53 (2009).

¶ 27 Here, after defendant represented himself during trial, he only sought the appointment of counsel to represent him on his posttrial motion because he thought that he did not "have the right tools" and claimed that he had mental health issues. The trial court denied the request, ruling that defendant chose to represent himself and his alleged mental health issues did not result in any doubt on the part of the court of his fitness for trial.

¶ 28 Defendant's situation is analogous to that in *People v. Palmer*, 382 Ill. App. 3d 1151 (2008), where the defendant had waived his right to counsel for trial and sentencing, but sought

counsel for postsentencing proceedings. *Id.* at 1153-55. The trial court denied his request, finding he did not have an absolute right to revoke his waiver at that stage and he had not shown good cause to revoke his waiver. *Id.* at 1155. The State conceded this was error. *Id.* at 1162. The appellate court concluded that the defendant was entitled to counsel for postsentencing proceedings as it was a critical stage of the criminal proceedings, and he did not need to show good cause for his request. *Id.* at 1162-63. The court specifically noted that the "defendant's change of mind occurred at a new stage of the proceedings, which constituted a clean slate for the trial court's consideration of the issue." *Id.* at 1163. In other words, when the defendant requested counsel at a new stage of proceedings, the trial court could no longer use his prior waiver of counsel to deny him representation from that point forward. See *Cleveland*, 393 Ill. App. 3d at 706.

¶ 29 Here, as in *Palmer*, we find the trial court erred by refusing defendant's request for counsel during posttrial proceedings, prior to sentencing. While, pursuant to the continuing waiver rule, defendant's waiver of counsel during pretrial proceedings continued to be valid throughout his subsequent trial proceedings, the waiver terminated once he requested counsel during posttrial stage, but prior to sentencing. See *Cleveland*, 393 Ill. App. 3d at 705-06; *Palmer*, 382 Ill. App. 3d at 1163. His request was made at a critical stage of the criminal proceedings, where he was constitutionally entitled to representation of counsel. See *Abdullah*, 336 Ill. App. 3d at 950. Therefore, as defendant requested counsel during a new stage of the proceedings, he was entitled to have counsel represent him during the posttrial proceedings and he did not need to show good cause, *i.e.*, that his lack of knowledge in how to write a posttrial motion or his mental health issues warranted the appointment of counsel. See *Palmer*, 382 Ill. App. 3d at 1162-

63. Upon defendant's request, the trial court should have appointed counsel. See *id.* at 1163. By refusing the request, the trial court abused its discretion.

¶ 30 Citing to *Palmer*, 382 Ill. App. 3d at 1163, the State argues that, because the trial court substantially complied with Rule 401(a) when defendant initially waived his right to counsel, "the court can hold the defendant to his election to proceed *pro se*, even though the defendant subsequently changes his mind during trial, in light of the importance of judicial administration and the need to avoid giving a defendant the opportunity to 'game the system.' " However, this statement in *Palmer* was directed to situations where defendants waive their right to counsel prior to trial and then systematically engage in delay tactics by requesting counsel prior to or during trial, not in a subsequent new stage of the proceedings as occurred here. If the statement was not limited to those situations, it would directly contradict our supreme court's holding that "a competent waiver of counsel by a defendant once made before the court carries forward to all subsequent proceedings *unless defendant later requests counsel.*" (Emphasis added.) *Baker*, 92 Ill. 2d at 91.

¶ 31 Furthermore, we find no evidence that defendant's intentions were to game the system or delay his sentencing. Defendant stated he sought the appointment of counsel post trial because he did not have the "tools" necessary to complete a posttrial motion while in custody and later explained to the trial court that he had mental health issues. Notably, defendant never vacillated in his decision to represent himself throughout the trial and did not make his request for counsel until his first posttrial appearance. For whatever reason, defendant changed his mind, and when he requested counsel for posttrial motions, he was entitled to the appointment of counsel to represent him in posttrial proceedings which culminated in sentencing. This was clearly a new

phase of the proceedings. It is undisputed that the sentencing phase of the proceedings in any criminal case is immensely important. Defendant apparently recognized this fact and sought to have the assistance of counsel. The trial court erroneously denied defendant this important right to representation at a crucial stage of the proceedings.

¶ 32 Because the trial court committed error, we must determine whether the error rises to the level of plain error. The denial of a defendant's right to counsel affects his substantial rights and therefore is plain error under the second prong of the doctrine. See *Vernon*, 396 Ill. App. 3d at 150. Accordingly, although we affirm defendant's conviction for theft, we vacate his sentence and remand the matter to the trial court for the appointment of counsel as the defendant requested to represent him in posttrial proceedings.

¶ 33 Affirmed in part, vacated in part and remanded with directions.