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2017 IL App (3d) 140811-U

Order filed May 4, 2017

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2017

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 13th Judicial Circuit, La Salle County, Illinois,
Plaintiff-Appellee,)	
v.)	Appeal No. 3-14-0811
JIMMY MEMBERS, JR.,)	Circuit No. 13-CF-422
Defendant-Appellant.)	Honorable Cynthia M. Raccuglia, Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justices Lytton and McDade concurred in the judgment.

ORDER

¶ 1 *Held:* (1) The circuit court erred by denying defendant's request to proceed *pro se* without addressing his capacity to make an intelligent and knowing waiver of his right to counsel; and (2) the circuit court did not abuse its discretion in sentencing defendant to a term of 35 years' imprisonment.

¶ 2 Defendant, Jimmy Members, Jr., appeals from his convictions for home invasion (720 ILCS 5/19-6(a)(2) (West 2012)) and residential burglary (720 ILCS 5/19-3(a) (West 2012)). He argues the circuit court erred by denying his posttrial request to proceed *pro se*. Defendant also contends the court abused its discretion in sentencing him to 35 years' imprisonment. We vacate

the circuit court's ruling denying defendant's request to proceed *pro se* and remand for further proceedings consistent with this order.

¶ 3

FACTS

¶ 4

In a two-count indictment, the State alleged defendant entered the home of Virginia Sommerville with the intent to commit a theft therein and caused injury to Sommerville by binding her hands and feet and placing tape over her mouth. The State subsequently filed notice of its intent to seek extended-term sentencing, as Sommerville was more than 60 years old at the time of the alleged offense.

¶ 5

The evidence at trial established that defendant and Richard Felton entered Sommerville's home in the early morning hours, used rope to tie her to her bed, placed duct tape over her mouth, and stole a number of items.¹ A third man acted as a lookout. Sommerville was 92 years old at the time of the incident. Felton was the ringleader of the group, and it was Felton who physically tied up Sommerville. Multiple witnesses testified that defendant participated in the home invasion. Prior to the home invasion, the three men had purchased rope, zip ties, and duct tape from a store in Joliet. Defendant testified that he did not take part in the home invasion, and denied having any knowledge of it. The jury found defendant guilty on both counts.

¶ 6

Defendant subsequently filed a *pro se* motion for a new trial. In the *pro se* motion, defendant made a number of allegations of ineffective assistance of counsel. At the next court date, defense counsel informed the court of defendant's wish to proceed *pro se*. The court explained to defendant that it is difficult to prevail on a motion for a new trial, and the appellate court would be able to look at the case more objectively. The court continued:

¹Because defendant does not challenge his conviction, or raise any issues related to his trial, a detailed recitation of the trial testimony is unnecessary.

“Now, I tell you that because you’ve already got the finding of guilty in front of me. And it doesn’t seem to make much sense since you have no idea about the aggravating and mitigating factors when it comes to sentencing, or what reason someone would give you a new trial for, or overturn the jury verdict, because you have no knowledge of legal proceedings. And I’m going to go through what you face in a minute at sentencing.

But my initial question is you understanding all of that, why at this stage of the proceeding do you think you know better than [defense counsel]?”

¶ 7 Defendant responded by stating “it’s not the point that I think I know more than he does.” He explained that he and defense counsel had disagreed with each other throughout the trial process, and had even participated in shouting matches. The court then allowed defendant and defense counsel to make arguments regarding the merits of defendant’s *pro se* motion.

¶ 8 The court clarified that defendant was requesting he be allowed to represent himself not only for the purposes of the posttrial motion, but also for sentencing. At the court’s request, the State read the potential sentencing ranges associated with each of the two offenses for which defendant was found guilty. The court then asked defendant if he was prepared to defend himself at sentencing; defendant replied, “Yes, I am.” The court continued:

“All of your complaints that I have let you give me have been presented to me, and I find that they are not justified.

I am finding that you are not capable at this stage of your proceeding to make a knowing waiver of your right to counsel. And it is that finding, based on

what I just said, that [defense counsel] is going to continue to represent you both for the Motion For New Trial and the sentencing hearing.

* * *

But I want the record to reflect it's because of that, and what you just said to me today at this stage of the proceedings, you have no clue as to the consequences of you representing yourself at this point.

And because of that, you are incapable of making a knowing waiver. And your allegations against [defense counsel] of ineffective assistance of counsel, which, by the way, I observed his performance, are not justified.”

¶ 9 Defense counsel filed another motion for new trial on August 19, 2014. At the hearing on the motion, defense counsel argued, *inter alia*, the circuit court had erred by not allowing defendant to proceed *pro se*. The court denied the motion.

¶ 10 Defendant's case proceeded to a full sentencing hearing. The State argued in aggravation that the conduct threatened serious harm, an extended sentence was needed to deter others, and defendant had shown no remorse. The State also emphasized the premeditated nature of the offense, as well as Sommerville's advanced age. The State requested the court sentence defendant to a term of 45 years' imprisonment on the Class X felony of home invasion, and 15 years' imprisonment on the Class 1 felony of residential burglary.

¶ 11 Defense counsel argued the threat of physical harm was inherent in the offense of home invasion. He also argued defendant had very little criminal history, had submitted several letters of support, and had rehabilitative potential. Defendant addressed the court, explaining he was remorseful “from the bottom of [his] heart.” He emphasized he had never been in jail before and he had a support system of friends and family.

¶ 12 In imposing sentence, the court expressed it was considering defendant’s rehabilitative potential, commenting “rehabilitation is very important to the court.” The court did not consider the fact that harm had occurred as an aggravating factor. The court cited defendant’s young age and lack of criminal history in mitigation. The court also recognized defendant’s extensive support system, as evidenced in the letters he had received.

¶ 13 In aggravation, the court cited the premeditation and planning that went into the offense, as well as defendant’s lack of remorse. On that topic, the court concluded: “[W]ithout remorse for unbelievably atrocious acts, rehabilitation cannot be an issue because you cannot rehabilitate someone who shows no remorse or responsibility for their actions.” The court sentenced defendant to a term of 35 years’ imprisonment for home invasion, to run concurrently with a 15-year sentence for residential burglary.

¶ 14 ANALYSIS

¶ 15 On appeal, defendant argues the circuit court erred by denying his request to proceed *pro se* after the conclusion of his trial. He maintains the court improperly based that ruling on its opinion that to do so would be unwise, rather than his capability of knowingly and intelligently waiving a right. Defendant also argues the court abused its discretion in sentencing him to a term of 35 years’ imprisonment for home invasion.

¶ 16 I. Right to Self-Representation

¶ 17 The constitutions of the United States and the State of Illinois both provide that a criminal defendant has the right to be represented by an attorney. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8. The constitutional right to counsel necessarily implies the constitutional right to dispense with counsel and represent oneself. *Faretta v. California*, 422 U.S. 806, 818 (1975). “Just as the right to counsel is fundamental, the right to represent oneself is

of equal dignity.” *People v. Ogurek*, 356 Ill. App. 3d 429, 436 (2005). A defendant’s request to proceed *pro se* must be clear and unequivocal. *People v. Baez*, 241 Ill. 2d 44, 116 (2011). Further, because a request to proceed *pro se* is a waiver of the right to counsel, a defendant’s request must be knowing and intelligent. See *id.* at 115-16. The right to self-representation applies at any stage where the correlative right to counsel would apply. See, e.g., *People v. Young*, 341 Ill. App. 3d 379, 386-87 (2003) (posttrial motions); *People v. Meeks*, 249 Ill. App. 3d 152, 171-72 (1993) (sentencing).

¶ 18 In order to make a knowing and intelligent waiver of his right to counsel, a defendant must possess “a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.” *People v. Lego*, 168 Ill. 2d 561, 564 (1995). Illinois Supreme Court Rule 401 (eff. July 1, 1984) seeks to ensure that a defendant has such an awareness before his waiver is accepted. Specifically, the rule provides:

“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.” *Id.*

¶ 19 If a defendant’s waiver of his right to counsel is made freely, knowingly, and intelligently, a court must accept that waiver, even where such a decision is unwise or likely to be a detriment to the defendant. See *Baez*, 241 Ill. 2d at 116. “[A] defendant need not possess the skill and experience of a lawyer in order to choose self-representation competently and intelligently.” *Lego*, 168 Ill. 2d at 564. Indeed, the denial of a defendant’s request to proceed *pro se* based on a perceived lack of legal knowledge and ability “has been repeatedly rejected.” *People v. Woodson*, 2011 IL App (4th) 100223, ¶ 23. The circuit court’s denial of a defendant’s request to waive counsel and proceed *pro se* is reviewed for an abuse of discretion. *Baez*, 241 Ill. 2d at 116. The application of an incorrect legal standard constitutes an abuse of discretion. *Woodson*, 2011 IL App (4th) 100223, ¶ 21.

¶ 20 In the present case, defendant’s request to proceed *pro se* was unequivocal. After filing a *pro se* motion, defendant declared in open court that he wished to proceed *pro se*. Defense counsel affirmed to the court that such was defendant’s desire. The court even reiterated defendant’s request. For purposes of the appeal, the State concedes that defendant’s request was unequivocal.

¶ 21 After defendant had made his request, the court observed defendant’s decision did not “seem to make much sense” because defendant had “no knowledge of legal proceedings.” The court further pointed out defendant had “no idea about the aggravating and mitigating factors when it comes to sentencing.” After defendant asserted he was prepared to represent himself at sentencing, the court concluded: “[Y]ou have no clue as to the consequences of your representing yourself at this point. And because of that, you are incapable of making a knowing waiver.” Before reaching this conclusion, the circuit court did not deliver the admonishments prescribed in Rule 401.

¶ 22 We recognize that the circuit court had defendant’s best interests in mind. Yet, the case law provides that, “[h]owever correct that opinion may be,” the court nevertheless applied an improper legal standard. *People v. Ward*, 208 Ill. App. 3d 1073, 1085 (1991). Accordingly, we must remand the matter for the circuit court to admonish defendant in accordance with Rule 401 and then determine whether defendant is able to knowingly and intelligently waive his right to counsel.

¶ 23 In so ruling, we necessarily reject the State’s argument that defendant’s request was untimely because his trial was finished and his attorney was already acquainted with his case. In making this argument, the State relies solely on *People v. Gorga*, 396 Ill. App. 3d 406 (2009) and *People v. Burton*, 184 Ill. 2d 1 (1998). The *Burton* court, however, did not find the defendant’s request untimely, instead finding that the defendant had not been clear and unequivocal. *Burton*, 184 Ill. 2d at 24. While the *Burton* court did *discuss* untimeliness, it remarked that requests to self-represent may be untimely “where it is first made just before the commencement of trial, after trial begins, or after meaningful proceedings have begun.” *Id.* (collecting cases). The *Gorga* court relied extensively on *Burton*.

¶ 24 The passage in *Burton* plainly contemplates the interruption of proceedings by a defendant’s request to proceed *pro se*, such as when the request is made immediately before or in the middle of a trial or hearing. In such contexts, the defendant’s request may be disruptive. Defendant’s request in the present case was not made at such a time—his trial had been completed, and his posttrial and sentencing hearings had yet to commence. To hold that defendant’s request to proceed *pro se* was untimely at that juncture would be tantamount to holding that a defendant simply does not have the right to represent himself at sentencing. See,

e.g., *United States v. Cano*, 519 F.3d 512, 515 (5th Cir. 2008) (holding the constitutional right to self-representation “extends to sentencing proceedings.”).

¶ 25 Accordingly, we vacate the circuit court’s judgment on that request, and remand the matter with instructions that the court: (1) deliver admonishments under Rule 401, and (2) then determine whether defendant is fully aware of his right to counsel and the consequences of proceeding *pro se*, without regard for defendant’s expected efficacy in representing himself. Further instructions regarding this remand are provided below. *Infra* ¶¶ 37-40.

¶ 26 II. Sentencing

¶ 27 Defendant next argues the court abused its discretion by imposing a sentence of 35 years’ imprisonment for the offense of home invasion. Specifically, he contends (1) the court improperly equated rehabilitation with an admission of guilt, (2) the court did not adequately consider defendant’s age and lack of criminal history, and (3) the sentence ultimately imposed was unduly harsh in comparison to that of Felton.²

¶ 28 Where the circuit court imposes a sentence that falls within the prescribed statutory sentencing range, that sentence will not be disturbed upon review absent an abuse of discretion. *People v. Coleman*, 166 Ill. 2d 247, 258 (1995). Such a sentence is not an abuse of discretion unless it is manifestly disproportionate to the nature of the offense. *People v. Franks*, 292 Ill. App. 3d 776, 779 (1997). It is not a reviewing court’s role to reweigh the factors involved in a sentencing decision. *People v. Alexander*, 239 Ill. 2d 205, 214 (2010). The Illinois Constitution

²Defendant requests we take judicial notice of the fact that Felton was sentenced to a term of 45 years’ imprisonment for the same home invasion, as well as the fact that his criminal history at the time he was sentenced contained prior convictions for aggravated battery of a peace officer and possession of a controlled substance. The State does not object. Because the information raised by defendant appears on the website for the Illinois Department of Corrections (IDOC), we take judicial notice of that information. See *People v. Henderson*, 2011 IL App (1st) 090923, ¶ 8. However, we also take judicial notice of other information available on the IDOC website, yet not mentioned by defendant. Namely, that Felton was also convicted of attempted murder and aggravated discharge of a firearm—both offenses bearing the same custody date as the home invasion conviction—and was sentenced to life in prison.

mandates that a criminal sentence should be fashioned “both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship.” Ill. Const. 1970, art. I, § 11. A defendant’s rehabilitative potential is not entitled to greater consideration than the seriousness of the offense. *Coleman*, 166 Ill. 2d at 261.

¶ 29 Home invasion is a Class X felony. 720 ILCS 5/19-6(c) (West 2012). The standard sentencing range for a Class X felony is 6 to 30 years’ imprisonment, while the extended sentencing range is 30 to 60 years’ imprisonment. 730 ILCS 5/5-4.5-25(a) (West 2012). A sentencing court may impose an extended-term sentence where “the defendant committed the offense against a person 60 years of age or older.” 730 ILCS 5/5-5-3.2(a)(8) (West 2012). As Sommerville was 92 years old when defendant invaded her home, defendant was eligible for an extended-term sentence. Accordingly, the effective statutory range of sentencing that defendant faced was between 6 and 60 years in prison. The sentence of 35 years’ imprisonment that defendant received was thus within the statutory range.

¶ 30 Defendant’s 35-year sentence for home invasion is not manifestly disproportionate to the offense. Defendant took part in a premeditated operation to break into and rob the home of a 92-year-old woman in the middle of the night. Moreover, the elderly woman was bound to her bed with ropes, and had duct tape placed over her mouth while defendant searched for valuables. The circuit court could not have put it any better when it referred to defendant’s offense as “atrocious.”

¶ 31 The record of the sentencing hearing also makes clear that the court considered defendant’s rehabilitative potential extensively. Not only did the court reference rehabilitation multiple times, it also made clear that defendant’s age, support system, and lack of criminal history worked in mitigation. Of course, those factors are themselves indicative of rehabilitative

potential. However, the court found that defendant's refusal to accept responsibility for his actions militated *against* rehabilitative potential. Given the heinous nature of defendant's offense, the middle-range sentence that he received—35 years out of a possible 60 years—reflects the circuit court gave ample consideration to the mitigating factors, as well as defendant's rehabilitative potential.

¶ 32 Finally, we reject defendant's contention that his sentence was an abuse of discretion in light of Felton's sentence. Initially, we note Felton's sentence was more harsh than defendant's by 10 years, reflective of Felton's role as ringleader as well as his criminal history. More importantly, Felton's other offenses and sentences make a direct comparison between him and defendant impossible. The IDOC does not provide specific details regarding Felton's sentences; for example, it does not show if the 45-year sentence for home invasion was imposed before, after, or contemporaneously with the imposition of the life sentence. Because there is simply not enough information to make a fair direct comparison, this court will not conduct such an analysis.

¶ 33 The circuit court in this case imposed a sentence of 35 years' imprisonment, which fell in almost the precise middle of the statutory range of 6 to 60 years' imprisonment for which defendant was eligible. Given the seriousness of defendant's offense, that sentence does not constitute an abuse of discretion.

¶ 34 III. Remedy and Instructions on Remand

¶ 35 We write further to clarify our precise instructions on remand, as well as to explain the interplay between the two issues we have addressed in this order.

¶ 36 As described above (*supra* ¶ 27), we vacate the circuit court's judgment denying defendant's request to proceed *pro se*. However, this judgment does not necessitate that

defendant will proceed *pro se* on remand. Defendant remains free to withdraw his request; alternatively, upon proper admonishment and application of the correct legal standard, the circuit court may once again deny defendant's request.

¶ 37 If, ultimately, defendant requests and is allowed to proceed *pro se*, the circuit court—pursuant to this order—should vacate its previous ruling on defendant's posttrial motion and vacate defendant's sentence. Defendant must then be allowed to represent himself in new posttrial and sentencing hearings.

¶ 38 If, however, defendant does not ultimately proceed *pro se* on remand—either because he withdraws his request or because the circuit court denies the request—it is unnecessary to hold further proceedings in which defendant is represented by counsel. Defendant has already been represented by counsel in both posttrial and sentencing proceedings, and those proceedings have survived direct review here. To mandate that the circuit court engage in duplicative proceedings would be a waste of scarce judicial resources. Accordingly, as the circuit court's sentence was not an abuse of discretion, that sentence will stand unless defendant elects to proceed *pro se*. See, e.g., *People v. Moats*, 165 Ill. App. 3d 413, 416-17 (1988) (affirming defendant's convictions and sentence contingent upon circuit court's determinations on remand).

¶ 39 **CONCLUSION**

¶ 40 The judgment of the circuit court of La Salle County is vacated and remanded with instructions.

¶ 41 Judgment vacated.

¶ 42 Cause remanded with instructions.