

NOTICE  
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2017 IL App (5th) 130497-U

NO. 5-13-0497

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the   |
|                                      | ) | Circuit Court of  |
| Respondent-Appellee,                 | ) | St. Clair County. |
|                                      | ) |                   |
| v.                                   | ) | No. 09-CF-1456    |
|                                      | ) |                   |
| RICHARD G. ALLEN,                    | ) | Honorable         |
|                                      | ) | John Baricevic,   |
| Petitioner-Appellant.                | ) | Judge, presiding. |

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JUSTICE CATES delivered the judgment of the court.  
Presiding Justice Moore and Justice Chapman concurred in the judgment.

**ORDER**

¶ 1 *Held:* The circuit court did not err in summarily dismissing the defendant’s postconviction petition where the record showed that the defendant knowingly and voluntarily waived his right to counsel, and that the trial court’s incomplete or erroneous admonition regarding waiver of counsel did not prejudice the defendant. An error in the calculation of the defendant’s pretrial detention credit and a potential error regarding the defendant’s projected release date require a remand to the circuit court for a determination of the pretrial detention credit and the projected release date.

¶ 2 Following a jury trial in the circuit court of St. Clair County, the defendant, Richard G. Allen, was convicted of armed robbery and sentenced to 30 years in prison. The defendant’s conviction and sentence were affirmed on appeal. *People v. Allen*, 2012 IL App (5th) 100424-U. The defendant then filed a *pro se* petition under the

Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2012)). In the petition, the defendant asserted that the trial court failed to substantially comply with Illinois Supreme Court Rule 401(a) (eff. July 1, 1984), in that the court provided incomplete or erroneous admonitions regarding the range of punishment for the crime charged, and that the court's incomplete or erroneous admonitions rendered his waiver of counsel invalid. After reviewing the defendant's *pro se* petition along with the trial record, the circuit court entered an order summarily dismissing the defendant's petition. The defendant appealed. For reasons that follow, we affirm the order of summary dismissal, and remand the case for a determination of the defendant's pretrial detention credit and projected release date.

¶ 3 On December 15, 2009, the defendant and a codefendant were charged with armed robbery with a dangerous weapon, a Class X felony. According to the criminal complaint, the defendant and a codefendant went to the home of the victim on December 10, 2009, to buy marijuana and cocaine. At some point during the transaction, the defendant and codefendant produced a firearm, and forcibly took money from the victim. The defendant was arraigned on December 16, 2009. At that time, the defendant entered a plea of not guilty, and the public defender was appointed to represent him. Subsequently, a grand jury indicted the defendant on the same charge. On December 23, 2009, the defendant appeared in court with assistant public defender Anne Keeley, and the charge in the indictment was read to him.

¶ 4 On January 4, 2010, the defendant filed a *pro se* "Notice & Motion." In the motion, the defendant asserted, among other things, that he was exercising his right to act as his own counsel. The motion was heard on January 13, 2010. During the hearing, the

defendant stated that he wanted to “enact his constitutional right” to defend himself on the armed robbery charge. He also asked the trial court to appoint co-counsel or standby counsel. Initially, the court indicated that it would appoint standby counsel. The State, however, objected to the defendant’s request for standby counsel. The State asserted that a defendant has a constitutional right to be represented by counsel or to proceed *pro se*, but has no right to have standby counsel appointed. At that point, the defendant’s appointed counsel, Anne Keeley, advised the court that the defendant had indicated he wanted the public defender’s office to withdraw from the case. Ms. Keeley stated that she informed the defendant that the public defender’s office would not act as co-counsel, that there would be no “hybrid representation” during the trial, and that the public defender’s office would serve subpoenas, but would not offer any legal advice. After considering the positions of the parties and the public defender, the court granted the defendant’s request to proceed *pro se*, and permitted the defendant to have standby counsel for the limited purpose of serving subpoenas.

¶ 5 On February 2, 2010, the court held a pretrial hearing. During the hearing, Ms. Keeley requested that the public defender’s office be removed as standby counsel for all purposes, including serving subpoenas. Citing *People v. Pratt*, 391 Ill. App. 3d 45, 58, 908 N.E.2d 137, 148 (2009), Ms. Keeley stated that the right of self-representation does not carry with it the right to assistance of a legal advisor. She further stated that the trial court has discretion to refuse to appoint standby counsel. The State agreed with Keeley on those points. The State went on to state that while it might be preferable for the defendant to proceed by counsel, it was the defendant’s choice to proceed *pro se*. The

court then turned to the defendant and asked for his thoughts. The defendant twice stated that he had no problem proceeding on his own, and he thanked Ms. Keeley for her work. Hearing no objection, the court granted the public defender's request to be removed as standby counsel. Subsequently, the defendant received discovery materials, filed motions, and actively participated in hearings on his motions and other pretrial matters.

¶ 6 The case was called for trial on February 22, 2010. Prior to jury selection, the State requested that the trial court admonish the defendant regarding the potential dangers of representing himself at trial, pursuant to the United States Supreme Court's decision in *Faretta v. California*, 422 U.S. 806 (1975). The State also requested that the court advise the defendant that the public defender's office was available to represent him during the trial, and that by waiving counsel and representing himself, the defendant was voluntarily relinquishing a number of benefits of legal representation, including potential claims of ineffective assistance of trial counsel. The court asked the defendant if he intended to represent himself during the trial. The defendant stated that he would represent himself. The State then asked the court to admonish the defendant, pursuant to Supreme Court Rule 401, on the range of punishment. The State noted that if the defendant was convicted of armed robbery, he faced an enhanced sentence of 21 to 45 years in prison.

“THE COURT: All right. Do you understand that, Mr. Allen, that the potential range, if in fact, you are found guilty, would be—what is it, a minimum of 21 to a maximum of 45 years? Is that what the State's maintaining?”

MR. HILMES: Yes, Your Honor.

THE COURT: Okay.

THE DEFENDANT: My question would be, Your Honor, this case is a Class X. It's—from my understanding, it's punishable 6 to 30 years in prison. So my question would be that the Honorable Judge still—still has jurisdiction over that. So actually, it could be between 6 and 45 years, am I correct?

THE COURT: There is no question that that's my call, and I would submit any—either side wish to submit any case law or statutory argument in regard to what the true range would be, I'm open to it, of course.”

¶ 7 Following this exchange, the defendant stated that he wished to proceed on his own behalf. He then started to discuss trial exhibits. After considering some of the issues regarding the exhibits, the court returned to the issue of the defendant's decision to represent himself.

“THE COURT: Okay. All right, you have referenced *Faretta v. California*. Mr. Allen, I don't wish to beat a dead horse here, but you still wish to proceed *pro se*, is that correct?

THE DEFENDANT: That is correct, Your Honor, yes, sir.

THE COURT: And you feel that you are literate, competent and capable of providing your own defense, is that correct?

THE DEFENDANT: Sharp as a razor, yes, sir.

THE COURT: All right, does the State have anything else of the *Faretta* issue?

MR. HILMES: Yeah, just the indictment—amended indictment discloses sentencing pursuant to 720 ILCS 518-2(b) [*sic*]. It is a Class X criminal felony.

However, because there was a firearm used in the robbery, it's subject to a 15-year enhancement. That's where the State's position is 21 to 45 years. So that's—

THE COURT: Okay.

MR. HILMES: That's what should be included—

THE COURT: All right, that's the State's argument. Okay.

THE DEFENDANT: All right.

THE COURT: It would all be up to me to make that decision if, in fact, there was a conviction.

THE DEFENDANT: Well, I would just like to say, Your Honor, real quickly briefly that it's stated, as it's stated by—stated by the so-called victims, that Mr. Allen never had a weapon. So I would just like to—like the court to be aware of that, that it wasn't alleged that Mr. Allen ever had a gun.

THE COURT: All right, it's noted in the record.”

¶ 8 At the conclusion of pretrial matters, the court began the jury selection process. The record shows that the defendant actively engaged in this process. He questioned the venire panel, challenged jurors for cause, and used peremptory challenges. Over the course of the trial, the defendant made objections, cross-examined witnesses, presented witnesses, and offered an opening statement and a closing argument. The jury heard testimony over a three-day period, and after deliberating for two hours, returned a verdict, finding the defendant guilty of armed robbery.

¶ 9 The defendant filed a number of *pro se* posttrial motions. During a hearing on March 18, 2010, the defendant requested standby counsel to assist him with his posttrial

motions and sentencing matters. The court advised that it had already made a ruling, denying the defendant's request for standby counsel. The court further advised that the public defender could be appointed to represent the defendant during the posttrial and sentencing hearings if the defendant made that request. The defendant replied that he would "go on" by himself, and that he thought he did "a very good job against the State." On April 8, 2010, the defendant advised the court that he was in negotiations to hire a private attorney to represent him on posttrial motions and sentencing, and he sought a continuance of the hearing on his posttrial motions. The court granted a two-week continuance. During a hearing on April 14, 2010, the defendant indicated that he did not have the funds to hire a private attorney. At that time, the court advised the defendant that the public defender could be appointed to represent the defendant.

¶ 10 The defendant's posttrial motions were called for hearing on April 29, 2010. At the outset, the court noted that the defendant had filed a motion for substitution of judge for cause, and that the proceedings would be delayed until another judge could hear the motion. Later that morning another judge heard and denied the defendant's motion for substitution. When the hearing on posttrial motions resumed, the defendant called several witnesses in support of his claims of error. As the hearing extended into a second day, the defendant, at times voicing frustration, lost his composure and made improper comments directed to the court and the State in open court. The trial court found the defendant in direct criminal contempt of court for this conduct. Upon being cited for contempt, the defendant stated that he wanted to leave the courtroom. The court advised the defendant that the hearing would not be continued, and that the court would proceed

to consider and rule on the defendant's claims of error even if the defendant chose to leave the courtroom. The defendant expressed his feelings on the propriety of the court's rulings, and then left the courtroom of his own volition. The court proceeded to consider each point raised in the defendant's posttrial motion. Ultimately, the court struck one of the defendant's points, and denied the remainder on the merits.

¶ 11 On May 6, 2010, the defendant appeared for sentencing. During the hearing, the State noted that it had intended to request an enhanced sentence because a firearm was used in the robbery, and that it had failed to submit the enhancement issue to the jury. The State conceded that without a jury finding on enhancement, the sentencing range was 6 to 30 years. The State recommended a sentence of 30 years, based primarily on the defendant's lengthy criminal history and pattern of recidivism. The defendant addressed the court, and asked for mercy. He also called his mother as a witness, and she also asked the court to show mercy. After hearing from the State and the defendant, the court sentenced the defendant to a prison term of 30 years. As previously noted, the defendant's conviction and sentence were affirmed on appeal. *People v. Allen*, 2012 IL App (5th) 100424-U.

¶ 12 The defendant filed a *pro se* petition under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2012)) and asserted that the trial court failed to provide proper admonitions regarding waiver of counsel before permitting the defendant to represent himself at trial. The defendant asserted that Supreme Court Rule 401(a) requires the trial court to admonish a defendant regarding the maximum and minimum sentences that could be imposed before permitting a defendant to represent himself. The

defendant claimed that his conviction should be vacated and a new trial ordered because the trial court provided incomplete or erroneous admonitions regarding the range of punishment. After reviewing the allegations in the defendant's *pro se* petition along with the record, the circuit court found that the defendant failed to allege the "gist of a constitutional defect." The court summarily dismissed the petition, and this appeal followed.

¶ 13 On appeal, the defendant contends that the circuit court erred in summarily dismissing his *pro se* petition for postconviction relief because the allegations in his petition state the gist of a constitutional claim. The defendant argues the trial court provided incomplete or erroneous admonitions regarding the range of punishment for the crime charged, and that the court's failure to properly admonish him in compliance with Supreme Court Rule 401(a) rendered his waiver of counsel invalid. The defendant acknowledges that he failed to properly preserve this claim of error because he did not raise it during the appeal of his conviction and sentence. He requests that his claim be reviewed for plain error.

¶ 14 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)) provides a means by which a defendant may challenge his conviction or sentence based on alleged deprivations of his federal or state constitutional rights. *People v. Hodges*, 234 Ill. 2d 1, 9, 912 N.E.2d 1204, 1208 (2009). The Act sets out a three-stage process for adjudicating postconviction petitions in noncapital cases. *People v. Edwards*, 197 Ill. 2d 239, 244, 757 N.E.2d 442, 445 (2001). During the first stage of the proceedings, the trial court is required to conduct an independent review of the petition to determine whether it

is frivolous or patently without merit. *Edwards*, 197 Ill. 2d at 244, 757 N.E.2d at 445. In accordance with the Act, the court is directed to examine the court file, and any proceedings on appeal, to determine whether the allegations in the petition are positively rebutted by the record or whether the claims are barred by *res judicata*. 725 ILCS 5/122-2.1(c) (West 2012). A petition is considered frivolous or patently without merit if the allegations therein, taken as true and liberally construed, fail to present the “gist of a constitutional claim” warranting relief. *Edwards*, 197 Ill. 2d at 244, 757 N.E.2d at 445. A *pro se* petition for postconviction relief may be summarily dismissed as frivolous or patently without merit only if the petition is based on an indisputably meritless legal theory or sets forth fanciful factual allegations that are completely contradicted by the record. *Hodges*, 234 Ill. 2d at 16, 912 N.E.2d at 1212. The circuit court’s decision to summarily dismiss a postconviction petition at the first stage is reviewed *de novo*. *Hodges*, 234 Ill. 2d at 9, 912 N.E.2d at 1208.

¶ 15 Under the plain-error doctrine, a reviewing court may consider unpreserved errors when a clear and obvious error occurred, and (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) the error is so fundamental, and of such magnitude, 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, 870 N.E.2d 403, 410-11 (2007). In either circumstance, the defendant has the burden of persuasion. *Piatkowski*, 225 Ill. 2d at 565, 870 N.E.2d at 410-11. When conducting plain-error review, the first step is to determine whether an error

occurred. *Piatkowski*, 225 Ill. 2d at 565, 870 N.E.2d at 411. Therefore, we first consider whether the trial court's admonitions regarding waiver of counsel were adequate under Supreme Court Rule 401(a).

¶ 16 An accused criminal defendant has the constitutional right to the assistance of counsel and the correlative right to represent himself without counsel. U.S. Const., amend. VI; Ill. Const. 1970, art. I, § 8. An accused may waive his constitutional right to counsel if the waiver is voluntary, knowing, and intelligent. *Faretta v. California*, 422 U.S. 806, 833-34 (1975); *People v. Haynes*, 174 Ill. 2d 204, 235, 673 N.E.2d 318, 332 (1996). Although a court may consider the defendant's decision unwise, the defendant's knowing and intelligent decision to represent himself must be honored. *Haynes*, 174 Ill. 2d at 235, 673 N.E.2d at 332. When an accused engages in self-representation, he relinquishes several benefits associated with the right to counsel, and therefore he must knowingly and intelligently give up those benefits. *People v. Kidd*, 178 Ill. 2d 92, 104, 687 N.E.2d 945, 951-52 (1997). As such, a waiver must be clear and unequivocal. *People v. Burton*, 184 Ill. 2d 1, 21, 703 N.E.2d 49, 59 (1998). The determination of whether there has been a knowing and intelligent waiver of counsel depends upon the particular facts and circumstances in each case, including the background, experience, and conduct of the accused. *Kidd*, 178 Ill. 2d at 105, 687 N.E.2d at 952.

¶ 17 Supreme Court Rule 401(a) governs the trial court's acceptance of an accused's request to proceed without counsel. *Haynes*, 174 Ill. 2d at 235, 673 N.E.2d at 333. Rule 401(a) states that any waiver of counsel shall be in open court, and the trial court shall not permit a waiver of counsel by a person accused of an offense punishable by

imprisonment without first addressing the defendant personally in open court and informing him of and determining that he understands the nature of the charge, the minimum and maximum sentence prescribed by law, his right to counsel, and if he is indigent, the right to court-appointed counsel. Ill. S. Ct. R. 401(a) (eff. July 1, 1984).

¶ 18 Strict compliance with Rule 401(a) is not always required. *Haynes*, 174 Ill. 2d at 236, 673 N.E.2d at 333. Substantial compliance will be sufficient to effectuate a valid waiver where the record shows that the waiver was made knowingly and voluntarily, and that the trial court's admonishment did not prejudice the defendant's rights. *Haynes*, 174 Ill. 2d at 236, 673 N.E.2d at 333. Substantial compliance may be found where the failure to provide a complete admonition regarding sentencing did not prevent the defendant from making a knowing and intelligent waiver. *People v. Coleman*, 129 Ill. 2d 321, 334, 544 N.E.2d 330, 336 (1989); *People v. Johnson*, 119 Ill. 2d 119, 132, 518 N.E.2d 100, 106 (1987). Likewise, strict compliance with Supreme Court Rule 401(a) may be excused where a defendant exhibits a degree of legal knowledge and sophistication that demonstrates a knowing and voluntary waiver. *People v. Houston*, 174 Ill. App. 3d 584, 589, 529 N.E.2d 292, 296 (1988).

¶ 19 After reviewing the record in this case, we find that the trial court substantially complied with Supreme Court Rule 401(a). In this case, the trial court apprised the defendant of the nature of the charge when the defendant was arraigned on the complaint, and again on the indictment. The record shows that the trial court also advised the defendant on more than one occasion about his right to counsel, the difficulties of self-representation, the complexities of trial practice, and the dangers of proceeding *pro se*.

But the record also indicates that the trial court's admonitions regarding sentencing occurred prior to jury selection on the first day of trial. During pretrial motions on that day, the State requested that the court admonish the defendant that he was subject to an enhanced term of 21 to 45 years if the jury found that a firearm had been used during the robbery. At that point, the defendant noted that he was charged with a Class X felony, and that the sentencing range for a Class X felony was 6 to 30 years in prison. The State then explained that the defendant was subject to a 15-year enhancement if the jury found beyond a reasonable doubt that a firearm had been used during the commission of the robbery. At that point, the trial court incorrectly advised the defendant that if the enhancement issue was proved beyond a reasonable doubt, the decision to impose an enhanced sentence was within the court's discretion. Nevertheless, after being fully apprised of the range of sentencing, with and without a 15-year enhancement, the defendant remained steadfast in his commitment to represent himself.

¶ 20 In this case, the record shows that the defendant was aware of his right to counsel, and the nature of the charge against him. The record also shows that the defendant was fully aware of the range of punishment for the charge, and the potential for an enhanced sentence. Further, the record demonstrates that the State failed to present the enhancement issue to the jury for determination, thereby precluding an enhanced sentence. Under the circumstances presented here, we find that despite the incomplete and erroneous admonishments regarding the range of punishment, the trial court's admonitions substantially complied with Rule 401(a).

¶ 21 Next, we consider whether the failure to admonish the defendant about the range of punishment earlier in the case, or the erroneous admonition regarding the court's discretion in imposing an extended term, prevented the defendant from making a knowing and intelligent waiver. As previously noted, the determination of whether a defendant has made a knowing and voluntary waiver of his right to counsel depends upon the particular facts and circumstances of that case, including the background, experience, and conduct of the defendant. *Kidd*, 178 Ill. 2d at 105, 687 N.E.2d at 952. In this case, the record clearly shows that the defendant exhibited some degree of knowledge regarding criminal law and procedure. In the initial *pro se* motion, the defendant stated that he had the right to counsel and a right to represent himself. During the hearing on this motion, he articulately and unmistakably demanded that he be allowed to represent himself. Even after the public defender was removed as standby counsel, the defendant insisted on representing himself. The record shows that the defendant filed several pretrial motions, and cited legal authority in support of many of his motions. The defendant also participated in the jury selection process. He made peremptory challenges and challenges for cause. At one point, he questioned the State's motives for its peremptory challenges and the racial composition of the jury. The defendant was fully aware of the range of punishment for his charge, and he was apprised before jury selection of the possibility of a 15-year enhancement. The record shows that the defendant actively engaged in the trial process. The record also shows that the defendant was familiar with criminal proceedings and had represented himself on prior felony charges. While it is clear that the defendant did not possess the knowledge, discernment,

and refined skills of a trained trial lawyer, he did demonstrate an understanding of the trial process and the burden of proof.

¶ 22 After reviewing the entire record, we find that the defendant knowingly and voluntarily waived his right to counsel for purposes of trial and sentencing, that the trial court's admonitions substantially complied with Rule 401(a), and that the trial court's incomplete and erroneous admonition regarding the range of punishment did not prejudice the defendant or invalidate his waiver of counsel. Accordingly, we conclude that the defendant failed to establish that the trial court's erroneous and incomplete admonishments under Rule 401(a) constituted plain error.

¶ 23 The defendant next contends that an error in the judgment of sentence deprived him of one day of credit against his sentence. The defendant notes that the judgment indicates that he was taken into custody on December 16, 2009. He states that he was actually arrested and taken into custody on December 15, 2009. The defendant requests that the judgment be corrected to assure that he received proper credit for the pretrial confinement. The State has conceded this point and agrees that the defendant is entitled to one additional day of credit against his sentence.

¶ 24 The defendant also contends that the Illinois Department of Corrections website incorrectly identified his projected release date as January 16, 2025. The defendant notes that he was sentenced to a 30-year term, and that he is eligible for day-for-day credit under section 3-6-3(a)(2.1) of the Unified Code of Corrections (730 ILCS 5/3-6-3(a)(2.1) (West 2016)). The defendant argues that his projected parole date should be December 15, 2024, 15 years after his custody date. The State agrees that the Illinois Department of

Corrections website shows a projected parole date that is one month and one day beyond the defendant's initial custody date. The State suggests, and we agree, that the matter should be remanded to the circuit court to determine the proper pretrial detention credit and projected release date.

¶ 25 Accordingly, the trial court's summary dismissal of the defendant's postconviction petition is affirmed, and the cause is remanded to the trial court to determine the defendant's pretrial detention credit and projected release date.

¶ 26 Affirmed; cause remanded.