2018 IL App (1st) 162351-U

No. 1-16-2351

Order filed September 27, 2018

Fourth Division

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 DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 15 DV 60737
	)	
JEFFERY MURPHY,	)	Honorable
	)	Laurence J. Dunford,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE GORDON delivered the judgment of the court.
Presiding Justice McBride and Justice Reyes concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in failing to completely admonish defendant regarding his waiver of his right to counsel. The conviction is vacated, and the case is remanded for retrial preceded by proper admonishments.

¶ 2 Following a bench trial, defendant Jeffery Murphy was convicted of violating an order of protection (720 ILCS 5/12-3.4(a) (West 2014)) and sentenced to 18 months' probation. Defendant contends on appeal, and the State agrees, that the court did not properly admonish defendant pursuant to Illinois Supreme Court Rule 401(a) (eff. July 1, 1984) regarding waiver of

his right to counsel. The parties dispute the appropriate remedy, agreeing that the conviction must be vacated but disputing whether we should remand for retrial. We vacate the conviction and remand for retrial, preceded by proper Rule 401(a) admonishments if defendant chooses to proceed *pro se*.

¶ 3 Defendant was charged with violation of an order of protection for, on or about June 11-12, 2015, making telephone calls and sending text messages to Taylor Quinn in violation of an active order of protection. The record includes an order of protection by the Superior Court of Lake County, Indiana, effective for two years from its issuance on October 31, 2014. The order commanded that defendant was "restrained from any contact with" Quinn, including being "prohibited from harassing, annoying, telephoning, contacting, or directly or indirectly communicating with" Quinn.

¶ 4 In June 2015, private counsel appeared for defendant. The case was continued from time to time for discovery. In December 2015, defendant filed a *pro se* motion to dismiss counsel. That same month, counsel moved to withdraw on the grounds that he and defendant "have had a breakdown in communications." The court granted counsel leave to withdraw and gave defendant until January 14, 2016, to return to court with new counsel.

¶ 5 Defendant filed a *pro se* motion to dismiss the case "for lack of evidence," claiming a "failure to get evidence after numerous court continuations." In court on December 23, 2015, the State noted defendant's *pro se* motion and said that defendant was not *pro se*. The State told the court that discovery was provided to previous counsel and was in his possession to be given to new counsel. Defendant told the court that "I never said I was coming in with an attorney."

¶ 6 The court noted that it must give defendant certain admonishments if he were to proceed *pro se*. The court told defendant that representing the defense includes adhering to rules governing the conduct of trials, attorneys are more familiar with those rules, and the State would be represented by counsel at trial. The court told him that a person representing himself may make decisions with unintended consequences, such as failing to make appropriate objections. Counsel could find and argue defenses to the charges, negotiate a guilty plea to lesser charges, or successfully argue mitigation at sentencing. The court noted that a defendant who represents himself cannot complain of his own incompetence on appeal, and that it would not provide defendant special consideration if he appeared *pro se*. The court told defendant that he would not be allowed to change his mind during trial and the court would not appoint standby counsel. The court noted that defendant faced a sentence of up to a year in jail and $2,500 in fines. The court did not recite or describe the charge against defendant, nor mention that he had a right to counsel and to have counsel appointed if he was indigent.

¶ 7 The court asked defendant if he still wanted to represent himself after these admonishments, and he said that he did. The court denied defendant's motion to dismiss. The case was then continued until defendant received discovery in late January 2016, and the court on January 28 set a trial date of two months later.

¶ 8 On March 28, 2016, defendant told the court that he was not ready for trial because he had not interviewed witnesses. The court denied a continuance, noting that he had two months to prepare for trial. Defendant waived his right to a jury trial in open court and signed a jury waiver.

¶ 9 Taylor Quinn testified to her prior relationship with defendant, that she obtained the Indiana order of protection, that defendant acknowledged the order and was admonished by

police to not violate it on June 11, 2015, and that defendant then called and texted her over 100 times on June 11 and 12. Quinn acknowledged that she called and texted defendant after obtaining the order. A police officer testified that, on June 11, defendant acknowledged being aware of the order of protection, and the officer reminded him to not contact Quinn in violation of the order. The next day, Quinn showed the officer her cellphone containing text messages from defendant's cellphone. Copies of the order of protection and text messages on Quinn's cellphone were entered into evidence over defendant's objection. Defendant testified, admitting that he was aware of the order of protection when he contacted Quinn on June 12, and acknowledging his cellphone number. He testified that she contacted him "several times."

¶ 10 Following closing arguments, the court found defendant guilty of violating the order of protection. It immediately held a sentencing hearing and sentenced him to 18 months' probation.

¶ 11 On appeal, the parties agree that the court did not properly admonish defendant pursuant to Supreme Court Rule 401(a) regarding waiver of his right to counsel. Defendant contends that his conviction should be vacated outright as he has completed his sentence.[1] The State contends that vacatur should be accompanied by a remand for retrial.

¶ 12 Illinois Supreme Court Rule 401(a) provides that a waiver of counsel "by a person accused of an offense punishable by imprisonment" must be preceded by the trial court's admonishment of, and the defendant's personal acknowledgment 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

[1] Defendant states that he completed probation satisfactorily. The State does not contest it, and the record does not indicate otherwise.

> he is indigent, to have counsel appointed for him by the court." Ill. S. Ct. R. 401(a) (eff. July 1, 1984).

Violation of an order of protection is generally a Class A misdemeanor, punishable by up to one year of "imprisonment." 720 ILCS 5/12-3.4(d) (West 2014); 730 ILCS 5/5-4.5-55(a) (West 2014). Thus, defendant was entitled to Rule 401(a) admonishments when he sought to waive counsel and proceed *pro se*. See *People v. Campbell*, 224 Ill. 2d 80, 87 (2006).

¶ 13 Substantial compliance with Rule 401 is required for an effective waiver of counsel. *Campbell*, 224 Ill. 2d at 84. Reversal for imperfect admonitions is not required if the omission did not prejudice the defendant because either the absence of a detail from the admonishments did not impede him from giving a knowing and intelligent waiver, or he possessed a degree of knowledge or sophistication that excused the lack of admonition. *People v. Redmond*, 2018 IL App (1st) 151188, ¶ 25. For example, admonishments regarding the maximum sentence must be accurate before a court may accept a waiver of counsel, but a defendant not advised of the minimum sentence is not prejudiced if his actual sentence is below the maximum sentence of which he was advised. *People v. Pike*, 2016 IL App (1st) 122626, ¶ 122.

¶ 14 Here, the parties correctly agree that the admonishments before defendant waived counsel did not substantially comply with Rule 401(a). Regardless of what else the court said, it did not remind him of the nature of the charge against him. More importantly, it failed to tell him that he had a right to counsel and to have counsel appointed if he was indigent. The parties thus correctly agree that defendant's conviction must be vacated.

¶ 15 The remaining question is whether defendant's conviction should be vacated outright, or the case remanded for retrial with proper admonishments, as defendant has completed his sentence. Our supreme court and this court have addressed this issue.

¶ 16 Our supreme court in *Campbell* noted that a completed sentence does not render a challenge to a conviction moot, because a conviction itself may have consequences for a defendant. *Campbell*, 224 Ill. 2d at 83. "Ordinarily," the trial court's error in not giving proper Rule 401(a) admonishments "would compel the reversal of defendant's conviction and a remand for a new trial." *Campbell*, 224 Ill. 2d at 87. Nevertheless, the supreme court found "defendant has already discharged his sentence, and a new trial therefore would be neither equitable nor productive." *Campbell*, 224 Ill. 2d at 87. It therefore agreed that defendant's conviction for driving with a suspended license, a Class A misdemeanor, should be vacated outright. *Campbell*, 224 Ill. 2d at 82, 87-88.

¶ 17 This court has distinguished *Campbell* and found remand for retrial appropriate where the defendant completed his sentence but his offense was more severe than the traffic offense at issue in *Campbell*; to wit, harboring a runaway and contributing to the delinquency of a minor, offenses involving harm and danger to minors. *People v. Vazquez*, 2011 IL App (2d) 091155, ¶¶ 20-21. *Vazquez* explains:

> "There is nothing inequitable in allowing the State the opportunity to obtain convictions for wrongdoing, even if the court is ultimately unable to impose any additional penalty. A criminal conviction means something. Its presence in a criminal history has value to the State in its role as prosecutor. The presence or absence of a criminal conviction may be a factor in charging a potential defendant. It may impact

> whether a plea agreement is offered and certainly will impact the nature of the offer. A prior conviction may be used in aggravation in a future sentencing hearing without placing upon the State the additional burden of producing a minor or other witness to testify. While these factors could apply to all convictions, we conclude that the implications noted here are enhanced with the severity of the offense at issue. In other words, the more severe the offense at issue, the greater the importance of the conviction. The existence of these possibilities makes retrial here both equitable and productive." *Vazquez*, 2011 IL App (2d) 091155, ¶ 21.

¶ 18 We agree with the *Vazquez* court that a conviction alone, without an additional sentence, has value to the State. The State correctly notes that a repeat offense of violating an order of protection is no longer a Class A misdemeanor but a Class 4 felony. 720 ILCS 5/12-3.4(d) (West 2014). Our legislature has thereby clearly signaled that a conviction for the offense of violation of an order of protection has consequences for a defendant beyond the sentence imposed for that particular offense. We shall therefore remand for retrial.

¶ 19 Accordingly, the judgment of the circuit court is vacated and the case is remanded for retrial, before which the court shall properly admonish defendant pursuant to Supreme Court Rule 401(a) if he chooses to proceed *pro se*.

¶ 20 Vacated and remanded with directions.