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2018 IL App (3d) 150794-U

Order filed March 15, 2018

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2018

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 21st Judicial Circuit, Kankakee County, Illinois,
Plaintiff-Appellee,)	
v.)	Appeal No. 3-15-0794
JAMES A. PANOZZO,)	Circuit No. 14-CM-1356
Defendant-Appellant.)	Honorable Clark E. Erickson, Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Presiding Justice Carter and Justice Lytton concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court failed to substantially comply with Illinois Supreme Court Rule 401(a) (eff. July 1, 1984).

¶ 2 The defendant, James A. Panozzo, appeals his conviction and sentence. He contends he is entitled to a new trial because the circuit court failed to substantially comply with Illinois Supreme Court Rule 401(a) (eff. July 1, 1984) when it accepted his waiver of counsel.

¶ 3 **FACTS**

¶ 4 The State charged the defendant with violation of a stalking no contact order (740 ILCS 21/125 (West 2014)). On January 7, 2015, the defendant appeared in court and was represented by counsel. The defendant continued to be represented by counsel until the date of his bench trial.

¶ 5 On April 16, 2015, the defendant returned to court with counsel. Without objection, the State asked to continue the defendant’s bench trial. The court allowed the continuance and told the defendant,

“you’ll need to be back on that day. If you’re not back, we can actually proceed in your absence. If there’s sufficient evidence to find you guilty beyond a reasonable doubt, you can be found guilty and sentenced up to the maximum allowed by law. Which for a Class A Misdemeanor is up to 364 days in jail, up to a \$2,500 fine, or both jail and a fine. You also give up your right to confront and cross-examine the witnesses if you’re not here.”

The defendant responded, “No, I’ll be here.”

¶ 6 On June 4, 2015, the parties returned to court for the bench trial. However, the circuit court continued the trial due to scheduling conflicts. Before the proceedings ended, the court again told the defendant,

“you need to be present on that date, sir. If you’re not present, we can proceed in your absence. If there’s sufficient evidence to find you guilty beyond a reasonable doubt, you can be found guilty and sentenced up to the maximum allowed by law, which for a Class A misdemeanor is up to 364 days in jail and up to a \$2,500 fine or both jail and a fine.”

The defendant responded, “Okay.”

¶ 7 On September 28, 2015, the parties returned to court for the bench trial. Defense counsel informed the circuit court that the defendant could no longer afford representation and counsel asked to withdraw. Counsel also told the court that the defendant was ready to proceed *pro se*. The court asked the defendant, “All right. Well, very good. You’re ready to go to trial, sir?” The defendant answered, “I sure am, sir.” The circuit court then allowed defense counsel to withdraw.

¶ 8 Following the recess, the following colloquy between the defendant and the circuit court occurred:

“THE COURT: *** you are representing yourself, is that correct.

[THE DEFENDANT:] That’s correct, sir.

THE COURT: And you understand that you have a right to counsel ***?

[THE DEFENDANT:] Yes, yes.

THE COURT: And if you are indigent you have a right to have the Public Defender appointed, do you understand that.

[THE DEFENDANT:] Yes.

THE COURT: But you wish to represent yourself?

[THE DEFENDANT:] Yes, I think so, sir.

THE COURT: All right, let’s show that [the defendant] is gonna represent himself.”

¶ 9 Following the trial, the circuit court found the defendant guilty of violating a stalking no contact order.

¶ 10 On November 9, 2015, the circuit court held a sentencing hearing and sentenced the defendant to 10 days’ imprisonment and 18 months’ probation. The defendant made an oral

motion to reconsider his sentence that the circuit court denied. On the next day, the defendant filed a notice of appeal. The notice of appeal listed the offense charged as unlawful violation of a stalking no contact order. The notice also listed the judgment order date as November 9, 2015 (the day of sentencing). In addition, the notice indicated the judgment order as the denial of the defendant's oral motion to reconsider sentence.

¶ 11

ANALYSIS

¶ 12

At the outset, we address the jurisdictional argument raised by the State. The State asserts that this court lacks jurisdiction to consider the defendant's argument that the circuit court erred in accepting his waiver of counsel. Specifically, the State contends that the defendant's challenge to his conviction is not properly before this court because his notice of appeal lists the circuit court's denial of his motion to reconsider sentence. In other words, the State contends that the defendant's argument on appeal relates to his conviction, which was not included in the defendant's notice of appeal.

¶ 13

"A notice of appeal confers jurisdiction on the reviewing court to consider only the judgments or pertinent parts specified in the notice." *People v. Patrick*, 2011 IL 111666, ¶ 21. A notice of appeal is sufficient when, considered as a whole and liberally construed, it fairly and adequately sets out the judgment complained of and the relief sought. *Id.*

¶ 14

We find that the content and substance of the defendant's notice of appeal indicates that the defendant sought to appeal his entire conviction and sentence. The notice correctly states the date of judgment and the offense. The fact that the notice describes the judgment order as the denial of his oral motion to reconsider sentence does not change this conclusion. Moreover, the denial of a timely filed motion to reconsider sentence constitutes the final judgment that triggers the timing requirement for the filing of a notice of appeal. Ill. S. Ct. R. 606(b) (eff. Dec. 11,

2014). Even assuming the defendant's notice of appeal was facially defective, "a failure to comply strictly with the form of notice is not fatal if the deficiency is one of form rather than substance and the appellee is not prejudiced." *Patrick*, 2011 IL 111666, ¶ 27. The State does not argue it was prejudiced by the notice of appeal, nor does the record contain any indication that the State did actually suffer prejudice.

¶ 15 We now turn to the merits of the defendant's appeal. The defendant contends that he is entitled to a new trial because the circuit court failed to comply with the admonishment requirements of Illinois Supreme Court Rule 401(a) (eff. July 1, 1984) when it accepted the defendant's waiver of counsel.

¶ 16 Rule 401(a) provides:

"[t]he 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." Ill. S. Ct. R. 401(a) (eff. July 1, 1984).

Strict compliance with the rule is not required "if the record indicates that the waiver was made knowingly and voluntarily, and the admonishment the defendant received did not prejudice his

rights.” *People v. Haynes*, 174 Ill. 2d 204, 236 (1996). In other words, a court’s failure to provide a Rule 401(a) admonishment immediately before a defendant’s waiver of his right to counsel does not render the defendant’s waiver invalid. *Id.* at 242. “Substantial compliance means a deficiency in the admonishments does not prejudice the defendant, either because the defendant already knows of the omitted information or because the defendant’s degree of legal sophistication makes evident his or her awareness of the omitted information.” *People v. Moore*, 2014 IL App (1st) 112592, ¶ 38. We review the circuit court’s compliance with Rule 401(a) *de novo*. *People v. Wright*, 2017 IL 119561, ¶ 41.

¶ 17 Here, immediately before accepting the defendant’s waiver, the circuit court failed to address the first two elements required by Rule 401(a)—that the court determine the defendant understood the nature of the charge and the minimum and maximum penalties. Ill. S. Ct. R. 401(a)(1), (2) (eff. July 1, 1984). Therefore, we find that the circuit court did not strictly comply with Rule 401(a). The only question is whether the court substantially complied with the rule.

¶ 18 We acknowledge that the defendant was informed of the charges and the maximum sentence that could be imposed in prior hearings. However, those admonishments were not provided at a time that the defendant was considering proceeding *pro se*, and they were provided nearly three months before the defendant sought to waive counsel. The defendant “cannot be expected to rely only on the admonishments given to him several months earlier—at a point when defendant was not requesting to waive counsel.” *People v. Langley*, 226 Ill. App. 3d 742, 749-50 (1992). The record also shows that this was the defendant’s first offense. Therefore, the circuit court’s failure to engage in any discussion regarding the defendant’s legal sophistication establishes that there is no basis to conclude that the defendant was already aware of the omitted information. Accordingly, we find that the circuit court failed to substantially comply with Rule

401(a). Therefore, we vacate the defendant's conviction and remand the cause for a new trial. See *Brzowski*, 2015 IL App (3d) 120376, ¶ 47.¹

¶ 19 In reaching this conclusion, we reject the State's extended reliance on *Wright*, 2017 IL 119561, to support its argument that substantial compliance occurred in this case. We find *Wright* is factually distinguishable from the present case.

¶ 20 In *Wright*, the defendant initially asserted that he desired to proceed *pro se*, and the circuit court provided him with a copy of the charging instrument, admonished him that he was subject to a possible sentence of 21 to 60 years' imprisonment for the charged offenses, and that he was entitled to have a public defender represent him. *Id.* ¶ 53. At the next court date, the defendant was again admonished by the court under Rule 401(a). *Id.* The court informed the defendant of the charged offenses and again explained that the defendant faced a possible sentencing range of 21 to 60 years' imprisonment. *Id.* The court also informed the defendant of his right to appointed counsel and that if the defendant proceeded *pro se*, he would be held to the same standards to which a lawyer would be held and, if convicted, he could not complain about his own competency. *Id.* The court also engaged in a lengthy colloquy with the defendant regarding the defendant's ability to represent himself, the potential pitfalls in such a decision, and the basis for the defendant's desire to proceed *pro se.* *Id.* ¶ 51.

¶ 21 The *Wright* court held that the circuit court substantially complied with Rule 401(a) in all aspects, despite the fact that the court informed the defendant that he faced a maximum sentence of 60 years' imprisonment, when it was actually 75 years. *Id.* ¶ 54. The *Wright* court concluded that the defendant's decision to waive counsel was made freely, knowingly, and intelligently. *Id.*

¹The State argues that the defendant has forfeited review of this issue by failing to raise it in the circuit court. However, we excuse the defendant's forfeiture as the right to counsel is so fundamental that the failure to properly issue Rule 401(a) admonishments amounts to second-prong plain error. See *People v. Brzowski*, 2015 IL App (3d) 120376, ¶ 42 (collecting cases).

¶ 55. In coming to this finding, the supreme court relied on the fact that the circuit court also elicited from the defendant that he was 37 years old, had attended 2 years of college, and had previously represented himself on appeal in a felony case. *Id.* Additionally, the defendant expressed his desire to represent himself at the beginning of the case and reiterated that desire several times thereafter, even after being informed by the court of the potential pitfalls of doing so. *Id.* The supreme court also found compelling that the basis given by the defendant as to why he wished to represent himself was due to speedy trial concerns, and not on the maximum sentence allowed for the charged offenses. *Id.*

¶ 22 In contrast to *Wright*, after the defendant informed the court that he would proceed *pro se*, the court only admonished the defendant regarding his right to counsel. In addition to omitting two of the three Rule 401(a) admonishments, the court also did not engage in any discussion similar to that in *Wright* regarding the defendant's ability to represent himself or the potential pitfalls in such a decision. Significantly, the defendant's decision to proceed *pro se* hinged on his inability to afford his privately retained counsel, rather than a specific legal theory that the defendant pursued in *Wright*. Finally, the defendant's uncertain response that he "thought" he desired to proceed *pro se* supports our finding that his decision to waive counsel was not freely, knowingly, and intelligently made. Instead, his response should have prompted the circuit court to engage in further discussion regarding the defendant's decision.

¶ 23 CONCLUSION

¶ 24 The judgment of the circuit court of Kankakee County is vacated, and the cause is remanded for a new trial.

¶ 25 Vacated and remanded.