2018 IL App (5th) 150057-U

NO. 5-15-0057

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Clinton County.
	)	
v.	)	No. 14-CM-3
	)	
MICHAEL C. SHORES,	)	Honorable
	)	William J. Becker,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE MOORE delivered the judgment of the court.
Justices Chapman and Cates concurred in the judgment.

ORDER

¶ 1 *Held*: We reverse the defendant's conviction and sentence, following a bench trial in the circuit court of Clinton County, for the misdemeanor offense of attempted theft, because we conclude that the defendant's waiver of his right to counsel was not knowing and voluntary where: (1) it is not clear that he truly desired to represent himself at trial, (2) he did not definitively invoke his right of self-representation, (3) his purported waiver of counsel was far from "clear and unequivocal," and (4) we are required to indulge in every reasonable presumption against a waiver of the right to counsel.

¶ 2 The defendant, Michael C. Shores, appeals his conviction and sentence, following a bench trial in the circuit court of Clinton County, for the misdemeanor offense of attempted theft. For the following reasons, we reverse the defendant's conviction and sentence.

¶ 3 FACTS

¶ 4 On January 8, 2014, the defendant was charged, by information, with two offenses. Count I charged the defendant with the Class A misdemeanor of attempted theft, alleging that on or about December 16, 2013, the defendant, with the intent to commit a theft, performed a substantial step toward committing it. Count II charged the defendant with the Class A misdemeanor of conspiracy (theft), alleging that on or about December 16, 2013, the defendant agreed with two other individuals to commit a theft, and performed an act in furtherance of that agreement. Both counts alleged that the defendant, on the night in question, crawled under a motor vehicle that did not belong to him, with a gas can with the cap removed, and with the intent to steal gasoline from that vehicle.

¶ 5 On July 9, 2014, the defendant appeared *pro se* before the Honorable Dennis Middendorff for a pretrial hearing.[1] When asked if he had hired an attorney to represent him, the defendant stated that he had spoken with three attorneys, but had not been able to "find one to sign off [his] bond to." He was then asked if he was "going to go ahead without an attorney," to which he responded, "Yeah. I'm going to have to." He was subsequently admonished that if he could not afford an attorney, he had the right to request that one be appointed for him. When asked, he stated that he understood this. Judge Middendorff noted that the defendant had requested two continuances to hire an attorney, but still had not done so. He asked the defendant if he could afford to hire an

[1]The defendant is correct in his assertion that no transcripts are available for pretrial hearings held on January 27, 2014, February 25, 2014, and June 17, 2014.

attorney. The defendant answered, "Not right now. I'm drawing unemployment." He reiterated that if "someone could take [his] bond," he might be able to afford an attorney. He also reiterated that he had spoken to three attorneys, whom he named, about doing so. Judge Middendorff noted that the three attorneys "don't practice in Clinton County," and asked the defendant if he had contacted any attorneys who did. When the defendant stated that he did not know who practiced in Clinton County, Judge Middendorff noted that the defendant could consult a telephone book or could use his "eyes since their offices are all around the courthouse." The defendant subsequently stated that he wished to plead not guilty and that a bench trial was "fine" with him. Judge Middendorff then set the defendant's case for a bench trial on August 26, 2014.

¶ 6 On August 26, 2014, the defendant appeared *pro se* for his bench trial. The proceedings began with the following colloquy:

> "THE COURT: Mr. Shores, you're still not represented by an attorney?
>
> THE DEFENDANT: No.
>
> THE COURT: Mr. Shores, from time to time, I have reset your case. You've requested several opportunities to hire an attorney. Do you understand that your case is set for trial today, and you're proceeding without a lawyer? Are you satisfied this is what you want to do?
>
> THE DEFENDANT: I have no choice.
>
> THE COURT: Well, you have lots of choices, Mr. Shores. They're all yours to make. The—you've not made a request in the past for appointment of a Public Defender, I see, is that right? I'm not—

THE DEFENDANT: I've never been advised I had the right to have one.

THE COURT: I don't know that that's the case, Mr. Shores. I don't have your transcripts up before me. The—it's a little late now. The State has apparently subpoenaed witnesses, but you do have a right to be represented by an attorney. You're charged with two counts of a Class 1 felony—or excuse me—a Class A misdemeanor. If you're found guilty of either of those charges, you could be fined up to $2,500, sentenced up to 364 days in the county jail. Do you understand that, sir?

THE DEFENDANT: Yes.

THE COURT: How do you want to proceed, Mr. Shores?

THE DEFENDANT: A bench trial.

THE COURT: All right. I will take a brief recess. Mr. Shores, if you want to discuss your case with the State's Attorney, you can. If you—anything you say to the State's Attorney could be used against you later on. Do you understand that, sir?

THE DEFENDANT: Yeah."

¶ 7 After the recess, the trial commenced with the defendant proceeding *pro se*. Following the testimony of three witnesses, which is not relevant to the issues raised on appeal by the defendant, Judge Middendorff found the defendant guilty of attempted theft, but not guilty of conspiracy to commit theft, as no evidence was adduced by the State in support of the latter charge. Immediately thereafter, the defendant was sentenced to 364 days in the Clinton County Jail. On September 8, 2014, the defendant filed a

pro se motion to reconsider sentence. On September 23, 2014, the defendant filed a *pro se* motion for a new trial, in which he contended, *inter alia,* that he did not know he was eligible to be represented by the public defender. On October 8, 2014, following a hearing, counsel was appointed to represent the defendant on his posttrial motions. Ultimately, supplemental motions were filed by counsel, and responses by the State. Following several hearings before the Honorable William J. Becker, both posttrial motions were denied and this timely appeal followed. Additional facts will be provided as necessary below.[2]

¶ 8 ANALYSIS

¶ 9 On appeal, the defendant contends, *inter alia,* his waiver of counsel was not knowing, intelligent, and voluntary, because, *inter alia,* Judge Middendorff failed to ensure the defendant understood his right to counsel. The defendant posits that Judge Middendorff "failed to strictly or substantially comply with" the requirements of Illinois Supreme Court Rule 401(a), with regard to the waiver, by a defendant, of the right to counsel. See, *e.g.*, *People v. Campbell*, 224 Ill. 2d 80, 84 (2006). Illinois Supreme Court Rule 401(a) states:

> "(a) Waiver of Counsel. Any waiver of counsel shall be in open court. 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

[2]We note that our examination of the entire electronic record on appeal in this case reveals that several small portions of the record are illegible, perhaps due to faulty scanning equipment or scanning method. However, the illegible portions are not relevant to the issues raised on appeal by the defendant and therefore do not hinder this court's review of the case.

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).

¶ 10 The defendant notes that the waiver of the right to counsel must be knowingly, intelligently, and voluntarily made. See, *e.g.*, *Campbell*, 224 Ill. 2d at 84; *People v. Baez*, 241 Ill. 2d 44, 115-16 (2011). Moreover, as the defendant also notes, the waiver "must be clear and unequivocal, not ambiguous." *Baez*, 241 Ill. 2d at 116. "In determining whether a defendant's statement is clear and unequivocal, a court must determine whether the defendant truly desires to represent himself and has definitively invoked his right of self-representation." *Id*. A court is required to indulge in every reasonable presumption against a waiver of the right to counsel. *Id*. "The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances of that case, including the background, experience, and conduct of the accused." *Id*. The requirement that the waiver of the right to counsel be knowingly, intelligently, and voluntarily made "calls for nothing less than 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). Thus, a defendant must "be made aware of the dangers and disadvantages of self-representation, so that the record will establish that" the defendant is aware of what the defendant is doing and the " ' "choice is made with eyes open." ' " *Id*. (quoting *Faretta v. California*, 422 U.S. 806, 835 (1975), quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942)). Admonishments pursuant to Rule 401(a) must be given contemporaneously with the defendant's waiver of counsel. See, *e.g.*, *People v. Jiles*, 364 Ill. App. 3d 320, 329-30 (2006) ("Defendant cannot be expected to rely on admonishments given months earlier, when he was not requesting to waive counsel.").

¶ 11 In this case, the defendant contends, *inter alia*, he did not truly desire to represent himself, and only moved forward doing so because he did not fully understand his right to have counsel appointed to represent him. According to the defendant, there can be no knowing, intelligent, and voluntary waiver of the right to counsel under such circumstances. In both his opening brief on appeal and his reply brief, the defendant notes that he has already fully served his sentence of 364 days in the county jail, which was the maximum sentence allowable by law for the misdemeanor offense of which he was convicted, and he asks this court to reverse his conviction and sentence outright, rather than remand for a new trial on the attempted theft charge. See, *e.g.*, *Campbell*, 224 Ill. 2d at 87 (where defendant has fully discharged sentence, new trial "would be neither equitable nor productive"). In its brief on appeal, the State does not answer this argument, instead asking only that we affirm the defendant's conviction and sentence. Accordingly, we conclude the State has either acquiesced in this remedy in the event of reversal, or has

waived the right to contest it. See, *e.g.*, *id*. at 88 n.1 (argument that was not raised in State's brief is barred on rehearing under Illinois Supreme Court Rule 341).

¶ 12 We agree with the defendant that the roundabout and cursory manner in which the trial court dealt with the defendant's right to counsel leaves this court unable to conclude that the defendant truly desired to represent himself and "definitively invoked his right of self-representation." *Baez*, 241 Ill. 2d at 116. Nor can we conclude that his purported waiver of counsel was "clear and unequivocal, not ambiguous." *Id.* This is particularly true in light of the fact that we are required to indulge in every reasonable presumption against a waiver of the right to counsel. *Id*. At no point did the defendant state that he wished to represent himself in this case. Instead, he appeared to fumble his way through the question of his right to counsel in much the same way he (with all due respect to the defendant) fumbled his way through his representation of himself at the trial that followed and led to his conviction. We are unpersuaded by the State's argument that the defendant's previous experience with the criminal justice system, as opposed to his conduct with regard to his right to counsel in this case, should lead to a different result. Had the trial court not only admonished the defendant on the record with regard to his right to counsel, but also directly discussed with the defendant whether it was the defendant's desire to waive that fundamental right and represent himself—and if so, the ramifications thereof—the issue now on appeal easily could have been avoided. See, *e.g.*, *Lego*, 168 Ill. 2d at 564 (acceptable waiver of counsel "calls for nothing less than a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it"; therefore, defendant must be made aware of the dangers and

disadvantages of self-representation, so that the record will establish that defendant is aware of what defendant is doing and the choice is made with defendant's eyes open).

¶ 13 CONCLUSION

¶ 14 For the foregoing reasons, we reverse the defendant's conviction and sentence.

¶ 15 Reversed.