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2019 IL App (3d) 170597-U

Order filed October 9, 2019.
Modified upon denial of rehearing December 16, 2019

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2019

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellee,)	
v.)	Appeal No. 3-17-0597 Circuit No. 17-CM-594
NATHANIEL K. HOOKER,)	Honorable
Defendant-Appellant.)	Edward A. Burmila Jr., Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Presiding Justice Schmidt and Justice McDade concurred in the judgment.

ORDER

¶ 1 *Held:* After reviewing the transcript and the docket entry, we conclude that the March 14, 2017, hearing was a probable cause hearing where defendant did not have a right to counsel. Thus, the court did not deprive defendant of his sixth amendment right to counsel.

¶ 2 Defendant, Nathaniel K. Hooker, appeals from his conviction for domestic battery.

Defendant argues the Will County Circuit court deprived him of his right to counsel when it

conducted an arraignment after defendant stated he intended to retain private counsel and before counsel appeared on defendant's behalf. We affirm.

¶ 3

I. BACKGROUND

¶ 4

On March 14, 2017, the State charged defendant by criminal complaint with one count of domestic battery (720 ILCS 5/12-3.2(a)(2) (West 2016)). On the same date, defendant appeared before the court in the custody of the Will County sheriff. The court apprised defendant of the charge and the applicable sentence. Defendant told the court that he intended to retain private counsel. The court then conducted a *Gerstein* hearing and explained to defendant:

“The next part of the hearing, sir, will be what’s called a *Gerstein* hearing. The State is going to provide me with a very brief statement of facts so that I can determine if there is sufficient probable cause for your detention. If I find there is probable cause for you to be detained, we’re then going to proceed to a bond hearing.

By no comment that I make or question that I ask, sir, am I suggesting that you discuss the facts or circumstances that led to these charges or to your arrest. The last thing your attorney would want is for you to be discussing this case in front of a courtroom full of people being audio as well as video recorded and in the presence of an assistant state’s attorney, understood?”

Defendant responded that he understood the court’s suggestion. The State told the court that defendant was taken into custody following an incident where he pushed his spouse “in the chest several times” resulting in “redness” to the victim’s chest. The court found that the State had alleged “probable cause to detain” defendant. The court then set defendant’s bond, ordered defendant to surrender his firearms and Firearm Owners Identification (FOID) card, and ordered

defendant to have no contact with the victim. The court scheduled the cause for a pretrial hearing on April 11, 2017.

¶ 5 The docket entry for the March 14, 2017, hearing states:

“People present ***. Defendant present in custody of the Will County Sheriff pursuant to video court. Complaint is filed and copy served on the defendant. Charges and rights explained. Defendant enters a plea of not guilty. Case is set for jury pretrial. Based on sworn testimony of Assistant State’s Attorney ***, Court finds probable cause to continue the defendant’s detention. *Gerstein* hearing completed. Bond set in the amount of \$5,000.00- 10% to apply. As a condition of bond, defendant shall have no contact with Jaclynn Hooker or the residence located at 705 Beech Lane in New Lenox, IL. In addition, upon release from custody, defendant shall, within two days, surrender any and all firearms to the New Lenox Police Department and surrender F.O.I.D. card to the Clerk of the Circuit Court. Defendant is allowed to reside with parents in Muskegan, Michigan. Copy of mittimus issued in open court. Defendant remanded to the custody of the Will County Sheriff.”

¶ 6 The next transcript in the report of proceedings is from the April 11, 2017, hearing. At the beginning of this transcript, private counsel entered his appearance. Counsel then asked to continue the case to May 22, 2017. The State did not object, and the court granted counsel’s request.

¶ 7 On August 16, 2017, the cause proceeded to a bench trial. At the conclusion of the bench trial, the court found defendant guilty of domestic battery. The court sentenced defendant to 12 months of conditional discharge and ordered defendant to serve four days in the Will County Adult Detention Center. Defendant filed a notice of appeal.

¶ 8 II. ANALYSIS

¶ 9 Defendant argues the circuit court deprived him of his right to counsel when it conducted an arraignment hearing on March 14, 2017, after defendant announced his intent to retain private counsel but before counsel was able to enter an appearance. After reviewing the record, we find that on March 14, 2017, the court conducted a probable cause hearing, a proceeding where defendant does not have the right to counsel.

¶ 10 The sixth amendment of the United States Constitution provides defendant with the right to counsel or appointed counsel. U.S. Const., amend VI. This right attaches at or after the initiation of adversarial proceedings. *Kirby v. Illinois*, 406 U.S. 682, 688-89 (1972); *People v. Garrett*, 179 Ill. 2d 239, 247 (1997). To determine whether the court infringed on defendant’s right to counsel, we must first decide if the proceeding at issue was adversarial, and thus entitled defendant to representation. We review this issue *de novo*. *People v. Abernathy*, 399 Ill. App. 3d 420, 426 (2010).

¶ 11 Defendant argues he had the right to counsel because the March 14, 2017, hearing was an arraignment. An arraignment is the “initiation of formal criminal proceedings.” *People v. Stroud*, 208 Ill. 2d 398, 404 (2004). “The arraignment is the proceeding where the defendant is called to the bar, is advised of the charges against him, and is required to answer the accusation contained in the indictment.” *People v. Garner*, 147 Ill. 2d 467, 480 (1992). A defendant’s answer to the charge, *i.e.*, plea, is determinative of the need to proceed to trial as it defines the issues to be decided at trial. *Id.* Due to the importance of the arraignment, a defendant has the right to be represented by counsel during this proceeding. *Id.* (citing *Brewer v. Williams*, 430 U.S. 387, 398 (1977)). In addition to a defendant’s constitutional right to counsel, section 113-3 of the Code of Criminal Procedure of 1963 (Code) provides a defendant with a statutory right to counsel “before

pleading to the charge.” 725 ILCS 5/113-3(a) (West 2016). Where a defendant is unable to obtain counsel before an arraignment, this section requires the court to recess the proceedings until defendant has obtained and consulted with counsel before entering a plea to the charge. *Id.*

¶ 12 An arraignment, however, is not necessarily a defendant’s first appearance before the court. A defendant who is arrested without a warrant has the right to a probable cause hearing which must occur before the State may impose “an extended restraint on [his] liberty.” *People v. Mitchell*, 366 Ill. App. 3d 1044, 1048 (2006) (citing *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975)). This probable cause hearing must be held within 48 hours of a defendant’s arrest. *Id.* Section 109-1 of the Code codifies a defendant’s right to a probable cause hearing following a warrantless arrest. 725 ILCS 5/109-1(a) (West 2016). Section 109-1(b) requires the court to:

“(1) Inform the defendant of the charge against him and shall provide him with a copy of the charge;

(2) Advise the defendant of his right to counsel and if indigent shall appoint a public defender or licensed attorney at law of this State to represent him in accordance with the provisions of Section 113-3 of this Code;

(3) Schedule a preliminary hearing in appropriate cases;

(4) Admit the defendant to bail in accordance with the provisions of Article 110 of this Code; and

(5) Order the confiscation of the person’s passport or impose travel restrictions on a defendant arrested for first degree murder or other violent crime as defined in Section 3 of the Rights of Crime Victims and Witnesses Act, if the judge determines, based on the factors in Section 110-5 of this Code, that this will

reasonably ensure the appearance of the defendant and compliance by the defendant with all conditions of release.” *Id.*

Due to the nonadversarial nature of a probable cause hearing, it “is not a ‘critical stage’ in the prosecution that would require appointed counsel.” *Gerstein*, 420 U.S. at 122.

¶ 13 The transcript of the March 14, 2017, hearing establishes that this proceeding was a probable cause hearing. At the beginning of the hearing, the court apprised defendant of the charge and his right to counsel. Before the State read its factual basis, the court advised defendant, who had indicated that he intended to retain private counsel that he should not comment on the facts or circumstances that led to his arrest. In other words, defendant should not respond to the State’s presentation of the factual basis. Defendant abided by the court’s recommendation, and after the State presented the factual basis, the court found “probable cause to detain.” The transcript of the hearing ended shortly after the court set defendant’s bond and scheduled the next hearing date. Thus, the hearing comported with the probable cause hearing requirements prescribed by section 109-1 of the Code and *Gerstein*. Importantly, this proceeding is distinguished from an arraignment because the court never asked defendant to respond to the charge or enter a plea, and instead advised defendant not to engage in adversarial conduct by responding to the State.

¶ 14 We note that despite the lack of reference to entering a plea, the docket entry for this hearing states “[d]efendant *enters a plea of not guilty*. Case is set for jury pretrial.” (Emphasis added.) From this statement, defendant argues the March 14, 2017, hearing was an arraignment and he was entitled to counsel. However, given the court’s repeated references to *Gerstein*, its advice to defendant, and defendant’s complete lack of response to the charge, the docket reference to a “plea” appears to be a scrivener’s error. As such, it does not alter our conclusion that this was a probable cause hearing.

¶ 15 Even if we did not find that the reference to a “plea” was a scrivener’s error, we would find that the docket entry is contradicted by the transcript and conclude that the oral recording (transcript) controls over the written docket entry. Such a result would be justified by an extension of the doctrine that a court’s oral pronouncement controls when it is found to be in conflict with a written order. *Danada Square, LLC v. KFC National Management Co.*, 392 Ill. App. 3d 598, 607 (2009).

¶ 16 After reviewing the transcript and the docket entry, we conclude that the March 14, 2017, hearing was a probable cause hearing where defendant did not have a right to counsel. Thus, the court did not deprive defendant of his sixth amendment right to counsel.

¶ 17 Following the entry of our order, defendant filed a petition for rehearing. In the petition, defendant asks that we reconsider our finding that he did not have the right to counsel during the March 14, 2017, hearing because section 109-1(a-5) of the Code entitled him to the assistance of counsel during his initial appearance. 725 ILCS 5/109-1(a-5) (West 2018). However, section 109-1(a-5) did not take effect until January 1, 2018, almost one year after the hearing at issue, and therefore does not apply to defendant’s case. See Pub. Act 100-1, § 1-10 (eff. Jan. 1, 2018) (adding 725 ILCS 5/109-1(a-5)). Moreover, this amendment does not apply retroactively because: (1) section 109-1(a-5) does not expressly state its temporal reach, and (2) it constitutes a substantive change to the law—it creates a statutory right to counsel during a bail hearing—which applies prospectively. See *People v. Stefanski*, 2019 IL App (3d) 160140, ¶¶ 12-14. We find defendant’s remaining arguments to also be without merit and deny his petition for rehearing.

¶ 18 III. CONCLUSION

¶ 19 The judgment of the circuit court of Will County is affirmed.

¶ 20 Affirmed.