2019 IL App (4th) 170748-U

NO. 4-17-0748

FILED
January 10, 2019
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. STEPHEN V. TYLER, Defendant-Appellant.	) Appeal from the) Circuit Court of) Livingston County) No. 14CF112)) Honorable) Robert M. Travers,) Judge Presiding.

JUSTICE CAVANAGH delivered the judgment of the court.
Presiding Justice Holder White and Justice Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court substantially complied with Illinois Supreme Court Rule 401(a) (eff. July 1, 1984).

(2) Financially exploiting someone's craving for cocaine aggravates the offense of unlawful delivery of a controlled substance (720 ILCS 570/401(d)(i) (West 2014)).

(3) It is an aggravating factor that by committing unlawful delivery of a controlled substance, defendant subjected his two-year-old daughter to the foreseeable risk that she would have to go into foster care, considering that her drug-addicted mother was incapable of taking care of her; this was a threat of harm beyond that inherent in the offense.

(4) By immediately appealing, as defendant had instructed him to do, postsentence counsel subjected the prosecution's case to meaningful adversarial testing.

¶ 2 After a jury found defendant, Stephen V. Tyler, guilty of drug offenses, the trial court sentenced him to imprisonment. He appeals on three grounds.

¶ 3 First, defendant argues that the trial court accepted his pretrial waiver of counsel without accurately giving him, at the same time, all the admonitions that Illinois Supreme Court Rule 401(a) (eff. July 1, 1984) required. We find substantial compliance with Rule 401(a).

¶ 4 Second, defendant argues that, in the sentencing hearing, the trial court found the offenses to be aggravated by factors that already were inherent in the offenses. We disagree. The aggravating factors were genuinely aggravating.

¶ 5 Third, defendant argues that the attorney appointed to represent him in postsentence proceedings failed to subject the prosecution's case to any meaningful adversarial testing. On the contrary, counsel told the trial court that his client wished to appeal immediately and not to challenge the sentence, and appealing a case is, in itself, *some* meaningful adversarial testing. In any event, defendant instructed counsel to appeal right away instead of challenging the sentence, and defendant is estopped from criticizing counsel for doing precisely what he instructed counsel to do.

¶ 6 Therefore, we affirm the judgment.

¶ 7 I. BACKGROUND

¶ 8 A. The Information

¶ 9 The information had two counts. Count I alleged that on April 9, 2014, defendant committed the Class 2 felony of unlawful delivery of a controlled substance (720 ILCS 570/401(d)(i) (West 2014)). Count II alleged that on April 15, 2014, he committed the same Class 2 felony again.

¶ 10 Normally, the term of imprisonment for a Class 2 felony was not less than 3 years and not more than 7 years, but an aggravated factor could "extend," or increase, the term of imprisonment to not less than 7 years and not more than 14 years. See 730 ILCS 5/5-4.5-35(a)

(West 2014). A previous conviction could be such an aggravating factor. *Id.* § 5-5-3.2(b)(1). Each of the two counts of the information notified defendant that because he previously was convicted, in LaSalle County case No. 08-CF-661, of the Class 2 felony of unlawful delivery of a controlled substance, sections 5-4.5-35(a), 5-5-3.2(b)(1), and 5-8-2(a) of the Unified Code of Corrections (Code) (*id.* § 5-4.5-35(a), 5-5-3.2(b)(1), 5-8-2(a)) allowed the trial court to sentence him to an extended term of up to 14 years' imprisonment if he were convicted of the present offense.

¶ 11 B. The Appointment and Discharge of Defense Counsel

¶ 12 On April 23, 2014, the trial court appointed defense counsel to represent defendant.

¶ 13 Afterward, the trial court granted defendant two continuances so that he could attempt to retain private counsel.

¶ 14 On January 2, 2015, having met with no success in his search for private counsel, defendant filed a motion to proceed *pro se*.

¶ 15 On January 6, 2015, the trial court held a hearing on the motion. In the hearing, after describing to defendant the nature of the charges, the court told him that for each of the offenses charged in the information, he faced a minimum of 3 years' imprisonment and a maximum extended term of 14 years' imprisonment. Then the court told him: "You have a right to counsel; and if you are without funds, if you're indigent, we will appoint counsel to represent you. That's what we have done, that's why [the public defender, Randy] Morgan is here." After those admonitions, the court accepted defendant's waiver of counsel. The court warned him, however:

"If I accept your decision to represent yourself, you will not be given the opportunity to change your mind during trial. In other words, this decision will be effective until the end of this particular trial[,] and if you are convicted at that time, we can reconsider appointment of counsel for sentencing purposes."

¶ 16 C. A Belated Notice From the State That, Upon Conviction, Class X Sentencing Would Be Mandatory, Prompting a Revised Admonition by the Trial Court

¶ 17 On November 16, 2015, several months before trial, the State served upon defendant a "Notice of Mandatory Class X Sentencing." (The notice originally was titled, incorrectly, "Notice of Extended Term Eligibility," but in the hearing of November 16, 2015, after the trial court pointed out the mistake, "Extended Term Eligibility" was crossed out, and "Mandatory Class X Sentencing" was written above the stricken phrase.) The notice informed defendant that because of two of his previous convictions—the Class X felony of home invasion (LaSalle County case No. 94-CF-104) and the Class 1 felony of unlawfully delivering 1 to 15 grams of cocaine (LaSalle County case No. 08-CF-661)—section 5-4.5-95(b) of the Code (*id.* § 5-4.5-95(b)) would require the court to sentence him as a Class X offender should he be convicted of a Class 2 felony in the present case.

¶ 18 At the end of the hearing on November 16, 2015, the trial court admonished defendant, for the first time, that he faced mandatory Class X sentencing if he were convicted (as the notice from the State informed him). The court told him:

"THE COURT: *** I will remind you again that if you want an attorney to represent you, particularly now—This is mandatory Class X[,] so if you are found guilty, it's the State's position that you have to be sentenced to a minimum of six years in the Illinois Department of Corrections. The maximum is 30 years in the Illinois Department of Corrections.

THE DEFENDANT: Um-hum.

THE COURT: Plus a three year mandatory supervised release period. So[,] I will entertain today or when we come back on January 5th if you want an attorney to represent you. But if we show up for the jury trial on February 22nd or that week and you decide at that point that you want an attorney, then we're going to have some issues trying to delay the matter.

* * *

*** So[,] you might, you know, want to think about having counsel represent you in connection with the charges. They are very serious. As I said, mandatory minimum six years in the Department of Corrections on both charges. So[,] Count I and Count II you would not get probation or conditional discharge. It must be six years in the Department of Corrections; maximum 30. Any questions about that?

THE DEFENDANT: No."

¶ 19 On January 5, 2016, the trial court held a pretrial hearing, in which the court told defendant:

"THE COURT: ***

*** Mr. Tyler, I think at the last court date but I just want to be sure that you understand the State has filed a notice of mandatory Class X sentencing should you be found guilty or you plead guilty to the charge.

THE DEFENDANT: Yes.

THE COURT: That means if you are found guilty or plead guilty[,] you face a minimum of six years in the Illinois Department of Corrections. Maximum

would be 30 years in the Illinois Department of Corrections. Any questions about that?

THE DEFENDANT: No.

THE COURT: All right. And you still wish to proceed representing yourself in this matter?

THE DEFENDANT: Yes, Your Honor."

¶ 20 D. The Jury Trial

¶ 21 The case went to trial on February 22, 2016, with defendant proceeding *pro se*.

¶ 22 The State presented evidence that on April 9 and 15, 2014, defendant sold cocaine to a confidential source, Donald Schultheis, who, having previously been arrested for a drug offense, had agreed to cooperate with the police, in the hope of obtaining probation.

¶ 23 On February 23, 2016, the jury found defendant guilty of both counts of the information.

¶ 24 E. The Posttrial Motions

¶ 25 On March 22, 2016, defendant filed a *pro se* motion for a new trial, in which he complained of entrapment and the withholding of evidence by the prosecution. He also filed a "Motion To Strike the Habitual Criminal Act" as unconstitutional.

¶ 26 On March 24, 2016, the trial court denied both motions.

¶ 27 F. The Sentencing Hearing

¶ 28 After denying the posttrial motions, the trial court held a sentencing hearing.

¶ 29 1. *The Presentence Investigation Report*

¶ 30 At first, defendant objected to the presentence investigation report on the ground that it included his juvenile convictions. After the trial court explained to him that juvenile

convictions were supposed to be in the presentence investigation report because they were part of his criminal record, defendant stated he had no objection to the report.

¶ 31 a. The Circumstances of the Present Offenses

¶ 32 The report revealed that defendant was born on May 8, 1976. Therefore, he was 37 years old at the time of the controlled purchases, which occurred on April 9 and 15, 2014, at a house on 12th Street in Streator, Illinois.

¶ 33 On April 22, 2014, the police attempted a third controlled purchase, but defendant told the confidential source that he had seen two squad cars parked down the street, and he drove away. That was when the police pulled defendant over and arrested him for the previous two controlled purchases. "[H]is 1999 Dodge Durango was seized pending [a]sset [f]orfeiture proceedings. [Defendant] was taken to the Livingston County Public Safety Complex. Passengers Marissa Minkler and a minor child, [J.D.], age 9, (DOB 10-06-07) were released from the scene."

¶ 34 Police officers interviewed defendant at the police station. They asked him how often he had been delivering cocaine in the Streator area. He "said maybe two or three times a week and it would average $100.00."

¶ 35 When asked why he was delivering drugs, defendant replied that he "ha[d] two babies and bills to pay." He lived on Jackson Street with his "wife," and although he worked for Vactor Manufacturing, "he was just trying to make a little extra money." He denied being addicted to cocaine; instead, his "problem was he would do things for people if he asked them too [*sic*]."

¶ 36 Under the heading of "Defendant's Version/Attitude," the probation officer wrote:

"When asked to explain the offense for this report, the defendant stated the CS was contacting Marissa[,] who is his best friend's daughter. ['']Who is going to turn in his best friend['']s daughter? I was taking Marissa to the 12[th] [S]treet house on those occasions. Marissa was with me every time[,] but that is only mentioned in the 04-22-14 date.' He also said Marissa was his girlfriend and he was doing what he was told by taking her where she wanted to go.

When asked if he felt what he did was wrong and why, he stated[,] ['']Y]es, taking her there was wrong.['']"

¶ 37 b. Marital Status and Children

¶ 38 Defendant reported that he was engaged to Amy Craft and that they had "been together for 14 years." They had one child together, S.L., who was two years old. Craft had four other children from previous relationships, and they were 15, 10, 6, and 3 years old.

¶ 39 Also, defendant had a two-year-old daughter, S.V., with Marissa Minkler. "He advised he sees his daughter 'a lot.' He advised he is not ordered to pay child support."

¶ 40 c. Defendant's Criminal History

¶ 41 i. *Juvenile Record*

¶ 42 On December 11, 1990, in LaSalle County case No. 09-J-164, defendant was sentenced to two years' continuance under supervision, with special conditions, for battery. The outcome of the supervision was "[u]nsatisfactory termination."

¶ 43 On December 17, 1991, in LaSalle County case No. 91-J-292, defendant was sentenced to one year of probation, with special conditions, for aggravated battery of a school employee. The outcome of the probation was "[u]nsatisfactory termination."

¶ 44 ii. *Adult Record*

¶ 45 On July 1, 1992, in LaSalle County case No. 92-OV-707, defendant was fined for criminal damage to property.

¶ 46 On June 16, 1994, in LaSalle County case No. 94-CF-104, he was sentenced to 10 years' imprisonment for home invasion and three years' imprisonment for receiving, selling, or possessing a stolen vehicle.

¶ 47 On April 20, 2006, in LaSalle County case No. 06-CM-661, he was sentenced to one year of conditional discharge and eight days in jail for resisting a peace officer.

¶ 48 On February 2, 2009, in LaSalle County case No. 08-CF-661, defendant was sentenced to six years' imprisonment for unlawful delivery of a controlled substance.

¶ 49 On November 17, 2009, in Livingston County case No. 08-CF-135, he was sentenced to three years' imprisonment and a fine for unlawful possession of a controlled substance. He was discharged from mandatory supervised release in that case on April 20, 2015. (Thus, when he committed the present offenses, on April 9 and 15, 2014, he was still on mandatory supervised release in Livingston County case No. 08-CF-135.)

¶ 50 2. *Evidence in Mitigation*

¶ 51 The prosecutor told the trial court that the presentence investigation report was the only evidence the State had in aggravation. The court then asked defendant if he had any evidence in mitigation.

¶ 52 Defendant first called his mother, Mary Tyler, who testified that even though defendant had gotten into some trouble, he had "been doing tremendously" as of late and was "a wonderful kid." She was sure he was "not a drug dealer." He had "two young girls" and was buying a home, which he had gutted and refurbished, and he was about to get married. She said: "And as far as taking care of two women, that's impossible. You do the best you can for the

woman that has the child of yours, and you do the best that you can for the woman that has your other child. *** I'll take you for a son any time of the day."

¶ 53 Defendant next called Travis Weems, who testified that he and defendant had worked together at a bar for three years as bouncers and that defendant had saved his life on two occasions. Weems testified: "He kept me from getting stabbed once and kept me from getting shot once. It was a very brutal club known for gang violence, and the man saved my life." Defendant was like a brother to him, and defendant's family treated him, Weems, like a member of the family.

¶ 54 Next, defendant called his father, Stephen Tyler Sr., who insisted that all this was "not [defendant's] fault, it's just the situations he has been put into"; he had been treated "like he's a dog." Defendant had done "a lot of stuff when he was a kid" that he now regretted. Defendant knew he had done wrong, and in Tyler's view, he ought not to be put away for 14 or 15 years. That would be counterproductive and bad for defendant's children. "He just got the kids," Tyler testified. "He hasn't, the first year he had them he wasn't in their life. Now, we got in his life, and he changed. And I see him changing."

¶ 55 Next, defendant called Amy Craft, who testified that she and defendant became acquainted with one another 14 years ago and that they had been "the best of friends" ever since. Because of people whom defendant had associated with, he had done bad things, but the past year, after "being out" (bond was posted on February 3, 2015), he had avoided those bad influences and, instead, had stayed home, with his family, fixing up the house. For the past year, he had been "a perfect man." Her own children regarded him as a father, and, by his guidance and paternal influence, defendant, thus far, had managed to save her son, who had been getting in trouble and coming home high.

¶ 56 On cross-examination, the prosecutor noted that, according to the probation report, Craft and defendant had been "together" for 14 years. The prosecutor asked Craft if that was true. She answered in the negative; she and defendant had been *friends* for 14 years, but they "just actually got together when he was locked up in here." On further cross-examination, she testified that she had a two-year-old child by defendant and four other children by someone else. Additionally, defendant had another two-year-old daughter, by Marissa Minkler, and Minkler had custody of her.

¶ 57 On redirect examination, defendant asked Craft:

> "Q. Why does Marissa have custody of [S.V.]?
>
> A. You would have—If you wouldn't be sitting here, if didn't get any time, you would have custody of her, you would have your baby home with you every day.
>
> Q. And why is that?
>
> A. Because she doesn't have her other daughter. She doesn't take care of her; she doesn't give her the love that she needs. She's addicted to drugs. She's now going to rehab in a couple weeks.
>
> Q. So, would you say the environment that [S.V.] is going into with her grandparents at this point, seeing as I'm not there, would be the ideal situation instead of having me there?
>
> A. No, it's worse. She doesn't never have anything to do with that baby."

¶ 58 The final witness whom defendant called was Keith Teamer, who testified that he was a Jehovah's Witness and that he met defendant one day as he, Teamer, was going door to door, doing "preaching work." Teamer had watched defendant take a gutted house and refurbish

it. He had watched defendant working on the house night and day, and all the while, defendant was providing for his children and meeting his other obligations. Never did defendant once try to evade Teamer when he came over to talk about God. He believed that defendant deserved a second chance.

¶ 59 The prosecutor then made an argument, in which he observed that, at 38 years of age (37 years, by our calculation), defendant was "still delivering drugs here in Livingston County, still making bad decisions, not learning from his mistakes[,] and making decisions that have a significant impact on these people that he claims to care for, love, and wish to take care of." When, as a "young adult," defendant was sentenced to 10 years' imprisonment for the "heinous" offense of home invasion, that "should have been an incredible wake-up call." And yet, 14 years later, he committed the offense of unlawful delivery of a controlled substance. Then, after serving the prison sentence for that conviction, he committed another drug offense in 2009. To top it off, the present case was two additional felony drug offenses. Considering that the sentencing range was 6 to 30 years and that defendant, with his already considerable criminal record, reoffended while on mandatory supervised release, the prosecutor recommended a sentence in the middle of that range: 18 years' imprisonment.

¶ 60 The trial court asked defendant if he had any counterargument. Defendant noted, by way of correction, that although he was a "young man" when he was convicted of home invasion, he was "held in LaSalle County until the 18th birthday to which they could legally say [he] was an adult." Being, in those days, "the only black kid" in his school and "undersized," he "had a chip of [his] shoulder," and he granted that, back then, he was an "ass." Fourteen years after serving his sentence for home invasion—in a penitentiary that did not exactly instill "a higher sense of right and wrong"—he "started getting high" and "pretty much not even car[ing]

about the consequences," and he ended up in prison again. Then he got into his present legal difficulties because he "was in love, dumb": "the woman[,] in his eyes[,] couldn't do [anything] wrong." He argued it would be unjust to send him to prison for 18 years simply because of his criminal background. He asked, rhetorically, how he would be able to explain to his children that he was not a "big drug dealer" but that, really, he was in prison for no better reason than the confidential source had called Minkler and defendant had taken Minkler to see him.

¶ 61 The trial court asked defendant if he had any further statement to make in allocution.

¶ 62 Defendant continued: "[I]f this is your girlfriend and she wants to go somewhere and you have the only transportation, you do what[?] you take her. So, wherever she went[,] I went. Wherever I went[,] she went." He denied going to the confidential source "with the intention of taking anything from this man." He admitted he should not have "showed up at this man's house with this woman," but he had learned from his mistake, and he had lived an exemplary life since then. "Give me a chance," he urged the court. Sending him to prison for a long time would be devastating to his children as well as to Craft's sons, whom only he could persuade to stay out of trouble. He posed the question of what would become of the children:

> "With me gone, what do they do? At some point become part of the judicial system, the same judicial system that's trying to put me away for 18 years because of my past mistakes? Where in that do they get justice with nobody there to help them?"

¶ 63 After defendant made his statement in allocution, the trial court found the following factors in mitigation and aggravation:

"In looking at factors in mitigation first, I would find only that the defendant's criminal conduct was facilitated by someone other than the defendant; and, that is, simply the buyer in this instance.

In relation to factors in aggravation, I would note that the defendant's conduct threatened serious harm. I would note also that the defendant received compensation for committing the offense; he was paid for the drugs. I would find that the defendant has a history, an extensive history of prior delinquency and criminal activity. I further find that a sentence is necessary to deter others from committing the same crime. And as [the prosecutor] noted and as I hope the defendant will always remember, these offenses were committed while he was on parole. These offenses were committed while he was released on mandatory supervised release from the Department of Corrections. Those are the findings as far as aggravation and mitigation."

¶ 64 Having listed the factors in mitigation and aggravation, the trial court "address[ed] just a couple of things that were raised." The court expressed astonishment that "anybody with the defendant's history would come in and say, ['G]ive me a second chance.[']" After recapitulating that criminal history, the court told him:

"You have a history of failure. You have a history of making life hard on the people around you. You ask, ['W]hat am I going to tell my kids?['] Well, I hope you tell them[,] ['D]ad made a mistake, I hope you don't make the same mistake[']; but that's not what I'm hearing you argue today.

This also is not an instance where you were surrounded by bad people and didn't have the opportunity to make good choices. You've been surrounded by

good people. Okay, you could have spent your time with Mr. Teamer or with your family; but apparently you didn't, you preferred to spend time, is it Marissa, is that the name, the one that led you astray, the drug addict, as opposed to spending time with the mother of your child. No. This is a choice; this is called bad judgment, and it leads to bad circumstances.

* * *

*** In this instance, you've even told us today that you are not a drug addict, you're just a drug dealer. You weren't addicted to anything at the time that you were making these sales, you were just selling drugs. So, there's no compulsion here.

You're basically asking me to ignore the past, ignore your history of prior failures. We're talking about '94, 2008, 2009, 2014, just repeated failures. I can't do that. Okay? It would be a mistake to do that."

¶ 65 The trial court sentenced defendant to 14 years' imprisonment for count I and another 14 years' imprisonment for count II, ordering that the terms would run concurrently.

¶ 66 At the conclusion of the sentencing hearing, the trial court admonished defendant that before taking an appeal, if he wished to challenge the correctness of the sentence, he had to file, within 30 days, a motion to reconsider the sentence and that any sentencing issue omitted in that motion would be considered, on appeal, to be "waived."

¶ 67 G. Postsentence Proceedings

¶ 68 On March 29, 2016, defendant filed a document titled "Notice of Appeal of Sentence," which read as follows:

"Defendant challenges[:]

1. Mand[a]tory Class X Sentencing

2. Subsequent offense sentencing

3. The Controlled Substances Act.

Brief will follow, as defendant[']s situation at this point is not sufficient to grant him the opportunity to fully defend this motion."

¶ 69 On March 31, 2016, the trial court held a hearing basically for the purpose of asking defendant, "What is it that you want to do with this document?" Defendant answered:

"THE DEFENDANT: Well, you said that I had to either, I can appeal the sentence or reconsider the sentence or I misunderstood and I'm sorry.

THE COURT: Well, let me—Maybe I can simplify the whole thing for you. Are you asking me to appoint an attorney to assist you in your filings?

THE DEFENDANT: Yes, if that would be possible."

¶ 70 The trial court then reappointed Morgan to represent defendant in any further postsentence proceedings.

¶ 71 In a hearing on February 24, 2017, the trial court noted that because of a conflict of interest, Morgan had assigned the matter to Paul Mason and that, "apparently[,] nothing ha[d] been done" in the case since then. The court asked Mason how he would like to proceed. Mason requested 30 days to file any amendment to the "Notice of Appeal of Sentence."

¶ 72 In a hearing on July 24, 2017, Mason told the trial court that the "Notice of Appeal of Sentence" was "really a misnomer and should have been a petition to reconsider." The court responded that it was "willing to accept that representation." The prosecutor stated he had no objection to treating the document as a motion to reconsider the sentence. Again, the court gave Mason leave to amend the "Notice of Appeal of Sentence."

¶ 73 In a hearing on September 29, 2017, the trial court stated:

"THE COURT: *** I believe we're here on a motion to reconsider sentence, but let me just confirm that. ***

Mr. Mason, what are we here on today, at least from your point of view?

MR. MASON: When we last had court a couple of months ago I think, that was to be the plan. Since that time, Mr. Tyler has thought about things and reconsidered. He feels that the, what he would prefer to do is appeal the conviction itself because the sentence would fall if the conviction fell, which he believes it would. [He] would ask to file what he has called an [']Amended Notice of Appeal and Conviction and Sentencing['] [and] would ask to have that filed as his notice of appeal of the sentence and to have that then go on to the Appellate Court, just the conviction.

* * *

*** The only thing he would like to have done today is to have the notice of appeal, the notice of appeal of conviction filed on his behalf.

THE COURT: All right. So, can the Court consider anything that is pending withdrawn with the exception of what he is to file, the amended notice of appeal?

MR. MASON: That is correct, Your Honor.

THE COURT: Okay. So, I will show that all is withdrawn, nothing is pending.

And, Mr. Tyler, do you want me to have the Clerk of the Court file the Amended Notice of Appeal?

THE DEFENDANT: Yes.

THE COURT: Okay. I will direct the clerk to do so."

¶ 74 II. ANALYSIS

¶ 75 A. Substantial Compliance With Rule 401(a)

¶ 76 If a defendant is accused of an offense punishable by imprisonment, the trial court may not permit the defendant to waive counsel unless the court, addressing the defendant personally in open court, first informs the defendant of the following three items and determines that the defendant understands them:

"(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) (July 1, 1984).

¶ 77 Substantial, rather than strict, compliance with Rule 401(a) is required. *People v. Haynes*, 174 Ill. 2d 204, 236 (1996). We will find substantial compliance with the rule "if the record indicates that the waiver [of counsel] was made knowingly and voluntarily *** and [if] the admonishment the defendant received did not prejudice his rights." *Id.* We decide *de novo* whether the record shows substantial compliance with Rule 401(a). See *People v. Pike*, 2016 IL App (1st) 122626, ¶ 114.

¶ 78 In defendant's view, the record makes no such showing. He argues that, without substantial compliance with Rule 401(a), the trial court committed plain error by accepting his

ineffective waiver of counsel. See *People v. Thomas*, 335 Ill. App. 3d 261, 263 (2002); *People v. Stoops*, 313 Ill. App. 3d 269, 273 (2000).

¶ 79 Defendant does not dispute that on January 6, 2015, before accepting his waiver of counsel, the trial court described to him the nature of the charges (see Ill. S. Ct. R. 401(a)(1) (eff. July 1, 1984)) and admonished him that he had the right to counsel and, if he was indigent, the right to appointed counsel (see Ill. S. Ct. R. 401(a)(3) (eff. July 1, 1984)).

¶ 80 The trial court also was supposed to tell defendant, however, the minimum and maximum sentence prescribed by law, including the penalty to which he might be subjected because of prior convictions. See Ill. S. Ct. R. 401(a)(2) (eff. July 1, 1984). On January 6, 2015, the court told him that each of the two counts of the information carried a prison term of no less than 3 years and no more than 14 years. That admonition was incorrect. Given defendant's criminal history, each of the counts actually carried a prison term of no less than 6 years and no more than 30 years. See 730 ILCS 5/5-4.5-25, 5-4.5-95(b) (West 2014).

¶ 81 Ten months later, on November 16, 2015, the trial court correctly informed defendant of the minimum and maximum Class X sentence prescribed by law. Even so, defendant argues that, for two reasons, Rule 401(a) remained unsatisfied. First, on November 16, 2015, the court failed to readmonish him that if he were indigent, he had a right to court-appointed counsel. See Ill. S. Ct. R. 401(a)(3) (eff. July 1, 1984). It is true that the court informed defendant of that right on January 6, 2015, but he quotes from *Stoops*, 313 Ill. App. 3d at 275: "Prior admonitions *** do not serve to fully inform a defendant of the ramifications of acting on his own behalf."

¶ 82 *Stoops* is inapposite because the prior admonitions to which *Stoops* referred were admonitions the trial court gave several months before the defendant proposed waiving counsel.

The Fourth District stated: "[The defendant] cannot be expected to rely on admonishments given several months earlier, *at a point when he was not requesting to waive counsel*." (Emphasis added.) *Id.* This was not the same as declaring all prior admonitions to be ineffective, even admonitions the trial court previously gave *in response to* the defendant's proposal to waive counsel.

¶ 83 As a matter of fact, as defendant admits, it is the supreme court's view that prior admonitions *can* count as substantial compliance with Rule 401(a). See *Haynes*, 174 Ill. 2d at 242. In *Haynes*, the supreme court remarked that "[i]t would have been preferable for the trial judge accepting the waiver to admonish the defendant in accordance with Rule 401(a) at the time he accepted the defendant's waiver of counsel"—but the supreme court stopped short of holding that all prior admonitions were, *per se*, ineffective. The supreme court stated: "We cannot hold *** that the failure of a trial judge to admonish a defendant contemporaneously with his waiver is always fatal to the validity of a waiver of counsel. Rather, each case must be assessed on its own particular facts." *Id.*

¶ 84 Defendant argues that, on the particular facts of his case, the trial court's prior admonition, on January 6, 2015, that he had the right to court-appointed counsel if he were indigent does not suffice as substantial compliance with Illinois Supreme Court Rule 401(a)(3) (eff. July 1, 1984). His reason is this: "the court specifically told [him] that if he waived his right to counsel, he could not have counsel appointed again later."

¶ 85 Actually, the trial court told defendant:

> "If I accept your decision to represent yourself, you will not be given the opportunity to change your mind during trial. In other words, this decision will be

> effective until the end of this particular trial[,] and if you are convicted at that time, we can reconsider appointment of counsel for sentencing purposes."

If the second sentence of that quotation were considered in isolation, the court could be understood as saying that the waiver of counsel would remain effective from that present time all the way until the end of the trial. In the context of the first sentence, however—to which the second sentence refers by the phrase "[i]n other words"—the court clearly means that *once the day of trial arrives*, the waiver of counsel will remain effective from the beginning of the trial to the end of the trial.

¶ 86 It would have been impossible to mistake the trial court's meaning later, on November 16, 2015, when the court told defendant:

> "I will entertain today or when we come back on January 5th if you want an attorney to represent you. But if we show up for the jury trial on February 22nd or that week and you decide at that point that you want an attorney, then we're going to have some issues trying to delay the matter."

Granted, the court did not explicitly tell defendant on November 16, 2015, that he still had the right to a court-appointed attorney if he were indigent; but when the court told defendant, "I will entertain today or when we come back on January 5th if you want an attorney to represent you," defendant surely did not think the court was referring to *private* counsel. If defendant means to suggest he was under the delusion that he needed judicial approval to hire private counsel, we reject that suggestion as implausible. Clearly, on November 16, 2015, the court was referring to appointed counsel, and defendant, who had extensive experience with the judicial system, understood that. See *People v. Phillips*, 392 Ill. App. 3d 243, 264 (2009).

¶ 87 After correcting its earlier admonition regarding the minimum and maximum punishment, the trial court again offered to appoint counsel to represent defendant—or, at least, common sense would have understood the court to be so offering—and defendant declined the offer. Thus, he suffered no apparent prejudice from the delay in informing him that he faced a Class X sentence if convicted, and we find substantial compliance with Rule 401(a). See *Haynes*, 174 Ill. 2d at 236.

¶ 88 B. The Claim of Double Enhancement

¶ 89 "[T]he sentencing authority must carefully weigh the factors, aggravating and mitigating, in order to reach a fair and just result, one that is based on the particular circumstances of the offense and the defendant." (Internal quotation marks omitted.) *People v. Palmer*, 162 Ill. 2d 465, 483-84 (1994). To "aggravate" an offense means to make it "worse" or "more serious." Merriam-Webster's Collegiate Dictionary 22 (10th ed. 2000). Therefore, something that already is inherent in the offense, as defined by statutory law, cannot be an aggravating factor. *People v. Phelps*, 211 Ill. 2d 1, 11 (2004). "Stated differently, a single factor cannot be used both as an element of an offense and as a basis for imposing a harsher sentence than might otherwise have been imposed." (Internal quotation marks omitted.) *Id.* at 11-12. Reusing a punishment-enhancing factor in this way is called "double enhancement." *People v. Siguenza-Brito*, 235 Ill. 2d 213, 232 (2009). "A double enhancement occurs when either (1) a single factor is used both as an element of an offense and as a basis for imposing a harsher sentence than might otherwise have been imposed, or (2) the same factor is used twice to elevate the severity of the offense itself." (Internal quotation marks omitted.) *Id.*

¶ 90 On the authority of *People v. Johnson*, 2017 IL App (4th) 160920, ¶¶ 47-48, defendant argues that each of the following purported factors in aggravation was a double

enhancement: (1) his receipt of compensation and (2) the threat of harm. He acknowledges that he withdrew his postsentencing motion and that sentencing issues are forfeited unless they are raised in a postsentencing motion. See *People v. McGath*, 2017 IL App (4th) 150608, ¶ 66. Nevertheless, he argues that the doctrine of plain error should avert the forfeiture. See *People v. Hall*, 195 Ill. 2d 1, 18 (2000).

¶ 91 "The first step in plain-error review is to determine whether clear or obvious error is present." *People v. Albea*, 2017 IL App (2d) 150598, ¶ 17. Because the State in *Johnson* effectively conceded that the receipt of compensation and the threat of harm to society were double enhancements (*Johnson*, 2017 IL App (4th) 160920, ¶ 47-48), it not clear or obvious that those factors are, *per se*, double enhancements. (In the present case, the State acknowledges *Johnson* but disputes that those factors are double enhancements.)

¶ 92 After all, the receipt of compensation is not an element of unlawful delivery of a controlled substance. See 720 ILCS 570/401(d)(i) (West 2014); *Siguenza-Brito*, 235 Ill. 2d at 232; *Phelps*, 211 Ill. 2d at 11. Unlawfully delivering cocaine is wrong and injurious, regardless of the presence or absence of a profit motive. Arguably, though, it is cold and mercenary to be in the business of selling cocaine, compared to sharing it in a spirit of misguided hospitality. A reasonable sentencing court could take the view that a seller deserves a somewhat greater punishment than a sharer. Defendant, as a seller, could be considered more blameworthy than someone who passes the crack pipe around. Evidently knowing the harmfulness of cocaine, he personally abstained from it, but he nevertheless sold it to others. Selling the controlled substance is not an element of unlawful delivery of a controlled substance, and preying on addicts, exploiting their addiction, aggravates the offense.

¶ 93 This is not to deny that it is often pursuant to a sale that people deliver cocaine, an expensive commodity. It does not follow, however, that a sale is inherent to the statutorily defined offense of unlawful delivery of a controlled substance (720 ILCS 570/401(d)(i) (West 2014)). See *Siguenza-Brito*, 235 Ill. 2d at 232; *Phelps*, 211 Ill. 2d at 11. To use an analogy, even if it came to pass that most murders nowadays were murders for hire, the payment still would be aggravating. By statutory law, the receipt of compensation is an aggravating factor (730 ILCS 5/5-5-3.2(a)(2) (West 2014)) unless the compensation is simply the proceeds of a burglary or theft, in which case it really is not compensation for committing the offense (*People v. Conover*, 84 Ill. 2d 400, 405 (1981)). In the present case, there really was compensation for committing the offense. Defendant unlawfully delivered cocaine to Schultheis, who, in return, handed defendant some cash. If defendant had delivered the cocaine to Schultheis for free, it still would have been unlawful delivery of a controlled substance. Payment was inessential to the offense. Payment aggravated the offense instead of being inherent in the offense. See 730 ILCS 5/5-5-3.2(a)(2) (West 2014); *Siguenza-Brito*, 235 Ill. 2d at 232; *Phelps*, 211 Ill. 2d at 11.

¶ 94 Nor, strictly speaking, is the threat of harm to society an element of unlawful delivery of a controlled substance (see 730 ILCS 5/5-5-3.2(a)(2) (West 2014)), but because all offenses threaten harm to society (or else the legislature would not have proscribed them), such a threat can justifiably be called an *aggravating* factor only if "the conduct of the defendant had a greater propensity to cause harm than that which is merely inherent in the offense itself." (Internal quotation marks omitted.) *Johnson*, 2017 IL App (4th) 160920, ¶ 48.

¶ 95 It is not inherent in the offense of unlawful delivery of a controlled substance that the offender have children who rely on him and who, as defendant put it, would "become part of the judicial system" if he were convicted of another Class 2 drug offense. As defendant argued in

the sentencing hearing, sending him to prison would effectively condemn his two-year-old daughter S.V. to foster care. He must have been aware of that risk when selling cocaine on April 9 and 15, 2014, and yet he chose to take that risk because "the woman[,] in his eyes[,] couldn't do [anything] wrong."

¶ 96 The trial court did not find a threat of harm to *society*; rather, the court found simply that "the defendant's conduct threatened serious harm," and according to defendant's own argument in the sentencing hearing, there was a real threat of harm to his own children, most notably S.V. Also, there was a real threat of harm to Craft's sons, whom only defendant could persuade to stay out of trouble. Defendant himself, by his conduct, was the originator of these threats. By unlawfully delivering a controlled substance on April 9 and 15, 2014, he created threats of harm beyond the harm generic to unlawful delivery of a controlled substance.

¶ 97 In sum, then, we find no double enhancement; the aggravating factors were legitimate. Absent error, we find no plain error. See *People v. Hanson*, 238 Ill. 2d 74, 115 (2010) ("Finding no error, our plain-error analysis ends here.").

¶ 98 C. The Claim of Ineffective Assistance of Counsel

¶ 99 Defendant complains that after neglecting his case for one and a half years, postsentence counsel never filed an amended motion to reconsider the sentence but, instead, withdrew all pending motions and requested the trial court to consider the "Notice of Appeal of Sentence" as a notice of appeal. Defendant argues: "Counsel's failures in this case fall under the higher *** standard [of *United States v. Cronic*, 466 U.S. 648, 659 (1984)], rather than [under] the usual *** standard of [*Strickland v. Washington*, 466 U.S. 668, 687 (1984)], because counsel's performance here was tantamount to a 'complete denial of counsel.' "

¶ 100 In *Cronic*, the Supreme Court stated: "[I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *Cronic*, 466 U.S. at 659. Just because postsentence counsel delayed the case, it does not follow that he "*entirely* fail[ed] to subject the prosecution's case to meaningful adversarial testing." (Emphasis added.) *Id.* He appealed the case. Taking an appeal is *some* meaningful adversarial testing. Defendant is estopped from complaining that postsentence counsel appealed the case in lieu of raising sentencing errors; that is precisely the course of action that defendant instructed counsel to take. See *People v. Velez*, 388 Ill. App. 3d 493, 503 (2009).

¶ 101 III. CONCLUSION

¶ 102 For the foregoing reasons, we affirm the trial court's judgment.

¶ 103 Affirmed.