2019 IL App (5th) 160040-U

NO. 5-16-0040

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Effingham County.
	)	
v.	)	No. 15-CF-88
	)	
RANDY A. OTTEN,	)	Honorable
	)	Kimberly G. Koester,
Defendant-Appellant.	)	Judge, presiding.

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

ORDER

¶ 1 *Held*: We affirm the order revoking the defendant's probation following his conviction for unlawful failure to register as a sex offender, and sentencing him to four years in the Illinois Department of Corrections, and one year of mandatory supervised release, because we agree with the parties that this appeal is not moot (see, *e.g.*, *People v. Halasz*, 244 Ill. App. 3d 284, 286 (1993)), and because we conclude that the defendant has not met his burden of demonstrating that he was prejudiced, or denied real justice, by the incomplete Illinois Supreme Court Rule 402A (eff. Nov. 1, 2003) admonishment he received in this case.

¶ 2 The defendant, Randy A. Otten, appeals the order of the circuit court of Effingham County that revoked his probation following his conviction for failure to register as a sex offender, and that sentenced him to four years in the Illinois Department of Corrections, followed by one year of mandatory supervised release. For the following reasons, we affirm.

¶ 3 FACTS

¶ 4 The facts necessary to our disposition of this appeal follow. The defendant was required, because of a 2012 conviction for the offense of aggravated criminal sexual abuse, to register as a sex offender. When he failed to do so, he was charged with unlawful failure to register as a sex offender. He entered an open plea of guilty to the charge, admitting that at the period of time in question he was homeless and did not comply with the sex offender registration requirements for homeless persons. On September 3, 2015, following a contested sentencing hearing at which the State requested a term of imprisonment of five years and the defendant requested a term of probation of a duration to be determined by the trial judge, the defendant was placed on 30 months of probation, with various accompanying conditions not relevant to this appeal. On September 25, 2015, the State filed a petition to revoke the defendant's probation, wherein the State alleged the defendant violated the terms of his probation by committing retail theft while on probation. In terms of relief sought by the petition, the State requested therein that the circuit court hold a hearing on the petition, and that "if, upon the said hearing, the [circuit court] finds that allegations contained in this [p]etition are true, that the [o]rder granting [the defendant's] probation be revoked and the [circuit court] enter a sentence in accordance with such findings, as provided by law." On November 10, 2015, and November 25, 2015, pretrial hearings were held on the petition to revoke.

¶ 5 On November 30, 2015, a final hearing was held, at which the defendant was represented by the same counsel who had represented him throughout the proceedings described above. The defendant was asked if he had had time to speak with counsel before the case was called, and he answered, "Yes, I did." He was asked if he had "any questions or concerns about what's going to happen," and answered, "No, ma'am." The State then advised the trial judge that the defendant was "going to confess the petition to revoke." The defendant thereafter signed an

"acknowledgement of rights and admission to petition to revoke." The acknowledgement stated that the defendant was aware that he was "entitled to have a hearing concerning" the allegations in the petition, and that he "freely and voluntarily" admitted to the allegations in the petition. When asked, the defendant agreed that he signed the document "freely and voluntarily." The trial judge admonished the defendant that "by signing that plea of guilty," the defendant was giving up the right to: (1) go to trial, (2) plead not guilty, and (3) confront and cross-examine witnesses that might be called to testify against him. The defendant agreed, and agreed that "[k]nowing all those rights," he still wished the court to accept his "plea of guilty." The State thereafter provided a factual basis, which was that the defendant had entered "the IGA grocery store" in Effingham and taken "food, drinks, and sunglasses from the store and left without paying for them." The trial judge accepted the factual basis and set the matter for sentencing.

¶ 6 The sentencing hearing was held on December 30, 2015. This time the State requested a term of imprisonment of six years, noting that the defendant "went less than two weeks" on his previous probation before committing "a new felony offense." The defendant again requested probation, stating that a "community-based sentence" could be crafted "that would not deprecate the seriousness of this conduct and be inconsistent with justice." The defendant described the retail theft as resulting from the defendant being "in a difficult and desperate situation." In an order filed on December 31, 2015, the defendant was sentenced to a term of imprisonment of four years in the Illinois Department of Corrections, followed by one year of mandatory supervised release, on the original conviction of unlawful failure to register as a sex offender, with credit for 246 days already spent in custody. The retail theft charge was dropped. On January 7, 2016, the defendant filed a motion to reconsider sentence, which challenged only his sentence. A hearing on the motion was held on January 27, 2016, after which the motion to reconsider sentence was denied. This timely appeal followed.

¶ 7 ANALYSIS

¶ 8 On appeal, the defendant contends the trial judge failed to properly admonish him, as required by Illinois Supreme Court Rule 402A (eff. Nov. 1, 2003), before the judge revoked his probation, because the judge failed to ensure that the defendant understood that at the hearing, the State was required to prove the alleged probation violation by a preponderance of the evidence. The defendant does not argue that any of the other requirements of Rule 402A were not met. The State responds to the defendant's argument by conceding that the trial judge failed to admonish the defendant "that the State only needed to prove the violation by a preponderance of the evidence," but contends the trial judge's "mere failure to admonish [the] defendant about the lowered burden of proof did not deny the defendant due process." The parties agree, and so do we, that this appeal is not moot, despite the fact the defendant has already served his sentence and his period of mandatory supervised release, because of the potential collateral legal consequences that the defendant faces, in the future, as a result of the revocation of his probation and the sentencing that followed. See, *e.g.*, *People v. Halasz*, 244 Ill. App. 3d 284, 286 (1993).

¶ 9 As the parties also agree, it is well settled in Illinois that a probationer is entitled to due process at a revocation hearing. *People v. Harris*, 392 Ill. App. 3d 503, 508 (2009). An admission to a probation violation must be voluntary, but that fact notwithstanding, "only the minimum requirements of due process must be followed in a probation revocation proceeding." *Id*. This is consistent with the long-established rule that "[a] defendant in a proceeding to revoke probation has fewer, rather than more, procedural rights than a defendant who still awaits trial." *People v. Dennis*, 354 Ill. App. 3d 491, 495 (2004). Illinois Supreme Court Rule 402A codifies the admonishments that must be given for due process concerns to be satisfied when there is an admission to a violation of probation. *Harris*, 392 Ill. App. 3d at 508. The purpose of the admonishments is to make certain that a defendant understands his or her admissions, the rights

the defendant is waiving, and the potential consequences of making the admissions. *Id*. Because there is very little precedent specific to admissions to probation violations under Rule 402A, a reviewing court may consider case law related to Illinois Supreme Court Rule 402 (eff. July 1, 2012). *Id*. at 507-08. Under Rule 402, substantial compliance is sufficient to ensure that due process requirements have been met, "and an imperfect admonishment is not reversible error unless real justice has been denied or the defendant has been prejudiced by the inadequate admonishment." *People v. Whitfield*, 217 Ill. 2d 177, 195 (2005). When a defendant claims that he or she has been prejudiced by an inadequate admonishment, it is the defendant, not the State, "who must demonstrate that [the defendant] has been prejudiced by the improper admonishment." *People v. Delvillar*, 235 Ill. 2d 507, 522 (2009); see also *People v. Guzman*, 2015 IL 118749, ¶ 18.

¶ 10 We agree with the State that in this case, the defendant has not even alleged, and certainly has not proven, that he was denied real justice, or prejudiced, by the trial judge's failure to tell him that the lower standard of proof by a preponderance of the evidence was applicable to his probation violation admission. As the State points out, Illinois law is replete with examples of reviewing courts finding, in various circumstances, that violations of Rule 402 that did not prejudice a defendant do not result in reversible error. See, *e.g.*, *People v. McCoy*, 74 Ill. 2d 398, 401 (1979); *People v. Williams*, 2012 IL App (2d) 110559; and *People v. Bryant*, 2016 IL App (5th) 140334. We also agree with the State that it is difficult to imagine how the defendant could have been prejudiced in this case, because, as the State puts it, if he "believed the State's burden was proof beyond a reasonable doubt, and he still admitted to the petition, there is no reasonable likelihood [the] defendant would have proceeded differently if he was aware that the State's burden was, in fact, far lower." Although we agree with the defendant that the trial judge should have given him complete admonishments, and we in no way condone the omission made by the

trial judge, strict compliance in this case was not required by the law. See *Whitfield*, 217 Ill. 2d at 195. The only way to potentially find prejudice to the defendant in this case would be to conclude that because he was not told that the State's burden of proof was proof by a preponderance of the evidence, the defendant mistakenly believed the State had some unspecified lower burden, or no burden of proof at all. The defendant has not alleged he held such a mistaken belief. Moreover, as the State points out, the defendant in this case is not a stranger to the criminal justice system, and was assisted by counsel at the hearing on the revocation petition; accordingly, we conclude that any such claim would, to say the least, border on the incredible. We conclude that the defendant has not met his burden of showing that he was prejudiced, or denied real justice, by the incomplete admonishment he received in this case. See *Delvillar*, 235 Ill. 2d at 522 (when defendant claims prejudice due to inadequate admonishment, it is defendant, not State, "who must demonstrate that [defendant] has been prejudiced by the improper admonishment"); see also *Guzman*, 2015 IL 118749, ¶ 18.

¶ 11 CONCLUSION

¶ 12 For the foregoing reasons, we affirm the order of the circuit court of Effingham County.

¶ 13 Affirmed.