2020 IL App (5th) 180309-U

NO. 5-18-0309

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Montgomery County.
	)	
v.	)	No. 17-CM-401
	)	
MATTHEW B. WAGEHOFT,	)	Honorable
	)	James L. Roberts,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE BARBERIS delivered the judgment of the court.
Justices Overstreet and Boie concurred in the judgment.

ORDER

¶ 1 *Held*: This appeal, from a judgment of conviction entered after a bench trial and imposition of an agreed-upon sentence, does not present any issue of arguable merit, and therefore appointed appellate counsel is given leave to withdraw, and the judgment is affirmed.

¶ 2 The defendant, Matthew B. Wagehoft, was found guilty of violation of a stalking no contact order, and he was sentenced to probation. The instant appeal is from the judgment of conviction. The defendant's court-appointed attorney on appeal, the Office of the State Appellate Defender (OSAD), has concluded that this appeal lacks merit. Accordingly, OSAD has filed a motion to withdraw as counsel, along with a brief in support thereof. See *Anders v. California*, 386 U.S. 738 (1967). OSAD has notified the defendant of its motion, and it has supplied him with a copy of the motion and brief. This court gave the defendant ample opportunity to file with this court a *pro se*

brief, memorandum, etc., responding to OSAD's motion and explaining why this appeal has merit, but the defendant has not taken advantage of that opportunity. Based upon a careful examination of OSAD's *Anders* motion and brief and the entire record on appeal, this court concludes that this appeal does indeed lack merit. Therefore, OSAD is granted leave to withdraw as the defendant's counsel on appeal, and the judgment of conviction is affirmed.

¶ 3 BACKGROUND

¶ 4 In this case, the State charged the defendant with violation of a stalking no contact order, a Class A misdemeanor. See 740 ILCS 21/125 (West 2016). At the defendant's first appearance in this case, in mid-December 2017, the circuit court reminded the defendant that it had recently appointed the public defender to represent him in a separate case "of a similar nature." The court asked the defendant whether he wanted the public defender appointed in this case as well, and the defendant answered, "No. For now I don't really want any representation for this." After finding probable cause and setting bond, the court returned to the subject of legal representation. The court told the defendant that since the public defender already had been appointed to represent him in "related" matters, an appointment in this case, too, "would make sense," and the court said that it would appoint the public defender. The defendant repeated that he did not want legal representation in this case, at least for the time being. After scheduling this case for a pretrial hearing that coincided with a pretrial hearing in the defendant's other cases, the court told the defendant that the scheduling would give him "additional time to consider what [he] wish[ed] to do." The court added that it would "wait and see what happens" in this case but the defendant was "currently *** representing [him]self."

¶ 5 In mid-January, approximately one month after the defendant's first appearance in this case, the defendant returned to court for a pretrial hearing, in this case and in three other

misdemeanor cases. A public defender, who represented the defendant in two of those three other misdemeanor cases, appeared with him. In answer to the public defender's inquiry, the court confirmed that the two cases in which she represented the defendant were scheduled for pretrial. The court asked the defendant whether he wanted the public defender appointed in this case and in the other case in which he was not represented, and the defendant answered, "No counsel right now." In regard to the two cases in which he was not represented by counsel, the defendant pleaded not guilty and indicated a desire for a bench trial. The court suggested to the defendant that he discuss all four of his misdemeanor cases with the public defender, and the court further suggested that all four cases be set for a pretrial on February 12, 2018. "If you come back on that date," the court said to the defendant, "and after having discussed your other two cases with [counsel], if you confirm you wish to waive your right to a trial by jury, I will permit you to do that after proper admonishment and assurances you understand what you are doing and that's what you want to do." The defendant agreed to that approach, and the court scheduled a pretrial hearing.

¶ 6 On February 12, 2018, the scheduled pretrial hearing was held. The defendant asked the court to appoint the public defender in the instant case and in the other misdemeanor case in which counsel had not yet been appointed. The court made the appointment. With that appointment, the public defender represented the defendant in all four of his pending misdemeanor cases, *i.e.*, in the instant case and three others. In the instant case, a jury trial was scheduled for March 5, 2018.

¶ 7 On March 5, 2018, the State, the defendant, and the defendant's public defender appeared in the court's chambers, while the clerk of the court addressed prospective jurors in the courtroom. Addressing the defendant, the court mentioned the presumption of innocence and the burden of proof, and then said, "You have a right to a trial, and you get to choose which type of trial you would like to have, either a [j]ury trial in front of 12 of your peers or a [b]ench [t]rial which would

be a trial in front of the [c]ourt without the presence of a [j]ury." The court mentioned that the defendant's public defender had said that the defendant might want a bench trial instead of a jury trial, and the court told the defendant, "It's your choice to decide which type of trial you would like to have." The court explained to the defendant that the "40 or 50" prospective jurors in the courtroom would be questioned so as to determine whether they had "any knowledge or other prejudice with regard to this case," that 12 of the prospective jurors would be selected to serve on the jury, and that those 12 would hear the evidence and "render a decision on guilt or innocence." The court further explained to the defendant that if he chose to waive his right to a trial by jury, the judge would "hear[ ] that same testimony and evidence and then mak[e] that decision." Also, the court told the defendant that if he decided to waive his right to a jury trial, the court was inclined to proceed to a bench trial that very day, absent "some extraordinary reason" for continuing the trial. "I have an extra [j]udge here that's covering my daily call," the court elaborated, "so from a scheduling purpose, it is more convenient for this [c]ourt." The court asked the defendant whether he wanted to be tried by a jury or by the judge alone, and the court told the defendant that if he wanted additional time to discuss the matter with counsel in private, the court would allow it. The defendant indicated that he did not need additional time to discuss the matter with counsel, and that he wanted to waive his right to a jury trial and to be tried by the judge alone.

¶ 8 The defendant signed a written waiver of his right to a trial by jury. In answer to the court's queries, the defendant indicated that he understood the written waiver and was not under the influence of any medication or other substance, and that he signed it freely, not in response to any threats or promises. The court asked the defendant to explain, in his own words, the effect of the written waiver, and the defendant responded as follows: "That is something that I signed to withdraw or not consent for a [j]ury [t]rial of my own free will and it will be then set for not a

[j]ury [t]rial but a [b]ench [t]rial." In response to the court's further queries, the defendant indicated that he did not have any questions about the written waiver and that he wanted to proceed to a bench trial instead of a jury trial. The court found that the defendant had "knowingly and voluntarily waived his right to a [t]rial [b]y [j]ury."

¶ 9 After the defendant waived his right to a trial by jury, the public defender requested a continuance of the bench trial. She explained that she was "ready" but that the defendant did not feel "prepared" for a bench trial. The court explained to the defendant that evidence would be presented in the same manner, regardless of the type of trial. The court asked the defendant whether he wanted to discuss with his attorney his reasons for wanting a continuance of the bench trial, and the defendant answered in the affirmative. A recess was taken. After approximately 30 minutes, court reconvened. The public defender moved to continue the bench trial to "another date this week," explaining that the defendant was "just not feeling prepared enough" given the change in the trier of fact. The State objected to continuing the trial to another date, stating that its witnesses were prepared to testify that day. The court refused to continue the trial to a later date, noting that the court's ruling might have been different if the defense had offered "something specific with regard to witnesses or evidence or other reasons or a basis to continue the matter."

¶ 10 Later that morning, the cause was called for bench trial. The State and the public defender announced that they were ready for trial, though the public defender informed the court that the State had just informed her of an additional State's witness, one whose name had not appeared in any police report. Counsel added that the State had given her "a brief moment" to speak with the new witness. Both the State and the public defender waived opening statement.

¶ 11 For the State, Leslie Hosick testified that in early August 2017, she sought and obtained from the circuit court an emergency stalking no contact order against the defendant. On August

25, 2017, she sought and obtained from the court a plenary stalking no contact order against the defendant, which was effective for two years commencing on that date. She subsequently learned that the plenary order had an omission; although the plenary order specified that Hosick's residence at 1031 East Tremont Street in Hillsboro, Montgomery County, was a protected place, the order did not include a specific distance that the defendant was required to stay away from the residence. Hosick returned to court and obtained an amended plenary stalking no contact order that specified a distance; it required the defendant to stay 500 feet away from the residence. During the evening of December 13, 2017, while the plenary order remained in effect, Hosick was inside her residence when she saw the defendant walk eastbound on the sidewalk in front of her house. The defendant paused directly in front of her house and then continued walking eastbound. According to Hosick, the distance from her residence to the sidewalk was no more than 15 feet.

¶ 12 Brooke Helvey testified in a manner consistent with Hosick's testimony. Helvey testified that during the evening of December 13, 2017, she was at Hosick's residence, and she saw the defendant walk on the sidewalk in front of the residence. According to Helvey, she shouted to the defendant that she was going to call the police. At that point, the defendant paused, directly in front of the residence. Helvey immediately called 9-1-1. Defense counsel did not cross-examine Helvey.

¶ 13 Kelly Brewer, a Hillsboro police officer, testified that she was on duty on December 13, 2017, at 10:13 p.m., when she received a dispatch in regard to a violation of an order of protection. In response, she drove on and near Tremont Street, searching for the defendant. At 10:21 p.m., she made contact with the defendant, across some railroad tracks from Tremont Street. Defense counsel did not cross-examine Brewer.

¶ 14 Rick Furlong, a deputy of the Montgomery County Sheriff, testified that on August 26, he handed to the defendant a no-contact order entered in case number 17-OP-179. At that time, Furlong read aloud to the defendant "the remedies" specified in the order. In an "affidavit of service," entered into evidence at trial, Deputy Furlong certified that on August 26, 2017, at 11 a.m., he personally served the defendant with a "stalking no contact order plenary" issued on August 25, 2017, in case No. 17-OP-179. Defense counsel did not cross-examine Furlong.

¶ 15 The trial court took judicial notice of the stalking no contact orders that had been entered in case No. 17-OP-179. At trial, a plenary stalking no contact order entered on August 25, 2017, and a modified plenary stalking no contact order entered on August 30, 2017, both from case No. 17-OP-179, were identified as State's exhibits 2 and 3, respectively, but neither of those two exhibits was entered into evidence and neither is included in the instant record on appeal. The trial court also took judicial notice of the transcript of a hearing held on October 30, 2017, in case No. 17-OP-179. The transcript is part of the record on appeal. It shows that at that hearing, Judge Douglas L. Jarman told the defendant, who was the respondent in the OP case, "The order will be modified to provide that the Respondent has to stay 500 feet from the residence. Okay. So it will be modified and then you will get a copy of that over at the Clerk's Office—I am sorry, at the jail. Okay." The defendant replied, "I can't hear you very well, but yes." Judge Jarman said, "All right. I am going to modify the order. The order will still be in place. You've got to stay away from Miss Hosick and her house. You will have to stay 500 feet away." The defendant did not say any more, and the very brief hearing ended.

¶ 16 The defendant testified that he did not remember being in court on October 30, 2017. He further testified that he never was served with an order specifying that he was to stay at least 500

feet away from the residence at 1031 East Tremont Street, and that he did not know that he was supposed to stay 500 feet away.

¶ 17 During closing arguments, the State acknowledged that the defendant had not been served with a copy of the modified plenary stalking no contact order, specifying the 500-feet requirement, but the State argued that the transcript of the October 30, 2017, hearing in case No. 17-OP-179 made clear that the defendant, at the time of the offense, had actual knowledge that the modified order required him to stay at least 500 feet away from the Tremont Street residence. The defendant, through counsel, argued that the transcript of the October 30, 2017, hearing failed to establish that the defendant actually heard the judge inform him of the modification, and therefore the State had failed to prove beyond a reasonable doubt that the defendant had actual knowledge of the 500-feet requirement.

¶ 18 The court found the defendant guilty as charged. Among other factual findings, the court found that the defendant, at the time of the offense, had "actual knowledge" that a court order required him to stay 500 feet away from Hosick's residence, and that the defendant had this knowledge by virtue of Judge Jarman's previously informing him, in open court, that the plenary order in case No. 17-OP-79 had been modified so as to include the 500-feet provision. The court scheduled a sentencing hearing and suggested to the defendant that perhaps his public defender and the State could negotiate a "global resolution" of the instant case and the defendant's three other pending misdemeanor cases.

¶ 19 A sentencing hearing was held on March 19, 2018, but apparently the hearing was not taken verbatim. The docket entry for that date shows that the parties presented an "agreed disposition" with a sentence of probation for a period of 18 months. A written sentencing order entered on that date reflected a sentence of probation for 18 months, and it stated that a condition

of probation was incarceration in the county jail for 150 days, but the defendant had spent 75 days in jail while awaiting trial, and therefore that condition had been fulfilled.

¶ 20 On April 4, 2018, the defendant filed, by counsel, a motion to vacate the judgment or for a new trial. The sole basis for this motion was a claim that the trial court "erred in finding that [the defendant] was given actual notice of the amended order of protection issued on October 30, 2017." On May 7, 2018, the circuit court denied the motion. On June 5, 2018, the defendant filed, by counsel, a notice of appeal, thus perfecting the instant appeal.

¶ 21 ANALYSIS

¶ 22 This appeal is from a judgment of conviction. As previously mentioned, the defendant's court-appointed attorney for this appeal, OSAD, has filed an *Anders* motion to withdraw as counsel and a supporting brief. In support of its motion, OSAD also has filed a brief in which it discusses six potential issues on review. Each of the six potential issues is discussed below.

¶ 23 The first potential issue raised by OSAD is whether the circuit court committed reversible error when it allegedly failed to comply with Illinois Supreme Court Rule 401(a) (eff. July 1, 1984). Under Rule 401(a), a circuit court "shall not permit a waiver of counsel by a person accused of an offense punishable by imprisonment without first *** informing him of and determining that he understands *** (1) the nature of the charge; (2) the minimum and maximum sentence prescribed by law ***; 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, 2984). The purpose of Rule 401(a) is "to ensure that a waiver of counsel is knowingly and intelligently made." *People v. Haynes*, 174 Ill. 2d 204, 241 (1996). An effective waiver of counsel requires substantial compliance with the rule. *Id.* at 236. OSAD suggests that the circuit court here failed to comply with all portions of Rule 401(a), permitting the defendant to waive counsel without first informing

him of the minimum and maximum sentence for the charge he faced, but that the court's failure to comply with the rule did not prejudice the defendant. The record reveals that the circuit court showed great solicitude for the defendant's rights, and in particular for his right to legal representation, and obviously wanted the defendant to reconsider his stated desire to proceed *pro se*. Assuming, for the sake of this discussion, that the circuit court failed to comply substantially with Rule 401(a), the failure did not prejudice the defendant in the slightest. Eventually, the defendant requested the appointment of counsel in this case, and the court immediately appointed counsel, and the appointment was made well before the jury waiver and the bench trial in this factually simple case. There was no prejudice to the defendant and no reversible error. See, *e.g.*, *People v. Mitchell*, 34 Ill. App. 3d 311, 317-18 (1975) (the defendant was not prejudiced by his lack of legal representation at arraignment, and therefore no reversible error was committed, where counsel was appointed for him months before his factually simple case went to trial).

¶ 24 The second potential issue raised by OSAD is whether the circuit court abused its discretion in deying the defendant's motion to continue the bench trial. The granting of a continuance for additional trial preparation is a matter left to the sound discretion of the trial court. See, *e.g.*, *People v. Lewis*, 165 Ill. 2d 305, 326-27 (1995). The denial of a defendant's motion to continue is reversible error only if the denial prejudiced the defendant's rights. *Id.* at 327. This case was far from complex, and the defendant did not suggest any specific additional action that he needed to take in order to be ready for trial. Appointed counsel said that she was ready to try the case. Meanwhile, the State's witnesses were ready to testify, and the court had made arrangements for another judge to handle his usual call while he tried this case. The court certainly did not abuse its discretion in denying the defendant a continuance of the bench trial.

¶ 25 The third potential issue raised by OSAD is whether the State failed to prove the defendant guilty beyond a reasonable doubt. For an issue of this type, this court views the trial evidence in the light most favorable to the defendant and considers whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *People v. Hardman*, 2017 IL 121453, ¶ 37. The defendant was charged with violation of a stalking no contact order. See 740 ILCS 21/125 (West 2016). The State was obliged to prove (1) that the defendant committed an act prohibited by a stalking no contact order and (2) that the defendant had been served notice, or had otherwise acquired actual knowledge, of the content of the order. See *People v. Stiles*, 334 Ill. App. 3d 953, 957 (2002). As the above description of the evidence adduced at the defendant's trial makes clear, the State proved both elements beyond a reasonable doubt. At trial, the defendant did not dispute that he got within 500 feet of the Tremont Street residence; his defense was that he did not have actual knowledge of the 500-feet provision in the modified plenary stalking no contact order. However, the transcript of the October 30, 2017, hearing in case No. 17-OP-179, during which a judge informed the defendant of the 500-feet provision in the modified order, was solid proof that the defendant did in fact know of the 500-feet requirement. The trial evidence fully supports the circuit court's finding that the defendant was guilty as charged.

¶ 26 The fourth potential issue raised by OSAD is whether reversible error occurred where the sentencing hearing was not transcribed. As OSAD notes in its *Anders* brief, citing *People v. Gold*, 99 Ill. App. 3d 468, 469 (1981), neither a statute nor case law requires that a sentencing hearing in a misdemeanor case be taken verbatim, and even if it was required, the defendant could not establish that the lack of a sentencing transcript prejudiced him, given that his sentence was one to which the parties had agreed.

¶ 27 The fifth potential issue raised by OSAD is whether the defendant's jury-trial waiver was valid. A criminal defendant's waiver of his right to a jury trial, in order to be valid, must be done knowingly and understandingly in open court. 725 ILCS 5/103-6 (West 2016); *People v. Bracey*, 213 Ill. 2d 265, 269 (2004). Here, the record clearly shows that the defendant's waiver was valid. As detailed above, the court admonished the defendant that he had a right to a trial and that he had the option of choosing between a jury trial and a bench trial, concepts that the court explained, and the defendant freely waived his right to a jury trial and freely chose a bench trial.

¶ 28 The sixth and final potential issue raised by OSAD is whether the defendant's trial counsel was ineffective for failing to give an opening statement and failing to cross-examine three of the State's four witnesses. A defendant claiming ineffective assistance of counsel must show both (1) that counsel's performance fell below an objective standard of reasonableness and (2) a reasonable probability that a proceeding's result would have been different but for counsel's unprofessional error(s). *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *People v. Albanese*, 104 Ill. 2d 504 (1984). Here, the defendant cannot satisfy either prong of *Strickland*, either in regard to the waiver of opening statement or in regard to the cross-examination of witnesses.

¶ 29 The defendant was tried by the court alone, the facts and issues in the trial were simple, and the State waived its own opportunity to make an opening statement. This court cannot imagine what defense counsel possibly could have said, during an opening statement, that might have changed the result of the defendant's trial, or how the defendant could possibly have been harmed by counsel's waiver of opening statement. See *People v. Penrod*, 316 Ill. App. 3d 713, 724 (2000) (defense counsel's waiver of opening statement is a strategic or tactical matter that, in itself, does not demonstrate ineffective assistance). Counsel's waiver of opening statement was not constitutionally ineffective.

¶ 30 As for counsel's decision not to cross-examine three of the State's witnesses—*viz.*, Brooke Helvey, who corroborated Leslie Hosick's testimony that the defendant was on the sidewalk in front of the Tremont Street residence, Kelly Brewer, the Hillsboro police officer who arrested the defendant not far from the residence, and Rick Furlong, the sheriff's deputy who served the defendant with the original plenary stalking no contact order—the record does not suggest any particular approach that counsel should have taken in regard to cross-examination. The record does not include any particular basis for the impeachment of their credibility, such as evidence of bias or prior inconsistent statements. Furthermore, their testimonies were not pertinent to, and did not contradict in any way, the defendant's trial defense that at the time he was near the Tremont Street residence, he was unaware that the plenary stalking no contact order had been modified so as to require him to stay at least 500 feet away from the residence. Counsel's not cross-examining those three witnesses was not constitutionally ineffective.

¶ 31 CONCLUSION

¶ 32 An examination of the record makes clear that none of OSAD's six potential issues has any merit whatsoever. Furthermore, this appeal does not present any issue of arguable merit. Accordingly, OSAD is granted leave to withdraw as the defendant's counsel on appeal, and the judgment of conviction is affirmed.

¶ 33 Motion granted; judgment affirmed.