2012 IL App (4th) 101045-U

Filed 8/15/12

NO. 4-10-1045

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Morgan County
RAFAEL C. KENNEDY,	)	No. 09CF10
Defendant-Appellant.	)	
	)	Honorable
	)	Richard T. Mitchell,
	)	Judge Presiding.

JUSTICE McCULLOUGH delivered the judgment of the court.
Justices Cook and Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court reversed defendant's conviction and remanded for a new trial, concluding the trial court improperly admonished defendant as to mandatory firearm sentencing enhancements and imposed a void sentence.

¶ 2 After a stipulated bench trial, defendant, Rafael C. Kennedy, was convicted of first degree murder (720 ILCS 5/9-1(a)(1) (West 2008)). The trial court sentenced defendant to 30 years' imprisonment, with 3 years of mandatory supervised release (MSR) and credit for 526 days' time served. Defendant appeals, arguing (1) he was not properly admonished before his stipulated bench trial as to the minimum and maximum sentence—specifically, the mandatory nature of sentencing enhancements when a firearm was involved—and (2) the trial court imposed a void sentence when it erroneously believed the sentencing enhancements did not apply. We reverse and remand.

¶ 3 On January 21, 2009, the State charged defendant with four counts of first degree murder (720 ILCS 5/9-1(a)(1) (West 2008)). Count I alleged defendant shot Earl Capone Jackson, knowing said act would cause death. Count II alleged defendant, with the intent to kill, shot Earl Capone Jackson, thereby causing his death. Count III alleged defendant shot Earl Capone Jackson, knowing such act created a strong probability of death or great bodily harm. Count IV alleged defendant, while committing a forcible felony, shot Earl Capone Jackson and thereby caused his death. Defendant entered into a stipulated agreement with the State in which the State proceeded on count IV only.

¶ 4 On August 26, 2010, the trial court held a stipulated bench trial. At the trial, the State informed the court that it "believe[d] the defendant ha[d] been advised by his attorneys and through the stipulation that this is similar to a guilty plea without him actually saying [']I plead guilty.['] " Defense counsel responded that the State's "statements that this is akin to pleading guilty is not really one intended."

¶ 5 The trial court then advised defendant that the State was only proceeding on count IV, first degree felony murder. The State added, "We have just stipulated as to the facts, obviously, which we believe are sufficient to find defendant guilty on felony murder only." The court admonished defendant that each count of first degree murder was subject to 20 to 60 years' imprisonment, with 3 years of MSR. The court further admonished defendant:

> "[T]here *could be* enhancements to the sentences of an additional 15 years *if* you were—if the offense was committed while the defendant *possessed* a firearm, or enhancement of 20 additional years if the defendant personally discharged a firearm during the

commission of the offense, or an additional 25 years if—or up to a natural term of life—if the defendant personally discharged a firearm during the commission of the offense, in so doing caused great bodily harm, permanent disability, or permanent disfigurement or death of the, the person." (Emphases added.)

¶ 6 The stipulation stated that defendant had been advised "that a stipulated bench trial is a kin [*sic*] to a guilty plea wherein the defendant is waiving all of his pre-trial rights." The stipulation also stated that defendant acknowledged that based upon the stipulated facts, "the [c]ourt would almost certainly find the defendant guilty."

¶ 7 Defendant stipulated Julius Washington would testify that on September 22, 2007, he, Sean Jackson, and defendant drove to Jacksonville, Illinois, where they observed the victim, Earl Capone Jackson, "with a large stash of money." Washington and defendant decided to rob the victim and thereafter confronted him from their van while the victim was walking down Hooker Street. (Sean Jackson chose not to participate in the robbery because the victim was his cousin.) Upon confronting the victim, Washington exited the van and pulled a gun on the victim for the purpose of demanding money. Washington and the victim then engaged in a struggle, wherein one gunshot was fired. After the first shot, defendant exited the van and became involved in the struggle. A second gunshot was then fired. Following the struggle, Washington and defendant returned to the van, picked up Sean Jackson, and left town.

¶ 8 The stipulation also provided that Washington would testify that defendant was driving the van as they left town. On their way out of town, defendant pulled over and exited the driver's seat, and Sean Jackson took his place. As they were leaving town, they discarded two

guns and Washington's bloody shirt in a wooded area. After the three men left Jacksonville, they drove to Springfield, Illinois, and eventually burned the van in Decatur, Illinois.

¶ 9 Sean Jackson would testify to the same events as Washington and that he was not in the van when the robbery took place. On the day following the robbery, Jackson took detectives back to the wooded area where the guns and shirt were discarded.

¶ 10 Dr. Jessica Bowman would testify that the victim died as a result of gunshot wounds. Crime lab technicians would testify that the recovered guns were consistent with guns that could produce the wounds inflicted on the victim's body. Deoxyribonucleic acid (DNA) collected from one of the guns could not exclude defendant from the DNA profile.

¶ 11 Lab technicians would also testify that the blood found on the recovered shirt was that of the victim's, and the shirt also contained DNA from Washington. However, the DNA found on the shirt could not be attributable to Jackson and defendant.

¶ 12 A video would be admitted at trial that contained defendant making a statement that he went to Jacksonville with Washington and Jackson, but not in the van. He was unaware of the surroundings of Jacksonville, he did not know where he was going, and he did not know what vehicle they were driving.

¶ 13 Finally, additional witnesses would testify. These witnesses would corroborate the evidence of a struggle, testify to gunshots being fired, testify to the direction the van traveled in after the gunshots were fired, and of a third man entering the van after the gunshots were fired.

¶ 14 After admonishments, the trial court took a short recess to take the stipulated evidence into consideration. After the court's recess, the court went through a short summary of the stipulated evidence and found defendant guilty of first degree murder. The court further

found that none of the enhanced sentencing provisions would apply because "there was no showing beyond a reasonable doubt that [defendant] possessed a firearm." On October 6, 2010, the court sentenced defendant to 30 years in the Illinois Department of Corrections, with 3 years of MSR and credit for 526 days' served.

¶ 15 On October 5, 2010, defendant filed a motion to vacate judgment, or in the alternative, to grant defendant a new trial. The motion alleged that the evidence was insufficient to prove defendant guilty beyond a reasonable doubt. Defendant further alleged that the stipulation was factually incorrect and that he only agreed to the stipulated bench trial because he was threatened by the State with a sentence in excess of 40 years and was advised by his counsel that a jury trial would likely result in a sentence in excess of 40 years.

¶ 16 On November 3, 2010, defendant filed a motion to vacate his sentence, wherein defendant asked the trial court to vacate his sentence and impose the minimum sentence of what he believed to be 20 years. Defendant also filed an amended motion to vacate the judgment, alleging that his due process rights and right to a fair trial were violated by the court's sealing of Washington's plea agreement, as it contained important information that would have benefited defendant before trial. Defendant also filed a motion to unseal the written plea agreement.

¶ 17 On November 30, 2010, the trial court considered defendant's motions and denied them. The court stated:

> "We were very careful in explaining what was taking place to [defendant] at the time. I was confident that he, he was aware of what he was doing and he understood what he was doing. I then took that stipulation. I reviewed it, and I found beyond a reason-

able doubt that he was guilty of committing felony murder. ***
He was handed a sentence, *** 30 years. *** But I thought it was
the appropriate sentence. I haven't heard any new evidence to ***
grant your request for relief, so I'm going to deny the motions, the
post-trial motions."

¶ 18 This appeal followed.

¶ 19 On appeal, defendant argues his stipulated bench trial was tantamount to a guilty plea and, therefore, he should have been admonished in compliance with Illinois Supreme Court Rule 402 (eff. July 1, 1997). More specifically, defendant contends the trial court did not properly admonish defendant of the minimum and maximum sentences for first degree murder involving the use of a firearm. Defendant also argues on appeal that his sentence is void because it is less than the statutory minimum. The State argues the trial court was not required to admonish defendant pursuant to Rule 402 because defendant's stipulated bench trial was not tantamount to a guilty plea. The State concedes defendant's sentence is void for failing to adhere to the mandatory sentencing enhancements for use of a firearm.

¶ 20 Whether defendant was properly admonished pursuant to Rule 402 depends upon whether defendant's stipulated bench trial was tantamount to a guilty plea. "[W]hether a stipulation amounts to a guilty plea is a question to be reviewed *de novo*." *People v. Mitchell*, 353 Ill. App. 3d 838, 844, 819 N.E.2d 1252, 1258 (2004).

¶ 21 Generally, a stipulated bench trial is tantamount to a guilty plea when the defendant either (1) stipulates the evidence is sufficient to find him or her guilty beyond a reasonable doubt or (2) he or she does not present or preserve a defense. *People v. Isaacson*, 409

Ill. App. 3d 1079, 1081, 950 N.E.2d 1183, 1186-87 (2011) (citing *People v. Thompson*, 404 Ill. App. 3d 265, 270, 936 N.E.2d 195, 199 (2010)).

¶ 22 Defendant argues he stipulated that the evidence was sufficient to convict him of first degree murder. Defendant points to the language in the stipulation, which states that "a stipulated bench trial is a kin [*sic*] to a guilty plea" and "based upon these presented facts, the [trial] [c]ourt would almost certainly find the defendant guilty." He also relies on statements made by the State at the stipulated bench trial. At the start of the proceedings, the State informed the court, "We have just stipulated as to the facts, obviously, which we believe are sufficient to find defendant guilty on felony murder only."

¶ 23 The State argues that defendant did not stipulate that the evidence was sufficient to convict him of first degree murder. The State suggests that defendant's acknowledgment that the facts would "almost certainly" result in a guilty verdict is not equivalent to conceding the evidence was sufficient to find defendant guilty beyond a reasonable doubt. The State further directs our attention to the start of the hearing wherein the State informed the trial court that "defendant ha[d] been advised *** that [the stipulation] is similar to a guilty plea." Again, the State asserts that defendant's understanding that the stipulation was "similar" to a guilty plea is not analogous to stipulating that the evidence was sufficient to find him guilty beyond a reasonable doubt.

¶ 24 Additionally, the State highlights defense counsel's response to the State's comment, "We have just stipulated as to the facts, obviously, which we believe are sufficient to find defendant guilty on felony murder only." Defense counsel stated, "I think [the State's] statements that this is akin to pleading guilty is not really one intended, but I think you're not

deciding the case based on what he says, you're deciding it based on the terms and conditions in the stipulation." The trial court's response was, "That, that would be correct." The State argues this dialogue shows that defense counsel knew defendant did not intend to plead guilty and was stipulating only to the evidence.

¶ 25 After reviewing the record in its entirety and considering both the language of the stipulation and the colloquy of the stipulated bench trial, we conclude that defendant did not stipulate to the sufficiency of the evidence and, therefore, the stipulated bench trial was not tantamount to a guilty plea.

¶ 26 Our conclusion is first drawn from the language of the stipulation. The stipulation provided that "[d]efendant hereby acknowledge[d] *** he is stipulating to the facts here and presented by the State that these would be facts presented to the [c]ourt if this matter were to proceed through to trial." The stipulation did not include an express statement defendant was stipulating that the evidence was sufficient to convict him. The stipulated bench trial was not tantamount to a guilty plea. See *People v. Foote*, 389 Ill. App. 3d 888, 894, 906 N.E.2d 1214, 1220 (2009) (stipulated bench trial was not tantamount to a guilty plea when stipulation did not include express statement that evidence was sufficient to convict and the parties were stipulating only to the evidence); see also *Thompson*, 404 Ill. App. 3d at 270-71, 936 N.E.2d at 199 (where defense counsel did not stipulate that the facts as presented were sufficient to convict, but merely stipulated that if the case proceeded to trial, the State could in fact present the evidence that it had represented to the trial court, the stipulated bench trial was not tantamount to a guilty plea).

¶ 27 Our conclusion is further supported by the dialogue at the trial. The record does not indicate that defense counsel ever expressly stipulated to the sufficiency of the evidence.

Counsel's only comment relating to the stipulation was his reluctance to agree with the State's conclusion that the stipulation was "akin to pleading guilty." Counsel's comments are vague and do not lead this court to conclude counsel expressly stipulated to the sufficiency of the evidence. See *People v. Torres*, 279 Ill. App. 3d 599, 601, 665 N.E.2d 519, 521 (1996) (concluding that when defense counsel only made a vague comment and never expressly stipulated to the sufficiency of the evidence, stipulated bench trial was not tantamount to a guilty plea).

¶ 28 Moreover, the only mention of sufficient evidence came from the State at the trial. The State informed the court, "We have just stipulated as to the facts, obviously, which we believe are sufficient to find defendant guilty on felony murder only." This comment was made in response to the court's attempt to confirm that the State only planned to proceed with count IV, felony murder. Reading this comment in the context in which it was made leads to the conclusion the State was not stipulating that the evidence was sufficient to convict, but rather explaining the State was only proceeding on count IV because it believed it had sufficient evidence to do so. We do not conclude the State's belief it had sufficient evidence to convict is the equivalent of the State stipulating to that effect.

¶ 29 Finally, this court has held that "when a defendant stipulates that evidence is sufficient to convict, this is tantamount to a guilty plea *because* the [trial] court is not called upon to determine if the State has proved defendant guilty beyond a reasonable doubt." (Emphasis added.) *People v. Pollard*, 216 Ill. App. 3d 591, 596, 575 N.E.2d 970, 973 (1991); see also *Foote*, 389 Ill. App. 3d at 894, 906 N.E.2d at 1220 (stipulated bench trial was not tantamount to a guilty plea when defendant agreed that judge would decide whether defendant would be found guilty). The record shows that the court *was* called upon to determine if the State presented

sufficient evidence to prove defendant guilty beyond a reasonable doubt. The record also shows that defendant understood such a determination would be made.

¶ 30 At the start of the proceedings, the trial court asked defendant if he understood "that the evidence before the [c]ourt that I'm going to decide guilty or not guilty in this instance is all contained in this written stipulation?" Defendant responded in the affirmative. After the court admonished defendant, it informed the parties, "I will take into consideration the stipulated evidence here for the bench trial, and I'll reach a decision." After a short recess, the court reconvened and briefly provided a recitation of the stipulated facts. The court then found "from the evidence that ha[d] been stipulated to that [defendant was] guilty of felony murder, first degree murder, beyond a reasonable doubt."

¶ 31 Because we have concluded that defendant's stipulated bench trial was not tantamount to a guilty plea, the trial court was not required to admonish defendant in accordance with Rule 402. Nevertheless, while we hold that the court was not required to admonish defendant pursuant to Rule 402, we acknowledge that the court did admonish defendant and did so improperly. Thus, the interests of fairness and substantial justice compel the exercise of the equitable powers of this court and a reversal of defendant's conviction.

¶ 32 We have concluded defendant's conviction warrants reversal based on the following: (1) the mandatory sentencing enhancements were not included in the written stipulation, yet the stipulation was clear that a firearm was used in the commission of the offense; (2) the trial judge incorrectly admonished defendant the enhancements would only apply if the court found defendant "possessed" a firearm during the commission of the offense, wherein the sentencing enhancements were actually mandatory; and (3) the trial judge made an erroneous

finding that the sentencing enhancements would not apply to defendant because "there was no showing beyond a reasonable doubt that [defendant] possessed a firearm," which resulted in a void sentence.

¶ 33 Section 5-8-1 of the Unified Code of Corrections imposes a mandatory 15-year sentencing enhancement when "the person committed the offense while armed with a firearm." 730 ILCS 5/5-8-1(a)(1)(d)(i) (West 2008). Our supreme court has held that when the factual basis provided to the trial court "made it clear that a firearm was *used* in the commission of the offense," the 15-year mandatory sentence is automatically triggered and the court must impose such sentence. (Emphasis Added.) *People v. White*, 2011 IL 109616, ¶ 29, 953 N.E.2d 398. The stipulation accurately provided that the applicable sentencing range for felony murder is 20 to 60 years. See 730 ILCS 5/5-8-1(a)(1)(a) (West 2008). However, the stipulation failed to include the 15-year mandatory firearm enhancement of section 5-8-1. 730 ILCS 5/5-8-1(a)(1)(d)(i) (West 2008).

¶ 34 The stipulated facts in this case made it clear that a firearm was used in the commission of the offense. The stipulation stated that Dr. Bowman would testify that the victim died of gunshot wounds. Further, additional witnesses would testify that gunshots had been fired. Thus, the mandatory sentencing enhancement was triggered, and the stipulation should have specified that defendant would be facing an additional 15 years of imprisonment if the court were to find him guilty based on the stipulated facts. It seems only logical that where defendant is put on notice of the possible sentence in his stipulation, he should likewise be put on notice that mandatory sentencing enhancements will also apply.

¶ 35 Moreover, after the stipulation was presented to the trial court, and before the

court accepted the stipulation, the court admonished defendant as follows:

> "there *could be* sentence enhancements of an additional 15 years *if* *** the offense was committed while the defendant *possessed* a firearm, or enhancement of 20 additional years if the defendant personally discharged a firearm during the commission of the offense, or an additional 25 years if *** the defendant personally discharged a firearm during the commission of the offense, in so doing caused great bodily harm, permanent disability, or permanent disfigurement or death of the, the person." (Emphases added.)

Although the court was not required to admonish defendant, it did admonish him, and did so improperly. As stated, because the stipulated facts made it clear that a firearm was used in the commission of the offense, the court should have admonished defendant the sentencing enhancements were mandatory if it were going to admonish him at all. Instead, the court erroneously admonished defendant that the sentencing enhancements were a possibility based on the court's misapprehension of the law that defendant had to "possess" a firearm for the enhancements to apply.

¶ 36 Finally, the trial court erroneously found that the sentencing enhancements did not apply to defendant because "there was no showing beyond a reasonable doubt that [defendant] possessed a firearm." As explained, the court was not required to find that defendant "possessed" a firearm but only that a firearm was used in the commission of the offense. The stipulated facts make clear that a firearm was used in the commission of the offense. Thus, the court was required to impose the mandatory 15-year sentencing enhancement, but it did not. The sentence

is therefore void as the court did not comply with the statutory requirements. See *White*, 2011 IL 109616 at ¶ 21, 953 N.E.2d 398 (where the trial court's sentence did not conform to the statutory requirements, the sentence was void).

¶ 37 The trial court's imposition of a void sentence, in conjunction with the court's improper admonishments, leads this court to conclude the trial court was operating under a misapprehension of the law as to whether the sentencing enhancements would apply. Thus, it would be inequitable to conclude defendant knew the sentencing enhancements were actually mandatory where the court itself did not know. This is especially true in light of the fact the stipulation included the statutory sentencing range for felony murder but did not include the sentencing enhancements.

¶ 38 For the reasons stated, we reverse defendant's conviction and remand for a new trial.

¶ 39 Reversed and remanded.