

2011 IL App (1st) 101314-U
No. 1-10-1314

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FIRST DIVISION
June 30, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 08 CR 16309
)	
TALMON HEGWOOD, JR.,)	Honorable
)	Thomas M. Tucker,
Defendant-Appellant.)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.

Presiding Justice Hall and Justice Hoffman concurred in the judgment.

O R D E R

HELD: Where defendant admitted possession of stolen merchandise, evidence supported conclusion that he violated his conditional discharge; the trial court's order revoking defendant's conditional discharge was affirmed; however, resentencing was required due to earlier absence of presentence investigation report.

¶ 1 Defendant Talmon Hegwood Jr. appeals the orders of the trial court revoking his sentence of conditional discharge and sentencing him to an extended term of nine years in prison. On appeal, defendant contends the State did not offer sufficient evidence that he violated his conditional discharge and that this case should be remanded for a new sentencing hearing because the court did not order a presentence investigation (PSI). Defendant also argues the trial court did not adequately admonish him of his right to counsel under Supreme Court Rule 401(a) (eff. July 1, 1984). We affirm the revocation of defendant's conditional discharge but remand for a new sentencing hearing and correction of the mittimus.

¶ 2 On October 10, 2008, defendant pled guilty to committing felony retail theft at a Wal-Mart store in Forest Park on July 17, 2008, and was sentenced to 12 months of conditional discharge. Defendant represented himself in those proceedings. Nine days later, on October 19, 2008, defendant was arrested pursuant to an active warrant and was found in possession of stolen merchandise.

¶ 3 The State filed a petition to revoke defendant's conditional discharge. In April 2009, a hearing was held on the State's petition, and defendant again acted as his own attorney. The court took judicial notice of defendant's sentence of conditional discharge imposed on October 10, 2008.

¶ 4 Before hearing testimony, the court secured another oral waiver of counsel from defendant after defendant indicated he wished to proceed *pro se*. Officer Joseph Petersen of the Berwyn Police Department testified that on October 19, 2008, he was on patrol and responded to a call about a disturbance at a McDonald's restaurant. While investigating the incident, the officer discovered an outstanding warrant for defendant. As defendant was being placed under arrest, he asked the officer to retrieve his duffel bag from a nearby table. Officer Petersen testified the duffel bag bore a K-Mart price tag and contained "an extensive amount of clothing and hats." Some of the items were on hangers and had theft detection devices attached. Defendant admitted the items were his.

¶ 5 Officer Petersen testified he spoke to Robert Harts, an employee of a nearby K-Mart store, who said the items had been taken from the store in the hour before defendant's arrest. Harts told the officer he had viewed video from a store security camera that depicted defendant entering the store, picking up an duffel bag and filling it with merchandise before leaving the store. Harts said defendant also wore different clothing when he left the store than he wore when he entered, and the video did not show defendant paying for any merchandise. Defendant's objections to that testimony were overruled.

¶ 6 Officer Petersen testified the duffel bag did not contain a receipt for any of the items. Harts told the officer the items were valued at \$459.83. On cross-examination by defendant, Officer Petersen stated he did not personally view the video, which he said was not forwarded to the police department.

¶ 7 After that testimony, the court found "sufficient evidence for the violation of the conditional discharge" and sentenced defendant to an extended term of nine years in prison based on his previous convictions. The court awarded defendant 178 days of credit for time spent in custody. Defendant now appeals those rulings.

¶ 8 Defendant first contends on appeal the State failed to present competent evidence that he violated his conditional discharge. He argues Officer Petersen's testimony of his conversation with the K-Mart employee, as well as the officer's account of the contents of the store security video, constituted inadmissible hearsay.

¶ 9 Defendant concedes he did not preserve this claim of error by raising it in a post-trial motion but asks this court to review his claim as plain error. The plain error doctrine allows a reviewing court to remedy a "clear or obvious error" regardless of the defendant's forfeiture where: (1) the evidence in the case is so closely balanced that the jury's guilty verdict may have resulted from the error and not the evidence; or (2) the error is

so serious that the defendant was denied a substantial right and, thus, a fair trial. *People v. McLaurin*, 235 Ill. 2d 478, 489 (2009). Defendant argues plain error review is warranted under the first alternative because the evidence in this case was closely balanced.

¶ 10 At a proceeding to revoke conditional discharge, a defendant has the right to the same due process safeguards as at a hearing to revoke probation or supervision. *People v. Kruszyna*, 245 Ill. App. 3d 977, 980 (1993). Because those proceedings are not determinative of the defendant's guilt or innocence of a substantive criminal offense, only "minimum requirements" of due process need be applied. *Kruszyna*, 245 Ill. App. 3d at 980 (citing *People v. Beard*, 59 Ill. 2d 220, 225 (1974), and *People v. Grayson*, 58 Ill. 2d 260, 264-65 (1974)); see also *People v. Ellis*, 375 Ill. App. 3d 1041, 1046 (2007) (defendant in probation revocation proceeding has fewer procedural rights than defendant awaiting trial).

¶ 11 Nevertheless, a revocation of conditional discharge can only follow a hearing at which the defendant had an opportunity to be heard, present evidence and confront witnesses. *Kruszyna*, 245 Ill. App. 3d at 981. "In other words, due process requires a fair determination that the acts which formed the basis for the revocation petition did occur and that fairness be accorded a defendant during the proceedings." *Kruszyna*, 245 Ill. App. 3d at

981-82. A defendant at a revocation hearing "has the right to confront and cross-examine adverse witnesses and to present witnesses and evidence in his or her behalf." Ill. S. Ct. R. 402A(a)(3) (eff. Nov. 1, 2003).

¶ 12 In a proceeding to revoke conditional discharge, the State must prove the alleged violation by a preponderance of the evidence, while using only competent evidence. *People v. Smith*, 337 Ill. App. 3d 819, 822 (2003); *People v. Renner*, 321 Ill. App. 3d 1022, 1025 (2001); see also Ill. S. Ct. R. 402A(a)(4) (eff. Nov. 1, 2003). Defendant contends the State offered evidence that was not competent in the form of Officer Petersen's hearsay testimony that Harts said the items in defendant's possession were stolen from the K-Mart store. Defendant asserts that because Harts' account was offered via the officer's testimony, he was unable to cross-examine Harts or personally view the store security video.

¶ 13 Hearsay evidence is not competent evidence in a revocation proceeding. *Renner*, 321 Ill. App. 3d at 1026; *People v. Wilson*, 44 Ill. App. 3d 15, 17 (1976). Hearsay can only be admitted where the evidence falls within a firmly rooted hearsay exception or where "particularized guarantees of trustworthiness assure the reliability of the evidence." *Renner*, 321 Ill. App. 3d at 1026; see, e.g., *Wilson*, 44 Ill. App. 3d at 17 (spontaneous utterance

of complaining witness to arresting officer shortly after robbery was admissible as exception to hearsay).

¶ 14 The State's response to defendant's hearsay argument is twofold. The State contends Officer Petersen's testimony regarding his conversation with Harts was admissible non-hearsay because it was not offered for its truth but instead was offered to explain the course of the officer's investigation and defendant's arrest. The State further asserts even aside from any purported hearsay, defendant's violation of his conditional discharge was established by Officer Petersen's testimony that defendant claimed ownership of the duffel bag and its contents and lacked a receipt for those items.

¶ 15 Inadmissible hearsay exists when a third party testifies to statements made by another nontestifying party that identify the accused as the perpetrator of a crime. *People v. Robinson*, 391 Ill. App. 3d 822, 834 (2009). However, such testimony is allowed where it is necessary to fully explain the State's case to the trier of fact, and, as the State points out here, testimony describing the progress of an investigation is admissible even if it suggests a nontestifying witness, such as Harts, implicated the defendant. See *Robinson*, 391 Ill. App. 3d at 834.

¶ 16 Even without the testimony relating to Harts, the evidence was not closely balanced so as to warrant relief for defendant. The proof presented by the State was sufficient to establish, by

a preponderance of the evidence, that defendant committed retail theft. Evidence of recent, exclusive and unexplained possession of recently stolen property by an accused may give rise to an inference of guilt of theft. *People v. McCracken*, 244 Ill. App. 3d 318, 322 (1993). The trial court heard testimony that defendant claimed ownership of the duffel bag and its contents, to which theft detection devices were attached.

¶ 17 Defendant next contends the trial court did not adequately admonish him of his right to counsel under Supreme Court Rule 401(a) (eff. July 1, 1984). He argues he should receive a new hearing on the violation of his conditional discharge.

¶ 18 Defendant acted as his own attorney throughout the proceedings. The record reveals that on September 11, 2008, defendant appeared *pro se* before Judge Carole Kipperman and stated, "I am invoking my right under the 6th Amendment to represent myself before this Honorable Court." The court admonished defendant as follows:

"THE COURT: Before you do that, I have a series of questions I have to ask you, so let me get them.

All right. First of all, the nature of the charge. Do you understand the nature of the charge in this case? It appears to be theft.

DEFENDANT: Yes, your Honor."

¶ 19 The court requested a copy of the indictment from the courtroom clerk and the assistant State's Attorney gave defendant a copy of the information and a discovery motion. The court then read the Wal-Mart felony retail theft charge to defendant and advised him of the minimum and maximum sentence for that offense and his eligibility for an extended term due to his criminal background. Defendant indicated he understood.

¶ 20 The trial court continued:

"You have a right to an attorney and if you can't afford one, you have a right to have an attorney appointed by the Court. Do you understand that?

DEFENDANT: Yes, your Honor.

THE COURT: Now, again, you have advised the Court that you wish to proceed to trial in this case *pro se*, that is with you representing yourself without the assistance of an attorney; is that correct?

DEFENDANT: Yes, your Honor."

¶ 21 The court advised defendant that appointed counsel would help defendant prepare for trial by preparing a defense and advising defendant on a plea and the choice of a bench trial or a jury trial. The court reviewed other aspects of representation and stated standby counsel would not be appointed to assist defendant during trial. Defendant indicated he understood.

¶ 22 The court asked defendant's age and educational background, and defendant replied he was 60 years old and had a bachelor of science degree in political science from Jackson State University in Mississippi. The court asked if defendant had any courtroom experience, and defendant responded he had represented himself in a criminal case in 1976 in federal court. Defendant cited the volume and page of the published opinion of his case to the court.

¶ 23 The court admonished defendant that if he proceeded *pro se*, he would be held to the same standards as an attorney, and defendant indicated he understood. The court further advised defendant that self-representation "is not a wise thing to do," and the court ascertained defendant waived his right to counsel voluntarily. The court found defendant "had been fully advised of his right to counsel and he understands his rights" and that his waiver was knowing and voluntary. The court ruled defendant could proceed as his own counsel.

¶ 24 Defendant then asked that his case be transferred to another judge. The court responded that could occur but told defendant he may have to be readmonished regarding his decision to represent himself. Defendant responded as follows:

"DEFENDANT: I'm aware of the fact that when I get to another judge, they say - well, they'll know that Judge Kipperman did the full - did the Supreme

Court Rule 401(a) dialogue to a defendant because they know you don't make those type of mistakes.

THE COURT: But they'll have to do it - they may have to do it again.

DEFENDANT: It's not such a big thing."

¶ 25 The case was set for the following week before a different judge. On September 17, 2008, the following colloquy took place:

"DEFENDANT: Judge, I am proceeding *pro se*.

THE COURT: Oh, sure.

DEFENDANT: I was before the Honorable Judge Kipperman, and she did go over Supreme Court Rule 401(a).

* * *

THE COURT: [to defendant] I have to ask you some questions, sir. You have a right to represent yourself. You understand that?

DEFENDANT: Yes, your Honor.

THE COURT: Can you tell me, sir, how old you are?

DEFENDANT: Sixty years old.

THE COURT: Can you tell me how much education you have?

DEFENDANT: B.S. degree in political science.

THE COURT: Do you read and write the English language?

DEFENDANT: Yes.

THE COURT: If you were to ask for an attorney, I would appoint a public defender to represent you.

DEFENDANT: Yes, your Honor.

THE COURT: You understand, sir, also that you have a right to hire an attorney of your own choosing?

DEFENDANT: Yes, Judge.

THE COURT: Understanding all that I have said to you today, do you wish to continue to represent yourself without an attorney?

DEFENDANT: Yes, your Honor.

THE COURT: You understand, sir, that you are setting yourself back by representing yourself; that I cannot help you in any way, shape or form; that in fact, if there is evidence in the case that you do not present, I will not hear it, and, therefore, I cannot consider it in the case.

Do you understand that?

DEFENDANT: Yes, your Honor.

THE COURT: But you still wish to proceed on your own?

DEFENDANT: Yes, I do.

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THE COURT: You are allowed to do so, sir.

DEFENDANT: Thank you very much."

¶ 26 On October 10, 2008, defendant pled guilty to the initial retail theft involving Wal-Mart. The court admonished defendant that offense was a Class 3 felony punishable by 2 to 5 years in prison and between 5 and 10 years in prison if an extended term sentence was involved. The court advised defendant of the consequences of his plea and ascertained it was defendant's wish to represent himself before sentencing him to conditional discharge.

¶ 27 At the April 2009 hearing to revoke defendant's conditional discharge, the court again informed defendant of his right to counsel:

"THE COURT: Before I begin I just want to go one time more with you, Mr. Hegwood, on the fact that you want to represent yourself. Is that correct?

DEFENDANT: Yes, your Honor.

THE COURT: You do not wish to have an attorney represent you?

DEFENDANT: No, I do not, your Honor.

THE COURT: Okay. And you understand if you wished an attorney, I would appoint a public defender or I would give you the opportunity to hire an attorney. Do you understand that?

DEFENDANT: Yes, your Honor.

THE COURT: And it's your desire not to do so?

DEFENDANT: No, your Honor. As a matter of fact -- Excuse me, your Honor.

THE COURT: You understand -- You are able to read and write the English language?

DEFENDANT: Yes, your Honor.

THE COURT: How far did you go in school?

DEFENDANT: I have a B.S. degree in political science.

THE COURT: Okay. You may proceed, State."

¶ 28 Pursuant to Supreme Court Rule 401(a) (eff. July 1, 1984), the court must determine that a defendant who wishes to waive counsel understands: (1) the nature of the charge against him; (2) the minimum and maximum sentences applicable in his case, including the effect of prior convictions; (3) his right to counsel and to have counsel appointed for him by the court if he is indigent.

¶ 29 Defendant argues the last set of admonitions set out above, which were given in April 2009, were insufficient because the court did not specify the nature of the charge or the minimum and maximum possible sentences. Defendant concedes the admonishments on October 10, 2008, included an explanation of the sentencing ranges, including the possible range of an extended term

sentence, but contends the seven-month time span between the admonitions renders them inadequate to satisfy Rule 401(a).

¶ 30 Defendant relies on *People v. Stoops*, 313 Ill. App. 3d 269 (2000), to assert that admonishments given several months apart can be insufficient to fully inform a defendant of his right to counsel. We do not find *Stoops* analogous, because there, the defendant indicated he wished to retain private counsel, and the public defender was discharged from representing the defendant, who proceeded to trial *pro se* without receiving any Rule 401(a) admonitions on the record. *Stoops*, 313 Ill. App. 3d at 274-75. In reversing and remanding for a new trial, this court rejected the State's argument that the defendant was aware of Rule 401(a), holding the defendant "cannot be expected to rely on admonishments given several months earlier, at a point when he was not requesting to waive counsel." *Stoops*, 313 Ill. App. 3d at 275.

¶ 31 The gravamen of Rule 401 is that a defendant be informed of the effect of waiving counsel at the time he or she elects to forego an attorney's representation. See *Stoops*, 313 Ill. App. 3d at 275; *People v. Langley*, 226 Ill. App. 3d 742, 750-51 (1992) (defendant cannot rely on admonitions given at stage where he was not asking to waive counsel). Moreover, substantial compliance with the rule has been held sufficient. See *People v. Smith*, 249 Ill. App. 3d 460, 472-73 (1993) (absence of formal admonitions at

time defendant finally rejected standby counsel did not negate defendant's knowing and intelligent waiver of counsel; by that point, defendant knew nature of charge and right to counsel).

¶ 32 Here, defendant indicated he was familiar with Rule 401 and repeatedly expressed his intent to act as his own attorney and, contemporaneous to those declarations, defendant received thorough admonitions from the trial court on several court appearances as to the consequences of that decision.

Accordingly, the court's repeated admonitions to defendant were adequate to secure his waiver of counsel.

¶ 33 Defendant's remaining contentions are that the trial court was required to review a written PSI report before sentencing him to nine years in prison on the underlying retail theft conviction and that the mittimus should be corrected to award him additional credit for time spent in custody.

¶ 34 Pursuant to section 5-3-1 of the Unified Code of Corrections, a defendant "shall not be sentenced for a felony before a written presentence report of investigation is presented to and considered by the court." 730 ILCS 5/5-3-1 (West 2008); *People v. Youngbey*, 82 Ill. 2d 556, 561 (1980). This requirement applies to proceedings involving revocations of probation. *People v. Harris*, 105 Ill. 2d 290, 299 (1985).

¶ 35 The State concedes a PSI report was not prepared in the instant case and asks that this court remand for resentencing by

the trial court after the completion of such a report. The State further contends, and we agree, that any amendment of the mittimus to reflect the correct amount of presentence credit is best completed by the trial court upon remand. See, e.g., *People v. Phillips*, 371 Ill. App. 3d 948, 954-55 (2007).

¶ 36 In conclusion, we affirm the judgment of revocation of defendant's conditional discharge. However, we remand for a new sentencing hearing after a PSI report has been prepared for and considered by the trial court and also for any necessary correction of the mittimus to reflect defendant's time spent in custody.

¶ 37 Affirmed in part and remanded.