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2011 IL App (3d) 100267-U

Order filed November 10, 2011

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of the 14th Judicial Circuit,
)	Whiteside County, Illinois,
Plaintiff-Appellee,)	
)	Appeal No. 3-10-0267
v.)	Circuit No. 09-CF-143
)	
DETRICH JOHNSON,)	Honorable
)	John L. Hauptman,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Presiding Justice Carter concurred in the judgment.
Justice Schmidt dissented.

ORDER

- ¶ 1 *Held:* Where the public defender was reappointed after trial and the defendant sought to waive counsel again during the posttrial proceedings, the trial court was required to readmonish defendant in accordance with Supreme Court Rule 401(a).
- ¶ 2 Defendant Detrich Johnson was convicted of burglary (720 ILCS 5/19-1(a) (West 2008)) and driving while license revoked (625 ILCS 5/6-303(a) (West 2008)). The trial court sentenced him to an aggregate term of three years in prison. On appeal, defendant argues that the case should be

remanded for a new posttrial hearing because the trial court failed to comply with the admonishment requirements of Supreme Court Rule 401(a) (Ill. S. Ct. R. 401(a) (eff. July 1, 1984)) when defendant waived his right to counsel prior to the posttrial proceedings. We reverse and remand.

¶3 Defendant was charged burglary and driving while license revoked based on allegations that, on March 30, 2009, he knowingly entered Timothy Wright's garage and removed a minibike. Defendant was represented by the public defender and then by private counsel, Janet Buttron. While represented by Buttron, defendant filed *pro se* motion to suppress alleging that officers lacked consent to search the van. The State filed a motion to dismiss because defendant was represented by counsel. The defendant then informed the court in a handwritten letter that he wished to represent himself.

¶4 On July 29, 2009, a hearing was held, and the trial court allowed Buttron to withdraw from the case. At that time, defendant was informed of the nature of the charges and the appropriate sentence ranges for each charge. Defendant stated that he understood the charges and the possible sentences. The court also informed defendant that he had the right to an attorney and that if he could not afford one, a public defender would be appointed. Defendant stated that he did not want a public defender, and the court accepted his written and oral waivers of counsel.

¶5 In the months that followed, defendant filed several *pro se* motions to suppress evidence and exclude testimony, which the trial court denied.

¶6 On December 16, 2009, defendant waived his right to a jury trial. Before proceeding to a bench trial, the trial court admonished defendant on the record that he had the right to appointed counsel, that he was presumed innocent, that he had the right to be tried by a jury, that he had the right to be present and to present witnesses at trial, and that he had the right to cross-examine

witnesses. Defendant stated that he understood his rights and that he had not been forced to waive his right to a jury trial. Defendant then read and signed the written jury waiver in open court.

¶ 7 Following a bench trial, the court found defendant guilty of both charges. Defendant filed two *pro se* motions to vacate the judgment, arguing that the evidence used to convict him of burglary was inadmissible and that the State failed to prove that his license was revoked on March 30, 2009. Defendant also filed with the clerk a letter addressed to the trial court in which he requested, among other things, that the public defender be reappointed to represent him. The trial court appointed the public defender, and a hearing was scheduled for March 19, 2010.

¶ 8 At the March 19 posttrial hearing, defendant complained that he did not want reappointed counsel to represent him any more because "[the public defender] told me in so many words I really don't want to mess with this case but I will do it." The trial court then allowed the reappointed public defender to withdraw from the case. No Rule 401(a) admonishments were given after counsel was allowed to withdraw.

¶ 9 The trial court subsequently denied defendant's posttrial motions. The court concluded that the evidence was sufficient to establish that defendant entered the garage, removed the minibike and placed it in a van that he was driving. The court then sentenced defendant to a three-year term on the burglary charge and a one-year term on the driving while license revoked charge, to be served concurrently.

¶ 10 Defendant argues that he was required to be readmonished under Supreme Court Rule 401(a) when he waived his right to counsel for a second time during posttrial proceedings.

¶ 11 The State notes that defendant failed to raise this issue in his posttrial motion. The right to counsel is so fundamental that it should not be "lightly deemed waived." *People v. Robertson*, 181

Ill. App. 3d 760, 763 (1989). Errors affecting substantial rights may be addressed on review even if they were not raised in a posttrial motion. *People v. Langley*, 226 Ill. App. 3d 742 (1992). During the sentencing stage, defendant's substantial rights are affected and defendant has a constitutional right to counsel. *Id.* We will therefore address the merits of the issue raised on appeal.

¶ 12 When a defendant expresses a desire to proceed without counsel, he is entitled to be advised of his right to the assistance of counsel, as well as his right to self-representation. *People v. Campbell*, 224 Ill. 2d 80 (2006). Under Illinois law, Supreme Court Rule 401(a) helps ensure that a defendant's waiver is knowing and voluntary. *People v. Haynes*, 174 Ill. 2d 204 (1996). Before permitting waiver of counsel, Rule 401(a) requires the trial court to determine that the defendant understands: (1) the nature of the charge; (2) the sentence range, including the penalty to which the defendant may be subjected because of prior convictions; and (3) his right to counsel and, if he is indigent, his right to have counsel appointed for him. Ill. Sup. Ct. R. 401(a) (eff. July 1, 1884); *Campbell*, 224 Ill. 2d at 83. The trial court need not strictly comply with Rule 401(a); however, substantial compliance is required for an effective waiver of counsel. *Campbell*, 224 Ill. 2d at 84.

¶ 13 Generally, once a defendant makes a valid waiver of counsel, that waiver remains in effect throughout later stages of the proceedings, including posttrial stages; this rule is called the continuing waiver rule. *People v. Baker*, 92 Ill. 2d 85 (1982). The continuing waiver rule is subject to two exceptions: (1) the defendant later requests counsel; or (2) other circumstances suggest that the waiver is limited to a particular stage of the proceedings. *People v. Cleveland*, 393 Ill. App. 3d 700 (2009). Circumstances requiring readmonishments include lengthy delays between trial stages, or defendant's request and receipt of counsel. *Langley*, 226 Ill. App. 3d at 749-750; *Cleveland*, 393 Ill. App. 3d at 708-09. For example, prior admonishments are insufficient for a defendant to waive

counsel for a second time when the continuing waiver rule is voided by a later request for representation. *Cleveland*, 393 Ill. App. 3d at 709.

¶ 14 In *Cleveland*, the appellate court considered circumstances almost identical to this case. In that case, the defendant waived his right to counsel during pretrial proceedings and was properly admonished according to Rule 401(a). *Cleveland*, 393 Ill. App. 3d at 702. After defendant was tried and convicted, he requested that counsel be reappointed to assist him in posttrial proceedings. At the posttrial hearing, the defendant once again waived counsel, and the trial court allowed him to represent himself without giving any admonishments. On appeal, the court concluded that defendant did not make a valid waiver of counsel at the posttrial proceedings because he was not properly admonished a second time. The court held that "where a defendant waives counsel, proceeds *pro se*, requests counsel for a distinct stage of the proceedings, receives counsel, and then decides to waive counsel again," the trial court must readmonish the defendant. *Id.* at 712.

¶ 15 Here, as in *Cleveland*, defendant made a request that counsel be reappointed at the posttrial stage after waiving counsel earlier in pretrial proceedings; he requested counsel for a distinct stage of the case after representing himself at trial. His request was granted, and the trial court reappointed the public defender to assist defendant with his posttrial motions. Thus, the trial court was required to readmonish defendant when he made his second request to waive counsel in a separate stage of the proceedings from his initial waiver of counsel. See *Cleveland*, 393 Ill. App. 3d at 712.

¶ 16 We note that the trial court's prior admonishments do not cause defendant to forego the right to be informed of the possible pitfalls of acting on his own in posttrial proceedings and at sentencing. Although strict adherence is not required, the trial court must substantial comply with

Rule 401(a) and readmonish the defendant under such circumstances. The record in this case demonstrates that no admonishments were given when reappointed counsel was allowed to withdraw during the posttrial proceedings. Thus, defendant's waiver at the posttrial stage was ineffective.

¶ 17 The judgment of the circuit court of Whiteside County finding defendant guilty of burglary and driving while license revoked is affirmed. Defendant's sentences are vacated, and the cause is remanded for new hearings on defendant's posttrial claims and sentencing.

¶ 18 Reversed and remanded with directions.

¶ 19 JUSTICE SCHMIDT, dissenting:

¶ 20 I respectfully dissent. Here, defendant had counsel and then discharged counsel. The trial court admonished defendant under Supreme Court Rule 401(a) (Ill. S. Ct. R. 401(a) (eff. July 1, 1984)) in addition to giving lengthy additional warnings regarding the decision to proceed *pro se* before allowing counsel to be discharged. As the majority points out, the trial court gave defendant Rule 401 admonitions on July 29, 2009. *Supra* ¶ 4. Defendant was again admonished that he had the right to appointed counsel on December 16, 2009. *Supra* ¶ 6. It is also clear that defendant knew he had a right to appointed counsel after trial for posttrial proceedings because he requested counsel after trial and counsel was appointed. Then, defendant again chose to dismiss counsel and proceed *pro se*. It seems clear to me that additional Supreme Court Rule 401 admonitions would have accomplished nothing.

¶ 21 To the extent that *Cleveland*, 393 Ill. App. 3d 700 (2009), would point to a different conclusion, I will attempt to distinguish it. To the extent my attempts to distinguish it fail, I would not follow it.

¶ 22 As far as distinguishing *Cleveland*, I note that the *Cleveland* court found that defendant

was prejudiced in that case by the absence of counsel at his sentencing hearing. *Id.* at 711.

There has been no such finding in this case.

¶ 23 As far as not following *Cleveland*, the *Cleveland* court found it very important that readmonishing defendant would not place a great burden on the trial court. *Id.* at 712. It seems to me that the purpose of Supreme Court Rule 401 is to ascertain to the extent possible that a criminal defendant's waiver of counsel is made knowingly. The ease or difficulty with which the trial court can give Supreme Court Rule 401 admonitions is irrelevant. This defendant was the beneficiary of meticulous and lengthy admonitions regarding his waiver of counsel prior to the trial in the case. His act in requesting counsel for posttrial proceedings, coupled with the trial court's appointment of counsel for those proceedings, makes it abundantly clear, at least to me, that this defendant clearly understood his right to counsel and that the trial court's prior admonitions satisfied both the letter and spirit of Supreme Court Rule 401.

¶ 24 I would affirm the trial court.