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No. 3-09-0494

Order filed April 11, 2011

IN THE
APPELLATE COURT OF ILLINOIS
THIRD JUDICIAL DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 10th Judicial Circuit,
Plaintiff-Appellee,)	Tazewell County, Illinois,
)	
v.)	No. 08-CF-387
)	
RICKY O. SARVER,)	Honorable
)	Richard E. Grawey,
Defendant-Appellant.)	Judge Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justices Lytton and McDade concurred in the judgment.

ORDER

Held: The trial court erred by conducting a trial *in absentia* because the trial court failed to properly admonish defendant as required by the Code of Criminal Procedure. Defendant's conviction and sentence are reversed and vacated, and the cause is remanded to the trial court for a new trial.

Defendant failed to appear for trial, and the court conducted a jury trial in defendant's absence. The jury convicted defendant of violation of order of protection on February 24, 2009. On appeal, defendant claims that the trial court committed reversible error by failing to admonish defendant that he could be tried *in absentia* and by failing to make a proper inquiry into

defendant's pretrial request for new counsel. We reverse and vacate defendant's conviction and sentence, and remand the cause to the trial court for a new trial.

FACTS

On July 8, 2008, the State filed a one-count information charging defendant with the offense of violation of order of protection in violation of section 12-30(a)(1) of the Criminal Code of 1961 (720 ILCS 5/12-30(a)(1) (West 2008). On that same day, July 8, 2008, the trial court entered a written, form order which indicated that defendant appeared in court and continued the cause for a preliminary hearing. The order also indicated that the court advised defendant as to a "trial in absentia pursuant to 725 ILCS 5/113-4(e)." The boxes on the form order were not marked to indicate defendant entered a plea of not guilty. The record does not contain a report of proceedings from July 8, 2008.

On August 7, 2008, defendant appeared before the court with appointed counsel. The court set the cause for review on August 29, 2008. The court then stated to defendant: "You are required to be at all your court dates. If you're still in custody, you will be brought over. If you fail to appear, the State has a right to proceed in your absence."

On September 4, 2008, defendant posted bond. The bail bond form contained defendant's signature in a box entitled "CERTIFICATE OF DEFENDANT." The form stated that if defendant failed to appear in court as required, the result would be that defendant waived his right to confront witnesses and that defendant's trial could proceed in his absence.

A Tazewell County grand jury issued a one count bill of indictment against defendant on September 11, 2008. The indictment charged defendant with the offense of violation of order of protection in violation of section 12-30(a)(1) of the Criminal Code of 1961 (720 ILCS 5/12-

30(a)(1) (West 2008)). On December 10, 2008, defendant appeared in open court. The court provided defendant with a copy of the indictment. The court asked defense counsel if he waived reading and explanation of the charges. Defense counsel stated that without waiving the pending motion to dismiss, he waived any further reading of the charges and requested a pretrial and jury trial setting. After discussing the delay in the case, defense counsel advised the court that defendant was willing to withdraw his pending motion to dismiss due to the State's failure to conduct a preliminary hearing on the criminal information.

According to the written order entered that day, defendant "arraigned today." Also according to the order, the trial court set the cause for jury trial on January 26, 2009. The minute entry of December 10, 2008, states: "JOINTLY CONT TO 1/09/09 AT 900 FOR PTC AND 1/26/09 AT 1030 FOR JT. SEE ORDER."

Following another continuance, defendant and the attorneys appeared before the court on February 20, 2009, defense counsel advised the court that defendant's jury trial was scheduled for the coming Monday morning. He stated that defendant expressed a desire to enter residential alcohol treatment. Defense counsel requested a continuance so that defendant could enter residential alcohol treatment. Further, defense counsel said that defendant indicated that he wanted to hire private counsel. Defense counsel said that defendant intended to begin inpatient treatment on the previous day, but the prosecutor told defense counsel that if defendant did not appear in court on Monday, the prosecutor would ask for a warrant and proceed to trial *in absentia*. The trial court entered a written order that day which stated that defendant's motion to continue was denied.

On February 23, 2009, the attorneys appeared before the court and advised that defendant

appeared at the courthouse but then left. The State indicated that it was ready to proceed and requested a trial *in absentia*. Defense counsel advised the court that he checked the transcript of the proceedings from the previous week and that the record did not indicate that defendant was admonished by the court that the State could conduct a trial in his absence. The court noted, “Yes, July the 8th box is marked, Court advises Defendant as to trial in absentia.” The court then denied defendant’s request to vacate defendant’s trial date.

After selecting a jury panel on February 23, 2009, the trial court recessed for the day. During jury selection, the court stated that this was a criminal case, and “criminal cases are started by an Indictment.” The trial court read the contents of the indictment as amended by the State to the jury pool.

On February 24, 2009, defendant again failed to appear for trial. The State presented evidence to the jury with defense counsel present in court. Ultimately, the jury found defendant guilty of the offense of violation of order of protection.

On June 4, 2009, defense counsel filed an amended posttrial motion claiming defendant was improperly tried *in absentia*. Defendant also argued that the court made improper remarks to the prospective jurors during *voir dire* regarding defendant’s absence. Defendant claimed that the trial court improperly denied defendant’s oral motion for continuance on February 20, 2009, and motion to obtain new counsel.

On June 10, 2009, the trial court denied defendant’s amended posttrial motion and sentenced defendant to five years imprisonment in the Department of Corrections. On June 11, 2009, defense counsel filed a motion to reconsider sentence. On June 15, 2009, defendant filed a handwritten *pro se* motion for new trial and new counsel.

On June 15, 2009, the trial court heard and denied defense counsel's motion to reconsider sentence. The trial court also entered an order providing that defendant's *pro se* motion for retrial filed on April 21, 2009, and defendant's *pro se* motion for new trial and new counsel are considered raised and presented as part of the court's order of June 10, 2009. Further, the order provided that defendant's *pro se* motions are denied as part of the posttrial motion. On that same day, June 15, 2009, defendant filed a timely notice of appeal.

ANALYSIS

On appeal, defendant originally raised three claims of error. However, in his reply brief, defendant acknowledged that our supreme court's decision in *People v. Thompson*, 238 Ill. 2d 598 (2010), is dispositive of defendant's claimed error regarding non-compliance with Supreme Court Rule 431(b). Consequently, defendant concedes that this issue "has no merit under the circumstances of this case." Accordingly, we will only review defendant's first two contentions of error.

First, defendant argues that the trial court erred by conducting defendant's jury trial *in absentia* because the trial court did not properly admonish defendant that the trial court could conduct a trial in defendant's absence. The State responds that the trial court did not err in conducting a trial *in absentia* because the trial court substantially complied with section 113-4(e) of the Code of Criminal Procedure (725 ILCS 5/113-4(e) (West 2008)), and therefore, defendant was adequately admonished.

Second, defendant argues that the trial court committed reversible error when the court failed to make a proper inquiry into defendant's request for a new attorney on the eve of trial. The State responds that defendant did not request a new attorney, thereby obligating the trial

court to inquiry into defendant's concerns or allegations. Instead, the State asserts that defendant requested a continuance, which the trial court properly denied.

The parties agree that the issue of whether the trial court erroneously conducted defendant's trial *in absentia* presents a question of law which we review *de novo*. *People v. Ramirez*, 214 Ill. 2d 176, 179 (2005); *People v. Chapman*, 194 Ill. 2d 186, 217 (2000); *People v. Spivey*, 377 Ill. App. 3d 146, 148 (2007). The relevant statutory provision provides that if a defendant pleads not guilty to a criminal charge, the trial court "shall advise" a defendant, *at the time of arraignment or at any later court date*, that if a defendant is released on bond and fails to appear, defendant waives his right to confront witnesses against him, and the court can proceed to trial in his absence. 725 ILCS 5/113-4(e) (West 2008). (Emphasis added).

Recently, our supreme court held "that section 113-4(e) unambiguously requires the trial court to admonish a defendant in open court." *People v. Phillips*, No. 109413, slip op. at p. 7 (Ill. Sup. Ct. March 24, 2011). Our supreme court in *Phillips* also stated:

"Given the architecture of this provision of the Code within the section of the statute that governs when a defendant is called upon to plead at arraignment, and the plain and ordinary meaning of the language contained in section 113-4(e), we further agree with *Lester* and *Green* that the legislature intended for the trial court to orally admonish a defendant as to the possibility of trial *in absentia* when he is present in open court at arraignment, or at any later date. We also believe that oral admonishment is most effective to meet the legislative purpose of section 113-4(e) as it provides the

trial court with an opportunity to both notify a defendant of his right and obligation to be present at trial, and to verify that he understands this important right and duty.” *People v. Phillips*, No. 109413, slip op. at pp. 8-9 (Ill. Sup. Ct. March 24, 2011).

Further, the court held that “[n]o exemption from the admonishment requirement exists, regardless of how seasoned or knowledgeable the criminal defendant.” *People v. Phillips*, No. 109413, slip op. at p. 9 (Ill. Sup. Ct. March 24, 2011), (citing *People v. Garner*, 147 Ill. 2d 467, 479 (1992)).

Here, the July 8, 2008, order indicates that the trial court gave defendant section 113-4(e) admonishments with respect to the information filed by the State. However, the order signed by the judge does not show defendant entered a plea on that date, and the hearing was not transcribed for this court on appeal. Thus, “[i]n the absence of any evidence to the contrary, we must presume that the written order showing that no plea was entered is correct.” *People v. Lane*, 404 Ill. App. 3d 254, 260 (2010); See *People v. Martinez*, 361 Ill. App. 3d 424, 427 (2005). Therefore, we conclude the *in absentia* admonishments given on that date did not comply with section 113-4(e) because the statute requires the court to admonish defendant at the time a plea is entered or at a later court appearance. *People v. Lane*, 404 Ill. App. 3d at 260.

Similarly, although defendant was present in court on August 7, 2008, the record again does not indicate that defendant entered a plea on the pending information. The trial court’s comments at the end of the proceedings that day did not comply with the requirements of section 113-4(e) and did not notify defendant of his right and obligation to be present at trial, or verify that he understood this important right and duty, as required by our supreme court. See *People v.*

Phillips, No. 109413, slip op. at pp. 8-9 (March 24, 2011).

Moreover, the grand jury's indictment, issued on September 11, 2008, superseded the criminal information and constituted a complete charging instrument. See *People v. Sarver*, 102 Ill. App. 3d 255, 256 (1981). The record clearly demonstrates that the State proceeded to trial on the indictment, and the trial court first arraigned defendant on the indictment on December 10, 2008, but did not verbally provide *in absentia* warnings to defendant on that date. Additionally, the record does not document that the court provided verbal *in absentia* warnings during any court appearances following December 10, 2008.

Based upon our supreme court's recent ruling, neither the written bail bond form dated September 4, 2008, nor defense counsel's statement in open court, with defendant present, regarding the prosecutor's intent to try defendant in his absence satisfies the statutory admonishment requirements. *People v. Phillips*, No. 109413, slip op. at pp. 8-9 (March 24, 2011). Accordingly, we conclude that the trial court failed to admonish defendant pursuant to section 113-4(e) (725 ILCS 5/113-4(e) (West 2008)).

Our supreme court has determined that reversible error occurs when the trial court fails to admonish a defendant as required under section 113-4(e) at the time of his arraignment, or at a later court date at which he is present. *People v. Phillips*, No. 109413, slip op. at p. 9, (citing *People v. Garner*, 147 Ill. 2d at 483-84); see *People v. Thomas*, 216 Ill. App. 3d 405, 408-09 (1991). Consequently, we need not reach defendant's other contention on appeal. Defendant's conviction and sentence are vacated, and the cause is remanded to the trial court for a new trial.

CONCLUSION

The judgment of the circuit court of Tazewell County is reversed and vacated, and the

cause is remanded to the trial court for a new trial.

Reversed and remanded.