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2011 IL App (3) 090650-U

Order filed July 21, 2011

IN THE APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	for the 22th Judicial Circuit,
Plaintiff-Appellee,)	Kankakee County, Illinois
)	
v.)	Appeal No. 3-09-0650
)	Circuit No. 89-CF-739
BERNON L. HOWERY,)	Honorable
)	Gordon L. Lustfeldt
Defendant-Appellant.)	Judge, Presiding

JUSTICE O'BRIEN delivered the judgment of the court.
Justices Holdridge & McDade concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err in allowing defendant to proceed *pro se* at his postconviction proceedings. Illinois Supreme Court Rule 401 admonishments were not required and the defendant's waiver of counsel was knowing, voluntary, and intelligent.

¶ 2 Defendant Bernon Howery was convicted of first degree murder and aggravated arson and sentenced to a term of natural life. He opted to proceed *pro se* on his postconviction motions, including a postconviction petition and a section 2-1401 petition. The trial court found that Howery's waiver of counsel was knowing and voluntary. We affirm.

¶ 3

FACTS

¶ 4 Defendant Bernon Howery was indicted on eight counts of first degree murder and one count of aggravated arson. Ill. Rev. Stat. ch. 38, par. 9-1(a)(2), (3) (1989); Ill. Rev. Stat. ch. 38, par. 20-1.1 (1989). Counsel was appointed, and following a 1991 bench trial, Howery was found guilty on all counts and sentenced to death. On automatic appeal to the Illinois Supreme Court, the case was remanded for filing of posttrial motions. Counsel was again appointed and filed several motions on Howery's behalf. The trial court denied Howery's posttrial motions and the case was again automatically appealed to the supreme court. The supreme court affirmed Howery's conviction and remanded for a new sentencing hearing. *People v. Howery*, 178 Ill. 2d 1 (1997). On June 30, 1995, while Howery's direct appeal was pending, he filed a *pro se* postconviction petition. On remand, Howery's sentencing hearing was held before a jury, and on the jury's recommendation, the trial court sentenced Howery to a term of natural life imprisonment.

¶ 5 Following the re-sentencing, the trial court appointed counsel to represent Howery on his 1995 postconviction petition. Counsel withdrew and new counsel was appointed, who also withdrew. A third attorney was appointed. In November 2002, Howery filed *pro se* motions to compel the State to produce all its physical evidence and for deoxyribonucleic acid (DNA) testing pursuant to section 116-3 of the Code of Criminal Procedure. 725 ILCS 5/116-3 (West 2002). Howery also sought to remove the public defender's office from representing him due to an alleged conflict of interest. The trial court engaged in a conversation in open court with Howery about the adequacy of his representation and cautioned him about representing himself. The trial court allowed a continuance for Howery to consider whether he still wished to proceed *pro se*. In January 2005, with the State's agreement, the evidence at issue was sent to the Illinois State Police laboratory for analysis. The following month, Howery filed a section 2-1401 petition alleging that the State

had fraudulently concealed evidence of his innocence. 735 ILCS 5/2-1401 (West 2004). He also filed a *pro se* motion to remove his appointed counsel in which he stated he was invoking his right of self-representation.

¶ 6 In March 2005, Howery filed another motion to have counsel withdraw. In June 2005, Howery's appointed counsel informed the trial court that Howery had filed a complaint against him with the Attorney Registration and Disciplinary Commission (ARDC), and Howery again informed the trial court that he wished to proceed *pro se*. The trial court admonished Howery that although he had a right to proceed *pro se*, he could not continuously fire his appointed attorneys until he found one he liked. The trial court also told Howery that he would face procedural hurdles that would be difficult to overcome if he proceeded *pro se* and that the trial court would not be able to assist him. The trial court cautioned him that he could end up damaging his case and that he would not be able to complain about it on appeal. Despite the trial court's rulings, Howery chose to proceed *pro se*. In response, the trial court stated:

“Well, Mr. Howery's educational background, his life experiences, his government service – all of that's in the record already and I don't need to go through all of that again. Mr Howery's filed documents with the Court before that I think show to me that he has at least a rudimentary understanding what the issues are and that he is able to express himself. And he's an adult man. If this is what he wants to do, my main concern is to make sure that this is a decision that he's undertaken of his own free will.”

The trial court found Howery's waiver to be knowingly and voluntarily made and allowed appointed counsel to withdraw.

¶ 7 At a September 2005 hearing, Howery appeared with appointed counsel and the trial court again addressed Howery's request to proceed *pro se*, noting that at the June hearing, it did not have a waiver form for Howery. The trial court again admonished Howery regarding his decision to represent himself. The trial court repeated its cautions to Howery that he would face procedural hurdles that would be easier to overcome with an attorney; that he would not receive special consideration based on his *pro se* status; that his previous appointed attorneys had effectively represented him; that he could still obtain appointed counsel; and that if he opted to proceed *pro se*, he would not be allowed to change his mind. The trial court instructed Howery to sign a waiver form, which stated that he understood the following:

“1. I will be required to follow the various technical rules of procedure;

2. An attorney has substantial experience and training in trial procedures. The State will be represented by an experienced attorney;

3. As a result of my inexperience and lack of training, I may fail to object to inadmissible evidence, may not make effective use of my trial rights, and may make tactical decisions which have unintended consequences:

4. I will not be allowed to complain on appeal about the incompetence of my attorney;

5. The effectiveness of my defense may be diminished by my dual role as attorney and accused;

6. I will receive no special consideration;

7. I will receive no extra time for preparation and, since I am incarcerated, will not have access to the law library;

8. An attorney could provide assistance by determining whether defenses exist, by consulting with the prosecutor regarding possible reduced charges or lesser sentences, and, in the event of a conviction, by presenting mitigating evidence;

9. Once I begin the trial representing myself, I will not be allowed to change my mind during trial; and

10. No stand-by counsel will be appointed.”

Howery signed the waiver and the trial court again stated found that Howery was “capable of defending himself and that he signed the waiver knowingly and voluntarily.” Appointed counsel was allowed to withdraw and Howery was allowed to represent himself for the remainder of the proceedings.

¶ 8 A hearing on the section 2-1401 petition took place in September 2005 and the trial court dismissed the petition as untimely. Howery appealed and this court affirmed the dismissal. *People v. Howery*, No. 3-05-0674 2007) (unpublished order under Supreme Court Rule 23). In March 2006, Howery filed another section 2-1401 petition and an amended postconviction petition. The section 2-1401 petition alleged that physical new evidence supported Howery’s claim of innocence and that the State had fraudulently withheld the evidence. Attached to Howery’s petition was a August 2005 laboratory report that indicated hairs found on the victims did not match them or Howery. The State filed a motion to dismiss the section 2-1401 petition. Howery’s postconviction petition raised a number of issues, including counsel’s ineffective assistance for failing to call witnesses to rebut testimony by the victims’ mother. Two individuals were named in the petition and the affidavit of

one was attached to the petition.

¶ 9 Proceedings were continued by agreement to allow DNA testing of the hairs. In November 2007, the Federal Bureau of Investigation (FBI) laboratory testing the hairs for mitochondrial DNA (mDNA) informed the parties that the analysis would likely consume the evidence. After initially agreeing to go forward with the testing, Howery filed a written motion withdrawing his agreement. According to Howery, the initial testing of the hairs was sufficient to support his innocence claim. In May 2008, the State filed a motion to dismiss Howery's postconviction petition. Howery filed responses to that motion and the State's 2006 motion to dismiss his section 2-1401 petition. A hearing ensued after which the trial court dismissed both petitions. Howery followed with this appeal.

¶ 10

ANALYSIS

¶ 11 The issue on appeal is whether the trial court erred when it allowed Howery to proceed *pro se* on his postconviction petition. Howery asserts that because the trial court failed to admonish him pursuant to Supreme Court Rule 401(a), his waiver of counsel was not knowing, voluntary and intelligent, and the trial court should not have allowed him to represent himself. According to Howery, the trial court's failure to give him Rule 401(a) admonishments constituted reversible error.

¶ 12 A defendant is afforded a statutory right to counsel during the second and third stages of postconviction petition proceedings. 725 ILCS 5/122-4 (West 2006). A defendant also has a right to represent himself. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8; *People v. Simpson*, 172 Ill. 2d 117, 132 (1996). A defendant's waiver of counsel must be voluntarily, understandingly, and knowingly made. *Simpson*, 172 Ill. 2d at 133. Considering the record as a whole, the trial court must determine whether the defendant has the ability to understand the proceedings, as well as the consequences of his decision to represent himself, and that his waiver was not coerced. *Simpson*,

172 Ill. 2d at 133.

¶ 13 Illinois Supreme Court Rule 401(a) provides:

"Any waiver of counsel shall be in open court. The court shall not permit a waiver of counsel by a person accused of an offense, punishable by imprisonment without first, by addressing the defendant personally in open court, informing him of and determining that he understands the following:

“(1) The nature of the charge;

(2) The minimum and maximum sentence prescribed by law, including, when applicable, the penalty to which the defendant may be subjected because of prior convictions or consecutive sentences; 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, 1984).

¶ 14 The purpose of Rule 401 is to ensure that a defendant’s waiver of counsel is knowingly and intelligently made. *People v. Haynes*, 174 Ill. 2d 204, 241 (1996). Strict compliance with Rule 401 is not always required for an effective waiver of counsel. *Haynes*, 174 Ill. 2d at 236. When the record establishes that a defendant’s waiver was knowing and voluntary and the admonishment did not prejudice the defendant, substantial compliance with Rule 401 is sufficient to effectuate a valid waiver. *Haynes*, 174 Ill. 2d at 236. In interpreting supreme court rules, our goal is to ascertain and give effect to the intention of the rule’s drafters. *People v. Campbell*,

224 Ill. 2d 80, 84 (2006). The clear and unambiguous language of the rule will be interpreted as written, without resort to other tools of interpretation. *Campbell*, 224 Ill. 2d at 84. We review a trial court’s interpretation of a supreme court rule *de novo*. *Campbell*, 224 Ill. 2d at 84.

¶ 15 Howery maintains that his waiver of counsel was ineffective because the trial court did not properly admonish him pursuant to Rule 401. We disagree. Rule 401 does not require that admonishments be given to a *pro se* postconviction petitioner. In *People v. Young*, 341 Ill. App. 3d 379, 386-87 (2003), the trial court did not admonish the defendant after he waived counsel during posttrial proceedings and the defendant appealed, arguing that Rule 401(a) admonishments were required. The *Young* court determined that Rule 401(a) does not express an intent that admonishments are required when a defendant discharges his attorney late in the proceedings. *Young*, 341 Ill. App. 3d at 387. Looking to the plain language of the rule, the court concluded that the admonishments are required for defendants “ ‘accused’ ” of an offense that is “ ‘punishable’ ” by imprisonment. *Young*, 341 Ill. App. 3d at 387 (quoting Ill. S. Ct. R. 401(a) (eff. July 1, 1984)). The *Young* court found that “[t]he plain language and logic of Rule 401(a) does not require admonishing a defendant who has been convicted and sentenced of the nature of the charge for which he was just convicted and the sentence he just received.” *Young*, 341 Ill. App. 3d at 387.

¶ 16 We agree with the reasoning of the *Young* court. Under the instant facts, when Howery filed his amended *pro se* postconviction in 2006, he had been convicted, sentenced, and had served more than 20 years of his life sentence.

Requiring the trial court to admonish him of the nature of the charges against him, and the minimum and maximum sentences and would serve no viable function and would not further the rule's purpose. Moreover, Howery was aware that he had a right to counsel in his postconviction proceedings. As established in the record, the trial court had appointed a total of three attorneys to represent him on postconviction matters before he waived representation.

¶ 17 In addition, the record demonstrates that Howery's waiver was knowingly, voluntarily, and intelligently made. Factors a trial court may consider in determining the validity of a defendant's waiver of counsel include the defendant's background, experience and conduct. *Simpson*, 172 Ill. 2d at 133. A defendant's legal sophistication may also be considered. *People v. Langley*, 226 Ill. App. 3d 742, 752 (1992). Here, Howery had been involved in his legal proceedings for more than 20 years. The record indicates that he regularly filed *pro se* motions and expressed discontent with his appointed attorneys. A number of discussions ensued over the course of Howery's trial, resentencing and postconviction proceedings regarding his right to counsel as well as his right to represent himself. As noted by the trial court, Howery's background, experience, and conduct supported the court's conclusion that waiver was knowing, voluntary and intelligent. These factors, as well as Howery's long relationship with the criminal justice system by the time of his postconviction proceedings, contributed to his level of legal sophistication. Based on our review of the record, we are confident that Howery's waiver was knowingly, voluntarily and intelligently made, and that the trial court did not err in so finding.

¶ 18 Our review of the record also confirms that Howery was not prejudiced by

the trial court's decision to allow him to proceed *pro se*. Howery maintains that he was prejudiced by his misinterpretation of the results of the 2005 analysis of physical evidence. Throughout the postconviction proceedings, Howery was insistent that he would stand on the results of the 2005 microscopic tests rather than seek a mDNA analysis. In his view, the 2005 results were sufficient to support his claim of innocence. Although he argues on appeal that counsel would not have relied on the 2005 results, the record demonstrates that several discussions took place whereat the trial court explained to Howery the difference in the tests and how the 2005 results did not further his claim. There is no support in the record that an attorney's advice would have convinced Howery to go forward with the mDNA analysis. In addition, there is nothing in the record that indicates the results would have exonerated Howery or even furthered his innocence claim.

¶ 19 Howery also maintains that had he been represented by counsel, his postconviction petition would have included the names of witnesses he asserts trial counsel failed to call and their affidavits. Howery named two witnesses in his petition and attached the affidavit of one witness. We are not persuaded that the lack of counsel prevented Howery from naming the other witnesses and obtaining their affidavits. As evidenced by his postconviction petition and the attached affidavit, he was aware of the document requirements, and aside from easier access to them, he does not offer any reason why he could not obtain the information but an attorney could and would have done so.

¶ 20 We hold that the trial court did not err in failing to give Howery Rule 401(a) admonishments prior to accepting his waiver of postconviction counsel. The record

establishes that admonishments were not required at the postconviction stage of proceedings, that Howery's waiver was knowing, voluntary and intelligent, and that he was not prejudiced by the trial court's failure to admonish him per Rule 401(a). We affirm the trial court's dismissal of Howery's postconviction petition.

¶ 21 For the foregoing reasons, the judgment of the circuit court of Kankakee County is affirmed.

¶ 22 Affirmed.