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No. 3–09–0610

Order filed June 1, 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–165
)	
BRIAN E. PRINGLE,)	Honorable
)	Richard E. Grawey,
Defendant-Appellant.)	Judge Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justices O’Brien concurred in the judgment.
Justice Holdridge specially concurred.

ORDER

Held: Pursuant to the doctrine of plain error, the trial court’s sentencing order is vacated, and the cause is remanded to the trial court for further proceedings because the trial court failed to substantially comply with Supreme Court Rule 401(a) before allowing defendant to proceed *pro se* at sentencing.

On June 5, 2009, a jury found defendant guilty of armed robbery, aggravated fleeing and eluding, and driving while license revoked. The trial court allowed defendant to represent himself at his sentencing hearing on July 30, 2009, and sentenced defendant to concurrent terms

of imprisonment of 7 years, 3 years and 90 days on the respective convictions. On appeal, defendant claims that the trial court failed to substantially comply with Supreme Court Rule 401(a) before allowing defendant to represent himself at sentencing, and therefore, defendant is entitled to a new sentencing hearing. We vacate defendant's sentence and remand the cause to the trial court for further proceedings.

FACTS

On April 17, 2008, a Tazewell County grand jury issued a four-count bill of indictment charging defendant with the offenses of armed robbery, criminal damage to state supported property, aggravated fleeing and eluding, and driving while license revoked.

On August 15, 2008, the parties appeared before the court. Defense counsel advised the court, that contrary to counsel's advice, defendant wanted to proceed *pro se*. Defendant said that he had a right to proceed *pro se*, that he did not want an attorney and that he would refuse any attorney appointed by the court. Defendant said that he had mailed a motion to proceed *pro se* and that it should be filed shortly.

The court then advised defendant of the charges contained in the bill of indictment along with the possible penalties for each charge, if convicted. Defendant said that he understood the nature of the charges and the possible penalties. Defendant also acknowledged that he understood that he had a right to an attorney and that an attorney would be appointed for him if he could not afford an attorney. The court then asked defendant if "knowing all of that, it's your desire to go it alone." Defendant said "[y]es." The trial court granted defendant's motion to proceed *pro se*. That same day, August 15, 2008, the trial court entered a written order stating that after a hearing and admonishments, the trial court granted defendant's motion to proceed *pro*

se.

On January 8, 2009, the trial court conducted a hearing on the various *pro se* motions filed by defendant including a *pro se* request for stand by counsel filed on November 4, 2008. During the hearing, defendant told the court that he planned to testify at trial and that his reasoning for filing the request regarding stand by counsel was that he needed someone that could ask him questions. The trial court granted defendant's motion for stand by counsel and appointed defendant stand by counsel for the sole purpose of questioning defendant during defendant's case-in-chief.

On January 16, 2009, defendant filed a handwritten request to modify the duties of stand by counsel. Defendant requested that stand by counsel be allowed to provide advice and guidance to defendant during trial and that stand by counsel be allowed to raise objections during trial. On that same day, the trial court conducted a hearing on defendant's request. The court advised defendant that he could consult with stand by counsel during the course of the trial, but stand by counsel would not be allowed by the judge to conduct the trial and would not address the jury. On January 26, 2009, the trial judge stated that he had changed his mind regarding the duties of stand by counsel. The court stated that stand by counsel should be able to address the court and address opposing counsel.

On January 26, 2009, the State dismissed count II of the indictment, and defendant's jury trial began that day with standby counsel appointed by the court. The parties selected a jury panel, and the court recessed for the day. On January 27, 2009, the parties appeared before the court to present opening statements to the jury. At that time, defendant said that he "would like to withdraw going *pro se*" and wanted a public defender appointed on his behalf. Defendant said

he discussed the matter with stand by counsel. Stand by counsel advised the court that if appointed, he would request a mistrial and a continuance. The court asked defendant about his motives in changing his mind. Defendant replied, “I can tell also tell you that I don’t really know what I am doing here.” Defendant went to say that he did not think he was “capable of fairly representing myself” and that he made a mistake in representing himself.

After taking a short recess, the trial court stated that it believed the interests of justice would be advanced if defendant was represented by counsel. The court appointed counsel on defendant’s behalf. The court declared a mistrial and granted appointed counsel a continuance. The court stated that it would not allow any further changes in defendant’s desires regarding representation.

On June 1, 2009, defendant’s jury trial began with defendant represented by defense counsel. Following a multiple day trial, the jury found defendant guilty of the offenses of armed robbery, aggravated fleeing and eluding and driving while license revoked on June 5, 2009.

On June 15, 2009, defense counsel filed a motion for new trial and motion in arrest of judgment. On June 24, 2009, defendant filed a handwritten, *pro se* motion for new trial. Also on that same day, defendant filed a handwritten motion requesting the court to dismiss his appointed counsel and allow defendant to proceed *pro se* at his sentencing hearing.

On July 30, 2009, the parties appeared before the court. The court first addressed defendant’s motion to proceed *pro se*. The court advised defendant that he had a right to an attorney. The court asked defendant if he understood that by representing himself, he would not have a lawyer and it would not be the court’s duty to act as his lawyer. Defendant stated he understood. Defense counsel advised the court that defendant clearly wanted to represent

himself. Defense counsel said that “under the circumstances, I think it ought to be allowed that he represent himself. I mean, he knows what’s involved. He was admonished before, and based on his motion, I think it should be granted, and I would certainly move to withdraw.”

The trial court granted defendant’s request to proceed *pro se* and allowed defense counsel to withdraw. Defendant then argued his *pro se* motion for new trial to the court. After hearing arguments, the trial court denied defendant’s motion for new trial and proceeded to sentencing.

After receiving arguments from both defendant and the prosecutor regarding the appropriate sentence, the court stated that it considered all of the relevant factors and the nature and circumstances of the crime. The court then sentenced defendant to the maximum term of three years imprisonment for the offense of aggravated fleeing and eluding. The court also sentenced defendant to seven years imprisonment for the offense of armed robbery, along with 90 days jail for the offense of driving while license revoked, to run concurrently.

On July 30, 2009, the clerk of the court filed a timely notice of appeal on behalf of defendant at his request.

ANALYSIS

On appeal, defendant claims that the trial court failed to substantially comply with the admonishment requirements set forth in Supreme Court Rule 401(a) (eff. July 1, 1984) when defendant waived his right to appointed counsel at defendant’s sentencing hearing, thereby denying defendant of a fundamental right. Defendant argues that he is entitled to relief pursuant to the doctrine of plain error and requests this court to vacate his sentence and remand the cause to the trial court for proper admonishments and then a new sentencing hearing.

The State argues that defendant has forfeited review because defendant did not object at

sentencing and did not raise the issue in a postsentencing motion. The State further argues that the doctrine of plain error does not apply because the trial court did not commit error in admonishing defendant pursuant to Supreme Court Rule 401(a) (eff. July 1, 1984).

Alternatively, the State argues that if error occurred, defendant was neither denied a substantial right nor prejudiced, and therefore, defendant is not entitled to relief.

The parties agree that this appeal presents the issue of whether the trial court complied with the admonishment requirements set forth in Supreme Court Rule 401(a) (eff. July 1, 1984). We review *de novo*. *People v. Campbell*, 224 Ill. 2d 80, 84 (2006). We begin by addressing the issue of whether defendant has forfeited this issue for review.

It is well established that in order to preserve an issue for appellate review, a defendant must object to the error when before the trial court and then raise the error in a written posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 185-86 (1988). A review of the record shows that at the time the trial court allowed defendant to proceed *pro se* at his sentencing hearing, neither defendant nor appointed counsel objected to the trial court's admonishments. Further, defendant did not include the issue in a motion to reconsider sentencing. Therefore, defendant has forfeited the issue and is not entitled to relief unless defendant can establish plain error occurred.

Plain error applies to a forfeited error affecting the substantial rights of a defendant under two circumstances: 1) "where the evidence in a case is so closely balanced that the jury's guilty verdict may have resulted from the error and not the evidence;" and 2) "where the error is so serious that the defendant was denied a substantial right, and thus a fair trial." *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005); *People v. Allen*, 222 Ill. 2d 340, 350 (2006). The doctrine of plain error is not "a general saving clause preserving for review all errors affecting substantial

rights whether or not they have been brought to the attention of the trial court.” *People v. Herron*, 215 Ill. 2d at 177 (quoting *People v. Precup*, 73 Ill. 2d 7, 16 (1978)).

First, we examine whether the trial court committed error when admonishing defendant on July 30, 2009, pursuant to Supreme Court Rule 401(a) (eff. July 1, 1984), because there cannot be plain error unless error occurred. See *People v. Herron*, 215 Ill. 2d at 184; *People v. Wade*, 131 Ill. 2d 370, 376 (1989). Supreme Court Rule 401(a) provides that the court “shall not” allow a person to waive counsel “without first, by addressing the defendant personally in open court,” and informing a defendant of the nature of the charge, the minimum and maximum sentence prescribed by law, and that a defendant has a right to counsel and, if indigent, may have counsel appointed for him by the court. Ill. S. Ct. R. 401(a) (eff. July 1, 1984).

Compliance with Supreme Court Rule 401(a) (eff. July 1, 1984) is required for an effective waiver of counsel. *People v. Haynes*, 174 Ill. 2d 204, 236 (1996) (citing *People v. Baker*, 94 Ill. 2d 129, 137 (1983)). “[S]trict, technical compliance with Rule 401(a), however, is not always required.” *People v. Haynes*, 174 Ill. 2d at 236. Substantial compliance will be sufficient “if the record indicates that the waiver was made knowingly and voluntarily, and the admonishment the defendant received did not prejudice his rights.” *People v. Haynes*, 174 Ill. 2d at 236 (citing *People v. Coleman*, 129 Ill. 2d 321, 333 (1989); *People v. Johnson*, 119 Ill. 2d 119, 132 (1987)).

A review of the record from July 30, 2009, reveals that the trial court did not advise defendant of the nature of the charges or the minimum and maximum sentences for each offense. The State argues that the overall record established the trial court substantially complied with the requirements of Supreme Court Rule 401(a) because the trial court strictly complied with the

admonishment requirements on August 15, 2008, when the trial court granted defendant's first request to proceed *pro se*. The State argues that we should view the 2009 admonishments, together with the prior admonishments given in 2008, and the record as a whole. The State points out that on July 30, 2009, defendant's court appointed counsel agreed that defendant knew "what's involved" and "was admonished before."

Defendant does not dispute the validity of the admonishments given by the court or his waiver of counsel in 2008. Defendant also acknowledges the continuing waiver rule provides that a competent waiver of counsel by a defendant carries forward to all subsequent proceedings. See *People v. Baker*, 92 Ill. 2d 85, 91-92 (1982); *People v. Cleveland*, 393 Ill. App. 3d 700, 705 (2009).

However, our supreme court has recognized that some changes in circumstances within a case "might trigger the necessity to admonish defendant anew." *People v. Johnson*, 119 Ill.2d at 147. In *People v. Simpson*, 172 Ill. 2d 117 (1996), our supreme court stated that a defendant would have to be readmonished before sentencing in cases of "lengthy delays between trial phases, newly discovered evidence which might require or justify advice of counsel, new charges [are] brought, or a request from defendant [for counsel]." *People v. Simpson*, 172 Ill.2d at 138 (citing *People v. Baker*, 92 Ill. 2d at 93-94.)

Relying upon the reasoning of our supreme court in *Johnson* and *Simpson*, appellate courts have found that a defendant must be readmonished in cases where a defendant waives counsel for a second time in a single case. *People v. Cleveland*, 393 Ill. App. 3d at 707 (citing *People v. Langley*, 226 Ill. App. 3d 742 (1992)). In this case, defendant waived his right to counsel in 2008, but later abandoned his desire to proceed *pro se*, and the court re-appointed

counsel on January 27, 2009. We do not consider the cases cited by the State to be controlling because those cases addressed situations where a defendant waived his right to counsel on only one occasion during the pendency of a proceeding, and the waiver did not occur many months after the court provided proper Rule 401(a) admonishments .

Therefore, we conclude the continuing waiver rule does not apply under the circumstances involved in this appeal, and the prior admonishments in this case cannot suffice under the unusual circumstances presented in this appeal. See *People v. Cleveland*, 393 Ill. App. 3d 700; *People v. Langley*, 226 Ill. App. 3d 742. Consequently, we reject the State’s contention that the trial court substantially complied with Supreme Court Rule 401(a) (eff. July 1, 1984) on July 30, 2009, based upon the circumstances and admonishments given by the trial court at the time of defendant’s first waiver of counsel. See *People v. Cleveland*, 393 Ill. App. 3d at 709.

Having found error, we turn to the question of whether defendant is entitled to relief pursuant to plain error. Defendant does not assert that the evidence was closely balanced under the first prong of plain error. Defendant claims that he was denied a fundamental right as set forth in the second prong of plain error.

Our supreme court has equated the second prong of plain error with structural error. *People v. Thompson*, No. 109033, slip op. at 13 (Ill. Sup. Ct. October 21, 2010); *People v. Glasper*, 234 Ill. 2d 173, 197-98 (2009). The United States Supreme Court has found structural errors to be “a very limited class” of errors that affect the “ ‘framework within which the trial proceeds,’ ” *U.S. v. Marcus*, ___ U.S. ___, ___, 130 S. Ct. 2159, 2164-65 (2010) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S. Ct. 1246 (1991)). Included within this limited class are the total deprivation of counsel (*Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792

(1963)) and the right to self-representation (*McKaskle v. Wiggins*, 465 U.S. 168, 104 S. Ct. 944 (1984)). *U.S. v. Marcus*, ___ U.S. ___, ___, 130 S. Ct. at 2164-65.

Relying upon the United States Constitution, Illinois courts have found the right to counsel to be fundamental and therefore, should not lightly be deemed waived. *People v. Jiles*, 364 Ill. App. 3d 320, 328 (2006) (citing *People v. Stoops*, 313 Ill. App. 3d 269, 273 (2000)). This fundamental right includes representation at a sentencing hearing. *People v. Langley*, 226 Ill. App. 3d at 752. Relying upon this authority, we conclude that the trial court's failure to properly admonish defendant resulted in defendant being denied his fundamental right to representation at sentencing without first knowingly and voluntarily waiving his right to counsel, thereby satisfying the second prong of plain error.

Finally, the State argues that defendant was not prejudiced by the court's error and therefore, defendant is not entitled to relief pursuant to plain error. However, since the second prong of the plain error test involves errors so serious that they challenge the integrity of the judicial process, prejudice to a defendant is presumed. *People v. Allen*, 222 Ill. 2d at 352. Therefore, defendant is entitled to relief.

CONCLUSION

The trial court's sentencing order is vacated, and the cause is remanded to the trial court for proper admonishments pursuant to Supreme Court Rule 401(a) and then a new hearing on posttrial motions and/or sentencing hearing with counsel unless defendant knowingly and voluntarily waives his right to counsel following admonishments.

Order vacated, remanded with directions.

JUSTICE HOLDRIDGE, specially concurring:

I agree with the result reached by the majority. I write separately because I find the analysis employed by the majority to be problematic in certain respects. Relying upon *People v. Cleveland*, 393 Ill. App. 3d 700, 707 (2009), the majority appears to announce a rule requiring trial judges to admonish a defendant under Supreme Court Rule 401(a) whenever the defendant waives counsel for a second time in a single case, even if the record reveals that the defendant understood the Rule 401(a) admonishments when he waived counsel the first time and even if there is no reason to doubt that the defendant's second waiver was knowing and voluntary. I do not believe that such a sweeping rule is either necessary or advisable.

The point of giving the Rule 401(a) admonishments is to ensure that a defendant's waiver of the right to counsel is voluntary, knowing, and intelligent. *People v. Haynes*, 174 Ill. 2d 204, 235-37 (1996); *People v. Ware*, 407 Ill. App. 3d 315, _____. Thus, although the Rule 401(a) admonishments are mandatory, strict compliance with Rule 401(a) is not required; as the majority acknowledges, "substantial compliance will be sufficient to effectuate a valid waiver if the record indicates that the waiver was made knowingly and voluntarily, and the admonishment the defendant received did not prejudice his rights." *Haynes*, 174 Ill. 2d at 236; see slip op. at 7.). In other words, the touchstone of the analysis is whether the defendant's waiver of counsel was knowing and voluntary, not whether he received the Rule 401(a) warnings precisely as written every time that he waived counsel.

In determining whether a particular waiver of counsel was knowing and voluntary, a reviewing court should examine the "entire record" (*People v. Johnson*, 119 Ill. 2d 119, 132 (1987)), including admonishments that the defendant received when he waived counsel on previous occasions in the same case. *Ware*, 407 Ill. App. 3d 315, _____. The reviewing court should not

“solely focus on the admonishments given at the time that the defendant waived counsel for the final time.” *Ware*, 407 Ill. App. 3d 315, ____.

The majority appears to disregard this principle by crafting a rule requiring readmonishment in *all* cases involving a second waiver of counsel, regardless of whether the defendant was properly admonished prior to the initial waiver. (See slip op. at 8-9.) In so doing, the majority relies on four cases: our supreme court’s decisions in *Johnson* and *People v. Simpson*, 172 Ill. 2d 117, 138 (1996), and our appellate court’s decisions in *People v. Langley*, 226 Ill. App. 3d 742 (1992) and *Cleveland*. *Johnson* and *Simpson* are inapposite. Both address whether, and under what circumstances, a defendant’s waiver of counsel at one stage of the proceedings (*e.g.*, at trial) remains in effect during a subsequent stage of the proceedings (*e.g.*, during sentencing). Neither case involved a second waiver and neither stands for the proposition that a defendant must be readmonished when he waives counsel for a second time even if he was properly admonished prior to the first waiver.¹ *Langley* is also inapposite. In that case, the court held that Rule 401

¹ *Simpson* does suggest in passing that a defendant who waives counsel during the trial might need to be readmonished during the sentencing hearing if there is a “request [for counsel] from defendant.” However, this statement does not support the rule announced by the majority. First, the statement is *dicta* that has no bearing on the supreme court’s holding. Moreover, the cases that *Simpson* relied upon in making this statement, *People v. Baker*, 92 Ill. 2d 85, 93-94 (1982), and *Davis v. United States*, 226 F.2d 834, 840 (8th Cir. 1955), do not support the statement. Those cases merely suggest that a defendant’s waiver of counsel during one phase of a proceeding is no longer in effect after the defendant requests counsel during a subsequent phase of the proceeding. This unremarkable proposition does not support the majority’s analysis. Neither

admonishments given to a defendant at a time when he was represented by counsel were not effective and that a defendant must be admonished when he is seeking to waive counsel.

In short, neither *Johnson*, *Simpson*, nor *Langley* involved the situation presented here, where a defendant waived counsel immediately after being properly admonished, then later requested counsel, and then waived counsel again. Thus, these cases do not hold or imply that a defendant must be readmonished under such circumstances, particularly where nothing in the record suggests that the second waiver was uninformed or involuntary. Although *Cleveland* arguably does support that conclusion, I respectfully disagree with the court's reasoning in that case for the reasons set forth above.

In sum, as our supreme court has made clear, the Rule 401(a) admonishments are a means to an end, not an end in itself. They are not a talismanic incantation that must be ritually recited every time a defendant waives counsel in a single case. Rather, they are simply a procedural mechanism designed to ensure that the defendant's waiver of counsel is knowing, voluntary, and intelligent. Where the record shows that a defendant's previous waiver of counsel was knowing and voluntary and there is nothing to suggest that his subsequent waiver was uninformed or involuntary, I believe that repeated admonishments would be redundant and unnecessary. In my view, requiring readmonishment under such circumstances would elevate form over substance.

Nevertheless, I agree with the result reached by the majority. Although I believe that proper admonishments given before a valid waiver of counsel may, under certain circumstances,

Baker nor *Davis* addressed the question presented here: *i.e.*, whether a defendant who waives counsel after being properly admonished, then requests and is granted counsel, and then waives counsel again, must be readmonished prior to the second waiver.

obviate the need for additional admonishments prior to a second waiver, in this case the defendant's second waiver occurred more than *eleven months* after the initial admonishment and waiver. Thus, the initial admonishments had grown stale and might well have been forgotten by the time the defendant attempted to waive counsel the second time. This raises a serious question as to whether the second waiver was knowingly and intelligently made. *Cf. Simpson*, 172 Ill. 2d at 138 (stating that a defendant who waives counsel during trial might need to be readmonished prior to sentencing where there has been a "lengthy delay[]" between trial and sentencing); *Langley*, 226 Ill. App. 3d at 749 (holding that admonishments given to a defendant during his arraignments did not make his subsequent waiver of counsel during the sentencing phase knowing and voluntary where, *inter alia*, "[s]even months expired between the arraignments and defendant's sentencing"). Thus, although readmonishment before a second waiver is not always required, I believe that it was required in this case.