

No. 1-11-0390

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10 CR 5444
	)	
MACK GOODMAN,	)	Honorable
	)	James P. Etchingham,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE FITZGERALD SMITH delivered the judgment of the court.  
Presiding Justice Lavin and Justice Epstein concurred in the judgment.

**ORDER**

¶ 1 *Held:* Where defendant abandoned his request to proceed *pro se*, the trial court did not abuse its discretion in failing to grant that request. The \$200 DNA analysis fee and \$10 Fine for Domestic Battery are vacated; the fines, fees, and costs order is modified to reflect \$230 worth of \$5-per-day presentence custody credit against the remaining fines.

¶ 2 Following a jury trial, defendant Mack Goodman was convicted of aggravated battery of a child and received an extended-term sentence of 10 years in prison. On appeal, defendant contends that the trial court erred in denying his requests to dismiss counsel and proceed *pro se*. Defendant further contends that this court should vacate the trial court's assessment of a \$200

DNA analysis fee and a \$10 Fine for Domestic Battery as part of his sentence, and should grant him \$5-per-day presentence custody credit against his remaining fines.

¶ 3 For the reasons that follow, we affirm defendant's conviction and sentence, vacate the DNA analysis fee and Fine for Domestic Battery, grant defendant \$230 credit toward his remaining fines, and order modification of the fines, fees, and costs order.

¶ 4 Defendant's conviction arose from the battery of his nine-year-old step-daughter, A.H. Defendant's wife, who is A.H.'s mother, was tried in a simultaneous but separate jury trial and is not party to this appeal. At defendant's arraignment on April 12, 2010, defense counsel indicated that defendant wanted to address the trial court. The following exchange ensued:

"THE COURT: Yes, sir?

[DEFENDANT]: Judge, I don't want to have this PD represent me no more. I want to go self-representation.

THE COURT: Sorry?

[DEFENDANT]: I want to go for separate representation.

THE COURT: You want to what?

[DEFENDANT]: I want to represent myself, Judge.

THE COURT: Okay. Sir, do you remember the name Abraham Lincoln?

[DEFENDANT]: Yes.

THE COURT: He coined a phrase, 'Only a fool represents himself.'

[DEFENDANT]: Well, I'll be that fool today.

THE COURT: I am not going to allow you to do it today. Okay?

[DEFENDANT]: It's my right, Judge. It's my constitutional right.

THE COURT: We can address that at another time. Okay? I urge you under no uncertain terms to take the excellent legal representation that the county affords you on indigent cases. Okay? Thank you, sir. May tenth."

¶ 5 Several court appearances later, on August 5, 2010, defendant and his wife appeared before a different circuit court judge. At that time, defense counsel informed the court that defendant did not want his trial severed from his wife's. Against his counsel's advice, defendant addressed the trial court:

"THE COURT: What do you want to say?

[DEFENDANT]: They are not working in our favor regardless how you respect them as attorneys at law. They are telling us things that the State -- they are convicting us already.

They are telling us things the State should be telling you in they are convicting us already, bad words, accusations, threats, you are going to get this. You are going to get this.

THE COURT: Nobody knows anything about anything.

[DEFENDANT]: This is what we are hearing. And to try -- to be tried separately, we are on this case together. What is to be tried separately? Why are they trying to railroad this into this?

We came into this. I know very well, perfectly well what is going on. I understand what is going on.

What is the thing, try to railroad because she don't know. Separate this. That is what I am saying. No, no, don't separate nothing. We can -- we try together. We try together, case together, everything is together.

THE COURT: Thank you, [defendant]. I understand your point.

The lawyers have an obligation, so you know, to represent you with the highest degree of skill that they possess. They intend to do that.

Whether I allow a motion for severance or not, there is no motion pending before me presently to rule on.

When and if that is the case, I will make the appropriate ruling. And we will deal with those issues on a case by case basis as it is presented to the court.

I understand your comments. And at the appropriate time, I will make a ruling and admonish you each accordingly, as your lawyers have done. That is their professional obligation and responsibility to do, what they think is in your best interest legally.

I can tell you that nobody is endeavoring to, as you say, railroad anyone. This is a court of law.

Presumption of innocence remains with you until the State proves the charges. That is how it is going to be.

[DEFENDANT]: I perfectly understand. But it is not that way. Can I please represent myself then? Can I go for *pro se* representation? I been ready to demand trial for the longest and he is not.

Do you understand what I am saying? I am not scared of nothing, you know. What I am saying, she is not scared of nothing.

You got to understand, your Honor, they study these allegations. I get tired of listening to it. We are ready to go to trial. We understand.

THE COURT: Who is going to represent [defendant's wife]?

You want to represent yourself?

[DEFENDANT]: Yes.

THE COURT: Thank you, I heard that."

¶ 6 The trial court spoke briefly with defendant's wife and her attorney, and then announced that it would take defendant's and his wife's motions and "categorize them each as a motion that you wish to present at this time for leave to defend yourself or act as your own counsel." The court indicated that it would take those motions under advisement and would rule on them on the next court date. The trial court then advised defendant and his wife that the prosecutors and defense attorneys had many years of experience, that trials are governed by rules of procedure and evidence, and that if defendant and his wife represented themselves, they would be held to those rules just as any attorney would be. The court stated, "So, if in fact you represent yourself, say, well, gee I didn't know that, that doesn't count anymore, you are going to be judged by the same standards any lawyer would be if you represent yourself. Keep that in mind, and think about what I said."

¶ 7 Defendant's attorney asked the trial court to indulge his client and rule on his motion to proceed *pro se*. Counsel explained that his point of contention with defendant was that for strategic reasons, he would not file a written demand for trial. Defendant interjected, stating, "First this will be continued *ad infinitum*, and never go to trial." The trial court responded that that would not happen in his or his colleague's court room, where cases are processed expeditiously, and explained that it would take a "period of time" for investigation and preparation before trial could commence. The court stated that it would not rule on defendant's request that day, set the next court date for September 13, 2010, and indicated "whether you each continue in your representation of these defendants" would be determined on that date.

¶ 8 On September 13, 2010, defendant appeared before the original trial judge. When the court asked, "What's going to happen here?" defense counsel responded, "Judge, I believe we're in a position to set this matter for trial." The attorney for defendant's wife filed a motion for

severance, and the trial court set a date for trial. At a subsequent court date, it was decided that defendant and his wife would be tried at separate but simultaneous jury trials.

¶ 9 At trial, the State presented evidence that defendant and his wife beat A.H. with an extension cord and belt because, after not being allowed to eat anything for more than a day, she ate a pickle without their permission. About a week later, A.H.'s grandmother learned about the beating and took A.H. to the hospital. The treating physician testified that A.H. had multiple abrasions to her back, buttocks, face, and extremities, as well as scarring on her face, back, right leg, and chest. He also stated that A.H. was very thin, with very prominent bony features. Defendant gave a statement to the police in which he stated that he hit A.H. to punish her for doing inappropriate sexual things with his son, that A.H. was evil, and that she caused him to strike her "because she continued to say 'hit me again, hit me again.' "

¶ 10 Defendant testified at trial that he inflicted A.H.'s injuries "[f]or discipline, strong discipline," because he caught her in an "act of sexual mortality" with her five-year-old half-brother. Specifically, he stated that he saw A.H. from the back, "bobbing her head where his private parts are." Defendant explained that when he saw the children, he had a flashback to when he had been sexually abused as a child, and knew he had to discipline A.H. "to make her know that this was wrong." Accordingly, he ordered her to strip naked and "whooped" her with a belt and extension cord in front of her three siblings. He then made A.H., who was silent throughout the beating even though she was bleeding, take a bath. Defendant denied that he disciplined A.H. because of a pickle, and stated that he told the police A.H. had participated in an evil act, not that she was evil.

¶ 11 The jury found defendant guilty of aggravated battery of a child, and the trial court entered judgment on the verdict. At sentencing, defendant made a lengthy statement to the trial court, which spans more than five pages of the transcript. Among other things, defendant

addressed prayers to God; stated that the punishment he inflicted upon A.H. "was done and 'cuz of me being under Jesus" and "was out of love"; insisted that he was not wrong for disciplining A.H. and was "getting convicted and persecuted for a discipline of a child that did an evil act"; stated that "y'all gonna come in my house and destroyed my family"; and told the judge to sentence him "as you must." Based on defendant's criminal history, the trial court imposed an extended-term sentence of 10 years' imprisonment. As the trial court announced the sentence, defendant interrupted several times, telling the judge that its decision was "bull crap," referencing whippings by slave owners, stating that white people are crazy, calling the court an "evil ass judge," and insisting that he did no wrong in teaching his child.

¶ 12 On appeal, defendant contends that the trial court erred in denying his requests to dismiss counsel and proceed *pro se*. He asserts the trial court erroneously focused on his lack of legal skills and ability, when it should have based its ruling on whether his waiver of counsel was knowingly and intelligently made. As relief, defendant seeks reversal and remandment for a new trial.

¶ 13 As an initial matter, the State argues that due to defendant's failure to raise this issue during trial or in a posttrial motion, it is forfeited. It is true that in general, such a failure results in forfeiture. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Here, though, because defendant argues that the trial court deprived him of a substantial right, his claim may be reviewed under the plain error doctrine. *People v. Ellis*, 309 Ill. App. 3d 443, 445-46 (1999). However, before plain error analysis may be applied, we must first determine whether any error occurred. *People v. McGee*, 398 Ill. App. 3d 789, 794 (2010). Absent error, there can be no plain error. *McGee*, 398 Ill. App. 3d at 794, citing *People v. Herron*, 215 Ill. 2d 167, 187 (2005).

¶ 14 We next address the applicable standard of review. Defendant argues that the denial of a defendant's request to represent himself is a structural defect that should be reviewed *de novo*.

We disagree. The determination as to whether a defendant has made an intelligent waiver of his right to counsel and invoked his right to self-representation is reviewed under an abuse of direction standard. *People v. Baez*, 241 Ill. 2d 44, 116 (2011); *People v. Span*, 2011 IL App (1st) 083037, ¶ 55. An abuse of discretion is found only where the trial court's ruling is arbitrary, fanciful or unreasonable or where no reasonable person would adopt the court's view. *People v. Patrick*, 233 Ill. 2d 62, 68 (2009); *Span*, 2011 IL App (1st) 083037, ¶ 55.

¶ 15 A defendant has a constitutional right to represent himself. *Faretta v. California*, 422 U.S. 806, 835 (1975); *Baez*, 241 Ill. 2d at 115. To act as his own attorney, a defendant must knowingly and intelligently relinquish his right to counsel. *Baez*, 241 Ill. 2d at 115-16. A defendant's waiver of counsel must be clear and unequivocal, not ambiguous. *Baez*, 241 Ill. 2d at 116. The defendant must make "an articulate and unmistakable demand to represent himself; otherwise, he waives his right to self-representation." *Span*, 2011 IL App (1st) 083037, ¶ 59.

¶ 16 The task of the trial court is to confirm that the defendant can make a knowing and intelligent waiver of his right to counsel. *People v. Woodson*, 2011 IL App (4th) 100223, ¶ 23. Whether a defendant has intelligently waived his right to counsel has been distinguished from a defendant's "ability to do an appropriate job defending himself at trial." *People v. Ward*, 208 Ill. App. 3d 1073, 1084 (1991). A trial judge cannot reject a defendant's request for self-representation based upon the court's perception that the defendant lacks legal knowledge or the ability to defend himself. *People v. Fisher*, 407 Ill. App. 3d 585, 589-90 (2011). A defendant should be informed of the dangers and disadvantages of self-representation so the record will reflect that the defendant has made his decision "with eyes open." *Baez*, 241 Ill. 2d at 117. To determine whether a defendant has made an intelligent waiver of his right to counsel, a reviewing court examines the facts and circumstances of the case, including the background, experience,

and conduct of the defendant. *Span*, 2011 IL App (1st) 083037, ¶ 60, citing *Baez*, 241 Ill. 2d at 116.

¶ 17 In determining whether a defendant unequivocally waived his right to counsel, a court may consider the conduct following the defendant's request to represent himself. *People v. Burton*, 184 Ill. 2d 1, 24 (1998); *Span*, 2011 IL App (1st) 083037, ¶ 61. Even if a defendant gives some indication that he wishes to represent himself, he may later acquiesce in representation by counsel by vacillating or abandoning an earlier request to proceed *pro se*. See *Burton*, 184 Ill. 2d at 23 (citing cases); *Span*, 2011 IL App (1st) 083037, ¶ 61. A defendant may also forfeit the right to represent himself by remaining silent at critical junctures of the proceedings. *Burton*, 184 Ill. 2d at 24.

¶ 18 In the instant case, we find that defendant clearly and unequivocally stated his wish to proceed *pro se* at his arraignment. However, while defendant's initial request to represent himself was clear and unequivocal, his subsequent conduct establishes that he abandoned that request.

¶ 19 After defendant's arraignment, several court dates passed during which defendant made no mention of *pro se* representation. When the topic arose a second time, it was in a roundabout fashion. At that time, defendant had appeared before a different circuit court judge. He was articulating his displeasure at having his case severed from his wife's, and when the trial court responded that it would not rule on the issue of severance in the absence of a motion on the topic, defendant made the following statement:

"I perfectly understand. But it is not that way. Can I please represent myself then? Can I go for *pro se* representation? I been ready to demand trial for the longest and he is not.

Do you understand what I am saying? I am not scared of nothing, you know. What I am saying, she is not scared of nothing.

You got to understand, your Honor, they study these allegations. I get tired of listening to it. We are ready to go to trial.

We understand."

The trial court asked defendant whether he wanted to represent himself, and defendant answered yes. After speaking with defendant's wife and her attorney, the trial court announced that it would categorize defendant's and his wife's motions "each as a motion that you wish to present at this time for leave to defend yourself or act as your own counsel," would take those motions under advisement, and would rule on them on the next court date.

¶ 20 Defendant's statement to the trial court demonstrates that he wanted to proceed *pro se* not because he was desirous of actually representing himself, but because he believed doing so would prevent his case from being severed from his wife's and would speed up the pretrial process. See *Span*, 2011 IL App (1st) 083037, ¶ 63 (defendant wanted to proceed without defense counsel because he believed it would result in the case being transferred back to the trial court and that it would avoid further delays). Accordingly, his second request for self-representation was not clear and unequivocal.

¶ 21 Moreover, the topic of self-representation never arose again during pretrial proceedings, at trial, or posttrial. Defendant was not shy in speaking to the trial court. Despite taking advantage of numerous opportunities to address the court directly, he never again mentioned that he wished to represent himself. In these circumstances, we conclude that defendant abandoned his request to represent himself. See *Span*, 2011 IL App (1st) 083037, ¶ 66 (the defendant's subsequent conduct indicated abandonment of initial request to proceed *pro se*).

¶ 22 In arguing that he did not abandon his request to proceed *pro se*, defendant relies upon *Orazio v. Dugger*, 876 F.2d 1508 (11th Cir. 1989). The *Orazio* court held that a defendant is not required to continually renew a request for self-representation once that request is conclusively denied. *Orazio*, 876 F.2d at 1512. Here, the trial court never conclusively denied defendant's request. Rather, on both occasions when the topic arose, the trial court indicated it would rule on the request on a future date. Accordingly, *Orazio* is distinguishable. *Span*, 2011 IL App (1st) 083037, ¶¶ 67-68.

¶ 23 Here, defendant abandoned his request to proceed *pro se*. Accordingly, the trial court did not err in not granting that request. Absent error, the plain error doctrine does not apply. Defendant's contention is forfeited.

¶ 24 Defendant next contends that this court should vacate the trial court's assessment of a \$200 DNA analysis fee and a \$10 Fine for Domestic Battery as part of his sentence, and should grant him \$5-per-day presentence custody credit against his remaining fines.

¶ 25 Defendant argues that the DNA analysis fee should not have been imposed in this case because he has previously been convicted of a felony and therefore has already submitted DNA for analysis and been assessed the fee. Section 5-4-3(j) of the Unified Code of Corrections (730 ILCS 5/5-4-3(j) (West 2010)) authorizes a trial court to order the taking, analysis, and indexing of a qualifying offender's DNA, and corresponding payment of the analysis fee, only once where the defendant is not currently registered in the DNA database. *People v. Marshall*, 242 Ill. 2d 285, 303 (2011). An order imposing a duplicative DNA analysis fee is void and must be vacated, as it exceeds statutory authority. *Marshall*, 242 Ill. 2d at 302; *People v. Anthony*, 2011 IL App (1st) 091528-B, ¶ 23.

¶ 26 In the instant case, the records, of which we may take judicial notice (*People v. Jimerson*, 404 Ill. App. 3d 621, 634 (2010)), reflect that defendant was convicted of and sentenced on two

prior felonies in 2006. Therefore, we can presume that defendant is already registered in the DNA database. *People v. Leach*, 2011 IL App (1st) 090339, ¶ 38 (holding that in order to vacate a DNA charge under *Marshall*, a defendant need only show that he was convicted of a felony after the DNA requirement went into effect on January 1, 1998). Accordingly, we agree with defendant that the \$200 DNA analysis fee is duplicative and must be vacated.

¶ 27 Next, defendant challenges the trial court's imposition of a \$10 Fine for Domestic Battery. 730 ILCS 5/5-9-1.6 (West 2010). The State concedes that defendant should not have been assessed this fine, as he was not convicted of domestic battery. We agree with the parties and accordingly vacate the fine.

¶ 28 Finally, defendant contends that he is entitled to \$5-per-day presentence custody credit against the remaining fines imposed by the trial court. The State concedes that under section 110-14(a) of the Code of Criminal Procedure (725 ILCS 5/110-14(a) (West 2010)), defendant is entitled to \$5-per-day presentence custody credit against the fines. Because a sentence in conflict with a statutory guideline, such as section 110-14(a), is void, we accept this concession by the State. Defendant is entitled to 382 days' worth of \$5-per-day presentence custody credit against the \$30 Children's Advocacy Center fine (55 ILCS 5/5-1101(f-5) (West 2010)) and the \$200 Domestic Violence fine (730 ILCS 5/5-9-1.5 (West 2010)). However, because the amount credited may not exceed the total amount of the fines imposed, defendant's \$5-per-day presentence custody credit is limited to \$230. 725 ILCS 5/110-14(a) (West 2010).

¶ 29 For the reasons explained above, we vacate that portion of the trial court's order requiring defendant to submit an additional DNA sample and requiring him to pay the \$200 DNA analysis fee; vacate the \$10 Fine for Domestic Battery; and order \$230 worth of \$5-per-day presentence custody credit toward the remaining fines. We order the clerk of the circuit court to enter a

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modified fines, fees, and costs order consistent with our decision. We affirm the judgment of the circuit court of Cook County in all other respects.

¶ 30 Affirmed in part; vacated in part.