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2012 IL App (3d) 100208-U

Order filed June 20, 2012
Modified upon denial of rehearing July 25, 2012

IN THE
APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,) Appeal from the Circuit Court
) of the 10th Judicial Circuit,
) Peoria County, Illinois,
Plaintiff-Appellee,)
) Appeal No. 3-10-0208
v.) Circuit No. 07-CF-1092
)
DERAIL T. RILEY,) Honorable
) James E. Shadid,
Defendant-Appellant.) Judge, Presiding.

JUSTICE CARTER delivered the judgment of the court.
Presiding Justice Schmidt modified the special concurrence upon denial of rehearing.
Justice McDade dissented.

ORDER

- ¶ 1 *Held:* (1) Defendant was properly admonished and waived his right to counsel; (2) the trial court did not err in denying defendant's motion to quash arrest; (3) the trial court did not have a duty to advise defendant of his right to testify; (4) residential burglary is not a lesser-included offense of home invasion; and (5) the State confessed error that defendant's second conviction for home invasion should be vacated.
- ¶ 2 Following a bench trial, defendant, Derail T. Riley, was convicted of two counts of home

invasion (720 ILCS 5/12-11(a)(2) (West 2006)), one count of residential burglary (720 ILCS 5/19-3(a) (West 2006)), and two counts of aggravated battery (720 ILCS 5/12-4(b)(10) (West 2006)). Defendant appeals his convictions, arguing that: (1) the court did not obtain a valid waiver of his right to counsel; (2) the trial court erred in denying his motion to quash arrest; (3) the trial court denied him a fair trial when it failed to inform him of his right to testify; (4) defendant's conviction for residential burglary should be vacated as a lesser-included offense of home invasion; and (5) one of his home invasion convictions must be reversed because the State failed to prove the first victim suffered physical injury. We affirm in part and reverse in part.

¶ 3

FACTS

¶ 4 On October 2, 2007, defendant was charged by indictment with two counts of home invasion, one count of residential burglary, and two counts of aggravated battery. Count I charged home invasion in that defendant knowingly and without authority entered the dwelling of Frank Davis while having reason to know one or more persons were present within the dwelling, and defendant intentionally caused injury to Frank. Count II charged home invasion in that defendant knowingly entered the Davis home, knowing that one or more persons were present within the dwelling, and intentionally caused injury to Kay Davis. Count III charged residential burglary in that defendant knowingly entered the Davis home with the intent to commit a theft therein. The two aggravated battery charges alleged that defendant committed a battery that caused bodily harm to the two victims.

¶ 5 The trial court's October 4, 2007, order reflects that defendant was informed of the charges and provided with a copy of the indictment. Defendant pled not guilty. Subsequently, attorney Colette Bailey was appointed to represent defendant. However, on November 17, 2008,

defendant mailed an *ex parte* letter to the court requesting that Bailey be discharged and defendant be allowed to represent himself. The court recommended that defendant consider requesting another public defender because he was facing a home invasion charge that carried a possible sentence of 6 to 30 years and defendant might be eligible for an extended-term sentence of up to 60 years. Defendant indicated that he understood the possible penalties and requested that the court appoint another public defender.

¶ 6 On January 23, 2009, defendant appeared for a scheduling conference with attorney William Loeffel. Six days later, defendant filed a motion for the "appointment of Bar Association Lawyer[.]" At the hearing on defendant's motion, the court allowed Loeffel to withdraw and referred the case to the public defender's office for the appointment of a third attorney. Attorney Kevin Lowe was appointed to represent defendant.

¶ 7 On April 15, 2009, the court received an *ex parte* letter from defendant requesting to discharge Lowe and for the court to appoint a fourth public defender. However, defendant later asserted that he did not want another public defender and that he wanted to represent himself. The court admonished defendant that he had been charged with a Class X felony, home invasion, which carried a possible sentence of 6 to 30 years in prison and a possible extended-term sentence of up to 60 years. Defendant acknowledged that he understood the charge against him, the possible penalties, his right to a jury or bench trial, his right to subpoena witnesses, the procedure for filing motions, and that the court thought it was unwise for defendant to represent himself. Defendant told the court that if Lowe or another public defender were ordered to represent him that he would not cooperate. The court then allowed Lowe to withdraw and found that defendant had been informed of his rights, the possible penalties, the trial procedures, and

the discovery process, and that he had voluntarily and knowingly determined that he should represent himself in spite of the court's advice.

¶ 8 On April 20, 2009, defendant filed a motion alleging his fourth and fifth amendment rights had been violated during his arrest. On June 11, 2009, the court conducted a hearing on defendant's motion. At the hearing, the State called Officer Ronald Hartzell to testify. Hartzell testified that he was working surveillance detail on September 21, 2007. At the time, he was attempting to gather information on a string of home invasions and car burglaries on High Street in Peoria. Hartzell testified that the home invasion suspect was a black male, in his early twenties, approximately 5 feet 10 inches, 180 pounds, and wearing all dark clothing and a "due rag or a stocking cap." While conducting surveillance, Hartzell observed defendant walk by. Hartzell noted that defendant fit the suspect's description and was wearing all dark clothing, a "due rag," and a heavy coat. He stated that defendant's coat seemed out of place in the 70 degree weather. Hartzell observed defendant walk 20 to 25 yards, stop, put his hands in his pockets, and look around as if surveying the area. Defendant allegedly repeated this action four or five times.

¶ 9 Hartzell approached defendant after observing his repeated actions. Hartzell then displayed his badge and announced "Peoria Police Officer. Please step over here." Defendant walked over to Hartzell and immediately put his hands on the hood of Hartzell's car. Hartzell conducted a pat-down search because he was concerned that defendant might be carrying a weapon under his heavy coat or in his pockets. The search uncovered a knife, a ring, a set of apartment keys, and a car key with a fob from a Lincoln dealer in Moline, Illinois. After finding the knife, Hartzell handcuffed defendant and placed him in the back of Officer Anthony Allen's police car. While defendant was in Allen's car, Hartzell matched the car key to a nearby Lincoln.

Dispatch informed Hartzell that the Lincoln was stolen. Hartzell then directed Allen to take defendant to the police station.

¶ 10 On cross-examination, defendant questioned Hartzell's rationale for the stop. Hartzell testified that he stopped defendant because he

"fit the build, description, the approximate age of [the] home invasion suspect, the time of day, the location, [defendant's] clothing, plus [his] clothing being out of place, [defendant was] walking on the sidewalk, 20 to 25 yards stopping, thrusting both hands in [his] front pockets, canvassing and surveilling the area as if [he was] looking for a target or witness."

¶ 11 Hartzell further characterized the stop as an investigative stop and stated that he placed defendant in handcuffs for his safety. The court continued the hearing to make its determination on the morning before the bench trial.

¶ 12 Between the hearing and defendant's bench trial, defendant requested that the court appoint an attorney to represent him. The public defender was appointed, and the case was continued on defendant's motion.

¶ 13 On June 26, 2009, attorney Timothy Cusack appeared on behalf of defendant. At the hearing, defendant complained about Cusack's representation and eventually stated that he wanted to represent himself. The court again advised defendant against self-representation. Nonetheless, defendant wished to proceed to his bench trial *pro se*.

¶ 14 In October 2009, the court heard defendant's *pro se* motions to quash arrest and quash the indictment. Defendant later decided not to pursue his motion to quash arrest, and the court granted the State's motion to dismiss defendant's motion to quash the indictment. Defendant was then granted the assistance of a fifth public defender to pursue plea negotiations. However, the

plea discussions fell through, and defendant agreed to let public defender Sean Donahue represent him at trial.

¶ 15 On October 16, 2009, defendant appeared for his bench trial. At the start of the hearing, Donahue informed the court that he would not pursue defendant's request to file a motion to quash his indictment and arrest, and he had advised defendant to consider the State's plea offer. Defendant protested Donahue's recommendations, which prompted the court to inquire if defendant wanted to represent himself. Defendant continued to complain about Donahue's representation, and the court told defendant "[n]obody can protect your rights for you, *** because you won't let anybody[.]" The court then dismissed Donahue and continued the case for bench trial.

¶ 16 At the start of the bench trial, defendant asked the court to continue the case so that his family could hire a private attorney. However, defendant's family told the court that they did not have the money to hire private counsel. The court acknowledged that the sixth amendment gave defendant the right to counsel, but it was the court's finding that his request to hire private counsel was "simply an attempt *** to delay the trial because [he] *** had four or five attorneys." The court noted that more than two years had passed since the date of the alleged incident and defendant's request delayed the administration of justice. The case proceeded to a bench trial.

¶ 17 During the State's opening statements, defendant was permitted to leave the courtroom. After the State's opening, defendant was returned to the courtroom, but he requested to leave a second time. The court then inquired "when the time comes for an opportunity for you to testify, present your case, do you want to be brought back in the courtroom then?" Defendant did not

respond and left the courtroom before the State called its first witness.

¶ 18 The State called Kay as its first witness. On the morning of September 18, 2007, Kay was living with her husband Frank at 601 High Street, in Peoria. Kay testified that she got up, went to the kitchen and attempted to switch on the porch light. Later, Kay saw that the porch light was out. She tried the switch again and stepped onto the porch to see if the bulb was bad. When Kay stepped onto the porch, an individual grabbed her around the neck and shoved her into the kitchen. Frank charged the assailant as he entered the home with Kay, prompting the assailant to throw Kay on the ground. Kay then saw the assailant strike her husband with a wine bottle. Kay described the assailant as a young black male, who was approximately 5 feet 10 inches.

¶ 19 Next, the State called Frank to testify. Frank stated that around 6 or 6:30 a.m. he heard his wife scream from the porch. He then saw a young black male, around six feet tall, “pretty skinny,” and dressed in black, holding Kay around her neck. Frank thought the assailant had a knife, so he ran towards him and grabbed his arm. The assailant then hit Frank in the head with a wine bottle. On cross-examination, Frank stated that he was "100 percent sure" that defendant was the assailant who broke into his house in September 2007.

¶ 20 After the State rested its case, defendant called Hartzell to testify. Defendant attempted to discredit Hartzell’s testimony that he had given at the June motion hearing. However, Hartzell reasserted that when he stopped defendant he found a knife, ring, and keys in defendant’s pockets. The knife raised safety concerns, which prompted Hartzell to handcuff defendant and place him in the back of Allen’s car while he continued his investigation. Before defendant called his last witness to testify, the court inquired if defendant planned to testify. Defendant

replied in the negative. Afterwards, the case proceeded to closing arguments.

¶ 21 The trial court found defendant guilty of all five charges. After trial, the court appointed attorney Cusack to represent defendant in his posttrial proceedings. On defendant's behalf, Cusack filed a motion for new trial. The court denied defendant's motion and sentenced defendant to 28 years in prison for count I and concurrent terms of imprisonment of 28 years on count II and 15 years on count III. After sentencing, defendant sent an *ex parte* letter to the court claiming that he received ineffective assistance of counsel from Cusack. Prior to this, defendant filed a complaint with the judicial inquiry board and complaints with the Attorney Registration and Disciplinary Commission (ARDC) against several of his public defenders. Thereafter, defendant filed a notice of appeal.

¶ 22

ANALYSIS

¶ 23

I. Waiver of Right to Counsel

¶ 24 Defendant first argues that his case should be remanded for a new trial because the court did not obtain a valid waiver of his right to counsel. In support, defendant contends that he did not receive Supreme Court Rule 401 admonishments before representing himself, his earlier admonitions were not timely, the admonishments did not comply with Rule 401, and he did not knowingly waive his right to counsel.

¶ 25 The sixth amendment of the United States Constitution entitles a defendant to counsel. U.S. Const. amends. VI, XIV; see also *People v. Hughes*, 315 Ill. App. 3d 86 (2000). A defendant may waive this right and proceed without counsel only if he "voluntarily and intelligently elects to do so." *People v. Baker*, 92 Ill. 2d 85, 90 (1982); see also Ill. S. Ct. R. 401 (eff. July 1, 1984). However, a defendant may not use his right to counsel as "a weapon to

undermine the trial court's responsibility to administer justice." *Hughes*, 315 Ill. App. 3d at 91.

¶ 26 Before a defendant can represent himself, a trial court must obtain a valid waiver of defendant's right to counsel. Under Illinois Supreme Court Rule 401(a) (eff. July 1, 1984), a trial court shall not permit a waiver of counsel by a defendant accused of an offense punishable by imprisonment without first addressing defendant in open court and informing him of and determining that he understands: (1) the nature of the charge; (2) the minimum and maximum sentence prescribed by law, including 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.

¶ 27 We find that the trial court obtained a valid waiver of defendant's right to counsel. Although we note that the court did not provide Rule 401 admonitions before defendant's final waiver of counsel, defendant had been previously apprised of his rights and had expressed his desire, on various occasions, to represent himself and had shown an unwillingness to work with appointed counsel.

¶ 28 In April 2009, the court admonished defendant in substantial compliance with Rule 401. The court informed defendant that he was facing a home invasion charge which carried a sentence of up to 30 years in prison or a 60 year extended-term sentence. Although the court did not inform defendant of the lesser charges, it was only required to substantially comply with Rule 401. See *People v. Black*, 2011 IL App (5th) 080089. We find that the absence of the lesser crimes did not impede defendant from making a knowing and intelligent waiver. See *People v. Johnson*, 119 Ill. 2d 119 (1987). Moreover, the record reflects that defendant was informed of all of the charges in October 2007 and received copies of the indictment.

¶ 29 Additionally, defendant's waiver is supported by his knowledge and relative sophistication. See *People v. Nelson*, 47 Ill. 2d 570 (1971) (defendant's waiver was valid in spite of the lack of a contemporaneous admonition because of his prior admonishments and previous appearances before the court). The record reflects that defendant demonstrated significant knowledge of the proceedings when he filed motions both for discovery and to quash his indictment and arrest, and when he participated in a hearing on alleged violations of his constitutional rights. Defendant also filed complaints with the ARDC against several of his public defenders and complained to the judicial inquiry board about the trial court.

¶ 30 Furthermore, we find that although the April 2009 waiver occurred several months before defendant's final waiver of his right to counsel, the lapse of time did not negate the effect of the admonition. See *People v. Haynes*, 174 Ill. 2d 204 (1996). At the time of defendant's final waiver, he was well aware of his right to counsel, knew the charges he faced, and the maximum sentence he might receive. Consequently, the trial court's failure to readmonish defendant did not invalidate his waiver of counsel.

¶ 31 Finally, defendant argues that he never validly waived his right to counsel. Defendant's conduct, however, demonstrated his desire to represent himself. See *People v. Kennedy*, 204 Ill. App. 3d 681 (1990) (intelligent and concerted effort to indefinitely postpone trial justified finding that defendant's conduct operated as a waiver of his right to counsel). Throughout the proceedings, defendant demonstrated an inability to work with his attorneys, and he had been represented by five public defenders. Immediately prior to the bench trial, defendant appeared before the court with attorney Donahue. As proceedings commenced, defendant complained of the alleged inadequacies of Donahue's representation. Upon hearing defendant's repeated

complaints, and considering the length of time the case had been pending, the court dismissed Donahue without protest from defendant. On the day of the trial, defendant requested a continuance so that his family could hire private counsel. The court asked defendant's family if they were attempting to hire counsel, but they indicated that they could not afford one. The court proceeded, noting that defendant's request had been used to further delay the proceedings. We find that defendant had used his right to counsel to undermine the court's administration of justice, and the inadequacies of the trial court's admonishments did not prevent defendant from making a voluntary, intelligent, and knowing waiver.

¶ 32

II. Motion to Quash Arrest

¶ 33 Second, defendant argues that the court erred in denying his motion to quash arrest because the police lacked reasonable suspicion to conduct an investigatory stop and did not have probable cause to turn the investigatory stop into a seizure.

¶ 34 A police officer may conduct an investigatory stop when he has a reasonable, articulable suspicion that the person in question has committed or is about to commit a crime. *People v. Love*, 199 Ill. 2d 269 (2002). An officer may conduct a limited pat-down search for weapons if he believes that the person questioned is armed and dangerous. *Id.* The facts supporting the stop and limited search should be considered from the perspective of a reasonable officer at the time that the situation confronted him. *Id.*

¶ 35 The facts in the present case indicate that Hartzell had reasonable suspicion to stop defendant. Hartzell observed defendant acting suspicious, wearing a heavy coat in warm conditions, and defendant matched the description of a local home invasion suspect. These facts also created safety concerns that allowed Hartzell to conduct a pat-down search. The knife found

during the search verified Hartzell's suspicion.

¶ 36 The car key and dealership fob raised additional suspicion relating to the car burglaries in the neighborhood. See *United States v. Stewart*, 388 F.3d 1079 (7th Cir. 2004) (reasonable suspicion for an investigative stop did not dissipate when the witness arrived at the detention and could not positively identify the suspect). Further, handcuffing and placing defendant in the back of a police car did not transform the stop into an arrest. *Stewart*, 388 F.3d 1079; see also *People v. Waddell*, 190 Ill. App. 3d 914 (1989) (the stop and handcuffing of a suspected drug trafficker did not transform the investigative stop into an arrest). Here, Hartzell testified that he handcuffed and placed defendant in Allen's police car for his safety while he finished investigating the Lincoln key. Hartzell's safety concerns were supported by the facts known to the police at that time. Therefore, Hartzell had reasonable suspicion to stop defendant, conduct a pat-down search, and further detain defendant until he finished investigating the car key.

¶ 37 III. Defendant's Right to Testify

¶ 38 Third, defendant contends that he was denied his right to a fair trial because the court did not inform defendant of his right to testify.

¶ 39 Defendant advocates that we adopt the minority rule, requiring courts to advise *pro se* defendants that they have a right to testify. We decline to adopt this position. In *People v. Guice*, 83 Ill. App. 3d 914 (1979), the First District dealt with a similar issue. There, the trial court failed to inform a defendant of his right not to testify. The First District held that failing to inform a *pro se* defendant of his right not to testify was harmless where "there is no possibility that the error affected the outcome of the trial." *Id.* at 918. Here, the trial court asked defendant when he left the courtroom during the State's opening statement if he wanted to return to testify.

Defendant did not respond, and the court later inquired during defendant's case if he was going to testify. Defendant replied in the negative. Therefore, we find that defendant was aware of his right to testify and declined to exercise it. The trial court did not have a duty to advise defendant of his right to testify.

¶ 40

IV. Lesser-included Offense

¶ 41 Fourth, defendant argues that his conviction and 15-year concurrent sentence for residential burglary should be vacated as a lesser-included offense of home invasion.

¶ 42 We initially note that in making their arguments, defendant and the State both refer to one-act, one-crime principles and the lesser-included offense rule. In *People v. Miller*, 238 Ill. 2d 161 (2010), our supreme court provided a two step analysis for one-act, one-crime cases. First, the court must determine whether a defendant's conduct involved multiple acts or a single act. "Multiple convictions are improper if they are based on precisely the same physical act." *Id.* at 165. Second, "if the conduct involved multiple acts, the court must determine whether any of the offenses are lesser-included offenses." *Id.* at 165.

¶ 43 Applying the first step, we conclude that home invasion and residential burglary involve multiple physical acts. The record shows that defendant made a single unauthorized entry into the victims' dwelling place. This unauthorized entry was charged in both the home invasion and residential burglary counts. However, the indictment showed that the home invasion offense contained an additional act of causing injury to Frank. Therefore, we find that defendant's conduct consisted of multiple acts.

¶ 44 Second, *Miller* directs us to apply the abstract elements approach to determine if defendant's multiple acts involved a lesser-included offense. *Miller*, 238 Ill. 2d 161. Statutorily,

a lesser-included offense is established by proof of lesser facts or mental state, or both, than the charged offense. 720 ILCS 5/2-9 (West 2006). Under the abstract elements approach, all of the elements of the first offense must be included within the second offense, and the first offense must contain no element that is not included in the second offense. *Miller*, 238 Ill. 2d 161. If these criteria are satisfied, the first offense is deemed the lesser-included offense.

¶ 45 In the present case, we conclude that all of the elements of residential burglary are not included within all of the elements of home invasion. Home invasion and residential burglary only share the act of entry. *People v. Price*, 2011 IL App (4th) 100311. Commission of home invasion requires a defendant (1) who is not a peace officer acting in the line of duty, (2) to knowingly and without authority enter the dwelling of another, (3) having reason to know one or more persons are present within that dwelling, and (4) intentionally cause injury to one of the persons. 720 ILCS 5/12-11(a)(2) (West 2006). Residential burglary requires that a defendant knowingly and without authority enter a dwelling place of the victim with the intent to commit a theft therein.¹ 720 ILCS 5/19-3(a) (West 2006). Thus, home invasion required defendant to intentionally cause injury to a resident, whereas residential burglary required defendant to intend to commit theft within the dwelling. Home invasion also required that defendant not be a peace officer, acting in the line of duty, and that defendant must have reason to know that one or more persons is within the dwelling. These elements are not included in residential burglary. As a result of the differing elements, residential burglary is not a lesser-included offense of home

¹We note that the State did not use the more general element of residential burglary that defendant enter the dwelling place of another "with the intent to commit therein a felony." 720 ILCS 5/19-3(a) (West 2006).

invasion.

¶ 46

V. Home Invasion Convictions

¶ 47 Finally, defendant argues that his conviction for home invasion, as charged in count II, should be reversed because the State failed to prove that Kay suffered physical injury. The State confesses error.

¶ 48 To be convicted of home invasion, as charged in count II, the State had to prove that defendant caused injury to Kay. See 720 ILCS 5/12-11(a)(2) (West 2006). The record does not include evidence that Kay suffered injury. Therefore, we reverse defendant's conviction for home invasion as charged in count II.

¶ 49

CONCLUSION

¶ 50 For the foregoing reasons, the judgment of the circuit court of Peoria County is affirmed in part and reversed in part.

¶ 51 Affirmed in part and reversed in part.

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Modified Upon Denial of Rehearing

¶ 52 PRESIDING JUSTICE SCHMIDT, specially concurring:

¶ 53 I concur, but write separately with respect to the issue regarding the motion to quash defendant's arrest.

¶ 54 There had been a number of vehicle burglaries and at least one home invasion in the area where Officer Hartzell was working surveillance. As set forth in Justice Carter's opinion, defendant's behavior and dress warranted a *Terry* stop. Notwithstanding the weather, defendant had on heavy clothes and was found with a six-inch kitchen knife, flashlight and gloves. Officer

Hartzell testified that defendant had walked from an area the officer knew to be gated and contained a vehicle parking lot for an apartment complex. It was not an area that someone simply attempting to walk through the neighborhood would be able to easily traverse. There is nothing unreasonable about a brief detention of defendant while Officer Hartzell walked to that parking lot to see if any vehicles had been tampered with. The knife, flashlight and gloves together, along with all the other suspicious circumstances, would give a reasonable police officer suspicion that at the very least, defendant might be involved in vehicle burglaries or attempted vehicle burglaries. At the time the officer went to check the parking lot, he was not going to investigate the Lincoln key. In fact, he testified that he found nothing suspicious about the key. It was only when he got to the parking lot, saw a Lincoln with the license plate bracket showing the same out-of-town dealer identified on the key fob, that the officer became suspicious the key might be evidence of some crime. As stated above, the key matched the Lincoln and a quick check showed the Lincoln to be stolen. At that point, the officer instructed the uniform car to place defendant under arrest and take him to the police station. This was not an unreasonable detention of defendant in either time or space.

¶ 55 In a petition for rehearing, defendant argues that the majority based its original holding upon the "Mistaken Belief That Riley Remained at the Scene While the Officer Conducted the Investigation Leading to Probable Cause, When in Reality He Had Already Been Hauled Away to the Station." Defendant goes on to argue that "[n]othing in either the plurality or the special concurrence acknowledges the seemingly clear testimony from Officer Hartzell that he had directed Officer Allen to haul Riley away to the station *before* he left to investigate the parking lot." (Emphasis in original.) Defendant's arguments are not supported by the record.

¶ 56 Quoting from the record at pages 280 through 281, Officer Hartzell testified as follows:

"Q. What did you do then?

A. After he was -- I finished my pat-down, Officer Allen showed up and I placed the individual in Mr. -- Officer Allen's car. At this point, he's being detained. He was not free to leave.

I went back to 618 High where I first saw him come up, and knowing the layout of the parking lot, it's got like a wrought iron -- eight-foot wrought iron fence. And to the best of my knowledge, there was no cuts through the fence for anybody to be able to walk through from the apartments.

As I came down the hillside to the parking lot, I see a Lincoln vehicle sitting in the parking lot, and the rear license plate bracket has the same dealership out of Moline as the key fob.

I checked with dispatch, ran the plate. After I slid the key in the door and the key fit the car, they came back and advised -- requested, are you out on this vehicle? Yes, I am. The car is already listed as stolen.

Q. Then after you found out Mr. Riley had been carrying the keys to a stolen Lincoln, what did you do then?

A. I advised Officer Allen just to take Mr. Riley down to the police station, put him in a room, and myself or

detectives will be down shortly to talk to him."

¶ 57 There is nothing equivocal about the officer's testimony. He detained the defendant in a squad car at the scene until he established probable cause and at that point, he instructed the uniformed officer to take defendant to the police station and put him in a room so that they could question him.

¶ 58 At page 11 of the petition for rehearing, defendant argues that "[t]his Court was led astray by the State's improper and inaccurate recounting of the facts in its brief." Defendant now argues in a petition for rehearing that, in light of Supreme Court Rule 341(I), the State's failure to correct defendant's statement of facts in the State's own statement of facts, as opposed to in the argument section, renders the defendant's original and inaccurate statement of facts the "real" facts. I don't think so. The record is what it is. We have reviewed the record. The petition for rehearing is without merit.

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¶ 59 JUSTICE McDADE, dissenting:

¶ 60 The majority has found, *inter alia*, that the admonitions given to defendant, Derail T. Riley, substantially complied with the requirements of Supreme Court Rule 401(a) (effective July 1, 1984) and, therefore, his waiver of his right to counsel was made knowingly and intelligently. For the reasons that follow, I respectfully dissent from that holding.

¶ 61 Briefly stated, there are four problems with the majority's holding: (1) there *was* no express waiver by the defendant, (2) there were no admonitions given to defendant contemporaneously with what the majority has seemingly construed as a waiver by bad conduct,

(3) in the absence of a demonstrably voluntary, knowing and intelligent waiver – which we clearly have here – strict compliance is necessary; "substantial compliance" is not an available option, and (4) the closest recitation of the relatively accurate and relatively complete admonitions necessary to demonstrate "substantial compliance" was given more than two years prior to trial and there is no case law that authorizes a finding that they were contemporaneous.

¶ 62 Moreover, defendant's repeated requests for regular and stand-by counsel and his utilization of counsel continued, albeit with frequent complaints about the diligence and zealotness of his appointed counsel, right up until the trial court discharged his counsel two weeks before trial. Indeed, on the day of trial, the defendant made a final effort to secure professional representation at his trial. Even in the face of this effort, no 401(a) admonitions were given – a situation which apparently raises no concern for the majority.

¶ 63 Rule 401(a) prohibits the trial court from accepting a waiver of counsel from a defendant charged with an offense punishable by imprisonment unless the court has assured itself that the defendant understands: (1) the nature of the charge(s); (2) the minimum and maximum sentence prescribed by law, including 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. It is through application of this rule to the facts of the case that the determination of whether there has been a knowing and intelligent waiver is made. *People v. Campbell*, 224 Ill. 2d 80, 87 (2006). The supreme court has held that compliance with rule 401(a) is required for an effective waiver of counsel. *People v. Haynes*, 174 Ill. 2d 204, 235 (1996); *People v. Baker*, 94 Ill. 2d 129, 137 (1983).

¶ 64 Not only must the admonitions be given, they must be given contemporaneously with the

waiver of the right so that the defendant can consider the ramifications of his/her decision. *People v. Jiles*, 364 Ill. App. 3d 320, 328-30 (2006); *People v. Stoops*, 3313 Ill. App. 3d 269, 275 (2000); *People v. Langley*, 226 Ill. App. 3d 742, 750 (1992). Only if it can be determined from the record that the waiver was actually made voluntarily, knowingly and intelligently will "substantial" compliance suffice. *People v. Coleman*, 129 Ill. 2d 321, 333 (1989); *People v. Johnson*, 119 Ill. 2d 119, 132 (1987). Applying this law to the facts of this case, I am unable to find either a voluntary, knowing, intelligent waiver by defendant of his right to counsel or legally sufficient compliance by the trial court with the supreme court rule.

¶ 65 In this appeal, the defendant has alleged three deficiencies in the court's attempted compliance with Rule 401(a). First, he argues that he was never fully and accurately apprised by the court of the charges against him; second, he asserts that any actual waiver of counsel was made not by him but by the trial court; and, third, he claims that no admonitions were given him at, or even near, the time he is deemed to have waived. I believe each of these contentions is borne out by the record and is thus valid.

¶ 66 Timeliness and Adequacy of Admonitions:

¶ 67 It is undisputed that no admonitions were given to the defendant contemporaneously with the alleged waiver of counsel either on the day of the final pretrial or at the time of trial. As the majority has noted:

"In April 2009, the court admonished defendant in substantial compliance with Rule 401. The court informed defendant that he was facing a home invasion charge which carried

a sentence of up to 30 years in prison or a 60 year extended-term sentence. Although the court did not inform defendant of the lesser charges, it was only required to substantially comply with Rule 401. (Citation) We find that the absence of the lesser crimes did not impede defendant from making a knowing and intelligent waiver (Citation) Moreover, the record reflects that defendant was informed of all of the charges in October 2007 and received copies of the indictment." *Supra*, ¶28.

The majority's observation makes it clear that in April 2009 the trial court did not inform defendant of four of the five crimes with which he was charged and of which he was ultimately convicted. Nor did it advise him about concurrent and consecutive sentencing or of any potential impact of those "lesser" crimes on his sentencing. In fact, it does not appear that defendant was advised accurately, at *any* time, of all of the charges against him and all of the possible sentencing permutations.

¶ 68 Moreover, it should be noted that October 2007 was *two years* prior to the alleged waiver. Even the April 2009 recitation of the admonitions on which the majority relies occurred six months prior to the alleged waiver and trial. And even at his October 29, 2009, trial, the defendant sought a continuance so his family could secure private counsel. The trial court ascertained from defendant's mother that the family did not have the money to hire counsel, pointed out that the defendant had run through multiple attorneys, and concluded that he was simply trying to delay the trial.

¶ 69 There were no timely admonitions given to the defendant by the trial court, and I cannot

agree with the majority's contrary finding that there were.

¶70 Waiver of Right to Counsel:

¶ 71 On October 16, 2009, approximately two weeks prior to the trial, the defendant appeared in court with his fifth attorney, Sean Donahue, and complained of his counsel's continued refusal to challenge the propriety of his arrest and the admissibility of his statements. At that point the trial court stated:

"Nobody can protect your rights for you, Mr. Riley, because you won't let anybody, okay, so I think I'm not going to put Mr. Donahue through this any longer, you know everything, Mr. Riley, you do it your way. The matter remains on for trial, Mr. Donahue is thanked by this Court for undertaking this attempt to try to at least make you understand all of your options. Now after five attorneys have told you the same thing, I think that clearly there is no prejudice here to you about being able to say that you don't understand what's going on, so we'll see you on October 29th and be prepared for trial."

Thus, despite the defendant's denial of any intent to delay, the trial court required him to go forward without admonitions and without counsel, thereby arrogating to himself the defendant's right to decide whether or not to intentionally and knowingly waive that right, and to do so without following the rule promulgated for the defendant's protection. In addition, it should also be noted that on multiple earlier occasions, Riley had made and the trial court had denied requests for the assistance of stand-by counsel. The trial court, having discharged the

defendant's appointed counsel two weeks before trial, once again did not provide stand-by counsel even though both the judge and the defendant had repeatedly commented on defendant's demonstrated inability to adequately represent himself.

¶ 72 It is certainly possible to negatively construe the defendant's continuing dissatisfaction with his appointed attorneys and to become impatient with his vacillations regarding being represented and proceeding *pro se*. Indeed both the trial court and the majority have concluded that the defendant's complaints about his appointed attorneys were solely for purposes of delay, although his wavering appears to have been more from frustration with his counsel than from any real desire to represent himself. It is, however, worth noting that Riley was voicing complaints that we would view as a legitimate basis for disciplinary inquiry if made by a party against counsel he had hired and paid: failure to meet with the client²; failure to consult with the client about the issues in the case; possible conflicts of interest³; failure to even recognize the possibility that the client might have legitimate issues to raise and file motions reflecting that possibility. Riley asserted that he had proof of perjury by some of the officers involved in his arrest, but his attorney rejected filing a motion to quash because of "what I believe is a small likelihood of success, but *that's purely based on my review of the discovery.*" That comment does not suggest to me that he had considered whatever information his client had to offer.

¶ 73 I fully recognize the reality of the time constraints under which appointed counsel labor

²In speaking with defendant about his fifth attorney, the trial court implicitly agreed with this complaint, saying, "Mr. Donahue has spent more time with you than any of the others all put together, I believe."

³Defendant alleged that one of his appointed attorneys had claimed to be "good friends" with the *victims*, but counsel later acknowledged only that he knew them from working with community organizations. That attorney ultimately withdrew.

and acknowledge the fact that we make huge demands on them. I also want to emphasize that I am not concluding that the performance of Riley's attorneys was substandard. I do, however, find it significant that defendant's appellate counsel has presented credible arguments to this court advancing the merits of the issues defendant was urging – unsuccessfully – his appointed trial attorneys to raise. It is true that defendant did not prevail here, but the majority appears to have taken those arguments seriously and did not summarily dismiss them as frivolous. There seems to be some confusion about the facts of defendant's arrest that make his contention that it was effected without probable cause tenable, and a possible basis for reversal if defendant's right to a new trial on the 401(a) issues were not so clear. In this case, however, all that the defendant's persistent efforts to secure what he believed to be a full and fair presentation of his defenses against a criminal charge that ultimately cost him 28 years of liberty earned him was a complete failure of compliance with rule 401(a), the waiver *by the judge* of his constitutional right to counsel, and this court's pardoning of what appear to be undeniable errors by the trial court.

¶ 74 The potential impact of this result on the judicial system is particularly disturbing for at least three reasons: first, because the Code of Professional Responsibility requires the same commitment and effort of all attorneys without reference to by whom or how much they are paid; second, if we recognize and approve the application of different standards based on ability to pay, we expose the provision of counsel to indigent criminal defendants as posturing and a sham; and third, when we allow widely-divergent levels of professional performance, we undermine our adversarial method of seeking truth and, ultimately compromise the fundamental concept of our criminal justice system.

¶ 75 Because I find that the defendant, Derail Riley, did not make a voluntary, knowing and intelligent waiver of his constitutional right to counsel and that the trial court failed to comply with the clear and unambiguous requirements of rule 401(a), I would reverse the defendant's conviction and remand this matter for a new trial on that basis alone. I, therefore, do not reach the other issues raised by the defendant in this appeal.