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2012 IL App (3d) 100494-U

Order filed February 29, 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 9th Judicial Circuit,
Plaintiff-Appellee,) Henderson County, Illinois,
)
) Appeal No. 3-10-0494
v.) Circuit Nos. 09-CF-15, 09-TR-0273,
) 09-TR-0274 and 09-TR-0275
)
AUSTIN T. ADOLPH,) Honorable
) David F. Stoverink,
Defendant-Appellant.) Judge, Presiding.

PRESIDING JUSTICE SCHMIDT delivered the judgment of the court.
Justices Carter and Holdridge concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court substantially complied with Supreme Court Rule 401(a) in admonishing the defendant as to his right to counsel, resulting in a valid waiver of counsel from the defendant. The defendant's conviction and sentence for unlawful possession of cannabis with intent to deliver is vacated as a lesser included offense of his cannabis trafficking conviction.
- ¶ 2 Following a bench trial at which the defendant, Austin T. Adolph, represented himself, the defendant was found guilty of unlawful cannabis trafficking (720 ILCS 550/5.1(a) (West 2008)), unlawful possession of cannabis with intent to deliver (720 ILCS 550/5(g) (West 2008)),

and unlawful possession of cannabis (720 ILCS 550/4(g) (West 2008)). The defendant's unlawful possession of cannabis conviction merged into his conviction for unlawful possession of cannabis with intent to deliver. The trial court sentenced the defendant to concurrent terms of 12 years of imprisonment for unlawful cannabis trafficking and 6 years of imprisonment for unlawful possession of cannabis with intent to deliver. The defendant was also found guilty of and assessed fines for the following traffic offenses: illegal transportation of alcohol (625 ILCS 5/11-502 (West 2008)), driving while license suspended (625 ILCS 5/6-303 (West 2008)), and speeding (625 ILCS 5/11-601(b) (West 2008)). The defendant filed a *pro se* motion to vacate, which the trial court denied. The defendant appealed.

¶ 3 On appeal, the defendant argues that: (1) his convictions should be reversed and this case remanded for a new trial because prior to proceeding *pro se*, he was not properly admonished pursuant to Illinois Supreme Court Rule 401(a) (eff. July 1, 1984); and (2) his conviction and sentence for unlawful possession of cannabis with intent to deliver should be vacated as a lesser included offense of his cannabis trafficking conviction. We affirm in part and vacate in part.

¶ 4 **FACTS**

¶ 5 On April 22, 2009, a preliminary hearing took place, during which the defendant was represented by an attorney. An Illinois State trooper testified that police discovered drugs in the defendant's vehicle after a traffic stop, which led to the charges in this case. At the conclusion of the preliminary hearing, the trial court found probable cause that a felony had been committed by the defendant. The case immediately proceeded to an arraignment hearing, during which the defendant's attorney waived a reading of the charges.

¶ 6 On September 21, 2009, a hearing took place on defense counsel's motion to withdraw

from representing the defendant. The defendant's attorney, David Reid Clark, indicated that the defendant wished to raise a defense that the attorney was unable to raise "as an Officer of the Court" because it was "not well taken in law." The defendant indicated that he wished to represent himself. The trial court found that the defendant was competent to represent himself. The trial court allowed defendant's attorney to withdraw.

¶ 7 On October 14, 2009, at a hearing on the State's motion *in limine*, the trial court asked the defendant if he intended to retain alternate counsel. The defendant stated, "No." The trial court asked the defendant if he intended to represent himself. The defendant stated, "I represent nothing or no one." The trial court indicated that either the defendant represented himself or it would have to have somebody else represent him. The defendant stated, "Then I speak for myself then." The trial court indicated, "You are representing yourself then."

¶ 8 The trial court also indicated that the pending motion *in limine* was a "fairly technical motion because [the defendant was] not represented and *** this [was] a felony case [that had] fairly severe consequences." The court stated:

"It looks like it's a Class X felony. Under those circumstances, you would be well advised to have an attorney. You were given 21 days after [your attorney] withdrew to either indicate whether you were representing yourself or whether you were going to have somebody else represent you. Frankly, I don't understand why someone would want to proceed without an attorney on a case where they could end up with a mandatory prison sentence of at least six years without legal counsel, but that's your decision at this point, not mine. If you don't believe you're able to afford to hire an attorney, as your rights have been explained to you, you have the right to ask for a public defender as well."

¶ 9 On October 21, 2009, the defendant waived his right to a jury trial. The State withdrew its motion *in limine*, which had been filed for the purpose of keeping "certain arguments out of the purview of the jury[.]"

¶ 10 On February 3, 2010, the case proceeded to a bench trial. The defendant indicated that he was not ready to proceed because he did not understand what kind of court or jurisdiction applied to his case, nor had he consented to the criminal proceedings against him. The following colloquy took place:

"THE COURT: Your consent *** is not required.

* * *

THE COURT: You have been advised previously of what you're charged with. The Court has jurisdiction over you and over the subject matter.

THE COURT: The subject matter *** includes unlawful cannabis trafficking which carries a maximum incarceration term of 60 years and a minimum incarceration term, if you're convicted, of 12 years. You're also charged with unlawful possession with intent to deliver cannabis which is a Class X felony with a minimum incarceration term of six years and a maximum term of 30 years, and you're charged with unlawful possession of cannabis, a Class 1 felony, which carries a 4- to 15-year jail term. That is a probationable offense, the first two are not probationable offenses, and you're charged with three traffic charges as well. Is there anything specific that you don't understand about what you're charged with?

* * *

THE COURT: *** Now, you have previously had an attorney represent you through part of this proceeding and are no longer represented by an attorney and have indicated that you wish to represent yourself in this case. Is that still the case?

THE DEFENDANT: Well, I shouldn't be representing myself at all because I can't represent an artificial entity.

THE COURT: My question is whether you wish to represent yourself?

THE DEFENDANT: Yeah. I speak for myself, yes."

¶ 11 The State declined its opportunity to make an opening statement. The trial court asked the defendant if he wished to make an opening statement. The defendant indicated that he did not fully understand what was going on. The trial court asked the defendant if he wanted an attorney to represent him. The defendant said, "No, I do not because they have a conflict of interest because they have sworn an oath to support my adversary, not me."

¶ 12 Following the bench trial, the court found that the evidence against the defendant was overwhelming and the defendant had been proven guilty beyond a reasonable doubt of unlawful cannabis trafficking, unlawful possession of cannabis with intent to deliver, and unlawful possession of cannabis. The trial court found that the unlawful possession of cannabis conviction was a lesser included offense of unlawful possession of cannabis with intent to deliver, and therefore it did not enter a conviction for unlawful possession of cannabis. The trial court also found the defendant guilty of the traffic offenses of illegal transportation of alcohol, driving while license suspended, and speeding.

¶ 13 On March 31, 2010, a sentencing hearing took place. The defendant indicated that he was not ready to proceed because he "d[id not] understand what's going on" and he did not

consent to or acknowledge the proceedings. The defendant indicated that he needed to be informed as to "what [was] going on." The trial judge responded:

"You have previously been advised that you have a right to an attorney. Up to this point you have indicated consistently to this Court that you do not want an attorney to represent you. What is your position at this time with regard to whether you want an attorney to represent you?"

¶ 14 The defendant responded that he did not want an attorney and he could not be represented because he was *sui juris*. The defendant indicated that he was not requesting a continuance of the sentencing hearing and that he "need[ed] to be in a higher court." The matter proceeded with sentencing. The defendant was sentenced to concurrent terms of 12 years of imprisonment for unlawful cannabis trafficking, 6 years of imprisonment for unlawful possession of cannabis with intent to deliver, and fines on the traffic offenses. The defendant filed a *pro se* motion to vacate, which the trial court denied. The defendant appealed.

¶ 15

ANALYSIS

¶ 16

I. Rule 401(a) Admonishments

¶ 17 On appeal, the defendant argues that the trial court failed to substantially comply with Illinois Supreme Court Rule 401(a) (eff. July 1, 1984) in admonishing him as to the nature of the offenses, the applicable minimum and maximum sentences, and his right to counsel when he waived his right to counsel. The interpretation of a supreme court rule is a question of law that we review *de novo*. *People v. Campbell*, 224 Ill. 2d 80 (2006).

¶ 18 Supreme Court Rule 401(a) provides:

"(a) Waiver of Counsel. 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).

¶ 19 The purpose of the Rule 401(a) is to ensure that a waiver of counsel is knowingly and intelligently made. *Campbell*, 224 Ill. 2d 80. Substantial compliance with Rule 401(a) will be sufficient to effectuate a valid waiver if the record indicates that the waiver was made knowingly and voluntarily, and the admonishments that the defendant received did not prejudice his rights. *People v. Coleman*, 129 Ill. 2d 321 (1989); *People v. Haynes*, 174 Ill. 2d 204 (1996). A reviewing court will look to the entire record as a whole in determining whether the defendant was properly admonished under Rule 401(a) and whether a particular waiver of counsel was knowing and voluntary. *People v. Johnson*, 119 Ill. 2d 119 (1987); *People v. Ware*, 407 Ill. App. 3d 315 (2011).

¶ 20 The State initially argues that the defendant waived the issue of whether the trial court erred in complying with Supreme Court Rule 401(a) and accepting the defendant's waiver of his right to counsel because he failed to raise the issue in the lower court. The defendant contends that we should review the issue under the plain error doctrine. Plain errors or defects affecting

substantial rights may be noticed on appeal although they were not brought to the attention of the trial court. Ill. S. Ct. R. 615(a) (eff. Aug. 27, 1999). Plain error exists where either: (1) an error was made in a case where the evidence was closely balanced regardless of the seriousness of the error; or (2) the error was so serious that it affected fairness of the trial and challenged the integrity of judicial process. *People v. Herron*, 215 Ill. 2d 167 (2005). Under the second prong, prejudice is presumed because of the importance of a substantial right involved regardless of the strength of the evidence against the defendant. *Herron*, 215 Ill. 2d 167.

¶ 21 Because both parties agree that the evidence in this case was not closely balanced, we turn to the second prong of the plain error test. The right to counsel is fundamental, and a failure to issue proper Rule 401 admonishments is plain error. *People v. Black*, 2011 IL App (5th) 080089; see also *People v. Vernon*, 396 Ill. App. 3d 145 (2009); *People v. Jiles*, 364 Ill. App. 3d 320 (2006); *People v. Stoops*, 313 Ill. App. 3d 269 (2000). Therefore, we turn to the merits of the defendant's argument under a plain error review to determine whether the defendant's waiver of counsel was valid.

¶ 22 In this case, the defendant was initially represented by counsel at the preliminary hearing, where a formal reading of the charges was waived. On September 21, 2009, the defendant's attorney was allowed to withdraw after the trial court found the defendant was competent to represent himself. At the next court hearing, the defendant confirmed that he wanted to proceed *pro se*. At that time, the trial court warned the defendant against proceeding *pro se*, by stating that the defendant would be "well advised" to have an attorney because he faced a Class X felony charge with a mandatory prison sentence of at least six years of imprisonment. The trial court told the defendant that he had a right to appointed counsel if he could not afford an attorney. The

defendant again insisted on proceeding *pro se*. At the pretrial hearing, the defendant was advised of the charges against him and the minimum and maximum sentences. The trial court again asked the defendant if he wished to be represented by an attorney, and the defendant again declined representation. At sentencing, the defendant was advised of his right to counsel, and he again indicated that he wished to proceed *pro se*.

¶ 23 Therefore, in looking at the record as a whole, we find that the trial court substantially complied with Rule 401(a) in that the defendant had been informed of his right to counsel, the charges he faced, and the applicable minimum and maximum sentence prior to the time he waived counsel. The trial court repeatedly asked the defendant if he wanted counsel, and defendant repeatedly and consistently insisted on representing himself. One cannot read this record without coming to the conclusion that nothing the trial court could have said or done would have prevented defendant from waiving counsel. Also, the record does not show any prejudice to the defendant. The evidence against the defendant was overwhelming; he was given the minimum sentence available; there is no suggestion in the record that the outcome of the defendant's trial or sentencing hearing would have differed if he were represented by counsel. Under the circumstances of this case, we find the trial court obtained a valid waiver of the defendant's right to counsel; a new trial is not warranted.

¶ 24

II. Lesser Included Offense

¶ 25 The defendant also argues that his conviction for unlawful possession with intent to deliver cannabis must be vacated because it is a lesser included offense of cannabis trafficking.

¶ 26 The defendant acknowledges that he failed to raise this issue below, but requests that we review the issue under plain error. The potential for a surplus conviction and sentence affects the

fundamental fairness of the proceeding and the integrity of the judicial process, satisfying the second prong of the plain error rule. *People v. Harvey*, 211 Ill. 2d 368 (2004); *People v. Schmidt*, 405 Ill. App. 3d 474 (2010). Therefore, we will review the defendant's argument for plain error.

¶ 27 Only one conviction may stand where one offense is a lesser included offense of the other. *Schmidt*, 405 Ill. App. 3d 474. In determining whether a conviction is a lesser included offense of another conviction, a comparison is made of the statutory elements of the two offenses. *People v. Miller*, 238 Ill. 2d 161 (2010). If all the elements of one offense are included within the second offense, the first offense is a lesser included offense. *Id.* In other words, one offense is included within the other if it would be impossible to commit the greater offense without committing the lesser offense. *Id.*

¶ 28 We agree, as does the State, that a conviction for possession of cannabis with intent to deliver is a lesser included offense of cannabis trafficking. See *People v. Lynch*, 241 Ill. App. 3d 986 (1993) (finding that possession of cannabis with intent to deliver is a lesser included offense of cannabis trafficking in that cannabis trafficking includes all the elements of possession of cannabis with intent to deliver with the additional element of bringing 2,500 grams or more into the state); see also 720 ILCS 550/5.1(a) (West 2008) (providing the elements of cannabis trafficking), and 720 ILCS 550/5(g) (West 2008) (providing the elements of possession of cannabis with intent to deliver). Therefore, the defendant's conviction for possession of cannabis with intent to deliver and the associated six-year sentence are vacated.

¶ 29

CONCLUSION

¶ 30 For the foregoing reasons, the judgment of the circuit court of Henderson County is affirmed as to the defendant's conviction and sentence for cannabis trafficking and vacated as to

the defendant's conviction and sentence for possession of cannabis with intent to deliver.

¶ 31 Affirmed in part; vacated in part.