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2012 IL App (3d) 110582-U

Order filed September 26, 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 12th Judicial Circuit,
Plaintiff-Appellee,) Will County, Illinois,
)
v.) Appeal No. 3-11-0582
) Circuit No. 09-CF-581
GREGORY WOODS,)
) Honorable
Defendant-Appellant.) Sarah F. Jones,
) Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justice McDade concurred in the judgment.
Justice Carter dissented.

ORDER

- ¶ 1 *Held:* Defendant was wrongfully denied the opportunity to withdraw his plea of guilty under Supreme Court Rule 402(d) after the trial court withdrew its conditional concurrence in his guilty plea agreement.
- ¶ 2 On October 2, 2009, defendant, Gregory Woods, appeared *pro se* at his sentencing hearing and was sentenced to 19 years' incarceration for unlawful possession of a controlled substance. 720 ILCS 570/402(a)(2)(B) (West 2008). He now challenges his conviction under Illinois Supreme

Court Rule 402(d) (eff. July 1, 1997) and his sentence under Illinois Supreme Court Rule 401(a) (eff. July 1, 1984).

¶ 3

FACTS

¶ 4 On March 11, 2009, defendant was charged with unlawful possession of a controlled substance with intent to deliver, and a public defender was appointed to represent him. Shortly thereafter, defendant secured private counsel. On June 11, 2009, the State filed a two-count indictment against defendant alleging: (1) unlawful possession of a controlled substance with intent to deliver (720 ILCS 570/401(a)(2)(B) (West 2008)); and (2) unlawful possession of a controlled substance (720 ILCS 570/402(a)(2)(B) (West 2008)).

¶ 5 On June 16, 2009, the parties reached a plea agreement that contained the following terms: (1) defendant would plead guilty to unlawful possession of a controlled substance; (2) the State would *nolle prosequi* the charge of unlawful possession of a controlled substance with intent to deliver; and (3) defendant would receive a sentence of 10 years' incarceration. Prior to accepting defendant's plea, the trial court admonished defendant that based upon defendant's criminal history, the sentencing range for unlawful possession of a controlled substance was 6 to 60 years. The trial court also admonished defendant of his right to trial and ensured that defendant's guilty plea was knowing and voluntary.

¶ 6 After the trial court accepted defendant's guilty plea, but prior to sentencing, defendant requested that the court grant him a three-week furlough. The following exchange occurred:

"THE COURT: Okay, Mr. Woods, there's a lot of danger in that.

THE DEFENDANT: Not for me. I'm not going to get in any trouble.

THE COURT: Somebody said that one time they had a deal, I think, for four years

on a residential burglary. They wanted a furlough, they got a furlough, they got arrested outside a liquor store for disorderly conduct, and I gave him 15 years, okay, so they committed a class C misdemeanor but because I told them there was going to be a blind plea, if you get a furlough, it's going to be a blind plea. I am not going to accept anything right now. We will continue it for sentencing. If anything went wrong, if you got picked up on another charge, if you didn't show back up, it ends up to be a blind plea, and we would go to a sentencing hearing. All right. You understand?

THE DEFENDANT: All right.

THE COURT: But I am telling you somebody committed a class C misdemeanor, went from 4 to 15.

THE DEFENDANT: I understand you perfectly crystal.

THE COURT: You object?

[THE STATE]: I am not taking a position.

THE COURT: When he's been out, Mr. State's attorney, he's always returned.

THE [DEFENDANT]: I am. I'm not going to get in no trouble.

THE COURT: You understand?

THE DEFENDANT: I understand crystal clear.

* * *

THE COURT: And let's put it this way. Right now with this sentence and the good time, you will get out. If anything goes wrong, you will be real old.

THE DEFENDANT: I told you crystal clear.

THE COURT: Good enough. Okay."

¶ 7 While on furlough, defendant was charged with another count of unlawful possession of a controlled substance. The court revoked defendant's bond.

¶ 8 On September 11, 2009, while still represented by private counsel, defendant filed a *pro se* motion to withdraw his guilty plea. During a hearing on that motion, defense counsel stated that he could not adopt defendant's motion because it lacked merit, and counsel asked for leave to withdraw from the case. The trial court granted counsel's motion to withdraw and appointed a public defender.

¶ 9 On October 1, 2009, defendant filed a *pro se* amended motion to withdraw his guilty plea, and a hearing was held on that motion. The public defender stated that he could not adopt the amended motion because it had no legal basis. The trial court explained to defendant that the decision to file or withdraw motions belonged to counsel, not defendant. Thereafter, defendant was admonished that the motion could not be filed so long as he was represented by the public defender.

The following exchange occurred concerning the motion:

"THE COURT: Mr. Woods, you're indicating that you no longer want the Public Defender to represent you?

DEFENDANT WOODS: I'm indicating I want my motion filed.

THE COURT: Okay. He's in charge of the file as counsel.

If you want him as counsel then it's his decision. If he wants to file it and then have a hearing on it that's his prerogative.

If he says he cannot and wants to withdraw the motion then that's what we will do.

He has certain decisions he makes as counsel. Do you want the Public Defender to still represent you?

There's not going to be two lawyers here; okay. We don't have two lawyers here. It's

not you, what you want to do, and then him what he wants to do.

DEFENDANT WOODS: Well then I want to do it then.

THE COURT: You want to do it pro se?

DEFENDANT WOODS: I guess that's what I have to do. You're making me do it.
I guess that's what I have to do.

THE COURT: All right. Public Defender is allowed to withdraw."

¶ 10 The trial court then denied defendant's motion to withdraw his guilty plea.

¶ 11 On October 2, 2009, defendant appeared *pro se* at his sentencing hearing. The State presented testimony to establish that defendant had engaged in behavior sufficient to satisfy the most recent charge of unlawful possession of a controlled substance. The trial court then sentenced defendant to 19 years' incarceration.

¶ 12 Defendant appealed. On appeal, this court granted defendant's motion to remand for additional proceedings under Illinois Supreme Court Rules 605(b) (eff. October 1, 2001) and 604(d) (eff. July 1, 2006). *People v. Woods*, No. 3-09-0828 (2010) (unpublished order under Supreme Court Rule 23). The trial court then readmonished defendant of his right to appeal and appointed a new public defender. Defense counsel filed an amended motion to withdraw defendant's guilty plea and a motion to reconsider sentence, both of which the trial court denied. Defendant appeals.

¶ 13 ANALYSIS

¶ 14 I. Illinois Supreme Court Rule 402(d)

¶ 15 Defendant claims that under Illinois Supreme Court Rule 402(d) (eff. July 1, 1997), he was entitled to, and improperly denied, the opportunity to withdraw his guilty plea prior to being sentenced. We agree.

¶ 16 Rule 402(d) mandates the procedure that a trial court must follow when presented with a plea agreement. After the defendant has been informed by counsel of the terms of the plea agreement, but before the judge has accepted the plea, the court must "(1) state its (a) concurrence with the plea agreement or (b) conditional concurrence with the plea agreement or (2) admonish the defendant that it is not bound by the terms of the plea agreement and that if the defendant persists in [the] plea, the disposition may be different from that contemplated by the plea agreement." *People v. Collier*, 376 Ill. App. 3d 1107, 1111 (2007); Ill. S. Ct. R. 402(d)(2), (d)(3) (eff. July 1, 2012).

¶ 17 If a court conditionally concurs by reserving sentencing options, it must "specifically state on the record those options that it intends to reserve and ascertain on the record that the defendant understands the limits of the concurrence, and every sentencing option thereby reserved, *prior* to the entry of the guilty plea." (Emphasis in original). *Collier*, 376 Ill. App. 3d at 1111-12. If the court later withdraws its conditional concurrence—*e.g.*, because the defendant has failed to meet the condition—the court must "advise the defendant of [the withdrawal] and allow the defendant the opportunity to withdraw [his] guilty plea." *Id.* at 1112; Ill. S. Ct. R. 402(d)(2) (eff. July 1, 2012). If the defendant withdraws his guilty plea, the trial judge "shall recuse himself," and the case is transferred to a new judge. Ill. S. Ct. R. 402(d)(2) (eff. July 1, 2012).

¶ 18 A conditional concurrence occurs when the trial court "inform[s] the parties what actions of the defendant [the court] requires before [the court] will abide by the agreement." *People v. Bouie*, 327 Ill. App. 3d 243, 246 (2002). There is a presumption that these conditions do not become integrated into the plea agreement because "[t]he trial court is not a party to the plea agreement; its only role is to indicate, at the time the agreement is stated, whether it will concur or conditionally concur ***." *Collier*, 376 Ill. App. 3d at 1113.

¶ 19 In certain situations, it is possible for the conditions instituted by the trial court to become incorporated as terms of the plea agreement. If the trial court completely explains the conditional concurrence prior to the entry of the defendant's guilty plea, the conditions may become incorporated as terms of the plea agreement. See *People v. Hayes*, 159 Ill. App. 3d 1048 (1987). But, if the trial court does not explain the conditional concurrence until after the defendant has entered his plea, or the trial court fails to adequately explain the sentencing options left open by the conditional concurrence, the conditions do not become part of the plea, and the defendant is entitled to later withdraw his plea under Rule 402(d)(2). See *Collier*, 376 Ill. App. 3d 1107; *Bouie*, 327 Ill. App. 3d 243.

¶ 20 In the present case, the trial court was required, under Rule 402(d)(2), to allow defendant to withdraw his plea prior to sentencing. The trial court entered its conditional concurrence after defendant had entered his guilty plea. Therefore, the condition did not become part of defendant's plea agreement. Consequently, when defendant was charged anew while on furlough, the court's options for sentencing were: (1) sentence defendant within the range contemplated by the plea agreement; or (2) allow defendant to affirm or withdraw his guilty plea. See *Collier*, 376 Ill. App. 3d 1107.

¶ 21 In addition, the trial court did not "specifically state" the sentencing range it was leaving open under its conditional concurrence. *Id.* at 1111. The court informed defendant that in a previous case it had increased a sentence from 4 to 15 years when a defendant failed to comply with a condition imposed by the court. The court also informed defendant that if he failed to comply, he would "be real old." But nowhere in the record did the trial court state what range of sentencing options the court was leaving open.

¶ 22 In sum, the court did not specifically state the sentencing range and did not impose the condition until after defendant had entered his plea of guilty; therefore, the condition formed the basis of the court's conditional concurrence and did not become a part of defendant's plea agreement. When defendant violated the condition by picking up a new charge, Rule 402(d) required the court to either: (1) sentence defendant to 10 years in compliance with the plea agreement; or (2) withdraw its conditional concurrence and allow defendant the option to withdraw his guilty plea. The trial court improperly sentenced defendant to 19 years' imprisonment. Defendant is entitled to have his conviction vacated and his case remanded to allow an opportunity for defendant to withdraw his guilty plea.

¶ 23 II. Illinois Supreme Court Rule 401(a)

¶ 24 Defendant challenges the outcome of his sentencing hearing because he proceeded *pro se* without first receiving the necessary admonishments under Illinois Supreme Court Rule 401(a) (eff. July 1, 1984). Our resolution of the previous issue has rendered this argument moot, and therefore we shall not address it. We would simply note that should a similar situation arise on remand, the trial court should substantially comply with the admonishment requirements of Rule 401 before allowing defendant to proceed *pro se*. *People v. Haynes*, 174 Ill. 2d 204 (1996).

¶ 25 CONCLUSION

¶ 26 For the foregoing reasons, defendant's conviction is vacated, and the case is remanded for a new hearing in which defendant shall have the opportunity to withdraw or affirm his plea of guilty.

¶ 27 Vacated and remanded.

¶ 28 JUSTICE CARTER, dissenting.

¶ 29 I respectfully dissent from the majority's order in the present case. I would find that the

defendant was not entitled to withdraw his plea of guilty under Rule 402(d) after he failed to comply with the terms of the modified, negotiated plea agreement. I would also find that the trial court substantially complied with Rule 401(a) when it granted the defendant's request to proceed *pro se*. Based upon those two findings, I would affirm the judgment of the trial court.

¶ 30 Under Rule 402(d), when the trial court withdraws its conditional concurrence with a plea agreement, it must afford the defendant an opportunity to affirm or withdraw his guilty plea. Ill. S. Ct. R. 402(d)(2) (eff. July 1, 1997). In the present case, however, the trial court did not enter a conditional concurrence. Rather, the parties agreed to amend the original plea agreement to reflect the new terms that the defendant requested—that he be granted a three-week furlough in exchange for his sentencing agreement becoming a blind plea if he was charged with a new crime while on furlough. See *Hayes*, 159 Ill. App. 3d at 1053-54 (the appellate court held that under the terms of the final plea bargain of which defendant was fully aware, the trial court was allowed to sentence the defendant to a greater term of imprisonment if the defendant failed to appear after the mittimus had been stayed). Since the trial court did not enter a conditional concurrence in this case, Rule 402(d) is inapplicable.

¶ 31 As to the second issue raised by defendant on appeal, I would find that the trial court substantially complied with Rule 401(a) when it allowed the defendant to proceed *pro se*. Rule 401(a) requires the trial court, prior to accepting a defendant's waiver of counsel, to admonish a defendant as to: (1) the nature of the charge; (2) the minimum and maximum sentence; and (3) the defendant's right to counsel. Ill. S. Ct. R. 401(a) (eff. July 1, 1984). Only substantial compliance with Rule 401(a) is required. See *Haynes*, 174 Ill. 2d at 236. A competent waiver of counsel at one stage of a proceeding continues to function as an effective waiver during later stages. *People v.*

Langley, 226 Ill. App. 3d 742, 749 (1992). In determining whether a knowing and voluntary waiver of the right to counsel has been made, a reviewing court may consider the defendant's prior background and experience with the legal system. See *People v. Jackson*, 59 Ill. App. 3d 1004, 1008-09 (1978).

¶ 32 In the present case, at the guilty plea hearing, the trial court admonished defendant of the nature of the charge and the minimum and maximum penalties and took the time to ensure defendant understood that if he was charged with a new crime during his furlough, he would be subjected to a sentence longer than the 10 years prescribed by the original plea agreement. Those admonishments were sufficient to comply with Rule 401(a)(1) and (a)(2). See Ill. S. Ct. R. 401(a)(1), (a)(2) (eff. July 1, 1984); *Haynes*, 174 Ill. 2d at 236. Although the trial court never explicitly admonished defendant of his right to counsel under Rule 401(a)(3), the factual circumstances in this case demonstrate that defendant was fully aware of, and understood, his right to counsel and that defendant made a knowing and voluntary waiver thereof. Such a finding is also supported by the instant defendant's prior background and experience with the legal system. See *Jackson*, 59 Ill. App. 3d at 1008-09.

¶ 33 For the reasons stated, I respectfully dissent from the majority's order in the present case.