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2013 IL App (3d) 110560-U

Order filed November 19, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 21st Judicial Circuit,
Plaintiff-Appellee,)	Kankakee County, Illinois,
)	
v.)	Appeal No. 3-11-0560
)	Circuit No. 09-CF-633
)	
DONALD H. SAMPSON,)	Honorable
)	Clark E. Erickson,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Justice Carter concurred in the judgment.
Justice McDade dissented.

ORDER

- ¶ 1 *Held:* The trial court substantially complied with Supreme Court Rule 401(a).
- ¶ 2 Following a jury trial, defendant, Donald H. Sampson, was convicted of aggravated battery and sentenced to 10 years' imprisonment. On appeal, defendant argues that his conviction should be vacated because the trial court failed to provide Illinois Supreme Court Rule 401(a) (eff. July 1, 1984) admonitions before he waived his right to counsel. We affirm.

¶ 3

FACTS

¶ 4 Defendant was charged by indictment with aggravated battery (720 ILCS 5/12-4(b)(18) (West 2008)). On November 20, 2009, defendant appeared before the trial court. The court noted that defendant had represented himself on several prior cases. The court informed defendant that he was charged with aggravated battery and the offense carried a sentencing range of 3 to 14 years' imprisonment. Defendant stated that he was waiving his right to counsel. The trial court informed defendant that he had a right to counsel, and if he was indigent, counsel would be appointed. Nevertheless, defendant signed a written waiver of counsel. The court then read a letter from defendant. In the letter, defendant stated: (1) "I am actually confused mentally"; (2) "[a]t this moment my mind is so confused I do not know what to do"; (3) "I have come to the realize [*sic*] I need a lot of help mentally"; and (4) "[e]veryday I feel like I've lost more and more of my mind." Defendant also told the court that he did not always receive his medication in the jail. As a result, the trial court ordered a fitness evaluation.

¶ 5 On December 18, 2009, the court received the results of defendant's fitness evaluation. The evaluation concluded that defendant was fit to stand trial, and the case proceeded to arraignment. The court read the indictment and advised defendant that he faced a minimum prison sentence of 3 years and a maximum sentence of 14 years. The court also admonished defendant that he could be sentenced as a Class X offender, which would increase the sentencing range to 6 to 30 years. The court stated that defendant was entitled to be represented by a lawyer, and that a lawyer would be appointed if he could not afford one. Defendant requested the public defender, and counsel was appointed.

¶ 6 On February 9, 2010, the case was called for a status hearing. Defendant indicated that he

wanted to represent himself. The court questioned defendant about his level of education, mental state, and prior trial experience. Defendant also acknowledged that he had successfully represented himself in a prior felony case. The court advised defendant that: (1) presenting a defense was not a simple matter; (2) a person who is unfamiliar with legal procedures may allow the State an unfair advantage by failing to make: (a) objections to evidence, (b) effective use of *voir dire*, and (c) appropriate tactical decisions; (3) he would not be allowed special consideration; and (4) he could not complain on appeal about the competency of his representation. Defendant maintained his desire to waive his right to counsel, and the court accepted defendant's waiver.

¶ 7 In March 2011, the case proceeded to a jury trial. At trial, defendant appeared *pro se* with the assistance of standby counsel. Defendant was found guilty of aggravated battery. Defendant filed a motion for a new trial. The court denied defendant's motion and sentenced defendant to 10 years' imprisonment. Defendant appeals.

¶ 8 ANALYSIS

¶ 9 Defendant argues that his conviction should be vacated and the cause remanded for a new trial because the trial court failed to substantially comply with Illinois Supreme Court Rule 401(a) (eff. July 1, 1984) before it allowed him to waive his right to counsel. Defendant acknowledges that he has not properly preserved this issue, but asserts that plain error review is warranted because the right to counsel is fundamental. *People v. Stoops*, 313 Ill. App. 3d 269 (2000). We agree, and review the issue *de novo*. *People v. Campbell*, 224 Ill. 2d 80 (2006).

¶ 10 The sixth amendment of the United States Constitution entitles a defendant to the representation of counsel. U.S. Const., amends. VI, XIV. A defendant may waive this right only

if he voluntarily, knowingly, and intelligently elects to do so. *Campbell*, 224 Ill. 2d 80. A court shall not permit a waiver of counsel by a defendant accused of an offense punishable by imprisonment without addressing the 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; 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).

¶ 11 Under limited circumstances, a valid waiver of counsel may be effected if the trial court substantially complied with Rule 401(a). *People v. Koch*, 232 Ill. App. 3d 923 (1992). Illinois courts have recognized several categories of substantial compliance. *Id.* In the first category, the absence of a detail did not impede a defendant from giving a knowing and intelligent waiver. See *People v. Johnson*, 119 Ill. 2d 119 (1987) (admonitions failed to state the minimum sentence). In the second category, the defendant was seen as possessing a degree of knowledge or sophistication that excused the lack of admonition. See *People v. Houston*, 174 Ill. App. 3d 584 (1988) (defendant displayed knowledge and training as a paralegal, excusing admonition). Finally, admonitions given to a defendant within a reasonable time before his waiver of counsel may be sufficient. See *People v. Ray*, 130 Ill. App. 3d 362 (1984) (five-day lapse between the issuance of the admonishment and waiver of counsel did not result in reversible error).

¶ 12 In the instant case, the trial court substantially complied with Rule 401(a). On September 20 and December 18, 2009, the trial court informed defendant of the charges, the applicable sentencing range, and defendant's right to counsel. At the December 18 hearing, defendant acknowledged that he understood these rights and chose to be represented by the public defender's office. However, he appeared before the court two months later and asked to

proceed *pro se*. At that time, defendant told the court that he had represented himself before in a felony case. The court did not admonish the defendant in accordance with Rule 401(a). However, the court's earlier admonitions, considered in light of the defendant's relative legal sophistication, constituted substantial compliance with Rule 401(a). Additionally, the record reveals that the defendant received the assistance of standby counsel through several pretrial hearings and at trial. The availability of standby counsel tended to ameliorate any technical deficiency in the trial court's compliance with Rule 401(a). See *People v. Bliely*, 232 Ill. App. 3d 606 (1992) (a defendant who proceeds to trial with the technical assistance of counsel need not be given full admonishments under Rule 401(a)). Therefore, we conclude that the defendant made a knowing and intelligent waiver of his right to counsel.

¶ 13

CONCLUSION

¶ 14 For the foregoing reasons, the judgment of the circuit court of Kankakee County is affirmed.

¶ 15 Affirmed.

¶ 16 JUSTICE McDADE, dissenting.

¶ 17 Supreme Court Rule 401(a) is not complicated. It does not require interpretation by the court. It does not require construction with other rules or statutes. As the supreme court noted in *People v. Campbell*, 224 Ill. 2d 80, 84 (2006), its language "could not be clearer[.]" Nor are the supreme court's rules "merely suggestions to be complied with if convenient but rather obligations which the parties and the courts are required to follow." *People v. Reed*, 376 Ill. App. 3d 121, 125 (2007). See also *Campbell*, 224 Ill. 2d at 87.

¶ 18 In the instant case, the trial court properly admonished defendant when he waived his

right to counsel on November 20, 2009. The court also ordered a fitness evaluation because of a letter from defendant professing concern about mental problems and advising that he did not always get his medicines in jail.

¶ 19 When the defendant appeared in court on December 18, 2009, the trial court again complied with rule 401(a), this time adding the information that the defendant could be sentenced as a class X offender which could result in a sentence more than twice the unenhanced term. On this occasion when defendant was given complete 401(a) admonishments, it was the only time he elected to be represented by counsel. He requested representation by the public defender.

¶ 20 Defendant again sought to waive counsel a scant two months later on February 9, 2010, and, although the court carefully cautioned him about the complexities and pitfalls of self-representation, he was not given the 401(a) admonishments. On that occasion, he persisted in his election to represent himself.

¶ 21 The majority finds that there was substantial compliance with the requirements of the rule on February 9, 2010, because (1) the defendant had been given the required admonitions a short time before in December 2009 and (2) the court appointed standby counsel, which offset the deficiency in compliance with the rule.

¶ 22 With regard to the first basis for finding substantial compliance, it is true that there was not a significant period of time between the giving of totally correct admonitions on December 18, 2009, and the complete failure to admonish on February 9, 2010. Nonetheless, the defendant had advised the court that he had mental problems and spotty access to his medications in jail. In my opinion, his concern gains credence from his vacillations, within short periods of time, in his

decisions about waiving legal representation.

¶ 23 Of greater concern to me is the reliance of the majority on the appointment by the court of standby counsel. I freely acknowledge that a finding, such as the majority's, that the appointment of standby counsel somehow excuses the failure to give the 401(a) admonishments is not unprecedented, and I cannot fault them for such reliance. I would, however, take this opportunity to argue that this position lacks rationality and should be changed.

¶ 24 Some of the cases underlying this basis for excusing a trial court's failure to give the full 401(a) admonishments each time a defendant seeks to waive counsel essentially find that where standby counsel is appointed, the defendant receives the technical assistance of counsel at trial and is not actually defending *pro se*. Incomplete admonishments are, therefore, enough. See, i.e., *People v. Timmons*, 233 Ill. App. 3d 591, 596 (1992); *People v. Smith*, 133 Ill. App. 3d 574, 581 (1985); *People v. Vaughn*, 116 Ill. App. 3d 193, 198 (1983).

¶ 25 There are other cases which hold that whether or not the defendant avails himself of standby counsel is irrelevant to the corrective impact of their appointment. *People v. Johnson*, 119 Ill. 2d 119, 136 (1987); *People v. Myles*, 86 Ill. 2d 260, 269 (1981); *People v. Bliely*, 232 Ill. App. 3d 606, 618 (1992). *Contra*, *People v. Derra*, 92 Ill. App. 3d 1106, 1110 (1981); *People v. Brown*, 80 Ill. App. 3d 616, 627 (1980).

¶ 26 Logically, the appointment of standby counsel cannot be a substitute for or satisfy the purpose of rule 401(a) admonishments. The purpose of the rule is "to ensure that a waiver of counsel is knowingly and intelligently made." *People v. Campbell*, 224 Ill. 2d 80, 84 (2006). See also *People v. Ames*, 2012 IL. App (4th) 110513 (purpose of Rule 401(a) is to ensure that any waiver of counsel will constitute the intentional relinquishment of a known right.); *People v.*

Smith, 133 Ill. App. 3d 574, 578 (1985) (purpose of Rule 401(a) is to provide a procedure which will eliminate any doubt that defendant understands the nature and consequences of the charge against him before the trial court accepts his waiver of counsel.) Obviously, standby counsel appointed to assist defendant in his *pro se* defense at trial does *nothing* to fulfill this purpose. I am arguing for a change in the case law to recognize and eliminate a logical inconsistency that frustrates the purpose of the supreme court's rule.

¶ 27 Not to put too fine a point on it, to suggest that having an attorney standing by who may or may not be willing to assist a defendant who may or may not be savvy enough to realize he needs legal assistance in his criminal trial is somehow not proceeding *pro se* insults the intelligence of anyone reading such a rationale and demeans our own. "T'were better by far" to simply say we would rather not protect the defendant's constitutional rights than to require trial courts to diligently follow the rule.

¶ 28 In the instant case, when the defendant was fully and properly admonished, he elected to be represented by counsel. When he was not admonished, he persisted in his bid to proceed *pro se*. This latter decision was in no way informed or facilitated by the later appointment of standby counsel.

¶ 29 For the reasons stated above, I respectfully dissent from the decision of the majority affirming the defendant's conviction.