

**NOTICE**

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2014 IL App (4th) 120941-U

NO. 4-12-0941

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

**FILED**

February 26, 2014

Carla Bender

4<sup>th</sup> District Appellate  
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Vermilion County
ALFRED GRITTON,	)	No. 06CF656
Defendant-Appellant.	)	
	)	Honorable
	)	Claudia S. Anderson,
	)	Nancy S. Fahey,
	)	Judges Presiding.

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PRESIDING JUSTICE APPLETON delivered the judgment of the court.  
Justices Knecht and Steigmann concurred in the judgment.

**ORDER**

¶ 1 *Held:* (1) The record demonstrates defendant was properly admonished regarding his right to counsel, he knowingly and voluntarily waived that right, and willingly proceeded *pro se*.

(2) The trial court did not abuse its discretion in accepting the factual basis presented by the State in support of defendant's guilty plea, as the court could reasonably conclude from the basis presented defendant committed the offense to which he pleaded guilty.

(3) The restitution order did not extend beyond the time required by statute when the time defendant spent incarcerated was included.

¶ 2 Defendant, Alfred Gritton, pleaded guilty to aggravated home repair fraud and was sentenced to 48 months' probation, 180 days in jail, and ordered to pay restitution to the victim. He appeals, claiming the underlying judgment is void when he was not properly admonished regarding his right to counsel and the court did not secure a voluntary and knowing

waiver of his right to counsel before it allowed defendant to proceed *pro se*. He also claims the factual basis presented at the guilty-plea hearing was insufficient to support the element of intent required for the offense with which he was charged. Finally, defendant claims the order of restitution must be corrected as it extends beyond the allowable statutory time limit. We affirm.

¶ 3

### I. BACKGROUND

¶ 4 In November 2006, the State charged defendant with one count of aggravated home repair fraud, a Class 2 felony (815 ILCS 515/5 (West 2004)), for entering into a contract in July 2006 with a homeowner, who was over the age of 60, for home repairs in the amount of \$4,500, knowing he had no intention of actually performing the repairs. At his arraignment, the trial court, the Honorable Gordon R. Stipp presiding, admonished defendant regarding the nature of the charge against him, his right to have a preliminary hearing, and his right to counsel. Defendant said he "thought [he] had one," meaning he intended to retain private counsel. The court stated: "Then I'll enter a denial. Ask for a preliminary hearing date. Show a believe [*sic*] by defendant to retain private counsel."

¶ 5 At his preliminary hearing on December 7, 2006, defendant advised the trial court, the Honorable Joseph P. Skowronski presiding, he had retained an attorney, Warren Danz, but Danz had not entered an appearance and was not at the hearing. Defendant said they "even had letter communication and [defendant] talked with his associate yesterday and he was supposed to call [defendant] back but never did." Defendant asked for a continuance, but the court denied his request. Defendant proceeded *pro se*. The State presented the testimony of the investigating Danville police officer. After considering the testimony, the court found the State had demonstrated sufficient probable cause to proceed to trial.

¶ 6 On April 9, 2007, defendant, proceeding *pro se*, entered into a plea agreement. In exchange for his guilty plea, the State recommended a sentence of probation, the terms and conditions of which were open, and dismissed a pending unrelated charge. The trial court, the Honorable Claudia S. Anderson presiding, admonished defendant of the nature of the charge, the potential range of punishment, and his right to a jury trial. The court questioned defendant on the voluntariness of his plea. The court then admonished defendant as follows:

"So as far as the trial by jury, you have a right to the representation by a lawyer. If you cannot afford one, the court would appoint a lawyer to represent you during those proceedings. At trial, the jury would have the burden of proving the charges beyond a reasonable doubt. You have a right to see, hear, and confront the witnesses that the State calls to testify. The confrontation would be by cross-examination. In addition, you have a right against self-incrimination, so you can't be forced to testify. At trial, you could, however, do so voluntarily, if you chose, and bring in other witnesses and other evidence in your defense, if any you have. My point, sir, is once you enter into this plea agreement, there will be no trial. You will have given up that right."

Defendant indicated he wanted to plead guilty. The State presented the factual basis as follows:

"If this matter proceeded to trial, the State would call \*\*\*. He would testify in July of 2006, he resided at \*\*\*, and that he had spoken to a person identified as [defendant] in April of 2006 about doing a remodeling job at his house. He would then testify that in

July of 2006, he gave [defendant] \$4,500 in cash to do the remodeling work to an upstairs bathroom at his house. He would testify that he is handicapped, and the agreement was that [defendant] was to remodel the bathroom, which included removing the existing tub and installing a handicapped useable shower in his place. He would testify that after he gave [defendant] this \$4,500 in cash, [defendant] started to tear out the old tub, broke up about 1/3 of it that it was cast iron, left the rest of the tub there. [Defendant] did purchase the handicapped shower unit and delivered it and placed it in his kitchen and did not come back to finish the work. He would further testify that on October 23[], 2006, is when he reported this to the Danville Police Department and at that time, no further work had been done. If this matter proceeded to trial, there would be certain factual disputes I believe [defendant] would present, including some off-setting testimony about a seizure of some of [defendant's] tools."

¶ 7 The trial court acknowledged "a factual basis to support [defendant's] plea" and found defendant had knowingly and voluntarily entered the plea. The court entered a judgment of conviction and set the matter for sentencing.

¶ 8 At the sentencing hearing, on August 2, 2007, the trial court considered the presentence investigation report, defendant's testimony regarding restitution, and the State's sentencing recommendation of 48 months' probation and \$6,594.07 in restitution. The court

sentenced defendant to 48 months' probation, 180 days in jail with credit for one day served, and ordered restitution in the amount of \$6,594.07, at the rate of \$137 per month until paid in full.

¶ 9 In July 2011, the State filed a petition to revoke defendant's probation for his failure to pay restitution. At the hearing on the State's petition, the prosecutor informed the trial court the State would withdraw its petition in exchange for defendant's agreement to pay \$100 per month for two years toward the balance remaining of \$1,895.07. The court accepted the agreement and entered a restitution order in accordance with that agreement.

¶ 10 Defendant unilaterally stopped paying restitution when he discovered the victim had died. In August 2012, the State requested an order extending restitution and in September 2012, the trial court, the Honorable Nancy S. Fahey presiding, so ordered. The court entered an order extending the restitution in the amount of \$1,895.07 for an additional two years to be paid to the victim's estate. This appeal followed.

¶ 11 **II. ANALYSIS**

¶ 12 Defendant raises three issues in this appeal. He claims (1) the underlying judgment is void because he did not knowingly waive counsel and was not properly admonished regarding his right to obtain counsel; (2) the factual basis did not include a necessary element of the offense; and (3) the restitution order is invalid because it extends payment beyond that allowed under the statute.

¶ 13 **A. Waiver of Right to Counsel**

¶ 14 Defendant claims the trial court failed to obtain a voluntary, valid, knowing, and informed waiver of counsel prior to allowing him to proceed *pro se* to a guilty plea. According to defendant, he made it clear to the trial court at his initial appearance that he believed he had secured private counsel and he did not want to proceed without his attorney present. Because

defendant did not knowingly waive counsel, he claims his judgment of conviction is void. See *Johnson v. Zerbst*, 304 U.S. 458, 463 (1938) (the trial court lacks jurisdiction to proceed when there has been no intelligent waiver of counsel by the defendant).

¶ 15 The State characterizes defendant's contention of error as one involving a procedural rule, not one of jurisdictional magnitude. The State claims, if the trial court failed to comply with Illinois Supreme Court Rule 401 (eff. July 1, 1984), by failing to administer proper admonishments, such a failure does not divest the court of jurisdiction. Therefore, the State claims, the judgment is voidable, rather than void, if this court found error. See *People v. Davis*, 156 Ill. 2d 149, 155-56 (1993). The State further claims this court cannot grant effectual relief, even if we should find error, because defendant's probation was successfully terminated on October 3, 2011, and this appeal stems only from the trial court's order extending restitution. The State claims the appeal is moot.

¶ 16 First, we disagree with the State's characterization of this appeal as moot. As our supreme court has stated:

"while the completion of a defendant's sentence renders moot a challenge to the sentence, it does not so render a challenge to the conviction. [Citation.] This is because the nullification of a conviction may hold important consequences for a defendant. [Citation.] Here, defendant's claim clearly calls into question the validity of his conviction. The claim therefore is not moot."  
*People v. Campbell*, 224 Ill. 2d 80, 83-84 (2006).

¶ 17 Addressing the merits of defendant's claim, we begin with the general proposition regarding a defendant's right to counsel. Indeed, the United States Constitution guarantees

criminal defendants the right to assistance of counsel " 'at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected.' " *People v. Baker*, 92 Ill. 2d 85, 90 (1982) (quoting *Mempa v. Rhay*, 389 U.S. 128, 134 (1967)). Likewise, a criminal defendant has the corresponding right to self-representation and may proceed *pro se* provided the defendant acts knowingly and intelligently in foregoing counsel. *Faretta v. California*, 422 U.S. 806, 819 (1975). However, when a trial court permits defendant to waive counsel and the waiver is not knowing and intelligent, the trial court denies defendant a substantial right and commits reversible error. *People v. Jiles*, 364 Ill. App. 3d 320, 328-29 (2006).

¶ 18 In Illinois, the proper procedure for a trial court to follow when defendant seeks to waive counsel is governed by Illinois Supreme Court Rule 401(a) (eff. July 1, 1984), which 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."

¶ 19 Supreme Court Rule 401(a) helps to ensure that a defendant's waiver is knowing and voluntary, and as a consequence, our 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, 236 (1996), citing *People v. Baker*, 94 Ill. 2d 129, 137 (1983). Nevertheless, the trial court need not strictly comply with the provisions of the rule; "substantial compliance will be sufficient to effectuate a valid waiver if the record indicates that the waiver was made knowingly and voluntarily, and the admonishment the defendant received did not prejudice his rights." *Haynes*, 174 Ill. 2d at 236.

¶ 20 According to a docket entry on the date of defendant's initial appearance, the trial court appointed the public defender to represent defendant "with possible reimbursement." During the course of the arraignment, the following exchange occurred:

"THE COURT: Uh, your rights here with a felony include the right to have a preliminary hearing where the burden of proof will be on the State's Attorney to show, uh, enough evidence to amount to probable cause that a felony was committed and that you were the individual who committed it. At the time of that hearing you may be represented by your own attorney and if you can't afford to hire one the court would appoint one for you if you qualify as indigent. Any questions, Mr. Gritton, about those rights?"

DEFENDANT: I thought I had one.

THE COURT: Do you, do you understand your rights?

You think you're gonna hire private counsel?

DEFENDANT: I guess.

THE COURT: Then I'll enter a denial. Ask for a preliminary hearing date. Show a believe [sic] by defendant of intent to retain private counsel."

¶ 21 Next, at defendant's preliminary hearing, the trial court asked defendant if he had hired an attorney. Defendant stated he had retained Warren Danz. The court noted Danz had not entered a written appearance and was not present at the hearing. Defendant requested a continuance, but his request was denied.

¶ 22 Next, at the guilty plea hearing, the trial court admonished defendant of the nature of the charge pending against him, the class of the offense, the potential range of punishment, the imposition of a term of mandatory supervised release, and the maximum term of probation. Defendant indicated he understood the admonishments. The court further admonished defendant of his right to a jury trial and questioned whether he understood that by pleading guilty he would "be giving up that right." Defendant acknowledged he understood. He further responded to the court's inquiries that he was not being forced into pleading guilty, he was thinking clearly, he was not under the influence of drugs or alcohol, and he did not suffer from any mental condition that could impair his ability to understand. The following exchange occurred:

"THE COURT: Okay. So as far as the trial by jury, you have a right to the representation by a lawyer. If you cannot afford one, the court would appoint a lawyer to represent you during those proceedings. At trial, the jury would have the burden of

proving the charges beyond a reasonable doubt. You have a right to see, hear, and confront the witnesses that the State calls to testify. The confrontation would be by cross-examination. In addition, you have a right against self-incrimination, so you can't be forced to testify. At trial, you could, however do so voluntarily, if you chose, and bring in other witnesses and other evidence in your defense, if any you have. My point, sir, is once you enter into this plea agreement, there will be no trial. You will have given up that right. Is that what you want to do?

DEFENDANT: Yeah."

¶ 23 Given the above exchange, we conclude the trial court substantially complied with Rule 401. The rule requires the trial court to inform defendant of the nature of the charge, the potential range of punishment, his right to counsel and, if he is indigent, to have counsel appointed for him. See *Haynes*, 174 Ill. 2d at 241. The trial court admonished the defendant at length regarding his right to counsel, the nature of the charge against him, and the potential term of imprisonment he faced. Defendant stated he understood each of these admonishments. These efforts by the court constituted, at least, substantial compliance with Rule 401(a). See *Haynes*, 174 Ill. 2d at 240. Defendant received these admonishments from Judge Stipp at his arraignment in November 2006 and again from Judge Anderson at the guilty plea hearing in April 2007. As such, the trial court substantially complied with the requirements of the rule and did not accept defendant's guilty plea until the court was satisfied that defendant understood his rights. We conclude defendant's waiver of counsel was therefore valid.

¶ 24

B. Factual Basis

¶ 25 Defendant next contends the State failed to include in the factual basis sufficient facts to demonstrate he intended to defraud the victim. Section 5 of the Home Repair Fraud Act (815 ILCS 515/5 (West 2004)) provides a person commits the offense of aggravated home repair fraud when he commits home repair fraud against a person 60 years of age or older. For purposes of this case, as alleged by the State, home repair fraud occurs when the person "knowingly enters into an agreement or contract, written or oral, with a person for home repair, and he knowingly \*\*\* promises performance which he does not intend to perform or knows will not be performed." 815 ILCS 515/3(a)(1) (West 2004).

¶ 26 Defendant claims the factual basis presented does not demonstrate "that [defendant] entered into a contract knowing that he would not perform the contract." In other words, he claims the factual basis does not demonstrate he intended to defraud the victim at the time he accepted the money. He insists the facts show the opposite, that he intended to perform the contract, as he had begun performance by starting demolition and purchasing fixtures and materials, and he had left his tools at the site.

¶ 27 In light of defendant's argument, we must determine whether the trial court abused its discretion by accepting the factual basis presented. *People v. Bassette*, 391 Ill. App. 3d 453, 457 (2009). "An abuse of discretion occurs when no reasonable person would agree with the decision or the decision is arbitrary, unreasonable, or unconscionable." *Bassette*, 391 Ill. App. 3d at 457.

¶ 28 We begin with the following proposition: "A prosecutor's statement of a factual basis does not constitute 'evidence.' Nor is the prosecutor's statement of the factual basis the equivalent of a trial, at which the State must present evidence proving beyond a reasonable doubt

each of the elements of the offense with which the defendant is charged." *Bassette*, 391 Ill. App. 3d at 456. This court has stated the

" ' "requirement that the court determine the factual basis for the plea is satisfied *if there is a basis anywhere in the record* from which the court could reasonably reach the conclusion that the defendant actually committed the acts with the intent required to constitute the offense to which the defendant is pleading guilty." ' "

(Emphasis in original.) *Bassette*, 391 Ill. App. 3d at 457 (quoting *In re C.K.G.*, 292 Ill. App. 3d 370, 376 (1997), (quoting *People v. James*, 233 Ill. App. 3d 963, 971 (1992)).

¶ 29 The State is not required to explicitly prove each element of the offense and include such proof in its factual basis. *Bassette*, 391 Ill. App. 3d at 457. In particular, the State was not required to address how it would prove defendant had the requisite intent. *Bassette*, 391 Ill. App. 3d at 458. A trial judge need only be satisfied that the conduct of the defendant constitutes the offense charged. In making that determination, the court may look anywhere in the record to find a sufficient factual basis for the plea. *People v. Banks*, 213 Ill. App. 3d 205, 211 (1991). The factual basis can be established by the prosecutor's summary of the testimony and evidence which would have been presented at trial or the defendant's own admission that he committed the acts alleged in the indictment. *People v. Calva*, 256 Ill. App. 3d 865, 872 (1993). To comply with Illinois Supreme Court Rule 402(c) (eff. July 1, 1997), "the trial court is only required to ask the prosecutor to *briefly* describe the evidence the State would be prepared to present if the case went to trial." (Emphasis in original.) *People v. Williams*, 299 Ill. App. 3d 791, 794 (1998). *Rolston*, the case cited by defendant in support of his claim, is distinguishable

from the case *sub judice* because *Rolston* addresses the sufficiency of the State's evidence in light of its burden of proving the defendant's intent beyond a reasonable doubt at trial. See *People v. Rolston*, 113 Ill. App. 3d 727 (1983). It does not address the sufficiency of a factual basis.

¶ 30 In this case, Judge Anderson could reasonably conclude from the factual basis presented that defendant actually committed the offense to which he pleaded guilty. The State indicated defendant received \$4,500 cash from the victim, a 62-year-old, handicapped man. The victim believed defendant would remodel his bathroom to make it handicap accessible. After receiving the cash, defendant began demolition of the old cast iron tub by breaking up only part of it, leaving it in pieces in the home. Defendant purchased the handicapped shower and delivered it to the victim's kitchen. After purchasing the shower, defendant did not return to the project for three months (despite the victim's attempts to contact defendant) at which time the victim contacted the police. The investigating police officer determined defendant was not a licensed contractor and had not obtained a building permit. The prosecutor informed the court he expected defendant to present testimony of "certain factual disputes" if the matter proceeded to trial. However, he said those factual disputes addressed "off-setting testimony about a seizure of some of [defendant's] tools," not factual disputes regarding the work performed.

¶ 31 We find the trial court did not abuse its discretion in accepting the factual basis presented. The court could reasonably determine from the factual basis and the record before it that defendant actually committed the offense to which he was pleading guilty with the requisite intent.

¶ 32 C. Restitution Order

¶ 33 Finally, defendant claims the restitution order must be corrected because it extends past the statutory time limit for payment. The original restitution order was entered by

Judge Anderson on August 2, 2007, for a period of four years with payments to begin in September 2007. On September 15, 2011, the order was extended by Judge Anderson for two years. On September 11, 2012, the order was extended by Judge Fahey for two additional years and the payee was modified to the victim's estate. As such, according to defendant, the order would expire on September 11, 2014, more than seven years after the entry of the original order. Illinois law prohibits a restitution order to extend beyond seven years. See 730 ILCS 5/5-5-6(f), (i) (West 2006).

¶ 34 However, the restitution period normally begins after a defendant is released from incarceration. *People v. Brooks*, 158 Ill. 2d 260, 272 (1994). The trial court sentenced defendant to 180 days in jail. Adding defendant's time spent incarcerated to the statutory seven-year time limit, we find the record supports the State's assertion that the order of restitution will expire on January 29, 2015. The extended period ending on September 11, 2014, is within the allowable time frame. Therefore, we affirm the court's order of restitution.

¶ 35 III. CONCLUSION

¶ 36 For the foregoing reasons, we affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 37 Affirmed.