2015 IL App (1st) 131026-U

THIRD DIVISION
May 20, 2015

No. 1-13-1026

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 12 CR 6039
	)	
SIDNEY MCDOWELL,	)	Honorable
	)	Neera Lall Walsh,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HYMAN delivered the judgment of the court.
Presiding Justice Pucinski and Justice Lavin concurred in the judgment.

O R D E R

¶ 1 ***Held:*** Judgment entered on defendant's jury conviction of aggravated domestic battery affirmed over his forfeited due process claim.

¶ 2 Following a jury trial, defendant Sidney McDowell was found guilty of aggravated domestic battery and sentenced as a Class X offender to six years' imprisonment. On appeal, McDowell contends that the trial court denied him his right to due process when it misadvised him of the sentencing range which prevented him from making a knowing and voluntary

decision to reject or accept the State's plea offer. Under these circumstances, we find that McDowell has not established error that infringed on his right to a fair trial to warrant plain error review.

¶ 3 Background

¶ 4 McDowell was charged with two counts of aggravated domestic battery and two counts of aggravated battery based on the physical attack perpetrated on his girlfriend. Counsel was appointed to represent him, and the case was set for a jury trial on February 13, 2013. On that date, the court noted that the case had been transferred there for a jury trial on four counts. The State announced that it would only proceed on one count of aggravated domestic battery and *nolle prossed* the other charges. The court then clarified the charge to be prosecuted, and that McDowell did not accept the offer made by the State for five years' imprisonment in exchange for his guilty plea to the single offense.

¶ 5 At that point, the court addressed McDowell directly and admonished him that the decision whether to plead guilty or not was his alone, and that it wanted him to understand the sentencing range and the offer, commonly referred to as *Curry* admonishments (*People v. Curry*, 178 Ill. 2d 509, 528 (1997)). The court then stated that the offense was a Class 2 offense punishable from 3 to 7 years' imprisonment, which could be extended if he was eligible to 7 to 14 years' imprisonment, a fine of up to $25,000, and a two-year term of mandatory supervised release. McDowell indicated his understanding of these matters, and knowing the sentencing range and the State's offer, he again rejected the State's offer.

¶ 6 The case proceeded to a jury trial where McDowell was found guilty of aggravated

domestic battery. At the sentencing proceeding, the State advised the court that McDowell was Class X mandatory based on his criminal history, and the court then sentenced him to the minimum term of six years' imprisonment, and the required four years of MSR.

¶ 7 On appeal, McDowell raises no issue regarding the sufficiency of the evidence to sustain his conviction or error in the sentence imposed. Instead, he contends that the trial court violated his right to due process by affirmatively misadvising him of the maximum available sentencing range, thereby preventing him from making a knowing and voluntary decision to accept or reject the State's plea offer. He requests that his conviction be reversed and this cause remanded for resumption of the plea bargaining process, or a new trial.

¶ 8 The State responds that McDowell did not raise this issue at trial or in a post-trial motion, and has, therefore, waived the issue for review. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). In his reply brief, McDowell asserts that the issue may be reviewed for plain error under the second prong of the plain error test because it bears on his right to a fair trial.

¶ 9 Analysis

¶ 10 The plain error doctrine provides a narrow and limited exception to the general waiver rule allowing a reviewing court to consider a forfeited error where the evidence was closely balanced or where the error was so egregious that it deprives the defendant of a substantial right and thus a fair trial. *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). The burden of persuasion remains with defendant, and a plain error review begins by determining whether any error occurred. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009).

¶ 11 McDowell maintains that this court has recognized review under the second prong of the

plain error of the issue of whether a defendant has been improperly admonished about the consequences of rejecting a plea offer because it implicates defendant's right to a fair trial, citing *People v. Harvey*, 366 Ill. App. 3d 910, 918 (2006). He suggests that this error, which constitutes ineffective assistance of counsel, is even more egregious when committed by the court.

¶ 12 It is well-settled that defendant has a constitutional right to be reasonably informed of the direct consequences of accepting or rejecting a plea offer. *Curry*, 178 Ill. 2d at 528. Under a correlative principle, defense counsel must inform his or her client of the maximum and minimum sentences that can be imposed for the offenses with which defendant is charged. *Harvey*, 366 Ill. App. 3d at 918, citing *Curry*, 178 Ill. 2d at 528. Under Illinois Supreme Court Rule 402 (eff. July 1, 2012), the trial court must inform defendant of the nature of the charge and the sentencing range prescribed by law before *accepting* a guilty plea, but the court is under no duty to so inform defendant if he or she rejects the plea offer. (Emphasis in original.) *Harvey*, 366 Ill. App. 3d at 918.

¶ 13 The record shows that McDowell had already rejected the plea offer before the court provided the "*Curry* admonishments," in which it misstated the maximum sentencing range to which McDowell would be subject on conviction. Under these circumstances, the court had no duty to advise McDowell of these matters; rather, the duty to inform remained with defense counsel (*Harvey*, 366 Ill. App. 3d at 918), and that duty to advise did not transfer from counsel to the court as McDowell argues. Moreover, McDowell has not raised an ineffective assistance of counsel claim (*Harvey*, 366 Ill. App. 3d at 918), and the record shows that McDowell acknowledged to the court that only his attorneys could advise him as to plead or not, before he

rejected the plea offer again. In these circumstances we cannot find McDowell established an error that infringed on his right to a fair trial warranting plain error review.

¶ 14 In reaching that conclusion, we examined *Raley v. Ohio*, 360 U.S. 423, 438-39 (1959), *People v. Bounds*, 182 Ill. 2d 1, 5 (1998), *People v. Barghouti*, 2013 IL App (1st) 112373, ¶¶17-18, and *People v. Davis*, 145 Ill. 2d 240, 249 (1991), cited by McDowell in support of his contrary position, and find them distinguishable.

¶ 15 Neither *Raley* nor *Bounds* speaks to the situation before us, where the court had no duty to admonish defendant. In *Raley*, 360 U.S. at 435-39, the Supreme Court found that a due process violation by the Unamerican Activities Commission of the State of Ohio where a witness was convicted for refusing to testify based on the privilege against self-incrimination after being told by the Commission's Chairman, an agent of the State, that the privilege existed when it did not, in fact, exist. In *Bounds*, 182 Ill. 2d at 5, a due process violation was found where the circuit court advised post-conviction counsel that the next court date would be for status only, but then granted the State's motion to dismiss defendant's petition on that date. We are not persuaded by defendant's attempt to analogize or appropriate the duties set forth in those cases or under Rule 402 to this case.

¶ 16 The remaining two cases are equally distinguishable. In *Barghouti*, 2013 IL App (1st) 112373, ¶¶17-18, this court addressed the propriety of the dismissal of a post-conviction petition following a bench trial where defendant claimed ineffective assistance of his counsel for misadvising him on the range of sentences he faced if found guilty. This led him to reject the State's offer. We found that defendant had adequately alleged facts which arguably established

ineffective assistance of counsel during plea negotiations requiring a remand for second-stage proceedings. *Barghouti*, 2013 IL App (1st) 112373, ¶¶17-18. No discussion was had, or ruling made, concerning the trial court's conduct. Likewise distinguishable is Davis, 145 Ill. 2d at 250. Unlike here, defendant pleaded guilty after being incorrectly admonished by the trial court of the applicable sentencing range under Rule 402. McDowell, however, had already rejected the plea offer, the court was merely clarifying the situation before trial, and the court's admonishments were not subject to the provisions of Rule 402. Accordingly, there was no requirement, let alone a duty, on the part of the court to advise McDowell of the potential sentencing range (*Harvey*, 366 Ill. App. 3d at 918), and his due process argument fails to establish plain error to excuse his forfeiture of the issue.

¶ 17 We affirm the judgment of the circuit court of Cook County.

¶ 18 Affirmed.