2015 IL App (1st) 132212-U

SECOND DIVISION
September 29, 2015

No. 1-13-2212



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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | No. 12 CR 13618 |
| | ) | |
| BLAKE GRANT, | ) | Honorable |
| | ) | Rickey Jones, |
| Defendant-Appellant. | ) | Judge Presiding. |

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JUSTICE SIMON delivered the judgment of the court.
Presiding Justice Pierce and Justice Hyman concurred in the judgment.

**O R D E R**

¶ 1 *Held:* The trial court's admonishments prior to defendant's waiver of counsel substantially complied with Rule 401(a); the mittimus is amended to reflect the proper name of the offense and the fines and fees order modified to vacate inapplicable fees assessed.

¶ 2 Defendant and his girlfriend Jasmine Jemison were charged with possession of a controlled substance with intent to deliver arising from an incident that occurred on July 9, 2012. Jemison pled guilty in exchange for two years' probation prior to trial.

¶ 3 Following a bench trial, *pro se* defendant Blake Grant was found guilty of two counts of possession of a controlled substance with the intent to deliver and sentenced to four years' imprisonment. Defendant contends on appeal that his waiver of counsel was invalid because the trial court failed to properly admonish him in accordance with Supreme Court Rule 401(a) (eff. July 1, 1984), requests the mittimus be amended to reflect the correct offense, and requests the fines and fees order be modified to reflect the correct amount of assessments.

¶ 4 At a status conference on October 10, 2012, defendant informed the trial court that he "didn't feel comfortable" with his appointed counsel and asked the court for substitute counsel. This request was denied and the case continued. Approximately one week later, the trial court granted defendant a continuance to allow him time to hire private counsel. At the same time, the trial court also granted defendant's motion to be remanded to a drug rehabilitation program. At the next status conference, because defendant informed the trial court he was unable to afford private counsel, defendant's originally appointed counsel continued to represent him.

¶ 5 At a pretrial conference on February 28, 2013, defendant's counsel informed the trial court that he and defendant were "once again at a point where [they were] having some fundamental disagreements and [defendant] has indicated to me that he wishes to represent himself for a second time," which prompted the following response from the trial court:

> "THE COURT: You don't want the attorney from the Public Defender's Office to represent you?
>
> DEFENDANT: No, sir.
>
> THE COURT: Let me explain a few things to you. I may have explained these to you on a previous day. Are you a lawyer?
>
> DEFENDANT: No, sir.

THE COURT: How far did you go in school?

DEFENDANT: I got my high school diploma out of Von Stuben.

* * *

THE COURT: The gentleman that I appointed to represent you, he's a lawyer. He went to law school and college.

DEFENDANT: I understand.

THE COURT: You're charged with possession of a controlled substance with intent to deliver, multiple counts. Do you understand the charges?

DEFENDANT: Yes, sir.

THE COURT: These are Class 1 felonies. If found guilty, you could be sentenced to the Illinois Department of Corrections for between 4 to 15 years, plus 2 years mandatory supervised release, or possibly placed on probation. However, depending on your history of felony convictions – what's his background, state?

MS. AUGUSTUS [Assistant State's Attorney]: Judge, he has three felonies; one Class 2, one Class 4, and another Class 4.

THE COURT: He's extendable, but not mandatory Class X?

MS. AUGUSTUS: Yes, Judge.

THE COURT: Okay. With your history of felony convictions, Mr. Grant, you could be sentenced up to 30 years in the Illinois Department of Corrections, with 2 years mandatory supervised release, or possibly placed on probation. Do you understand that?

DEFENDANT: Yes, sir.

THE COURT: You have a right to have a lawyer represent you. Do you understand that?

DEFENDANT: Yes, sir.

THE COURT: If you can't afford a lawyer, a lawyer will be appointed to represent you at no cost to you. Do you understand that?

DEFENDANT: Yes, sir.

THE COURT: All right. I appointed an attorney from the Public Defender's Office to represent you, but apparently you know more than he does, so you decide that you want to represent yourself, right?

DEFENDANT: Yes, sir.

THE COURT: Is that what you still want to do?

DEFENDANT: Yes, sir.

THE COURT: Do you understand the attorney that I appointed to represent you from the Public Defender's Office, he was provided to you free of cost. Do you understand that?

DEFENDANT: Yes, sir.

* * *

THE COURT: Knowing and understanding that, do you want the attorney from the Public Defender's Office to represent you?

DEFENDANT: No, sir.

THE COURT: You want to represent yourself?

DEFENDANT: Yes, sir. "

The court vacated the appointment of the public defender allowing defendant to proceed *pro se* and continued the matter to conclude pretrial discovery.

¶ 6 At a subsequent status hearing on March 20, 2013, defendant asked the trial court to have counsel assist him for "going to trial with." The trial court denied defendant's request for standby counsel and informed him that he may represent himself or have counsel appointed to him and passed the case to allow defendant permission to consult with any available public defender present in court. When defendant was recalled, the trial court again confirmed defendant wished to represent himself and granted a continuance to allow defendant time to issue subpoenas.

¶ 7 One week later, on March 27, 2013, defendant asked the court to appoint substitute counsel. The trial court informed defendant that he must accept the counsel the Public Defender's office appointed for him, continued the matter to allow defendant to consult with and obtain assistance from available counsel, and requested assistance from court personnel to verify if defendant's previously appointed counsel was available in court that day and able to assist him. After an unsuccessful attempt to locate defendant's originally appointed counsel, the trial court asked defendant if he would like a continuance to allow defense counsel to appear in court with him. Defendant responded, "No, your Honor. I will proceed *pro se*."

¶ 8 Upon defendant's request, the case proceeded to a bench trial. The evidence at trial showed that Chicago police officers responded to a domestic disturbance at defendant's address. Upon their arrival, defendant's mother and brother notified officers that defendant and his girlfriend were "cutting" drugs upstairs in the kitchen. Police observed defendant and Jemison sitting at a kitchen table with 19 baggies of a rocky white substance, which the parties stipulated contained 1.1 grams of cocaine. The officers also recovered 37 baggies of the same rocky white substance from defendant's shoe located underneath the kitchen table, which the parties stipulated contained 1.2 grams of cocaine. Defendant and Jemison were subsequently arrested. Defendant admitted to police officers at the scene and in a subsequent custodial interview that

the drugs were his and not Jemison's. Defendant's brother, mother, and girlfriend all testified that they did not observe defendant near or in possession of the recovered narcotics, nor were they aware of the narcotics present in defendant's shoe.

¶ 9 The trial court found defendant guilty of both charges, merged the counts, set the case for sentencing and appointed posttrial counsel. In its finding of guilt, the trial court stated it concluded defendant's brother, mother, and girlfriend were not credible, but found the officers' testimony credible. Posttrial defense counsel filed a motion for new trial on defendant's behalf that failed to allege the trial court improperly admonished defendant regarding his right to counsel in accordance with Supreme Court Rule 401(a).

¶ 10 At sentencing, the State argued that defendant was ineligible for probation based upon his criminal history which included a Class 2 felony for possession of a stolen motor vehicle in 2008, among others, and that his sentencing range was 4 to 15 years for the current offense. The trial court ultimately sentenced defendant to the minimum sentence of four years' imprisonment with 351 days credit for time served. Defendant's timely appeal follows.

¶ 11 Defendant first contends that the trial court committed reversible error when it failed to properly inform him of the nature of the offense and misstated the minimum and maximum penalty as required by Supreme Court Rule 401(a) (eff. July 1, 1984). The State contends that defendant has forfeited this issue on review by failing to properly preserve this argument for appeal, or in the alternative, that defendant was substantially admonished and no error occurred. Defendant acknowledges he failed to preserve the issue on appeal, but contends that his claim is reviewable under the second prong "fair trial theory" as plain error.

¶ 12 To preserve an alleged error for appeal, defendant must both object at trial and include the alleged error in a written posttrial motion. *People v. Wright*, 2015 IL App (1st) 123496, ¶ 31;

*People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Here, defendant has failed to do either, thereby forfeiting the issue which may now only be considered on appeal if it amounts to plain error. Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967); *Wright*, 2015 IL App (1st) 123496, ¶ 44.

¶ 13 The plain error doctrine bypasses forfeiture principles and allows a reviewing court to consider an unpreserved error when: (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence. *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005). This court has "repeatedly held that the trial court's failure to comply with Rule 401(a) denies a defendant his or her fundamental right to be represented by counsel and therefore, is reviewable as plain error under the second prong of the plain error doctrine." *Wright*, 2015 IL App (1st) 123496, ¶ 44; *People v. LeFlore*, 2013 IL App (2d) 100659, ¶ 51, *rev'd on other grounds*, 2015 IL 116799, *petition for cert. filed sub nom. LeFlore v. Illinois*, No. 15-5325 (filed July 17, 2015); *People v. Black*, 2011 IL App (5th) 080089, ¶ 23.

¶ 14 Where there is no error, however, there can be no plain error. *People v. Bannister*, 232 Ill. 2d 52, 79 (2008). Therefore, before we reach the issue of plain error, we must first determine whether any error occurred. *People v. Walker*, 392 Ill. App. 3d 277, 294 (2009). Accordingly, we turn to the issue of whether the trial court substantially complied with Illinois Supreme Court Rule 401(a) (eff. July 1, 1984) (outlining requirements for compliant admonishment regarding waiver of counsel) to determine whether error occurred in the instant case.

¶ 15 Where the facts are not in dispute, whether a defendant's waiver of a right was knowing and voluntary is question of law to be reviewed *de novo*. *People v. Reid*, 2014 IL App (3d) 130296, ¶ 10.

¶ 16 A defendant has a constitutional right to defend himself and forego representation by counsel. *Faretta v. California*, 422 U.S. 806, 813-14 (1975); *People v. Burton*, 184 Ill. 2d 1, 21

(1998). Before the trial court accepts defendant's request, however, it must ensure this decision is being made knowingly, intelligently, and voluntarily. *People v. Baez*, 241 Ill. 2d 44, 116 (2011).

¶ 17 In order to ensure this purpose is served, our supreme court has adopted Rule 401(a), which requires the trial court to admonish defendant regarding (1) the nature of the charge; (2) the minimum and maximum sentence prescribed by law, including any additional penalty due to defendant's prior convictions or consecutive sentences; and (3) that defendant has a right to counsel and if indigent, to have counsel appointed, prior to accepting the waiver. Ill. S. Ct. R. 401(a); see *People v. Haynes*, 174 Ill. 2d 204, 241 (1996) (the purpose of the rule is to "ensure a waiver of counsel is knowingly and intelligently made"). However, trial courts need only substantially comply with this rule – strict technical adherence is not necessary as long as the admonishment given still fulfilled the fundamental purpose of the rule and did not prejudice defendant's rights. See *People v. Langley*, 226 Ill. App. 3d 742, 749 (1992); *Haynes*, 174 Ill. 2d at 234.

¶ 18 Earlier cases have required a defendant make a showing of actual prejudice in order to prevail on his claim of error. See *People v. Johnson*, 119 Ill. 2d 119 (1987). More recent decisions, however, have eliminated a defendant's burden to show affirmative prejudice in the record, concluding that a "deficiency in the admonishments does not prejudice the defendant only in the limited instances where [the record shows]: (1) the defendant already knows of the omitted information or (2) because the defendant's degree of legal sophistication makes evident his or her awareness of the omitted information." See *Wright*, 2015 IL App (1st) 123496, ¶ 46; see also *LeFlore*, 2013 IL App (2d) 100659, ¶ 52; *People v. Gilkey*, 263 Ill. App. 3d 706, 711 (1994). In other words, "[t]he rule provides a procedure which eliminates any doubt that a defendant understands the nature and consequences of the charge against him before a court

accepts his waiver of the right to counsel and precludes him from waiving the assistance of counsel without full knowledge and understanding." *Wright*, 2015 IL App (1st) 123496, ¶ 46 quoting *People v. Johnson*, 123 Ill. App. 3d 128, 130 (1984).

¶ 19 Defendant first argues that he was not properly informed of the nature of the charges against him where the court's indication of the number of counts was "vague," and the court failed to include, *inter alia*, additional details like the elements of the crime, the existence of any codefendant, mention the amount or type of drug alleged, or the date of the offense, arguing the name of the offense is insufficient to constitute substantial compliance.

¶ 20 The word "nature" as used in this rule "connotes and is synonymous with words like essence, general character, kind or sort." *People v. Harden*, 78 Ill. App. 2d 431, 444 (1966), *aff'd*, 38 Ill. 2d 559 (1967). Where the "nature" of the crime is factually simple and there is no indication in the record that defendant failed to understand the nature of the offense, simply telling defendant the name of the charge may be sufficient. See *People v. Phillips*, 392 Ill. App. 3d 243, 263 (2009). Here, the nature of the crime is self-evident in the name of the offense, possession of a controlled substance, and the facts alleged are fairly simple – defendant was preparing cocaine for sale in his apartment. Therefore, we find it was sufficient that the trial court admonish defendant by stating the name of the offense itself.

¶ 21 In addition to the name of the offense, defendant was also advised of the date and class of the offense, and the number of charges pending. The trial court also confirmed he understood the charges. During the waiver hearing on February 28, 2013, the trial court stated: "You're charged with possession of a controlled substance with intent to deliver, multiple counts. Do you understand the charges?" to which defendant affirmatively replied. Furthermore, on August 22, 2012, prior to the waiver hearing, the trial court stated: "charged with possession of a controlled

substance with intent to deliver from July 9, 2012. Those are – it's a Class 1 felony. In addition, [defendant], you are charged with possession of a controlled substance with intent to deliver from July 9, 2012." Therefore, even if "multiple counts" can be considered vague, defendant was clearly apprised of the nature of the charges at the time of the waiver.

¶ 22 There is also nothing in the record to indicate defendant failed to understand the nature of the charges. For example, defendant accurately recited the elements of the offense during trial. Although defendant contends the court may not consider defendant's behavior after the admonishment to determine knowledge, case law has expressly rejected this contention. See *Harden*, 78 Ill. App. 2d at 445; *Gilkey*, 263 Ill. App. 3d at 711. Thus, we find no error in this portion of the admonishment.

¶ 23 Defendant next argues that the trial court incorrectly stated the minimum and maximum penalties applicable when it informed defendant he may be eligible for probation and a maximum sentence of 30 years'. The State disagrees, and argues the trial court accurately stated defendant's minimum sentence because he was eligible for drug and alcohol related substance abuse probation (commonly known as TASC probation) and substantially complied with Rule 401(a) although it overstated the maximum penalty.

¶ 24 General sentencing guidelines provide that a defendant convicted of a Class 1 felony may not receive probation if they committed a Class 2 felony or greater within the last 10 years at the time of sentencing "except as otherwise provided by Section 40-10 of the Alcoholism and Other Drug Abuse and Dependency Act." 730 ILCS 5/5-5-3(c)(2)(f) (West 2012). Section 40-10 allows a trial court to sentence a defendant that it suspects suffers from alcoholism or other drug addiction to probation in a drug treatment facility instead of serving a traditional prison sentence. 20 ILCS 301/40-10(a) (West 2012). Because there is nothing in the statute that precluded

defendant's eligibility for TASC probation, the trial court's statement was accurate. See 20 ILCS 301/40-5 (West 2012).

¶ 25 Although the trial court accurately stated defendant's minimum sentence, the failure to accurately state a defendant's maximum penalty may also preclude a finding of substantial compliance. See *People v. Bahrs*, 2013 IL App (4th) 110903, ¶ 14. The parties do not dispute, and this court agrees, that defendant was ineligible for an extended term sentence based upon his prior criminal history, and therefore the trial court was incorrect when it stated defendant may be subject to a 30-year sentence. They disagree, however, regarding whether we may still find substantial compliance despite this error.

¶ 26 Defendant relies on *LeFlore*, 2013 IL App (2d) 100659 and *Bahrs*, 2013 IL App (4th) 11903, to support his argument that a misstatement of the applicable maximum sentence precludes a finding of substantial compliance. In *Bahrs* and *LeFlore*, this court held that the trial court's understatement of defendant's maximum penalty or sentencing range cannot support a finding of substantial compliance because it fails to adequately inform the defendant of the full extent of the penalty he or she faces to effectuate a knowing and intelligent waiver. *Bahrs*, 2013 IL App (4th) 110903, ¶ 31; *LeFlore*, 2013 IL App (2d) 100659, ¶ 53. The case at hand, however, is distinguishable because the trial court overstated, rather than understated, defendant's maximum applicable sentence.

¶ 27 The danger in the aforementioned cases, as well as in other cases where this court found the trial court's admonishment was insufficient to substantially comply with Rule 401(a) by misstating the applicable sentencing range, is allowing a defendant to proceed *pro se* without fully understanding the gravity of his situation, or in other words, the full extent of the consequences he or she faces in order for the waiver to be knowing and intelligent. *People v.*

*Redmond*, 73 Ill. App. 3d 160, 175 (1979) (defendant was made aware of the "gravity of his situation" when the trial court informed him of the applicable penalties). This same danger, however, is not present when the trial court overstates the potential maximum sentence.

¶ 28 Furthermore, defendant was also admonished regarding the minimum and maximum nonextended-term sentence, and despite being informed that he could receive 30 years in prison as opposed to the lesser 15 years, continued to request to represent himself. We acknowledge that the trial court should have been aware based upon the information available that defendant was not subject to an extended term sentence; however, at the time of the admonishment the State argued defendant was subject to such a term. Therefore, we conclude the trial court's admonishment regarding the applicable sentencing range substantially complied with Rule 401(a).

¶ 29 With regard to prejudice, defendant failed to identify, nor were we independently able to find, any basis in the record for prejudice he may have incurred where defendant received a minimum sentence well within the expected and admonished sentencing range (see *Johnson*, 119 Ill. 2d at 134-35 (no prejudice where defendant was admonished that he was facing the death penalty and he did, in fact, receive the death penalty despite the trial court's failure to admonish him regarding the potential for life imprisonment)) and where despite the sentence received, this court determined the waiver was knowing and intelligent. See *Haynes*, 174 Ill. 2d at 244-45 (defendant was not prejudiced by trial court's admonishment where waiver was knowing and intelligent); *cf. Wright*, 2015 IL App (1st) 123496, ¶ 59 (defendant was prejudiced by his unknowing waiver where trial court understated the maximum sentence and defendant lacked legal sophistication to know or was never made aware of correct maximum sentence prior to trial court's acceptance of defendant's waiver of counsel).

¶ 30 Consequently, because we find the trial court's admonishment substantially complied with Rule 401(a), there was no error, and therefore, no plain error (*Bannister*, 232 Ill. 2d at 79).

¶ 31 Defendant next contends that the mittimus should be corrected to reflect the proper name of the offense for which he was convicted and the fines and fees order amended to reflect the correct amount.

¶ 32 Defendant argues the mittimus is incorrect because he was convicted for possession of a controlled substance with intent to deliver and the mittimus reflects a conviction for manufacture or delivery of a controlled substance. The exact name of the offense in the mittimus appears as "MFG/DEL 01-15 GR COCAINE/ANLG." The State contends the mittimus is correct because this is the title of the offense in the statute. See 720 ILCS 570/401 (West 2012) (entitled "Manufacture or delivery unauthorized by Act"). In *People v. Blakney*, 375 Ill. App. 3d 554, 560 (2007), we previously held that this is an incorrect description of the name of the offense where defendant was convicted for possession and not manufacturing the substances. Accordingly, we direct the circuit court to amend the mittimus to reflect the proper name of defendant's conviction.

¶ 33 Defendant next contends, and the State agrees, that defendant was incorrectly assessed a $250 DNA ID system fee and a $5 electronic citation fee.

¶ 34 When a fine imposed does not conform to a statutory requirement, the fine is void and such issue may not be forfeited. See *People v. Milsap*, 2012 IL App (4th) 110668, ¶ 26; see also *People v. Breeden*, 2014 IL App (4th) 121049, ¶ 56. On appeal, the reviewing court may modify the fines and fees order without remanding the case back to the circuit court. Ill. S. Ct. R 615(b)(1) (eff. Aug. 27, 1999) ("[o]n appeal the reviewing court may *** modify the judgment or order from which the appeal is taken"); *People v. McCray*, 273 Ill. App. 3d 396, 403 (1995)

("[r]emandment is unnecessary since this court has the authority to directly order the clerk of the circuit court to make the necessary corrections"). The propriety of court-ordered fines and fees is reviewed *de novo*. *People v. Elcock*, 396 Ill. App. 3d 524, 538 (2009).

¶ 35 We accept the State's concession that the $250 DNA ID system fee and the $5 electronic citation fee should be vacated because they are inapplicable. An electronic citation fee may only be imposed when a defendant is convicted of a traffic violation and therefore does not apply. See 705 ILCS 105/27.3e (West 2012). The DNA ID system fee may not be imposed if defendant's DNA has already been taken. *People v. Marshall*, 242 Ill. 2d 285, 302 (2011). This court, at defendant's request, takes judicial notice of a letter from the Illinois State Police indicating defendant's DNA was previously on file for a conviction in 2007, and therefore, this fee is invalid. See *Id.* Accordingly, we hereby vacate the aforementioned fees and direct the circuit clerk to amend the fines and fees order to reflect the corrected total of $2,679 with applicable credit applied to the amount of assessments for defendant's presentence incarceration time served.

¶ 36 For the foregoing reasons, we affirm defendant's conviction for possession of a controlled substance with intent to deliver and direct the circuit clerk to amend the mittimus and fines and fees order to reflect the correct name of defendant's offense and the appropriate amount of fines and fees.

¶ 37 Affirmed; mittimus and fines and fees order amended.