2015 IL App (2d) 130934-U
No. 2-13-0934
Order filed June 29, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Boone County.
Plaintiff-Appellee,	)	
v.	)	No. 08-CF-348
CHARLES C. JACKSON,	)	Honorable C. Robert Tobin,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices McLaren and Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court substantially complied with Rule 401(a): although it did not initially admonish defendant that he was subject to a consecutive sentence, it did so as soon as it was aware that he was, and defendant was not prejudiced by any delay; (2) because the record did not establish the amount of sentencing credit to which defendant was entitled, we vacated the trial court's award and remanded for a determination.

¶ 2 Defendant, Charles C. Jackson, appeals from the judgment of the circuit court of Boone County finding him guilty of aggravated driving under the influence (DUI) (625 ILCS 5/11-501(a)(1), (d)(1)(H) (West 2008)). He contends that he was not properly admonished under Illinois Supreme Court Rule 401(a) (eff. July 1, 1984) and that the trial court did not calculate

properly his credit for time served. Because the court substantially complied with Rule 401(a), we affirm defendant's conviction, but, because there is an issue as to the proper number of days of credit for time served, we vacate that part of the judgment and remand for a determination of the correct number of days of credit.

¶ 3 I. BACKGROUND

¶ 4 Defendant was indicted on one count of aggravated DUI (625 ILCS 5/11-501(a)(2), (d)(1)(H) (West 2008)) (count I) and one count of aggravated DUI with a blood-alcohol concentration of 0.08 or more (625 ILCS 5/11-501(a)(1), (d)(1)(H) (West 2008)) (count II). Defendant committed the charged offenses on June 27, 2008. He first appeared in court in Boone County on December 2, 2011. On December 7, 2011, the trial court advised defendant that there was a hold on him from Minnesota.

¶ 5 On February 1, 2012, defendant's attorney advised the trial court that as of October 6, 2011, defendant had been in custody in Cook County on an unrelated charge. According to the assistant State's Attorney, defendant, upon his release from Cook County, was taken into custody in Boone County pursuant to an arrest warrant.

¶ 6 On August 30, 2012, defendant's counsel was allowed to withdraw. Defendant then moved to proceed *pro se*. The trial court advised him of the two charges. It also advised him that they were felonies, that they were punishable by one to three years in prison, and that he could be sentenced to one to six years in prison if an extended sentencing range applied. The court explained to defendant that he had a right to counsel and that counsel would be appointed if he were indigent. Defendant acknowledged that he understood the admonishments and stated that he wanted to represent himself. The court granted defendant's motion to proceed *pro se*.

¶ 7 On September 19, 2012, defendant posted bond. On September 24, 2012, the trial court noted that defendant had posted bond and that the "State of Minnesota came and got him." On November 21, 2012, the assistant State's Attorney advised the court that defendant was in custody in Minnesota and that the Minnesota authorities would not return defendant to Boone County. The court issued a warrant to have defendant returned to Boone County if he was released from custody in Minnesota.

¶ 8 On July 3, 2013, defendant, after being taken into custody pursuant to the warrant, appeared in court in Boone County. The trial court asked defendant if he wanted to continue to represent himself, to which defendant answered yes. The court advised him of the charges and that, because he was eligible for an extended-term sentence, the offenses were punishable by one to six years in prison. The court then asked the assistant State's Attorney if he had "[a]ny idea what [defendant was] sitting on now whether it would be consecutive sentences to that?" The assistant State's Attorney answered that he did not know "what [defendant was] sitting on." The court advised defendant that he had a right to appointed counsel. Defendant responded that "[t]his charge is nothing but three years. I'm already serving 63 months *** in Minnesota." The court granted defendant's request to represent himself.

¶ 9 On July 11, 2013, the trial court asked the State if it had made any offers to defendant. The assistant State's Attorney stated that he had made an offer when defendant was represented by counsel but that at that time he was unaware of the Minnesota case. He added that he did not know "if that is concurrent or consecutive at this point" and that he had not had a chance to verify that. The court stated that there was an issue as to whether a sentence in this case would be concurrent with, or consecutive to, defendant's Minnesota sentence. Defendant acknowledged that he understood the difference between a concurrent and a consecutive

sentence. The court continued the matter to the afternoon of July 11, 2013, to decide whether any sentence would be concurrent or consecutive.

¶ 10 Later, on July 11, 2013, the assistant State's Attorney advised the court that defendant had committed the Minnesota offense prior to committing the charged offenses. According to the assistant State's Attorney, defendant had pled guilty to the Minnesota charge, but, before being sentenced in Minnesota, he committed the charged offenses. He was then taken back to Minnesota and sentenced.

¶ 11 The trial court found that defendant's sentence here was to be served consecutively to the Minnesota sentence. The court encouraged defendant to accept appointed counsel, but defendant refused.

¶ 12 On July 18, 2013, the trial court reiterated to defendant that he was subject to a consecutive sentence. Defendant acknowledged that he understood. On July 25, 2013, defendant stated that he wanted to challenge the court's ruling that a consecutive sentence would apply.

¶ 13 On August 16, 2013, the trial court conducted a bench trial. The court found defendant guilty of both charges, but, because they were based on the same act, the court entered judgment only on count II. At sentencing, the court again ruled that defendant's sentence was consecutive to the Minnesota sentence. The court sentenced defendant to four years' imprisonment to be served consecutively to the Minnesota sentence. The court also gave defendant 317 days of credit for time served. Defendant did not file any posttrial or postsentencing motions. He filed a timely notice of appeal.

¶ 14 II. ANALYSIS

¶ 15 On appeal, defendant contends that the trial court failed to substantially comply with Illinois Supreme Court Rule 401(a) (eff. July 1, 1984) when he waived counsel, because it did not admonish him that he faced a consecutive sentence. He alternatively asserts that this case should be remanded so that the trial court can determine the proper number of days of credit for time served.

¶ 16 Initially, the State points out that defendant failed to preserve the issue as to whether there was substantial compliance with Rule 401(a) by not raising it in the trial court. We may review a forfeited issue under the plain-error doctrine when: (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). Whether a waiver of counsel is valid is a classic issue subject to plain-error review. *People v. Vernon*, 396 Ill. App. 3d 145, 150 (2009). Therefore, we will address defendant's contention regarding Rule 401(a).

¶ 17 A defendant may represent himself only if he voluntarily, knowingly, and intelligently waives his right to counsel. *People v. Black*, 2011 IL App (5th) 080089, ¶ 11 (citing *People v. Campbell*, 224 Ill. 2d 80, 84 (2006)). Before accepting a defendant's waiver of counsel, the trial court must fully inform a defendant of both the nature of the right being abandoned and the consequences of the decision. *Black*, 2011 IL App (5th) 080089, ¶ 11 (citing *People v. Kidd*, 178 Ill. 2d 92, 104-05 (1997)). To that end, Rule 401(a) directs that, before permitting a waiver of counsel, the trial court must inform the defendant of, and determine that he understands, the following: (1) the nature of the charges; (2) the minimum and maximum sentence prescribed by

law, including any applicable extended-term or consecutive sentence; and (3) that he has a right to counsel, including appointed counsel if he is indigent. Ill. S. Ct. R. 401(a) (eff. July 1, 1984); *Black*, 2011 IL App (5th) 080089, ¶ 12. Strict, technical compliance with Rule 401(a) is not required, and substantial compliance will suffice if the record shows that the waiver was knowing and voluntary and that the admonishments did not prejudice the defendant. *People v. Wright*, 2015 IL App (1st) 123496, ¶ 46.

¶ 18 In this case, when defendant first requested to proceed *pro se*, on August 30, 2012, the trial court admonished him under Rule 401(a). At that time, the court was unaware that any proceedings in Minnesota might result in defendant receiving a consecutive sentence in this case. Therefore, the court could not have advised defendant of the probability of a consecutive sentence arising out of proceedings of which the judge was not aware.

¶ 19 On July 11, 2013, the trial court, having been made aware of the Minnesota proceedings, ruled for the first time that defendant was subject to a mandatory consecutive sentence. Defendant acknowledged that he understood the difference between a concurrent and a consecutive sentence. After advising defendant that the sentence would be consecutive, the court encouraged defendant to accept appointed counsel, but defendant refused. One week later, the court reiterated that a consecutive sentence would be imposed if defendant were found guilty.

¶ 20 The trial court substantially complied with Rule 401(a). It did so by promptly advising defendant, upon deciding that a consecutive sentence would apply, of the applicable sentence, urging him to accept appointed counsel, and reiterating one week later that a consecutive sentence would apply. Clearly, defendant was not prejudiced by any delay in that admonishment. Under those circumstances, defendant was sufficiently admonished for purposes of Rule 401(a).

¶ 21 Although defendant relies on *People v. LeFlore*, 2013 IL App (2d) 100659, *rev'd on other grounds*, 2015 IL 116799, that case is distinguishable. In *LeFlore*, the defendant faced a Class X sentence. The trial court mistakenly failed to properly admonish the defendant under Rule 401(a) when it did not tell him that he was subject to a Class X sentence. *LeFlore*, 2013 IL App (2d) 100659, ¶ 53. Here, the court was not aware that a consecutive sentence applied when defendant first waived his right to counsel and the court admonished him pursuant to Rule 401(a). It was not until July 3, 2013, that the court first became aware of a possible consecutive sentence and not until July 11, 2013, that the court ruled that the consecutive sentence applied. The court then promptly advised defendant in that regard and again encouraged him to accept appointed counsel. The factual situation here is entirely different from that in *LeFlore*.

¶ 22 We next address defendant's contention that this case should be remanded to determine the amount of presentence credit to which he is entitled. Specifically, defendant argues that he is entitled to credit for time that he served while he was in custody in Cook County on an unrelated charge, because there was an arrest warrant in this case pending during that time. He asserts that, because the record is unclear as to when he entered custody in Cook County, we should remand for such a finding.

¶ 23 Section 5-4.5-100(b) of the Unified Code of Corrections requires that an offender be given credit for time spent in custody as a result of the offense for which he was sentenced. 730 ILCS 5/5-4.5-100(b) (West 2012). The credit is not subject to forfeiture. *People v. Johnson*, 401 Ill. App. 3d 678, 680 (2010). Our review of the propriety of any credit is *de novo*. *Johnson*, 401 Ill. App. 3d at 680.

¶ 24 A defendant who is in custody when he is charged with another offense is entitled to credit for time spent in simultaneous custody. *Johnson*, 401 Ill. App. 3d at 682-83. Where the

defendant is already in custody on an unrelated offense, the beginning point of his custody for purposes of calculating his credit is when he is charged with the new offense. *Johnson*, 401 Ill. App. 3d at 683.

¶ 25 Here, defendant was charged and an arrest warrant was issued on July 29, 2008. That warrant was still pending while defendant was in custody in Cook County. According to the assistant State's Attorney, after the charges were disposed of in Cook County, and the warrant was served on December 1, 2011, defendant was brought to Boone County. Defendant then stayed in custody in Boone County until September 19, 2012. Based on the assertion by his former attorney, defendant was in custody in Cook County as of October 6, 2011. That period of time, from October 6, 2011, until September 19, 2012, yielded 349 days of credit.

¶ 26 However, defendant points to a criminal-history record that suggests that he was arrested in Cook County on October 2, 2011. Based on that record, he maintains that this case should be remanded so that the trial court can decide whether he was in custody in Cook County before October 6, 2011. We agree that the record does not establish the exact date that defendant was taken into custody in Cook County but suggests that it might have been earlier than October 6, 2011. Therefore, we vacate that part of the judgment crediting defendant for 317 served and remand for the trial court to calculate the precise number of days of credit to which defendant is entitled.

¶ 27 III. CONCLUSION

¶ 28 For the reasons stated, we affirm that part of the judgment of the circuit court of Boone County finding defendant guilty of aggravated DUI, vacate that part of the judgment finding him entitled to 317 days of credit for time served, and remand for a determination of the proper number of days of credit.

¶ 29 Affirmed in part and vacated in part; cause remanded.