2015 IL App (2d) 131036-U
No. 2-13-1036
Order filed July 27, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. RICHARD WIGGINTON, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Lee County. No. 10-CM-419 Honorable Charles T. Beckman, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Hutchinson and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant showed no error (and thus no plain error) in the trial court's failure to comply with Rule 401(a): because defendant was sentenced only to pay a fine, he had no constitutional or statutory right to counsel, and thus Rule 401(a) did not apply.

¶ 2 Following a bench trial in the circuit court of Lee County, defendant, Richard Wigginton, was found guilty of battery (720 ILCS 5/12-3 (West 2010)). Although defendant was represented by appointed counsel at trial, the trial court granted counsel leave to withdraw shortly thereafter. Defendant filed a *pro se* motion for a new trial. The trial court denied the motion and subsequently imposed sentence following a hearing at which defendant appeared

without counsel. His sentence consisted exclusively of a $2,500 fine. Defendant argues on appeal that the trial court erred in permitting him to appear *pro se* in proceedings after trial without first admonishing him in accordance with Illinois Supreme Court Rule 401(a) (eff. July 1, 1984). We affirm.

¶ 3 Defendant did not raise the issue of compliance with Rule 401(a) in his posttrial motion. Ordinarily, a criminal defendant's failure to raise an issue in his or her posttrial motion forfeits appellate review of the issue. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Defendant argues, however, that the issue he raises is reviewable under the plain-error rule, which permits review of a forfeited error "where the evidence in a case is so closely balanced that the jury's guilty verdict may have resulted from the error and not the evidence" (*People v. Herron*, 215 Ill. 2d 167, 178 (2005)) or "where the error is so serious that the defendant was denied a substantial right" (*id.* at 179). "[T]he first step in determining whether the plain-error doctrine applies is to determine whether any reversible error occurred." *People v. Miller*, 2014 IL App (2d) 120873, ¶ 17. We conclude that no error occurred here.

¶ 4 Rule 401(a) provides as follows:

> "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." Ill. S. Ct. R. 401(a) (eff. July 1, 1984).

¶ 5 The rule presupposes that the accused, in fact, has a *right* to counsel. " '[W]aiver is the voluntary relinquishment of a known *right*.' " (Emphasis added.) *People v. Tapia*, 2014 IL App (2d) 111314, ¶ 36 (quoting *People v. Phipps*, 238 Ill. 2d 54, 62 (2010)). The trial court cannot be said to have "permit[ted] a waiver" (Ill. S. Ct. R. 401(a) (eff. July 1, 1984) unless there was a right that could be relinquished. As explained below, we conclude that defendant did not have a right to appointed counsel, so there was no violation of the rule.[1]

¶ 6 Defendant acknowledges that, pursuant to *Scott v. Illinois*, 440 U.S. 367, 373-74 (1979), the right to counsel under the Sixth Amendment to the United States Constitution (U.S. Const., amend. VI) applies only in cases in which the accused is actually sentenced to a term of imprisonment. The *Scott* court rejected the defendant's argument that the state must provide counsel whenever imprisonment is an authorized penalty. *Scott*, 440 U.S. at 368. Defendant points out, however, that in Illinois the statutory right to appointed counsel under section 113-3(b) of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/113-3(b) (West 2010)) applies "[i]n all cases, except where the penalty is a fine only" and is thus broader than the Sixth Amendment right. See *People v. Campbell*, 224 Ill. 2d 80, 85 (2006). Even so, because the penalty imposed upon defendant was a fine only, the statutory right to appointed counsel is still not broad enough to reach this case. Like the Sixth Amendment right to counsel, the statutory right depends on the punishment actually imposed, not the authorized penalty. *People v. Scott*, 68 Ill. 2d 269, 273-74 (1977), *aff'd*, 440 U.S. 367.

[1] Given this conclusion, we need not consider the State's argument that the record shows substantial compliance with Rule 401(a).

¶ 7 In *People v. MacArthur*, 313 Ill. App. 3d 864 (2000), we expressly rejected the proposition that Rule 401(a) "require[s] admonishments wherever there is a possibility of imprisonment." *Id.* at 869. We held that "the purpose of Rule 401(a) is to ensure the knowing and intelligent waiver of the *constitutional* right to counsel." (Emphasis in original.) *Id.* Accordingly, we held, as we had in prior cases, that "like the constitutional right to counsel itself, the right to Rule 401(a) admonishments attaches only if the defendant is actually sentenced to imprisonment." *Id.*

¶ 8 We note that in *People v. Herring*, 327 Ill. App. 3d 259, 262 (2002), the Fourth District specifically rejected our holding in *MacArthur*, reasoning as follows:

> "Rule 401(a) provides that the court must give the admonishments regarding waiver of counsel to 'a person *accused* of an offense *punishable* by imprisonment.' (Emphas[es] added.) [Citation.] The Second District has, in our opinion, misinterpreted the rule as if it read that the court must give admonishments to 'a person *convicted* of an offense and *punished with* imprisonment.' We recently declined to follow the Second District's interpretation that Rule 401 rights only attach when a defendant is actually sentenced to imprisonment." (Emphases in original.)

In *Herring*, the defendant's attorney was given leave to withdraw prior to trial and the defendant appeared without counsel at her trial for driving under the influence of alcohol (DUI) ((625 ILCS 5/11-501(a) (West 1998)). The trial court found the defendant guilty, imposed a fine, and placed her on supervision. According to the *Herring* court, because DUI, as charged, was a Class A misdemeanor punishable by imprisonment, the trial court was obligated to admonish the defendant pursuant to Rule 401(a). Because there was "no verbatim record of the admonishment and alleged waiver of counsel" (*Herring*, 327 Ill. App. 3d at 263), the *Herring* court concluded

that the "waiver" of counsel was ineffective (*id.*). Notably, the *Herring* court's assertion that there was a waiver of counsel was not accompanied by any consideration of whether the defendant was entitled to counsel in the first place. Evidently the court did not view the question as germane to the inquiry of whether Rule 401(a) admonishments were necessary. As previously discussed, however, waiver entails relinquishment of a *right*. Rule 401(a) is violated when the trial court permits a waiver of the right to counsel without properly admonishing the defendant. Permitting a defendant who has no right to counsel to proceed *pro se* is significantly different from permitting a *waiver* of counsel. Thus, we adhere to our decision in *MacArthur* insofar as it links the need for admonitions to the existence of a right to counsel.

¶ 9 We recognize, however, that *MacArthur*'s holding that "the right to Rule 401(a) admonishments attaches only if the defendant is actually sentenced to imprisonment" (*MacArthur,* 313 Ill. App. 3d at 869)—*i.e.* that the right to the admonishments corresponds to the *constitutional* right to counsel—is incompatible with our supreme court's subsequent decision in *Campbell*, which held that the right to Rule 401(a) admonishments also attaches when there is a waiver of the *statutory* right to counsel. Campbell, 224 Ill. 2d at 86. In *Campbell*, the unrepresented defendant was charged with an offense for which imprisonment was an authorized sentence, but he was actually sentenced to conditional discharge subject to payment of a fine and performance of community service. The State maintained that Rule 401(a) was inapplicable because the defendant had no sixth amendment right to counsel to be advised of or to waive. *Id.* at 85. The *Campbell* court rejected the argument, noting (as defendant has in this case) that the statutory right to counsel is broader that the constitutional right. The *Campbell* court reasoned as follows:

> "In *People v. Hall*, 114 Ill. 2d 376 (1986), this court explained that '[t]he provisions of section 113-3(b) *** assure *the right to counsel* to an indigent defendant.' (Emphasis added.) [Citation.] So even if defendant did not possess a sixth amendment right to counsel in this case, he *did* possess a statutory right to counsel, *as this was not a case in which the penalty imposed was a fine only*." *Id.* at 85. (Emphases added.)

¶ 10 *Campbell* does not dictate that Rule 401(a) admonitions must be given in every case in which imprisonment is a possible penalty. Instead, *Campbell* is entirely consistent with the view that the need for the admonitions depends upon the existence of a right to counsel. By holding that the admonitions are necessary before the waiver of either the constitutional or the statutory right to counsel, *Campbell* differs from *MacArthur*, which linked the admonitions only to waiver of the constitutional right to counsel. But that difference does not matter here. Because defendant was sentenced to a fine only, he cannot complain that he was deprived of the right to counsel under either the sixth amendment or section 113-3(b) of the Code. Therefore he cannot complain that he was not properly admonished.

¶ 11 For the foregoing reasons, the judgment of the circuit court of Lee County is affirmed. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2012); see also *People v. Nicholls*, 71 Ill. 2d 166, 179 (1978).

¶ 12 Affirmed.