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2015 IL App (3d) 130782-U

Order filed December 15, 2015

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2015

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS)	of the 10th Judicial Circuit,
)	Peoria County, Illinois,
Plaintiff-Appellee,)	
)	Appeal No. 3-13-0782
v.)	Circuit No. 12-CM-1831
)	
RAYMEL EVERETT,)	Honorable
)	Thomas A. Keith
Defendant-Appellant)	Judge, Presiding.
)	
)	

JUSTICE O'BRIEN delivered the judgment of the court.
Justice Lytton concurred in the judgment.
Justice Schmidt concurred in part and dissented in part.

ORDER

¶ 1 *Held:* Defendant was denied a fair trial where the trial court improperly denied his request for a continuance to obtain counsel to aid him with sentencing and other posttrial matters.

¶ 2 Defendant Raymel Everett was found guilty after a bench trial of theft and sentenced to two years' conditional discharge and 150 hours of community service to be completed within 18

months. A 40-day term of imprisonment was held in remission. Everett was ordered to pay \$4,995.67 in restitution to the victim, AT&T. He appealed. We reverse and remand.

¶ 3

FACTS

¶ 4

Defendant Raymel Everett was arrested by the Peoria police department for the alleged theft of a utility box and copper wire. He was charged by information with one count of misdemeanor theft. The complaint alleged that Everett knowingly took copper wire and its metal container belonging to AT&T. At his arraignment, Everett rejected the public defender assigned to him and informed the trial court that he wished to represent himself. He requested standby counsel, which the trial court denied. The trial court admonished Everett as follows:

[COURT]: “You want a trial by a jury? Okay. And you’re going to represent yourself?

[EVERETT]: Yes, sir.

[COURT]: Correct?

[EVERETT]: Yes, sir.

[COURT]: Now you understand you have the right to be represented by an attorney in this case.

[EVERETT]: There ain’t no --

[COURT]: You understand that though?

[EVERETT]: Oh, sure.

[COURT]: You understand that if you needed time to hire an attorney I would give you time.

[EVERETT]: I wouldn’t want it.

[COURT]: But you understand it?

[EVERETT]: Oh, sure.

[COURT]: You understand that if you proceed with jury trial in this case, you will be representing yourself, you won't be able to have any help from anybody else?

[EVERETT]: Sir, I never lost in a courtroom, and I've never had an attorney. And so my record is --

[COURT]: I understand."

¶ 5 The trial court had Everett read and initial a document that he was waiving his right to be represented by counsel. A hearing took place on a motion to visit the crime scene filed by Everett. The trial court denied the motion. At a pretrial status hearing, on the trial court's inquiry, Everett reiterated that his waiver of his right to an attorney was knowingly, freely, and voluntarily made. Another hearing took place where a motion Everett filed regarding the post-arrest tow of his vehicle was heard and denied. The trial court explained to Everett about questioning himself as a witness and that the State could object. Everett stated that he was aware of courtroom procedures, such as "Objection. Sustained. Hearsay speculation. Hearsay don't work in the courtroom. Only the facts."

¶ 6 The jury trial took place. The State presented the following evidence. Ronald Berger, an AT&T repairman and installer, who discovered the missing box while investigating phone outages in the area, testified that copper wire and the utility box were missing. Ronald Lightbody and Michael Lightbody, who work at Auto Tech Towing, a neighboring property to where the theft occurred, both testified they heard loud sounds from next door, looked over the fence, and saw a person putting the utility box into a white van with a "turtle top". The van drove off but they were able to provide a description and license plate number.

¶ 7 Beverly King testified that she hired Everett to remove a bush that was growing into her privacy fence. She paid Everett upfront and left for work. She did not tell him to remove the utility box and did not say it would be easier to remove the bush if the box was gone. The bush Everett removed was not near the utility box. The utility box did not have a top on it.

¶ 8 Todd Rusk, the arresting officer, testified he saw Everett's van as it was leaving a local scrap metal and recycling center. He pulled Everett over, arrested him, and gave him his *Miranda* warnings. Everett admitted he took the wire and utility box but maintained he was paid by King to remove it and that he was unaware the property belonged to AT&T.

¶ 9 The defense offered Carl Hill, pastor at Everett's church, who testified to Everett's good character. Everett testified in narrative form in his own behalf, stating, in part, that he was a veteran and 100% disabled.

¶ 10 During deliberations, the jury sent two questions to the trial court, which returned answers as agreed to by the parties. The first questions was, "The defendant stated that he had a disability. What is his disability?" The answer provided was, "The evidence in this case has been completed. The evidence which you are to consider consists of the witnesses and the exhibits offered and received in evidence." The jury's second question was, "Can anyone defend themselves or do they have to prove that they are competent?" to which the court responded, "Every defendant in a criminal case has the right to be represented by an attorney. If a defendant cannot afford an attorney, one will be appointed by the court to represent that defendant. Notwithstanding, every criminal defendant has the right to represent himself." In discussing the appropriate responses, Everett brought up his disability but insisted that he qualified to represent himself.

¶ 11 The jury returned a verdict of guilty and a sentencing hearing was scheduled at a later date to enable to parties to prepare. At the sentencing hearing, Everett moved for a continuance in order to hire an attorney. He stated he was 100% disabled and had been for 8 years. His disability was mental illness, including bipolar disorder. The trial court denied the motion, finding Everett was “perfectly capable” of representing himself, that Everett held himself out as capable of self-representation, and that Everett insisted on representing himself, despite the trial court’s warnings to the contrary. The trial court also heard and denied Everett’s motion for a mistrial. Everett proceeded with sentencing “against his will.” The trial court acknowledged Everett’s objection but determined that Everett failed to raise the issue of his disability until after the jury sent the questions during deliberations and that Everett was trying to create an issue for appeal.

¶ 12 Burger, the AT&T repairman, testified the cost to repair the utility box and replace the copper wire included \$3,231 for labor, \$829 for materials, and \$936 for the lost items, for a total of \$4,995.67.

¶ 13 The trial court accepted the State’s sentencing recommendation and sentenced Everett to 2 years’ conditional discharge, 150 hours of community service to be completed in 18 months, and ordered \$4,995.67 in restitution. Everett informed the trial court that he was on a fixed income and might not be able to timely make restitution. The trial court instructed Everett that his probation was not reporting and that the probation department would work with him to set up a payment plan. Everett appealed.

¶ 14 ANALYSIS

¶ 15 Everett raises four issues on appeal. He argues that he was deprived of his constitutional right to counsel when the trial court refused to let him revoke his waiver of counsel; the

restitution order was entered in error where the trial court failed to consider Everett's ability to pay; he was improperly assessed a probation fee; and the circuit court was without authority to assess the other fees.

¶ 16 We first consider whether Everett was deprived of his constitutional right to counsel when the trial court refused to let him revoke his waiver of counsel. This issue was not raised below and Everett urges us to review it under the plain error doctrine. The doctrine provides that an error otherwise forfeited may be reviewed for plain error when the evidence is closely balanced such that the error might have tipped the scales of justice against the defendant or when the error results in the denial of the defendant's substantial rights regardless of the closeness of the evidence. *People v. Herron*, 215 Ill. 2d 167, 178 (2005). The denial of a defendant's right to counsel affects his substantial rights and may be reviewed under the second plain error prong. *People v. Vernon*, 396 Ill. App. 3d 145, 150 (2009). For the plain doctrine to apply, there must first be clear or obvious error. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010).

¶ 17 Everett argues he was deprived of his sixth amendment right to counsel when the trial court denied his request for a continuance at the sentencing hearing. He maintains that he revoked his prior waiver of counsel and that the trial court's denial of his motion to continue deprived him of his right to obtain counsel to aid him with posttrial issues. Because we consider that the trial court erred in denying Everett's revocation of waiver of counsel, plain error review is appropriate.

¶ 18 All defendants have a constitutional right to the effective assistance of counsel. U.S. Const., amend. VI; *People v. Domagala*, 2013 IL 113688, ¶ 36. The sixth amendment right to counsel also includes the right to waive counsel and represent oneself. *People v. Toy*, 407 Ill. App. 3d 272, 282 (2011) (quoting *People v. Haynes*, 174 Ill. 2d 204, 235 (1996)). The sixth

amendment right to counsel applies to all critical stages of the proceedings, including sentencing and other posttrial matters. *Vernon*, 396 Ill. App. 3d at 153; *People v. Abdullah*, 336 Ill. App. 3d 940, 950 (2002). Under the continuing waiver rule, a defendant’s knowing and voluntary waiver applies to all subsequent proceedings. *People v. Baker*, 92 Ill. 2d 85, 95 (1982). There are two exceptions, including if the defendant later asks for counsel. *People v. Ware*, 407 Ill. App. 3d 315, 342 (2011) (quoting *People v. Cleveland*, 393 Ill. App. 3d 700, 705 (2009)). A defendant’s subsequent request for counsel may constitute a revocation of an earlier waiver of the right to counsel. *People v. Griffin*, 305 Ill. App. 3d 326, 330 (1999). On review, this court considers all reasonable presumptions in favor of a revocation of waiver. *Griffin*, 305 Ill. App. 3d at 330.

¶ 19 A continuance to obtain counsel may be granted when the “ ‘interests of justice’ ” demand. *People v. Pratt*, 391 Ill. App. 3d 45, 54 (2009) (quoting *People v. Friedman*, 79 Ill. 2d 341, 347 (1980)). The initial question is “whether the denial of a continuance violates a substantive right of the accused” and depends on the particular facts of each case. *Friedman*, 79 Ill. 2d at 347-48. The trial court should also consider the need to avoid allowing the defendant to “game the system.” *People v. Palmer*, 382 Ill. App. 3d 1151, 1163 (2008). This court reviews a trial court’s decision to deny a defendant’s revocation of his right to counsel and a trial court’s denial of a request for a continuance for an abuse of discretion. *Pratt*, 391 Ill. App. 3d at 53; *People v. Ward*, 154 Ill. 2d 272, 307 (1992).

¶ 20 Here, Everett asked for the appointment of counsel at the sentencing hearing, arguing he was incapable of representing himself because he was 100% disabled due to bipolar disorder. The trial court considered that Everett was “perfectly capable” of self-representation, had held himself out as capable, and rejected the trial court’s repeated warnings against self-representation. The trial court noted that Everett did not raise the issue of his disability as a

hindrance to his ability to represent himself until after the jury raised the issue of his competence during deliberations. The trial determined that Everett's motion for a continuance and request for counsel was untimely and made to preserve the issue for appeal.

¶ 21 We find the trial court's determination was an abuse of discretion. There was no evidence that Everett sought to revoke his waiver of counsel in order to delay the proceedings. His initial waiver of counsel was almost a year prior to the attempted revocation of the waiver. Everett did not alternate during the proceedings between requesting counsel and seeking to proceed *pro se*. At the time Everett waived counsel, the trial court assured him that he was entitled to representation and that the trial court would appoint counsel if Everett so requested. The trial court also informed Everett that if he "needed time to hire an attorney, [the trial court] would give you time." In spite of its earlier assurances to Everett, when Everett subsequently sought a continuance to obtain counsel, the trial court denied the request.

¶ 22 The trial court considered that Everett was "perfectly capable" of self-representation. The jury, however, seemingly questioned that assessment when it inquired during deliberations as to the qualifications to represent oneself. Everett, too, apparently took notice of the jury's question and reconsidered the efficacy of continuing to proceed *pro se* during posttrial matters and sentencing. It appears that, "[f]or whatever reason, defendant finally changed his mind about the wisdom of *pro se* representation." *Palmer*, 382 Ill. App. 3d at 1163. Like the defendant in *Palmer*, Everett's request for counsel was made at a new stage of the proceedings, requiring the trial court consider the issue anew. *Id.* The trial court, however, relied on its assessment of Everett's abilities and desire to represent himself in the prior stages of the proceedings, neglecting to consider whether the interests of justice required appointment of counsel for Everett.

¶ 23 The above issue is dispositive and requires remand for posttrial and sentencing issues. Nevertheless, the other issues Everett raised merit mention so that they are properly handled on remand. If the trial court again orders restitution, it must consider Everett's ability to pay. 730 ILCS 5/5-5-6(f) (West 2012) (when ordering restitution, a trial court must consider the financial resources of the defendant and decide whether restitution should be paid in a single payment or with an installment plan); *People v. Hayes*, 173 Ill. App. 3d 1043, 1052 (1988) (an order that does not specify time and manner of payment is an insufficient order and does not comply with the statutory requirements).

¶ 24 Similarly, a probation fee should be imposed only if Everett is ordered to be actively supervised. 730 ILCS 5/5-6-3(i) (West 2012) (probation fee "shall be imposed only upon an offender who is actively supervised" by the probation and court services department); *People v. Wynn*, 2013 IL App (2d) 120575, ¶ 33 (where a defendant is not actively supervised for all or part of the probation term, the proper remedy is to remand for the trial court to reduce the fees). In addition, the trial court must impose any fees and fines, not the circuit clerk. *People v. Alghadi*, 2011 IL App (4th) 100012, ¶ 20 (imposition of fines and fees is a judicial act and the circuit clerk has no authority to impose them).

¶ 25 For the foregoing reasons, the judgment of the circuit court of Peoria County is reversed and the cause remanded.

¶ 26 Reversed and remanded.

¶ 27 JUSTICE SCHMIDT, concurring in part and dissenting in part.

¶ 28 I agree that this case should be remanded for the trial court to set a payment schedule, taking into account Everett's ability to pay, and to impose appropriate fines. However, I would affirm the trial court's denial of Everett's motion for a continuance to obtain counsel filed on the

date of his sentencing hearing. It is well settled that a defendant may not use his constitutional right to counsel to delay the proceedings against him. *People v. Friedman*, 79 Ill. 2d 341, 349 (1980). Everett had three weeks from the date of trial to seek and obtain counsel. He failed to do so.

¶ 29 “[W]here the right to self-representation has been invoked voluntarily, knowingly, and understandingly, it stands in equal footing to the right to assistance by counsel.” *People v. Pratt*, 391 Ill. App. 3d 45, 53 (2009) (citing *Faretta v. California*, 422 U.S. 806, 819-20 (1975)). As such, a defendant’s motion for a continuance to obtain counsel on the day of sentencing is analogous to a request for substitution of counsel. See *Id.* The decision to deny a last minute request is reviewed for an abuse of discretion, which occurs only when the ruling is arbitrary, fanciful, or unreasonable, or when no reasonable person would take the same view. *People v. Ortega*, 209 Ill. 2d 354, 359 (2004).

¶ 30 The majority recognizes that the trial court found Everett’s motion for a continuance untimely, but reverses its ruling, finding that there was no evidence that Everett sought to revoke his waiver of counsel in order to delay the proceedings. To the contrary, there was evidence to support such a finding. In denying Everett’s motion for a continuance to obtain counsel on the basis that he was “100% disabled,” the trial judge explicitly noted that the jury raised the issue of Everett’s competence during deliberations, and that he had given Everett three weeks to prepare for sentencing when he could have just proceeded immediately following trial. While it very well may be true that Everett “finally changed his mind about the wisdom of *pro se* representation,” such newfound wisdom does not explain away his failure to set forth any effort or attempts at obtaining counsel during the three-week period between trial and sentencing. Nor does it explain his failure to have counsel ready and willing to represent him at the hearing. See

People v. Burrell, 228 Ill. App. 3d 133, 142 (1992) (“The denial of a motion for continuance to obtain new counsel is not an abuse of discretion if new counsel is not specifically identified or does not stand ready, willing, and able to make an unconditional entry of appearance *instanter*.”). Moreover, Everett was not incarcerated at the time of sentencing, yet he faced the possibility of serving time in jail.

¶ 31 Given these facts, one cannot say that the trial court’s denial of Everett’s motion for a continuance was in any way arbitrary or unreasonable. Any rational trier of fact could have inferred that Everett’s motion was an attempt to delay the proceedings and, ergo, Everett’s potential incarceration. I would therefore affirm the court’s denial of Everett’s motion for a continuance, and remand the case only for the court to enter a proper restitution order and to impose appropriate fines. For these reasons, I respectfully dissent.