2015 IL App (4th) 130636-U

NO. 4-13-0636

FILED
February 20, 2015
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from |
| Plaintiff-Appellee, | ) | Circuit Court of |
| v. | ) | McLean County |
| THOMAS SIX, | ) | No. 11CF1020 |
| Defendant-Appellant. | ) | |
| | ) | Honorable |
| | ) | Scott Drazewski, |
| | ) | Judge Presiding. |

JUSTICE TURNER delivered the judgment of the court.
Presiding Justice Pope and Justice Knecht concurred in the judgment.

**ORDER**

¶ 1 *Held*: The trial court's admonishments and the record demonstrate defendant did understand his right to appointed counsel to represent him at an evidentiary hearing on the State's petition to revoke defendant's probation.

¶ 2 In November 2011, a grand jury indicted defendant, Thomas Six, with two counts of a violation of an order of protection (720 ILCS 5/12-3.4(a)(1) (West Supp. 2011)), one count of domestic battery (720 ILCS 5/12-3.2(a)(2) (West 2010) (text of section effective July 1, 2011)), and one count of resisting a peace officer (720 ILCS 5/31-1(a) (West 2010)). Defendant and the State entered into a plea agreement, under which defendant would plead guilty to one count of a violation of an order of protection with a sentence of 30 months' probation and 126 days in jail and one count of resisting a peace officer with a sentence of 126 days in jail, and the State would seek dismissal of the other two charges. At the March 2012 plea hearing, the McLean County circuit court accepted defendant's guilty plea to one count of a violation of an

order of protection and one count of resisting a peace officer, dismissed the other two counts, and imposed the agreed-upon sentences.

¶ 3 In June 2012, the State filed a petition to revoke defendant's probation for failure to report to his probation officer and provide proof of his residence and employment. That same month, defendant appeared and the trial court reappointed the public defender's office to represent defendant on the petition to revoke. At a January 2013 hearing, defendant entered an open admission to the State's petition to revoke probation, and after admonishing defendant, the court accepted defendant's admission. At the March 2013 resentencing hearing, the court revoked defendant's probation and sentenced him to three years' imprisonment for a violation of an order of protection. In April 2013, defendant filed a motion to reconsider his sentence, which the court denied.

¶ 4 Defendant appeals, contending the trial court deprived him of due process by failing to admonish him about his right to have counsel appointed to represent him at an evidentiary hearing on the petition to revoke probation. We affirm.

¶ 5 I. BACKGROUND

¶ 6 The violation-of-an-order-of-protection indictments alleged that, on November 15, 2011, defendant knowingly, having been served with notice of the contents of an order of protection in McLean County circuit court case No. 11-OP-169, did intentionally commit an act prohibited by the order of protection in that defendant came within 500 of feet of Lisa Gipson. Count I also stated defendant had a prior conviction of domestic battery in McLean County case No. 00-CM-2084, and count II stated defendant had a prior conviction of aggravated battery in McLean County case No. 02-CF-1400. Due to defendant's prior convictions, the violation-of-an-order-of-protection charges were Class 4 felonies. See 720 ILCS 5/12-3.4(d) (West Supp. 2011).

The domestic-battery indictment (count III) was also based on defendant's November 15, 2011, actions against Gipson. Additionally, the resisting-a-peace-officer indictment (count IV) was also based on defendant's actions on November 15, 2011.

¶ 7 On November 15, 2011, defendant appeared in court, and the docket entry indicates the trial court appointed the public defender to represent defendant. On December 2, 2012, defendant appeared in court and was represented by assistant public defender, Kelly Harms. Defendant was represented throughout the remainder of the original proceedings by assistant public defender, David Rumley.

¶ 8 On March 20, 2012, pursuant to the plea agreement, defendant pleaded guilty to the first count of a violation of an order of protection and the resisting-a-peace-officer count. The trial court accepted defendant's plea and sentenced him in accordance with the plea agreement, which included a 30-month probation term for the violation-of-an-order-of-protection count. The court also dismissed the other two charges.

¶ 9 On June 11, 2012, the State filed the petition to revoke defendant's probation. On June 18, 2012, defendant completed an affidavit of assets and liabilities for the purpose of obtaining appointed counsel. On June 29, 2012, defendant completed another affidavit of assets and liabilities. He also appeared in court, and the trial court reappointed the public defender's office to represent defendant on the petition to revoke. Rumley represented defendant at this court appearance but noted on the record a different attorney from the public defender's office would represent defendant in the future. At the July 13, 2012, status hearing, defendant appeared and was represented by assistant public defender, Ronald Lewis. On August 24, 2012, Lewis appeared on defendant's behalf, but defendant failed to appear.

¶ 10 At a January 2013 hearing, defendant entered an open admission to the State's petition to revoke probation. Lewis also represented defendant at this hearing. The trial court gave defendant lengthy admonishments before accepting the admission, which included the following:

> "Do you also understand that you don't have to admit to any of these allegations, that you could require that a hearing be held before the Court, there being no option in essence of a jury trial on a petition for revocation of probation, but at that hearing before the Court, the State would be required to call witnesses against you. You would be able to go ahead and see and confront those witnesses through your attorney. He could question or cross examine any of the State's witnesses. You could call any witness or witnesses as part of your case that you wanted the trier of fact to hear from, using the power of the Court's subpoena if necessary, in order to compel the appearance of any such witness in Court, and you could also choose to testify in your behalf. If you admit to these allegations, then you won't hold the State to their burden of proof, which applies on a petition for revocation of probation, which is to establish that it's more probably true than not true or by a preponderance of the evidence that you violated your probation as alleged. Do you understand that by admitting to these allegations, that you'll be giving up and waiving each of those rights?"

Defendant responded with a "[y]es." After hearing the State's factual basis, the court accepted defendant's admission and set the matter for a resentencing hearing.

¶ 11 At the March 15, 2013, resentencing hearing, the trial court revoked defendant's probation and sentenced him to three years' imprisonment for the violation of an order of protection. In April 2013, defendant filed a motion to reconsider his sentence. He also filed a *pro se* postconviction petition. After a June 28, 2013, hearing, the court denied defendant's motion to reconsider. On July 24, 2013, defendant filed a timely notice of appeal, but while the notice of appeal listed the correct judgment date, it stated the appeal was from a denial of a postconviction petition. On August 29, 2013, defendant filed a timely late notice of appeal with all of the correct information. Ill. S. Ct. R. 606(c) (eff. Feb. 6, 2013). Thus, this court clearly has jurisdiction of this appeal under Illinois Supreme Court Rule 603 (eff. Feb. 6, 2013).

¶ 12 II. ANALYSIS

¶ 13 Defendant's sole argument on appeal is he was denied due process because the trial court failed to admonish him of his right to appointed counsel to represent him at an evidentiary hearing on the State's petition to revoke his probation.

¶ 14 Illinois Supreme Court Rule 402A(a) (eff. Nov. 1, 2003) required the trial court to address defendant in open court, informing him of and determining he understood the following:

> "(1) the specific allegations in the petition to revoke probation, conditional discharge or supervision;
>
> (2) that the defendant has the right to a hearing with defense counsel present, and the right to appointed counsel if the defendant is indigent and the underlying offense is punishable by imprisonment;

(3) that at the hearing, the defendant has the right to confront and cross-examine adverse witnesses and to present witnesses and evidence in his or her behalf;

(4) that at the hearing, the State must prove the alleged violation by a preponderance of the evidence;

(5) that by admitting to a violation, or by stipulating that the evidence is sufficient to revoke, there will not be a hearing on the petition to revoke probation, conditional discharge or supervision, so that by admitting to a violation, or by stipulating that the evidence is sufficient to revoke, the defendant waives the right to a hearing and the right to confront and cross-examine adverse witnesses, and the right to present witnesses and evidence in his or her behalf; and

(6) the sentencing range for the underlying offense for which the defendant is on probation, conditional discharge or supervision."

Rule 402A(a) expressly requires only substantial compliance, which is sufficient to satisfy due process (*People v. Ellis*, 375 Ill. App. 3d 1041, 1046, 874 N.E.2d 980, 983 (2007)). Whether a trial court substantially complied with the admonishment requirements presents a legal question, which we review *de novo*. *People v. Bowens*, 407 Ill. App. 3d 1094, 1104, 943 N.E.2d 1249, 1261 (2011).

¶ 15 This court has held " '[s]ubstantial compliance' means that although the trial court did not recite to the defendant, and ask the defendant if he or she understood, an item listed in

Rule 402(a), the record nevertheless affirmatively and specifically shows that the defendant in fact understood that item." *People v. Dennis*, 354 Ill. App. 3d 491, 495, 820 N.E.2d 1190, 1193 (2004) (applying Rule 402(a) case law addressing substantial compliance applied to probation revocation proceedings). The goal of Rule 402A admonishments is to ensure the defendant understood his or her admission, the rights he or she was waiving, and the potential consequences of the admission. See *Dennis*, 354 Ill. App. 3d at 496, 820 N.E.2d at 1194. "[T]hat goal is achievable by means other than reciting all of the information to the defendant at the time of the admission." *Dennis*, 354 Ill. App. 3d at 496, 820 N.E.2d at 1194. In *Dennis*, 354 Ill. App. 3d at 496, 820 N.E.2d at 1194, this court held a reviewing court may consider the entire record, including the record of earlier proceedings, to decide whether defendant understood the admonishments in *People v. Hall*, 198 Ill. 2d 173, 181, 760 N.E.2d 971, 975 (2001), which Rule 402A codified (Ill. S. Ct. R. 402A, Committee Comments (adopted Oct. 20, 2003)). Accordingly, we find the consideration of the entire record is appropriate in analyzing substantial compliance with all of the Rule 402A(a) admonishments.

¶ 16 Here, we consider whether an ordinary person in defendant's position would have understood, from the trial court's admonishments and earlier proceedings, that by admitting to the allegations in the State's petition to revoke his probation, he was giving up his right to an evidentiary hearing on the State's revocation petition at which he would be represented by appointed counsel. See *Dennis*, 354 Ill. App. 3d at 496, 820 N.E.2d at 1194. Defendant was represented by appointed counsel throughout the proceedings in this case. On both June 18 and 29, 2012, defendant filled out an affidavit of assets and liabilities for court-appointed counsel in the revocation proceedings. At defendant's first appearance on the petition to revoke, which was on June 29, 2012, the trial court expressly reappointed the public defender to represent defendant

on the petition to revoke probation. Rumley, defendant's trial counsel, was present but stated on the record he would represent defendant at that hearing but someone else would represent defendant in the future. We agree with the State that Rumley's statement highlights defendant's right to appointed counsel in the probation-revocation proceedings. At the next hearing on July 13, 2012, Ronald Lewis of the public defender's office represented defendant. On August 24, 2012, Lewis appeared, but defendant did not. At the January 29, 2013, hearing, at which defendant admitted the allegations in the State's petition to revoke, Lewis again represented defendant. Thus, the record shows defendant was aware of his right to appointed counsel during the petition-to-revoke proceedings.

¶ 17 As to the trial court's admonishments, it informed defendant he did not have to admit the allegations and could have a hearing before the court, not a jury, and the State would have to present witnesses against him. The court further stated, "[y]ou would be able to go ahead and see and confront those witnesses through your attorney. He could question or cross examine any of the State's witnesses." The court also informed defendant of his ability to call witnesses on his own behalf and to testify on his own behalf. Additionally, it explained the State's burden of proof. When defendant was asked if he understood that by admitting the allegations he was giving up the aforementioned rights, defendant answered, "[y]es."

¶ 18 The trial court's admonishments show defendant was entitled to an evidentiary hearing on the petition to revoke, at which he would be represented by appointed counsel. The court told defendant "your attorney" could confront the State's witnesses and defendant's attorney was and had always been during these proceedings a court-appointed attorney. Thus, defendant's assertion a person in his situation could have interpreted the court's admonishment to mean an attorney retained by defendant if he could afford one is an unrealistic and unreasonable

interpretation of the court's admonishments. The record contains no indication that defendant, who had a lengthy criminal history, did not understand the right to appointed counsel if indigent in the probation-revocation proceedings.

¶ 19 Accordingly, under the facts of this case, where defendant was present in court and actually represented by court-appointed counsel, we find the trial court's admonishments *actually* complied with the requirements of Rule 402A and defendant was not denied due process.

¶ 20 III. CONCLUSION

¶ 21 For the reasons stated, we affirm the McLean County circuit court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 22 Affirmed.