

NOTICE
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2015 IL App (5th) 120294-U

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

NO. 5-12-0294

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Jackson County.
)	
v.)	Nos. 09-CF-68, 11-CF-354
)	
JEVON M. ELLIOT,)	Honorable
)	William G. Schwartz,
Defendant-Appellant.)	Judge, presiding.

PRESIDING JUSTICE CATES delivered the judgment of the court.
Justices Welch and Chapman concurred in the judgment.

ORDER

¶ 1 *Held:* Because the defendant was not properly admonished under Illinois Supreme Court Rule 401(a) prior to waiving the right to counsel and proceeding *pro se* on two petitions to revoke conditional discharge, the orders revoking the sentences of conditional discharge and imposing prison terms must be vacated, and the causes must be remanded for new revocation hearings.

¶ 2 The defendant, Jevon M. Elliot, appeals from the orders revoking his sentences of conditional discharge for aggravated battery and criminal damage to government-supported property, and the orders imposing concurrent sentences of four years for aggravated battery and two years for criminal damage to property. On appeal, the defendant contends that the orders revoking the sentences of conditional discharge and

imposing prison terms must be reversed because the trial court did not substantially comply with Illinois Supreme Court Rule 401(a) before allowing the defendant to proceed *pro se* in the revocation proceeding. The defendant argues in the alternative that the trial court abused its discretion in refusing to allow the defendant to revoke his waiver of counsel during the revocation hearing.

¶ 3 On February 2, 2009, the defendant was charged in the circuit court of Jackson County, in cause number 09-CF-68, with three counts of aggravated battery involving peace officers, all Class 3 felonies, one misdemeanor count of resisting a peace officer, and one misdemeanor count of criminal damage to property. The State alleged that on January 30, 2009, the defendant damaged a storm door at his brother's home, and then engaged in physical contact with the police officers who attempted to place him under arrest. On February 27, 2009, the defendant appeared with assistant public defender Margaret Degen, and entered a negotiated guilty plea to one count of aggravated battery. He was placed on 24 months' probation with conditions, including requirements that he undergo a substance abuse evaluation, continue with mental health treatment, and pay fines and costs.

¶ 4 On August 14, 2009, the State filed a petition to revoke the defendant's probation. The defendant was again represented by Ms. Degen. Pursuant to a negotiated agreement, the trial court entered an amended mittimus, sentencing the defendant to serve a period of 120 days in the county jail in addition to the previous terms and conditions of probation. On February 25, 2011, the State filed another petition to revoke the defendant's probation. The petition alleged that the defendant failed to pay the assessed fines and

costs, failed to report to the probation department, and failed to attend mental health counseling. In May 2011, Ms. Degen filed a motion for appointment of a qualified expert to conduct a fitness evaluation on the defendant. Counsel noted that she had represented the defendant since he was initially charged, and that she was concerned that his mental health condition had deteriorated to the point that he may not be fit to assist in his defense. In June 2011, the trial court appointed Michael Althoff, Ph.D., to evaluate the defendant's sanity and his fitness to stand trial.

¶ 5 On July 8, 2011, the defendant was charged with criminal damage to government-supported property, a Class 4 felony, in the circuit court of Jackson County, in cause number 11-CF-354. The information alleged that on June 29, 2011, the defendant knowingly damaged a telephone while detained in the county jail. Ms. Degen was assigned to represent the defendant in this new case. On July 27, 2011, she filed a separate motion seeking an evaluation of the defendant's sanity at the time of the offense and his fitness to stand trial, and Dr. Althoff was appointed to conduct the evaluation.

¶ 6 Dr. Althoff conducted the evaluation and filed an extensive report that included a summary of his interviews with the defendant and his review of the defendant's mental health records. Dr. Althoff found that the defendant had some mental health issues and might benefit from treatment, but he concluded that the defendant was not insane at the time of the offenses and that he was fit to stand trial.

¶ 7 The defendant next appeared in court on August 25, 2011, before Judge Charles Grace. This time he was represented by Patricia Gross, the public defender of Jackson County. The defendant entered a negotiated plea of guilty to one count of criminal

damage to government-supported property in cause number 11-CF-354, and he was sentenced to 24 months' conditional discharge. The defendant also admitted to the allegations in the petition to revoke probation in cause number 09-CF-68, and he was sentenced to 12 months' conditional discharge. Prior to accepting the defendant's respective plea and admissions, the court admonished the defendant regarding his rights, including the nature of charges, the burden of proof in each proceeding, and the maximum and minimum penalties for the offenses and violations charged.

¶ 8 On February 22, 2012, the State filed a petition to revoke the conditional discharge in 09-CF-68, and alleged that the defendant failed to pay the assessed fines and costs, and that he violated a term of conditional discharge in that he was charged with new misdemeanors, including domestic battery, resisting a peace officer, and possession of cannabis. On February 23, 2012, the State filed a petition to revoke the conditional discharge in 11-CF-354, and asserted the same grounds.

¶ 9 The cases were called for a hearing on March 5, 2012, before Judge William Schwartz. The defendant appeared with a different assistant public defender. At the outset, the court noted that that the pending matters included a couple of new cases of domestic battery and possession of cannabis, as well as the petition to revoke in cause number 11-CF-354. The assistant public defender then informed the court that he met with the defendant to discuss the cases, that the defendant requested his counsel to file certain motions, that defendant expressed concerns that his counsel's refusal to file the motions would interfere with his right to competent representation, and that the defendant wanted to proceed *pro se*. The defendant was permitted to address the court. When the

defendant began to present his motion for a change of judge, the court interrupted him. The court told the defendant that the matter of representation had to be decided before any motions would be heard. The court informed the defendant that he was entitled to an attorney and that an attorney had been appointed. The court advised that unlike the defendant, his attorney had been "schooled in the law," and "knew how to proceed in court." The court further advised:

"I know you told me you read the law, but I know you also told me you have not read the Code of Illinois Procedure. It would be difficult for you to represent yourself without understanding those sorts of things. I'm forewarning you with regard to that. I can't prevent you from representing yourself unless I find you totally incapable of doing it."

The defendant responded that he wanted to proceed *pro se*.

¶ 10 At this point, the assistant State's Attorney stated that she would ask for a term in the Department of Corrections if the State prevailed on the revocation petition. The court warned the defendant that if the State proved its case and if its recommendation was followed, he would be going to jail or prison. The court asked the defendant if he understood, and the defendant answered, "Correct." The court then asked the defendant if he still wanted to represent himself, and the defendant replied, "*Pro se*. Yes, I do." The court stated that it would permit the public defender to withdraw and the defendant to represent himself. The defendant was given an attorney-waiver form. The court instructed the defendant to read it and to ask any questions about it. The defendant did

not ask any questions. He signed the waiver form, which referenced cause numbers 09-CF-68 and 11-CF-354.

¶ 11 The defendant was allowed to present his motion for change of judge. The court advised the defendant that it was too late to pursue a motion for substitution of judge as a matter of right, but that the motion could be considered for cause. The defendant indicated that he wished the court to consider the motion as one for cause. The court then advised the defendant that the motion would be considered and ruled on by another judge.

¶ 12 Judge Grace reviewed the defendant's motion and noted that the defendant had alleged that officers at the county jail violated the defendant's rights during his detention. Judge Grace concluded that these allegations were not matters to be decided in the criminal cases, and that Judge Schwartz's decision not to consider those matters did not establish that he was prejudiced against the defendant. Judge Grace denied the defendant's motion to substitute Judge Schwartz for cause.

¶ 13 The State's petitions to revoke conditional discharge in cause numbers 09-CF-68 and 11-CF-354 were called for hearing on April 20, 2012, but Judge Schwartz did not hear them. In the middle of the direct examination of the State's first witness, the defendant told the court that he was not "doing his motion *pro se*" anymore. The defendant stated that his court-appointed attorney was ineffective, and that he needed an attorney. The following exchange occurred:

The Court: "You decided you wanted to go *pro se*, sir."

The defendant: "I had to go *pro se*. He would not—"

The Court: "I asked you. You clearly said—"

The defendant: "He would not—"

The Court: "Be quiet. You clearly said on the record last time you wanted to proceed *pro se*. You may continue, Officer."

¶ 14 With that, the direct examination continued. When it came time for cross-examination of the witness, the defendant noted that he wanted to explain why he felt he had to bring his motion *pro se*. The defendant said that he had to bring his motion *pro se* because the public defender would not present it. The defendant again stated that he needed an attorney. The court informed the defendant that it was his turn to question the witness, and that he would not be permitted to grandstand and make statements. The defendant responded that he told the judge plenty of times that he had been beaten in the county jail, that the judge had been violating his rights, and that he wanted this on the record. The court directed the defendant to sit down or he would be removed from the courtroom. The court informed the defendant that he could not switch back and forth on representation. The defendant replied that he needed an attorney. The court then directed the State to proceed with its case. The record shows that the defendant did not cross-examine the State's witnesses. Instead, he made statements regarding the alleged abuse he incurred at the county jail and the court's violations of his rights. He presented no witnesses or evidence in his defense.

¶ 15 After hearing the testimony, the court found that the defendant had violated some of the terms of his conditional discharge in cause numbers 09-CF-68 and 11-CF-354, and set a date for sentencing. On June 27, 2012, the sentencing hearing was held before

Judge Schwartz. After considering the presentence investigation report and hearing from witnesses, Judge Schwartz sentenced the defendant to concurrent terms of four years in prison in cause number 09-CF-68, and two years in prison in cause number 11-CF-354.

¶ 16 On appeal, the defendant contends that the orders revoking the sentences of conditional discharge and imposing prison terms must be vacated because the circuit court did not substantially comply with Illinois Supreme Court Rule 401(a) before allowing the defendant to proceed *pro se*. The defendant argues in the alternative that the court abused its discretion in refusing to allow the defendant to revoke his waiver of counsel during the hearing on the petition to revoke his conditional discharge.

¶ 17 Initially, we will address the State's claim of waiver. The State contends that the defendant waived his claim regarding the inadequacy of the Rule 401(a) admonitions because he failed to raise that issue during the revocation hearing and in his posttrial motion and because he failed to seek plain-error review of the issue in this appeal. We agree that the issue was not preserved in the trial court and that the defendant did not make a plain-error argument in his opening brief. Nevertheless, the defendant argued for plain-error review in his reply brief in response to the State's waiver argument, and that has been deemed sufficient to allow a reviewing court to consider the issue for plain error. See *People v. Ramsey*, 239 Ill. 2d 342, 412, 942 N.E.2d 1168, 1206 (2010); *People v. Williams*, 193 Ill. 2d 306, 347-48, 739 N.E.2d 455, 477 (2000).

¶ 18 Under the plain-error doctrine, a reviewing court may consider an unpreserved error in a criminal case when either the evidence is closely balanced or the error is so fundamental and of such magnitude that the defendant was denied his right to a fair trial.

Williams, 193 Ill. 2d at 348-49, 739 N.E.2d at 477. Because the right to counsel is fundamental, the defendant's unpreserved contention that the court failed to comply with Supreme Court Rule 401(a) may be reviewed under the plain-error doctrine. See *People v. LeFlore*, 2013 IL App (2d) 100659; *People v. Black*, 2011 IL App (5th) 080089, ¶ 24.

¶ 19 Illinois Supreme Court Rule 401 (eff. July 1, 1984) requires the trial court to give specific admonishments before accepting a criminal defendant's waiver of counsel. Rule 401(a) plainly states that the trial court shall not permit a waiver of counsel by a defendant accused of an offense punishable by imprisonment without first addressing the defendant in open court, and informing him of and determining that he understands the nature of the offense charged, the minimum and maximum sentences possible for the offense, and that he has a right to counsel and if indigent, the right to have counsel appointed to represent him. Ill. S. Ct. R. 401(a) (eff. July 1, 1984). The rule also requires that the waiver be made in open court and preserved in a verbatim transcript. Ill. S. Ct. R. 401(b) (eff. July 1, 1984). The purpose of this rule is to ensure that the waiver of counsel is knowingly and intelligently made. *People v. Haynes*, 174 Ill. 2d 204, 241, 673 N.E.2d 318, 335 (1996). Substantial compliance with Rule 401(a) is sufficient to effectuate a valid waiver of counsel where the defendant shows a high degree of legal sophistication or where the record demonstrates that the waiver was knowingly and intelligently made. *People v. Campbell*, 224 Ill. 2d 80, 84, 862 N.E.2d 933, 936 (2006); *Black*, 2011 IL App (5th) 080089, ¶ 20. Review of the court's compliance with Rule 401(a) is *de novo*. *Campbell*, 224 Ill. 2d at 84, 862 N.E.2d at 936.

¶ 20 In this case, the trial court did not inform the defendant about the nature of the allegations, the burden of proof in a revocation proceeding, and the range of possible penalties, including the minimum and maximum prison terms if the defendant was found in violation of the terms of conditional discharge prior to granting his request to proceed *pro se*. Although the court admonished the defendant about the hazards of proceeding without counsel and attempted to dissuade him from proceeding on his own, the court's admonishments fell short of what is required in Rule 401(a). The purpose of the admonishments is to inform a defendant about matters that are deemed necessary to allow him to make an informed decision on whether to proceed without counsel. The defendant did not exhibit a high level of legal sophistication during these proceedings, and we are unconvinced that at the time of the waiver, he was cognizant of the information which the court omitted from the Rule 401(a) admonishments. In the exchanges between the court and the defendant during the hearing on the issue of waiver, and again during the revocation hearings, the defendant appeared fixated on obtaining a different judge and a dismissal of charges based on the alleged mistreatment he received at the county jail, rather than pausing to reflect on the ramifications of his decision to waive his right to counsel. In this case, the defendant was faced with two separate petitions to revoke conditional discharge, and the reasonable likelihood that he would be sentenced to prison terms if the alleged violations were proven. This was a critical stage in the proceedings, and we may presume that the defendant was prejudiced by the lack of counsel. This presumption finds support in the record. The State's allegations were not tested. The

defendant did not engage in cross-examination, and he offered no defense or justification for the violations of conditional discharge.

¶ 21 After reviewing the record, we conclude that the court's failure to comply with Rule 401(a), substantially or otherwise, resulted in an ineffective waiver of counsel and deprived the defendant of his fundamental right to counsel. Therefore, the court's orders revoking the defendant's sentences of conditional discharge and imposing prison terms must be vacated, and the causes must be remanded for new revocation proceedings. On remand, the defendant should be given the admonishments required under Rule 401(a), and the opportunity to be represented by an attorney or to make a knowing and intelligent waiver of that fundamental right. Given our disposition of this issue, we need not address the defendant's alternate claim that the court abused its discretion in refusing to permit the defendant to rescind his waiver of counsel.

¶ 22 Accordingly, the orders entered in cause number 09-CF-68 and cause number 11-CF-354, revoking the defendant's sentences of conditional discharge and imposing prison terms, are hereby vacated and the causes are remanded with instructions.

¶ 23 Orders and sentences vacated; causes remanded with instructions.