

SIXTH DIVISION  
March 4, 2016

No. 1-13-2592

**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).

---

IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

---

|                                      |   |                         |
|--------------------------------------|---|-------------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the         |
|                                      | ) | Circuit Court of        |
| Plaintiff-Appellee,                  | ) | Cook County.            |
|                                      | ) |                         |
| v.                                   | ) | No. 12 CR 60            |
|                                      | ) |                         |
| KIYON ORR,                           | ) | Honorable               |
|                                      | ) | Rosemary Grant Higgins, |
| Defendant-Appellant.                 | ) | Judge Presiding.        |

---

JUSTICE HALL delivered the judgment of the court.  
Presiding Justice ROCHFORD and Justice DELORT concurred in the judgment.

**O R D E R**

- ¶ 1 *Held:* Defendant's conviction for possession of a controlled substance with intent to deliver affirmed over his contention that his waiver of counsel prior to his posttrial motions and sentencing was invalid because the trial court failed to admonish him in substantial compliance with Supreme Court Rule 401(a).
- ¶ 2 Following a jury trial, defendant Kiyon Orr was convicted of two counts of possession of a controlled substance with intent to deliver and sentenced as a Class X offender to 14 years' imprisonment. On appeal, defendant contends that the trial court failed to admonish him in substantial compliance with Supreme Court Rule 401(a) (eff. July 1, 1984) prior to allowing him

to proceed *pro se* on his posttrial motions and at sentencing, rendering his waiver of counsel invalid.

¶ 3 The record shows that in January 2012, defendant was arraigned on two charges of possession of a controlled substance with intent to deliver, and the trial court appointed the public defender of Cook County to represent him. At a status hearing in April 2012, defendant stated that he appreciated that the court appointed counsel to represent him because he could not afford his own attorney, but complained that the assistant public defender who was representing him refused to file motions he suggested, finding them irrelevant and without grounds, and asked the court to assign him a different attorney. The trial court explained that it had no authority to appoint a different assistant public defender, that the attorney representing defendant was very good and had a lot of experience, and that defendant's other options were to hire his own lawyer or represent himself. Defendant then stated that he wanted to continue with the public defender. The following month, defendant's case was transferred to a different trial court judge, and a different assistant public defender was now representing him.

¶ 4 On October 22, 2012, the case was called for a jury trial, but continued because one of the State's witnesses was unavailable. Defendant demanded trial, then complained to the court that his counsel was unprofessional, had not prepared him for trial, and that he feared going to trial with her. Defendant stated that he could not afford to hire a private attorney and requested an alternative to going to trial with this assistant public defender. The trial court explained that it could not appoint a different assistant public defender to represent him, that counsel was an excellent lawyer and one of the most experienced assistant public defenders in the building, and that defendant's other option was to represent himself if he chose to make a knowing and intelligent waiver of his right to counsel.

¶ 5 The trial court explained that before defendant made a decision regarding self-representation, it was required to review certain aspects of the case with him. In response to the court's questions, defendant stated that he did not have a high school diploma, he was 32 years old, and he had never previously represented himself. The court then stated:

"You are at risk in this case in terms of sentencing as a Class X offender. You have a Class 1 felony which carries with it four to 15 years in the Illinois Department of Corrections plus two years mandatory supervised release to follow that.

Because of your background, that means that you have at least two Class 2 offenses or greater after the statutory period of time, \*\*\* meaning you could be sentenced 6 to 30 years plus three years mandatory supervised release. So there's a lot at stake for you here. And it seems you understand that part."

¶ 6 The court then admonished defendant that he would be required to follow the technical rules which govern trials, that he would be held to the same standard as a licensed attorney, that his unfamiliarity with legal procedures may give the prosecutor an advantage and cause him a disadvantage, that he could not challenge his own incompetence on appeal, and that he would receive no special consideration or extra library time for preparation. The court also explained that if defendant chose to represent himself, he could not change his mind during trial, nor would the court appoint stand-by counsel to assist him. The court further advised defendant that a lawyer could provide him with valuable assistance, expressly stating "[i]n the event of conviction, sometimes that means it could lead to a lesser sentence." Defendant confirmed that he understood each admonishment, then stated "I'm not versed in the law and I don't have the finances for a private attorney. So I guess I am going to remain with [appointed counsel]," but asked again if there was any process or alternative to have the assistant public defender removed

from his case. The court reiterated that it could not appoint a different assistant public defender, and that defendant could either continue with his current counsel or represent himself if it was convinced that his decision to do so was made intelligently and voluntarily. Defendant again stated that he wished to remain with the assistant public defender.

¶ 7 The following week at trial, Chicago police officer Edward May testified that at 9 p.m. on November 16, 2011, he was in an unmarked car with his partners, Officers Brian McDevitt and Thomas Carey, when a man they knew as "Pops" flagged them down. Following a conversation with him, the officers drove to an apartment building at 2515 West 64th Street and saw that the only light on in the building was in the first floor east apartment. The officers entered the building, and while his partners positioned themselves on the second floor, Officer May positioned himself on the stairwell between the first and second floors where he could observe the door to the first-floor apartment. A few minutes later, Officer May saw a woman knock on the apartment door, and defendant answered the door and asked her what she wanted. She replied "a blow," the street term for heroin, and defendant asked her for \$10. The woman handed defendant money, he closed the door, he reopened the door 30 seconds later and handed the woman an object from a bag he held in his hand. The woman took the object and left, and defendant closed the door.

¶ 8 A few minutes later, a man knocked on the door and defendant again answered and asked the man what he wanted. The man also requested "a blow," defendant requested \$10, the man handed him money and defendant closed the door. The three officers then approached the apartment, moved the man out of the way, and stood in front of the door. When defendant reopened the door, Officer May announced "police," and defendant attempted to slam the door shut. Officer May blocked the door with his shoulder, and defendant dropped the plastic bag

from his hand and fled inside the apartment. As Officers McDevitt and Carey pursued defendant, Officer May retrieved the plastic bag from the floor and found that it contained 17 packets of heroin and 12 packets of white crack cocaine. Defendant was arrested in his kitchen.

¶ 9 Chicago police officer Brian McDevitt testified substantially the same as Officer May regarding their narcotics surveillance of the apartment and the arrest of defendant, and added that during a custodial search at the police station, he recovered \$63 from defendant's pants pocket. Officer McDevitt also inventoried the bag of suspect narcotics recovered by Officer May.

¶ 10 Cathy Regan, a forensic drug chemist with the Illinois State Police crime laboratory, testified that she weighed and tested the contents of 7 of the 17 bags of powder and found it positive for 1.1 grams of heroin. She also weighed and tested the contents of seven bags of the rock-like substance and found it positive for 1.1 grams of cocaine.

¶ 11 The record shows that during the jury instruction conference, defense counsel informed the court that she had discussed the charges with defendant and explained to him that he could have the jury consider the lesser-included offense of simple possession of a controlled substance, but he declined. The court then asked defendant if he understood

"the consequences and the difference between the charges before the Court, that is the possession of a controlled substance with intent to deliver of both cocaine and heroin which are Class 1 felonies with a range in sentencing of 4 to 15 years in the Illinois Department of Corrections plus one year MSR as opposed to the straight possession of a controlled substance which is a Class 4 with 1 to 3 years plus one year MSR to follow."

Defendant confirmed that counsel had discussed the charges with him, that he understood the difference, and that he did not want the jury instructed on the lesser-included offense. The jury

found defendant guilty of two counts of possession of a controlled substance with intent to deliver, one based on his possession of heroin, and the other based on possession of cocaine.

¶ 12 On January 30, 2013, the court called the case for a hearing on the posttrial motion filed by defense counsel, and after the State said it was not ready to proceed, defendant interrupted the court and stated "I am waiving my 6th Amendment right to counsel pursuant to the Supreme Court Rule 401 and requesting a full admonishment, your Honor. I do not want this lady to represent me anymore." Defendant accused counsel of rendering ineffective assistance and stated that he was in the process of preparing a motion to that effect. He then stated "I still just want to waive my right to counsel. I would like to proceed pro se. That's my right. That's my constitutional right. And I'd like to exercise that right."

¶ 13 The court then stated that it was going to go through the admonishments for defendant's waiver of his right to counsel and reiterated many of the same points it made the week before trial, including the fact that defendant would be opposed by experienced licensed attorneys, that he would be required to follow the rules of the court, and that the court would not appoint stand-by counsel. The court did not mention the charges or sentencing range at this time. Defendant confirmed that he understood each admonishment and that he was discharging himself of his lawyer. The court then found that defendant had voluntarily waived his right to counsel and that he could proceed *pro se*.

¶ 14 Thereafter, the trial court asked defendant if he wanted a different assistant public defender appointed to assist him with his ineffective assistance of counsel claim and posttrial motions. Defendant initially said he wanted assistance, but moments later stated "No, I am going to proceed pro se. Never mind all that. I am going pro se. I don't trust none of you all. I am going pro se. I think I can do this on my own." The court allowed defendant to select the date for filing

his ineffective assistance of counsel claim and ordered the State to provide him with redacted discovery. Defendant then stated "thank you for acknowledging my rights."

¶ 15 On April 2, 2013, the trial court conducted a hearing on defendant's *pro se* motion alleging ineffective assistance of trial counsel pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984). The trial court began by noting that the jury had found defendant guilty of two counts of possession of a controlled substance with intent to deliver between 1 and 15 grams of heroin and cocaine, and that both charges were Class 1 felonies with a sentencing range of 4 to 15 years' imprisonment plus two years of mandatory supervised release. It further noted that after being admonished by the court, defendant knowingly and voluntarily waived his right to counsel and indicated that he wished to proceed *pro se* with his *Krankel* motion and sentencing. Following the hearing, the trial court denied defendant's *Krankel* motion.

¶ 16 The court then asked defendant if he wanted to have a different assistant public defender appointed to represent him at sentencing, and he replied "[n]o, ma'am. No, ma'am. I would like to proceed on my own." Several minutes later, defendant began arguing with the trial court, yelling numerous obscene profanities, and threatening to throw objects he held in his hands at the court. The court found defendant in direct criminal contempt of court and sentenced him to six months in the Cook County Department of Corrections, to run consecutive to the sentence later imposed in this case.

¶ 17 The record shows that defendant subsequently filed a *pro se* motion for a new trial, and following a hearing on July 25, 2013, the trial court denied that motion. The court then asked defendant if he was ready for sentencing, and he replied "[y]es, ma'am. But before you do so, I would like to exercise my right to counsel because I don't know how to do the actual appeal itself. I don't know how to do that." The court explained that it would appoint the appellate

defender to file an appeal for him, but that they needed to conduct the sentencing hearing first, and asked defendant if he wanted to represent himself at sentencing. Defendant replied "I guess. Yes, ma'am. Get it over with."

¶ 18 In aggravation, the State argued that defendant was a career criminal with five prior adult felony convictions, which subjected him to mandatory Class X sentencing. The State also pointed out that defendant was on parole at the time he committed this offense, and requested a sentence of 15 years' imprisonment. Defendant declined to present an argument in mitigation.

¶ 19 The trial court stated that it considered the information contained in the presentence investigation report, discussed defendant's lengthy criminal history in detail, and found that his potential for rehabilitation was "very minimal." The court then sentenced defendant as a Class X offender to 14 years' imprisonment with drug treatment, followed by three years of mandatory supervised release. The court also noted that it previously sentenced defendant to six months in jail for contempt which would run consecutive to his prison sentence. The court told defendant that the public defender would file a notice of appeal for him that day, and appointed the appellate defender to represent him on appeal.

¶ 20 The court then asked defendant if he had anything else to say, and he replied "[y]eah, fuck you." The court again found defendant in direct criminal contempt of court, and as it attempted to admonish him of his appeal rights, he continued using repeated profanities toward the court and left before the admonishments were complete. The court then found defendant in "major criminal contempt" and sentenced him to an additional two years' imprisonment to be served consecutive to his 14-year sentence and his previous six-month contempt sentence.

¶ 21 On appeal, defendant solely contends that the trial court failed to admonish him in substantial compliance with Supreme Court Rule 401(a) prior to allowing him to proceed *pro se*



on his posttrial motions and at sentencing, rendering his waiver of counsel invalid. Defendant acknowledges that the trial court accurately informed him of the Class X sentencing range the week before trial when the option of self-representation was first discussed, but argues that such admonishment cannot be considered towards a valid waiver because the court did not inform him of the nature of the charges and he did not choose to waive counsel at that time. He argues that the trial court was required to admonish him of the nature of the charges and the Class X sentencing range after trial, at the time he requested to proceed *pro se*, and because it failed to do so, his waiver of counsel was ineffective. Defendant contends that his sentence should be vacated and his case remanded for posttrial motions and sentencing.

¶ 22 The State responds that the trial court substantially complied with Rule 401(a) which is sufficient where, as here, the record shows that defendant knew the nature of the charges and the applicable sentencing range, his waiver was made knowingly and intelligently, and the admonishments given did not prejudice his rights. The State points out that defendant repeatedly insisted on proceeding *pro se*, and argues that his conduct was consistent with a waiver of counsel.

¶ 23 As a threshold matter, defendant acknowledges that he failed to object to the trial court's admonishments, and thus, failed to preserve his contention for appeal, but asserts that it should be reviewed for plain error. This court has repeatedly held that the trial court's failure to comply with Rule 401(a) denies a defendant his fundamental right to be represented by counsel, and therefore, such claims are reviewable as plain error. *People v. Black*, 2011 IL App (5th) 080089,

¶ 24 (and cases cited therein); *People v. Jiles*, 364 Ill. App. 3d 320, 328 (2006). Although defendant did not preserve his contention (*People v. Enoch*, 122 Ill. 2d 176, 186 (1988)), we consider his argument under the plain error doctrine (Ill. S. Ct. R. 615(a) (eff. Aug. 27, 1999)).

¶ 24 Pursuant to Supreme Court Rule 401(a), the trial court may not allow a defendant to waive counsel without first admonishing him and determining that he understands: (1) the nature of the charges; (2) the minimum and maximum sentences, including any penalty he may be subjected to due to prior convictions; and (3) that he has a right to counsel, and if indigent, to have counsel appointed for him. Ill. S. Ct. R. 401(a) (eff. July 1, 1984). The purpose of this rule is to ensure that defendant's waiver of counsel is voluntarily, knowingly and intelligently made, and where it is, his decision to represent himself must be honored. *People v. Haynes*, 174 Ill. 2d 204, 235, 241 (1996).

¶ 25 Defendant's waiver of counsel must also be clear and unequivocal, which prevents him from appealing the denial of his right to either self-representation or counsel, and from abusing the system by going back and forth between his decision to have counsel and his request to proceed *pro se*. *People v. Mayo*, 198 Ill. 2d 530, 538 (2002). In determining whether defendant's waiver of counsel was clear and unequivocal, the court considers the overall context of the proceedings, including defendant's conduct following his request to represent himself, and determines whether he truly desired to represent himself and definitively invoked his right of self-representation. *People v. Burton*, 184 Ill. 2d 1, 22-24 (1998).

¶ 26 Our supreme court has held that strict, technical compliance with Rule 401(a) is not always required, and instead, substantial compliance is sufficient to effectuate a valid waiver of counsel where the record shows that such waiver was made knowingly and voluntarily, and that defendant's rights were not prejudiced by the admonishment received. *Haynes*, 174 Ill. 2d at 236. Whether the trial court's admonishments substantially complied with Rule 401(a) is a question of law we review *de novo*. *People v. Ware*, 407 Ill. App. 3d 315, 341 (2011).

¶ 27 In this case, we find that the trial court's admonishments to defendant substantially complied with the requirements of Rule 401(a). The record shows, and defendant acknowledges, that on October 22, 2012, one week before trial, when the option of self-representation was first discussed, the trial court accurately informed defendant that because of his criminal background, he was subject to sentencing as a Class X offender, and could be sentenced to a term of 6 to 30 years' imprisonment, plus 3 years of mandatory supervised release. This admonishment fully complied with the requirement under Rule 401(a)(2).

¶ 28 The record further shows that the discussion that day was prompted by defendant's complaint to the court that the assistant public defender was unprofessional. Defendant told the court that he could not afford to hire a private attorney and requested an alternative to going to trial with appointed counsel. The trial court then explained that it could not appoint a different assistant public defender to represent him, and that his only other option was to represent himself if he chose to make a knowing and intelligent waiver of his right to counsel. During the court's admonishments about self-representation, it specifically advised defendant that a lawyer could provide him with valuable assistance. Defendant confirmed that he understood each admonishment, stated that he did not have the finances to hire a private attorney and would remain with the assistant public defender, but again asked if there was any way she could be removed from his case. The court reiterated that it could not appoint a different assistant public defender, and that defendant could either continue with his current counsel or represent himself if his decision to do so was made intelligently and voluntarily, and defendant chose to remain with the assistant public defender. The record thus shows that the trial court admonished defendant about his right to be represented by appointed counsel, thereby complying with the

requirement under Rule 401(a)(3). The court, however, did not discuss the nature of the charges that day.

¶ 29 The record further shows that on January 30, 2013, three months after trial, during a hearing on posttrial motions, defendant interrupted the court and announced "I am waiving my 6th Amendment right to counsel pursuant to the Supreme Court Rule 401." He further stated "I would like to proceed pro se. That's my right. That's my constitutional right. And I'd like to exercise that right." The court then repeated many of the same admonishments it made to defendant the week before trial, but did not mention the charges or sentencing range at this time. After defendant confirmed that he understood each admonishment, the court found that he had voluntarily waived his right to counsel and could proceed *pro se*.

¶ 30 We reject defendant's contention that his waiver of counsel was invalid because the trial court did not discuss the charges and sentencing range on this date. The supreme court has expressly found that a trial court's failure to admonish a defendant contemporaneously with his waiver is not always fatal to the validity of a waiver of counsel, but instead, each case must be assessed on its own particular facts. *Haynes*, 174 Ill. 2d at 242.

¶ 31 In this case, we find that the trial court's omission did not prejudice defendant's rights or invalidate his waiver of counsel because the record shows that his waiver was knowingly and intelligently made. *Id.* It is undisputed that the trial court accurately admonished defendant that he was subject to the Class X sentencing range of 6 to 30 years' imprisonment one week before the trial, at a time when he was first considering the possibility of self-representation, and therefore, he clearly knew the sentence he faced. As discussed above, the record also shows that defendant was well aware of his right to have appointed counsel as the trial court repeatedly

discussed that right with him, and he was, in fact, represented by appointed counsel prior to and throughout the trial.

¶ 32 In addition, we find that, although the trial court did not admonish defendant at the posttrial hearing of the nature of the charges, there is nothing in the record to indicate that he failed to understand the charges against him. *People v. Phillips*, 392 Ill. App. 3d 243, 263 (2009). At the time he waived counsel, defendant had already been convicted of the two counts of possession of a controlled substance with intent to deliver, and therefore, he fully understood the nature of the charges. Based on this record, we find that the trial court substantially complied with Rule 401(a), and that defendant clearly understood the charges, the sentence, and his right to appointed counsel, rendering his waiver of counsel valid.

¶ 33 Moreover, there is absolutely no doubt that it was defendant's choice to waive counsel as he was adamant about his desire to represent himself. *Haynes*, 174 Ill. 2d at 244. As quoted above, defendant interrupted the court during the posttrial hearing, announced that he was waiving his right to counsel pursuant to Rule 401, and expressly stated that he was exercising his constitutional right to proceed *pro se*. The record further shows that after waiving counsel, defendant repeatedly maintained his desire to continue *pro se* throughout the proceedings. Following his waiver of counsel, defendant declined the court's offer to appoint a different public defender to assist him with his *Krankel* motion, stating "No, I am going to proceed pro se. Never mind all that. I am going pro se. I don't trust none of you all. I am going pro se. I think I can do this on my own." Defendant even expressed his appreciation for being allowed to represent himself, telling the court "thank you for acknowledging my rights." Two months later, following the *Krankel* hearing, defendant again declined the court's offer to appoint the public defender and stated "I would like to proceed on my own." The record therefore shows that, in addition to being

knowingly and intelligently made, defendant's waiver of counsel was clear and unequivocal where he definitively invoked his right of self-representation and repeatedly expressed his desire to represent himself. *Burton*, 184 Ill. 2d at 22-24.

¶ 34 For these reasons, we find that the court substantially complied with Rule 401(a), that defendant's waiver of counsel was valid, and we affirm the judgment of the circuit court of Cook County.

¶ 35 Affirmed.