2016 IL App (3d) 140598-U

Order filed December 22, 2016

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2016

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 9th Judicial Circuit,
	)	Knox County, Illinois.
Plaintiff-Appellee,	)	
	)	Appeal No. 3-14-0598
v.	)	Circuit No. 13-CF-368
	)	
KEVIN E. MARTIN,	)	Honorable
	)	Scott Shipplett,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE CARTER delivered the judgment of the court.
Justices Lytton and McDade concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly admonished defendant in substantial compliance with Illinois Supreme Court Rule 402(a) prior to accepting his consent to a stipulated bench trial where the record shows that defendant understood the rights he was waiving and the consequences of his stipulation.

¶ 2 Following a stipulated bench trial, defendant, Kevin E. Martin, was found guilty of two counts of unlawful dissemination of child pornography (720 ILCS 5/11-20.1(a)(2) (West 2012)) and two counts of unlawful possession of child pornography (720 ILCS 5/11-20.1(a)(6) (West 2012)). The trial court sentenced defendant to a total of 26 consecutive years of imprisonment—

eight years, eight years, five years and five years, for each count respectively. The trial court also imposed the mandatory minimum of applicable fines on defendant in the amount of $6000. Defendant appeals, arguing that his convictions should be vacated and this cause should be remanded to the trial court for new proceedings because his bench trial was tantamount to a guilty plea and the trial court failed to properly admonish him in accordance with Illinois Supreme Court Rule 402 (eff. July 1, 2012). We affirm.

¶ 3 I. FACTS

¶ 4 Defendant was charged with 31 counts of child pornography—5 counts of dissemination of child pornography as Class X felonies, 1 count of dissemination of child pornography as a Class 1 felony, and 25 counts of possession of child pornography as Class 2 felonies. Defendant filed a plea of not guilty and a jury demand. He subsequently filed a motion to suppress evidence, which the trial court denied.

¶ 5 Thereafter, in exchange for the State's agreement to dismiss 27 charges, defendant agreed to enter an "offer of proof" as to the remaining four counts—Counts I, III, VII, and XXIV. The trial court admonished defendant that his potential sentence would be for consecutive sentences of 6 to 30 years of imprisonment for each of the two Class X felonies and for probation to 7 years of imprisonment for each of the two Class 2 felonies, with the State dismissing the remaining 27 counts. The trial court told defendant that if he were to go to trial on all of the charges, the sentencing range for just the five Class X felony charges would be a total of 30 to 150 years of imprisonment.

¶ 6 The trial court also described the applicable charges and sentencing ranges to defendant. In Count I, the State alleged defendant committed unlawful dissemination of child pornography, a Class X felony, in that defendant with knowledge of the nature and content thereof,

disseminated a film of a minor child, whom defendant knew or reasonably should have known to be under the age of 13 years, which showed the minor actually or by simulation engaging in acts of sexual penetration with an adult male. In Count III, the State alleged that defendant committed unlawful dissemination of child pornography, a Class X felony, in that defendant with knowledge of the nature and content thereof, disseminated a film of a minor child, whom defendant knew or reasonably should have known to be under the age of 13 years, which showed the minor actually or by simulation engaging in acts of sexual penetration with an adult male. In Count VII, the State alleged defendant unlawfully possessed child pornography, a Class 2 felony, in that defendant, with knowledge of the nature and content thereof, possessed a photograph of a minor child, whom defendant knew or reasonably should have known to be under the age of 13 years, which showed the minor actually or by simulation engaging in acts of sexual penetration with another person. In Count XXIV, the State alleged defendant unlawfully possessed child pornography, a Class 2 felony, in that defendant, with knowledge of the nature and content thereof, possessed a film of a minor child, whom defendant knew or reasonably should have known to be under the age of 13 years, which showed the minor actually or by simulation engaging in acts of sexual penetration with another person.

¶ 7 After discussing the charges against defendant, the trial court admonished defendant as follows:

> "And you're not pleading guilty to those charges. An offer of proof is a virtual plea of guilty in as much as here's the way it happened. You know, you have the right to a trial with the Judge or jury and at that trial you could be presumed innocent and the State would have to prove you guilty beyond a reasonable doubt. You'd have the right to face and confront witnesses against you, cross-examine them, call your own witnesses or

subpoena witnesses to court. You could testify or remain silent and have no negative inference drawn from that fact.

But if you agree to a trial on stipulated facts or an offer of proof, we're not going to have any of those. You're not going to have that trial. You're not going to have the witnesses come in to testify. You're not going to put on your own witnesses. You won't testify on your own behalf. Instead, the State will make an offer of proof without the actual witness being here what the evidence would show. And then I will compare that evidence with the charge and if I find that by their proffer and their evidence they can prove the case beyond a reasonable doubt, I would find you guilty of those four charges. And I don't want you to sit there and think, well, maybe the Judge is going to find me not guilty because that won't happen.

I mean, I suppose it would be possible but it would be extraordinarily unlikely that that would happen. In fact, I've never heard of it ever happening before but if the—I guess I will consider the evidence and the outcome will be the finding of guilt. And then we will have a sentencing hearing. ***

Do you understand the process, Mr. Martin, of what's being proposed here today?"

¶ 8 In response to the trial court's admonishments, defendant indicated that he understood the process and, other than the State's agreement to dismiss the other 27 counts charged, no one had made any threats or promises to get him to consent to a trial by stipulated facts. Defendant was taking prescription medication for a recent head injury, but defendant, defense counsel, and the trial court indicated defendant was oriented to time and place and the injury was not affecting

defendant's thought process. The trial court found defendant knowingly and voluntarily consented to proceeding with a stipulated bench trial.

¶ 9 In reference to the evidence the State would be able to prove, the prosecutor indicated that Tom Berola, an investigator with the Office of the Illinois Attorney General, was contacted by Officer Dale Hanson of the Minneapolis Police Department in May of 2013, who informed Berola that between April 22 and May 2, 2013, he used undercover investigative file-sharing software to download child pornography files from an IP address that had been assigned to defendant from February 12 to May 26, 2013. Hanson was able to download the file alleged in count I, which was a two-minute video showing a nude adult male and a nude prepubescent female, wherein the girl fondled the man's penis and then was penetrated vaginally by the adult male. Hanson was also able to download the file alleged in count III, which contained seven images of a nude 12 to 14 year old engaged in sexual conduct and sexual penetration activities with another person.

¶ 10 The prosecutor further indicated that a search warrant had been executed on defendant's premises, where investigators encountered defendant, his wife and his child. Thousands of files of child pornography movies and images were found on defendant's desktop computer, including the files specifically alleged in counts VII and XXIV. After defendant was read his *Miranda* rights, investigators interviewed him. Defendant indicated that he had been downloading child pornography for 15 years and knew that his software uploaded and distributed files of child pornography. Defendant told investigators that the child pornography on his computer was placed there by him and no one else.

¶ 11 The prosecutor indicated that the four files alleged in the applicable counts "all involved children under the age of 13 years old who were actually or by simulation engaged in acts of

sexual penetration with other people or in some cases animals or being tied up." The trial court asked, "By what manner other than the file name were you able to determine that they were under the age of 13?" The prosecutor indicated that the children were "known victims" who had been identified through prior or other investigations throughout the country or multiple countries, and investigators had determined their dates of birth and ages and had determined when the videos had been made. The trial court requested that the State present a single frame image to be representative of the child in each file for the trial court's review. The trial court indicated that it would vacate its judgment of guilty on the four counts if the images did not appear to be child pornography. The trial court found defendant guilty on Counts I, III, VII and XXIV.

¶ 12 Within 30 days of the finding of guilt, defendant filed a *pro se* motion to recant his "plea of no contest" claiming that he was not guilty of the charges. Defense counsel filed a motion for new trial, arguing that defendant was claiming that he was not told of possible defenses by his attorney and requested a hearing pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984). The trial court denied the motions.

¶ 13 At sentencing, Berola testified that thousands of child pornography files were found on defendant's computer and defendant had told investigators that the files were placed there by him. Berola also indicated that defendant told investigators that he knew the files from his computer were being sent out to other people as file sharing. Defendant gave a statement in allocution indicating that he intended to download a large file of adult pornography but days later, when the large file was finished downloading, he realized he had accidentally downloaded child pornography. Defendant indicated that he attempted to delete the files but the files were still in the process of being deleted when his computer was searched and he was arrested.

¶ 14 In sentencing defendant, the trial court noted that defendant's decision to stipulate to the evidence spared potentional jurors from having to view child pornography. The trial court stated:

> "I had asked the State to provide me with screen captures or stills from some of these files so that I could be assured that it was not a 16 year old who's fully developed or—and maybe she just looks 18 [and] *** that it was, in fact, child pornography and I did get those files and I had a chance to look at those and I will indicate that I'm taking those files now and placing them in an envelope along with the DVDs that have the actual videos and I will say that those are child pornography. ***
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> * * *
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> *** [T]here was a three-year-old who was performing oral sex on an adult male. On some of the other pictures in looking at them they were clearly girls—prepubescent ten-year-old girls—performing oral sex on dogs, having sex with dogs, tied onto beds having oral sex with adult males. Just the most horrifying stuff that you can image [*sic*] to be child porn. I'm not going to say but to your benefit you agreed to a trial by stipulated facts which saved us from having to publish those pictures and movies to a jury which may have resulted in us having to provide them with counseling after having had their eyes scorched out of the heads by those pictures but—so I give you credit for that, you know, you didn't make the jury go through that."

¶ 15 In considering defendant's sentence, the trial court stated, "there should be at least some consideration to the fact that [defendant] did plead guilty, [defendant] agreed to a stipulated

bench trial." The trial court sentenced defendant to a total of 26 consecutive years of imprisonment—eight years for each Class X felony and five years for each Class 2 felony—and imposed the mandatory minimum fines that totaled $6000.

¶ 16 Defense counsel filed a motion for the trial court to reconsider the sentence. Defendant filed a *pro se* "motion for relief of judgment," claiming that he had lacked the mental capacity to plead guilty. Defendant testified at the hearing on the motions that he had been in an altercation at the jail two days prior to the stipulated bench trial, resulting in four sutures and a fractured frontal sinus bone. The trial court denied both of defendant's motions, finding that defendant's agreement to proceed with the trial based on stipulated facts was made knowingly and voluntarily.

¶ 17 Defendant appealed.

¶ 18 ANALYSIS

¶ 19 On appeal, defendant argues that his stipulated bench trial was tantamount to a guilty plea and the trial court erred by failing to admonish him in accordance with Illinois Supreme Court Rule 402 (eff. July 1, 2012). Specifically, defendant argues the trial court did not adequately admonish him "because he was not told that he had the right to persist in his plea of not guilty." The State responds by arguing defendant has forfeited this argument by failing to make a timely objection and failing to include the issue in a posttrial motion. The State further contends that if this court reaches the merits of the issue, it would concede that defendant's stipulated bench trial was tantamount to a guilty plea but argues the trial court's Rule 402(a) admonishments were sufficient. See *People v. Campbell*, 2015 IL App (3d) 130614, ¶ 15 (a stipulated bench trial is tantamount to a guilty plea when the State's entire case is presented by stipulation and defendant does not present or preserve a defense).

¶ 20 Although defendant did not object to the trial court's Rule 402(a) admonishments in the trial court, this court may review the issue as a matter of plain error. See *Id.* ¶ 22. Whether a trial court properly admonished a defendant and whether the trial judge complied with Rule 402(a) is reviewed *de novo. People v. Chavez*, 2013 IL App (4th) 120259, ¶ 14.

¶ 21 A stipulated bench trial is tantamount to a guilty plea in two scenarios: (1) where the State's entire case is presented by stipulation and the defendant does not present or preserve a defense; or (2) where the stipulation includes a statement that the State's evidence is sufficient to convict the defendant. *People v. Clendenin*, 238 Ill. 2d 302, 322 (2010). Where a stipulated bench trial is tantamount to a guilty plea, the trial court must admonish defendant pursuant to Illinois Supreme Court Rule 402(a). Rule 402(a) provides:

> "(a) Admonitions to Defendant. The court shall not accept a plea of guilty *** without first, by addressing the defendant personally in open court, informing him or her of and determining that he or she 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;
>
> (3) that the defendant has the right to plead not guilty, or to persist in that plea if it has already been made, or to plead guilty; and
>
> (4) that if he or she pleads guilty there will not be a trial of any kind, so that by pleading guilty he or she waives the right to a trial by jury and the right to be confronted with the witnesses against him or her; or that by stipulating the evidence is sufficient to convict, he or she waives the right to a trial by jury and

the right to be confronted with any witnesses against him or her who have not testified." Ill. S. Ct. R. 402(a) (eff. July 1, 2012).

¶ 22 The purpose of Rule 402 admonishments is to ensure the defendant understands the procedure, the rights he is waiving, and the consequences of his stipulations. *Campbell*, 2015 IL App (3d) 130614, ¶ 15. Strict compliance with Rule 402 is not required but, rather, substantial compliance is sufficient. Ill. S. Ct. R. 402(a) (eff. July 1, 2012); *Id.* ¶ 16. Substantial compliance is satisfied when the record shows that the defendant understood the components of Rule 402(a). *Campbell*, 2015 IL App (3d) 130614, ¶ 16.

¶ 23 Here, the record is clear, and the State concedes, that the State's entire case was presented by stipulation to the evidence and defendant did not present or preserve a defense. Thus, the stipulated bench trial was tantamount to a guilty plea so that Rule 402(a) admonishments were required. Defendant claims that the trial court failed to substantially comply with the required Rule 402(a) admonishments because the trial court did not admonish him that he had the right to "plead not guilty, or to persist in that plea if it has already been made, or to plead guilty," as indicated in subsection (3) of Rule 402(a).

¶ 24 Initially, defendant had pled "not guilty" to the 31 charges against him and demanded a jury trial. He subsequently agreed to a stipulated bench trial on four charges in exchange for the dismissal of the other 27 charges. The trial court told defendant, "you're not pleading guilty" and explained defendant's stipulation to the State's "offer of proof" was a "virtual guilty plea." The trial court informed defendant he had the right to a jury trial, the right to call and confront witnesses, and the right to testify, but that by defendant stipulating to the evidence he would not have "any of those." The trial court indicated that it would compare the stipulated evidence to the charges and would find defendant guilty if the evidence proved that defendant was guilty

beyond a reasonable doubt. The trial court told defendant that he would most likely be found guilty if he stipulated to the evidence. Defendant indicated he understood the "process" of stipulating to the State's evidence. The record shows that defendant understood the components of Rule 402(a), including the fact that he was waiving his right to a jury trial. Therefore, the trial court properly admonished defendant as to the effect of his stipulation to the evidence, and defendant was provided with the intended protections of Rule 402.

¶ 25 While defendant's stipulation to the evidence was tantamount to a guilty plea, it was not a "guilty plea." A stipulated bench trial that is tantamount to a guilty plea is still a stipulated bench trial. *People v. Weaver*, 2013 IL App (3d) 130054, ¶23 (while a stipulated bench trial may be similar to a guilty plea for Rule 402 admonishment purposes, it is not a guilty plea requiring him to withdraw his guilty plea prior to an appeal). Defendant did not enter a guilty plea and did not change his initial plea of "not guilty." The record shows defendant understood his right to persist in his plea of "not guilty" where defendant did, in fact, persist in his plea of "not guilty." The record also shows defendant understood the rights he was waiving by stipulating to the State's evidence. On this record, we conclude that defendant knowingly and voluntarily consented to the stipulated bench trial, and the trial court substantially complied with Rule 402(a) when admonishing defendant. Accordingly, we affirm the trial court's judgment.

¶ 26 CONCLUSION

¶ 27 The judgment of the circuit court of Knox County is affirmed.

¶ 28 Affirmed.