2017 IL App (4th) 140959-U

NO. 4-14-0959

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
January 9, 2017
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
DENNY R. BUSBOOM,	)	No. 14CF563
Defendant-Appellant.	)	
	)	Honorable
	)	Richard P. Klaus,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Presiding Justice Turner and Justice Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: When admonishing defendant regarding his proposed stipulation that the evidence was sufficient to convict him, the trial court failed to substantially comply with Illinois Supreme Court Rules 402(a)(1) and (a)(2) (eff. July 1, 2012).

¶ 2 At the conclusion of a stipulated bench trial, the trial court found defendant, Denny R. Busboom, guilty of both counts of the information: count I, aggravated driving with an alcohol concentration of 0.08 or more (625 ILCS 5/11-501(d)(2)(D) (West 2014)); and count II, aggravated driving under the influence of alcohol (*id.*). The court afterward sentenced him to imprisonment for 12 years, plus 2 years of mandatory supervised release.

¶ 3 Defendant appeals on two grounds. First, he argues the trial court omitted some of the admonitions in Illinois Supreme Court Rule 402(a) (eff. July 1, 2012)—admonitions that were required because his stipulation was tantamount to a guilty plea, as the court recognized.

Second, he argues the sentence is too severe.

¶ 4 We agree with the first argument and consequently do not reach the second argument. We conclude, in our *de novo* review, that the trial court failed to substantially comply with Rules 402(a)(1) and (a)(2). Therefore, we reverse the trial court's judgment, and we remand this case for further proceedings consistent with this order, including compliance with Illinois Supreme Court Rule 402(a) (eff. July 1, 2012).

¶ 5 I. BACKGROUND

¶ 6 On May 9, 2014, in the arraignment, the trial court read counts I and II to defendant. Both counts arose from the same incident on April 12, 2014. The court told him: "It's a [C]lass [1], non-probationable felony. That means that it is a mandatory prison sentence of between [4] and 15 years in the Department of Corrections."

¶ 7 On August 13, 2014, defendant waived his right to a trial by jury and consented to a bench trial.

¶ 8 On September 22, 2014, the trial court called the matter for a bench trial. The prosecutor and the defense counsel submitted to the court a stipulation of facts, signed by both of them. Both the State and the defense then rested.

¶ 9 Because the stipulation covered the State's entire case and because defendant preserved no defense, the trial court proceeded to admonish him pursuant to Rule 402(a). See *People v. Clendenin*, 238 Ill. 2d 302, 324 (2010). The court told him:

> "THE COURT: Mr. Busboom, if I accept this stipulation, you're giving up certain rights, all right? We have already talked about the issue of your right to

trial by jury, and you've entered a waiver of that right to trial by jury, and by doing so, when you did that, you gave up your right to have your guilt or innocence decided by 12 citizens, and then instead, elected, and decided that the trial judge would be the one deciding your guilt or innocence. You understand that, sir?

DEFENDANT MR. BUSBOOM: Yes.

THE COURT: By entering into the stipulation and submitting this stipulation to the court, Mr. Busboom, you are also giving up other rights. You are giving up the right to see and hear the State's witnesses testify. You're giving up the right to have Mr. Dedman [(defense counsel)] cross-examine those witnesses. You're giving up the right to have witnesses come to this trial and testify, and you are giving up the right to have them subpoenaed, and requiring them to attend the trial and testify.

You also have a personal right. It's not something that Mr. Dedman gets to decide, it's something only that you can decide. That personal right is the decision to testify on your own behalf.

You are not required to testify. No one can make you testify. If you do not testify, that can't be—that cannot in any way influence the verdict in this case. But it is your decision, and your decision alone about whether or not to testify, and by entering into a stipulation and presenting no evidence, you are giving up that right to testify. You understand that, sir?

DEFENDANT MR. BUSBOOM: Yes, sir.

THE COURT: Sir, anyone promise you anything for entering into this stipulation?

DEFENDANT MR. BUSBOOM: No, sir.

THE COURT: Anyone force, threaten, pressure, or in any way coerce you to enter into this stipulation?

DEFENDANT MR. BUSBOOM: No, sir.

THE COURT: And you and Mr. Dedman have discussed this issue, and you are in agreement regarding submitting this stipulation to the court?

DEFENDANT MR. BUSBOOM: Yes, sir.

* * *

THE COURT: Mr. Dedman?

MR. DEDMAN: I agree they have convicted him of DUI.

* * *

THE COURT: ***

All right. Counsel, Mr. Dedman's correct. The State has convicted Mr. Busboom. The stipulation provides that the defendant is guilty of driving under the influence beyond a reasonable doubt, and the matter will be set for any post-trial motions, and/or sentencing."

¶ 10 II. ANALYSIS

¶ 11 A. Did the Trial Court Substantially Comply With Rules 402(a)(1) and (a)(2)?

¶ 12 If a stipulated bench trial is tantamount to a guilty plea, the trial court must

comply with Rule 402(a) before accepting the stipulation. *People v. Smith*, 59 Ill. 2d 236, 242 1974). "[A] stipulation is tantamount to a guilty plea—and therefore requires a defendant's personal admonishment and agreement—in only two instances: (1) the State's entire case is to be presented by stipulation and the defendant does not present or preserve a defense; or (2) the stipulation includes a statement that the evidence is sufficient to convict the defendant." (Emphases omitted.) *Clendenin*, 238 Ill. 2d at 322. The parties agree that both (1) and (2) hold true in the present case and that, because either (1) or (2) triggers Rule 402(a), compliance with that rule was required.

¶ 13 Illinois Supreme Court Rule 402 (eff. July 1, 2012) requires "substantial compliance" with its provisions ("In hearings on pleas of guilty, or in any case in which the defense offers to stipulate that the evidence is sufficient to convict, there must be *substantial compliance* with the following ***." (Emphasis added.)). The appellate court has said that "substantial compliance" means "such compliance as will assure that the beneficial effect of the rule will be achieved." *People v. Mehmedoski*, 207 Ill. App. 3d 275, 280 (1990).

¶ 14 This intended beneficial effect of Rule 402 is to ensure the intelligence and voluntariness of the guilty plea:

> "**(a)** ***Admonitions to Defendant.*** The court shall not accept a plea of guilty or a stipulation that the evidence is sufficient to convict 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.

(b) ***Determining Whether the Plea is Voluntary*****.** The court shall not accept a plea of guilty without first determining that the plea is voluntary. If the tendered plea is the result of a plea agreement, the agreement shall be stated in open court. The court, by questioning the defendant personally in open court, shall confirm the terms of the plea agreement, or that there is no agreement, and shall determine whether any force or threats or any promises, apart from a plea agreement, were used to obtain the plea." Ill. S. Ct. Rs. 402(a), (b) (eff. July 1, 2012).

¶ 15 On September 22, 2014, before accepting the stipulation, which was tantamount to a guilty plea, the trial court complied with Rule 402(b): by speaking with defendant personally, the court ascertained he was entering into the stipulation without being induced to do so by any force, threats, or promises. The court also complied with Illinois Supreme Court Rule

402(a)(4) (eff. July 1, 2012) by explaining to defendant, and confirming with him that he understood, he would be giving up "the right to be confronted with the witnesses against him."

¶ 16 Defendant argues, however, that, in the hearing of September 22, 2014, the court failed to tell him, and failed to make sure he understood, the nature of the charges (Ill. S. Ct. R. 402(a)(1) (eff. July 1, 2012)) and the minimum and maximum sentence prescribed by law (Ill. S. Ct. R. 402(a)(2) (eff. July 1, 2012)).

¶ 17 The State argues that, despite the trial court's omission of these points in its admonitions on September 22, 2014, the record shows "substantial compliance" with Rule 402 in that, in the arraignment, on May 9, 2014, the court read the charges to defendant and told him the minimum and maximum prison terms.

¶ 18 In several cases, however, the appellate court has held that what the trial court told a defendant in the arraignment does not serve, later on, as substantial compliance with Rule 402(a) in a guilty-plea hearing. *People v. Johns*, 229 Ill. App. 3d 740, 744 (1992); *People v. Packard*, 221 Ill. App. 3d 295, 297 (1991); *People v. Culbertson*, 162 Ill. App. 3d 319, 322 (1987); *People v. Louderback*, 137 Ill. App. 3d 432, 436 (1985).

¶ 19 The State contends, though, that *Johns* and similar cases are inconsistent with pronouncements by the supreme court that "we may consider the entire record in determining whether [the] defendant understood the nature of the charges against him." *People v. Burt*, 168 Ill. 2d 49, 64 (1995); see also *People v. Krantz*, 58 Ill. 2d 187, 192 (1974). We see two difficulties with that contention.

¶ 20 First, in *Packard*, we acknowledged these pronouncements by the supreme court "that the entire record [was] to be considered in determining whether the defendant [understood]

the nature of the charges to which he [was] pleading and the sentences that [might] be imposed." *Packard*, 221 Ill. App. 3d at 296-97. Even so, we were unconvinced that statements made to the defendant nine months earlier, in the arraignment, qualified as substantial compliance with Rule 402. *Id.* at 297.

¶ 21 Second, Rule 402(a)(1), by its terms, requires more than the arraignment statute requires. Under the arraignment statute, the trial court must simply inform the defendant of the charge and call upon the defendant to "plead thereto," and "[i]f the defendant so requests[,] the formal charge shall be read to him before he is required to plead." 725 ILCS 5/113-1 (West 2014). Rule 402(a)(1), by contrast, provides as follows:

> "***(a) Admonitions to Defendant.*** The court shall not accept a plea of guilty or a stipulation that the evidence is sufficient to convict 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 ***." (Emphasis added.) Ill. S. Ct. R. 402(a)(1) (eff. July 1, 2012).

¶ 22 If the charge is written in plain English and if, during the arraignment, the trial court read the charge to the defendant, the court can reasonably *assume* that the defendant understood what was read. Rule 402(a)(1), however, requires more than an assumption: the court must "*determin*[*e*]" that the defendant "understands *** the nature of the charge." (Emphasis added.) *Id.*

¶ 23 What does the supreme court mean by "determine"? We interpret a supreme court rule the same way we interpret a statute: we give the words their plain and ordinary meaning.

People v. Marker, 233 Ill. 2d 158, 165 (2009). To "determine" means to "ascertain or establish exactly, typically as a result of research or calculation." The New Oxford American Dictionary 466 (2001); see also *People v. Davison*, 233 Ill. 2d 30, 40 (2009) ("When the statute contains undefined terms, it is entirely appropriate to employ a dictionary to ascertain the plain and ordinary meaning of those terms."). As we said, a court can *assume* a defendant understands something expressed in plain English, but because no one can read anyone else's mind, the only way a court can really *determine*, *i.e.*, ascertain or establish exactly, that the defendant understands a given proposition is if the defendant somehow clearly signifies his understanding, such as by answering yes when the court asks him, in a plea colloquy, if he understands the proposition. See *People v. Tripp*, 248 Ill. App. 3d 706, 717 (1993) ("Here, there was no direct colloquy between the court and the defendant other than the court's perfunctory question as to whether or not defendant understood his sentence."); *cf. People v. Dominguez*, 2012 IL 111336, ¶ 27 ("Under [Illinois Supreme Court Rule 605(c) (eff. Oct. 1, 2001)], 'the trial court shall advise the defendant,' which means there must be some colloquy in open court between the court and a defendant."). Alternatively, the court could rest its determination on an argument or other statement the defendant personally made, on the record, that clearly evinces an understanding of the proposition. See *People v. Gilkey*, 263 Ill. App. 3d 706, 711 (1994) ("his degree of legal sophistication made it evident that he was aware of the information that compliance with the rule would have conveyed"). In any event, merely reading the charge to the defendant in the arraignment will not satisfy Rule 402(a)(1), because a reading of the charge, without more, cannot support a determination that the defendant understands the charge. In the arraignment, having been read the charge, the defendant might have thought, "I don't clearly understand the

particulars of what they're charging me with, but whatever it is, I'll plead not guilty because I refuse to agree to anything, and they're going to have to prove it."

¶ 24 This is not to say, absolutely, that all earlier proceedings should be disregarded when determining whether a defendant understands the propositions in Rule 402(a). We held, for example, in *People v. Dennis*, 354 Ill. App. 3d 491, 496 (2004), that, because, on two prior occasions, the trial court admonished the defendant on the rights he would be giving up and, on both occasions, he confirmed he understood these admonitions, and because, only a month earlier, the court gave him these same admonitions a third time, we found substantial compliance by virtue of "the repetition and recency of the admonitions."

¶ 25 The length of time between the admonition and the proposed guilty plea should be "the principal focus." (Internal quotation marks omitted.) *Id.* Reading the charges to defendant, and telling him the sentence range, more than four months earlier, in the arraignment, is not substantial compliance with Rules 402(a)(1) and (a)(2). We are concerned not only by the lapse of time between the arraignment and the stipulated bench trial but also by the lack of any colloquy between the trial court and defendant regarding the nature of the charges and the range of punishment. Ill. S. Ct. R. 402(a) (eff. July 1, 2012) ("determining that he or she understands").

¶ 26 B. Has Defendant Forfeited His Argument by Failing To Object When the Trial Court Gave the Incomplete Admonitions?

¶ 27 Generally speaking, "[f]ailure to raise an error to the trial court with sufficient clarity and specificity results in forfeiture." *People v. Hayes*, 319 Ill. App. 3d 810, 819 (2001). Because requiring a defendant, however, to object to deficiencies in the admonitions the trial

court gave him would be equivalent to requiring him to admonish himself, we find no procedural forfeiture. See *People v. Whitfield*, 217 Ill. 2d 177, 188 (2005).

¶ 28 C. Must Defendant Show Prejudice?

¶ 29 The State argues that the "imperfect admonishments" caused defendant no apparent prejudice. In *Whitfield*, the supreme court said that "an imperfect admonishment is not reversible error unless real justice has been denied or the defendant has been prejudiced by the inadequate admonishment." *Id.* at 195.

¶ 30 According to *Boykin v. Alabama*, 395 U.S. 238 (1969), however, which Rule 402 is supposed to implement (*People v. Seyferlich*, 398 Ill. App. 3d 989, 991 (2010)), due process has been denied—and therefore real justice has been denied (see *People v. Lindsey*, 199 Ill. 2d 460, 472 (2002))—if the record fails to *affirmatively show* that the defendant's guilty plea was intelligent and voluntary. *Boykin*, 395 U.S. at 242; *Boykin*, 395 U.S. at 244-45 (Harlan, J., dissenting) ("The Court today holds that petitioner Boykin was denied due process of law, and that his robbery convictions must be reversed outright, solely because 'the record (is) inadequate to show that petitioner *** intelligently and knowingly pleaded guilty.' ").

¶ 31 An incorrect admonition would not necessarily prevent the record from making such a showing. For example, "[i]n situations where a defendant has entered an open plea and the trial court has admonished the defendant regarding the maximum sentence to which he would be exposed by his plea, the failure to admonish a defendant concerning the [mandatory supervised release] is not a constitutional violation, as long as the sentence plus the term of [mandatory supervised release] is less than the maximum sentence which [the] defendant was told he could

receive." *Whitfield*, 217 Ill. 2d at 194. Despite the court's failure to admonish him about mandatory supervised release, the record would nevertheless show the defendant's guilty plea to be intelligent. The guilty plea would be intelligent because, as it turned out from the sentence the court ended up imposing, the possibility of being subject to mandatory supervised release over and above the maximum term of imprisonment the court told him he could receive was a possibility that never came to pass. Thus, in retrospect, it was an irrelevant possibility.

¶ 32 We are aware of no case holding, however, that the nature of the charge and the maximum punishment are irrelevant to the intelligence of a guilty plea. See *People v. Didley*, 213 Ill. App. 3d 910, 915 (1991) ("In order for a guilty plea to withstand appellate *** review, the record must reflect the defendant's plea was entered as a knowing, intelligent act, done with sufficient awareness of the relevant circumstances and likely consequences."). Nor are we aware of any case holding that if the only time the trial court mentioned to the defendant the nature of the charge and the maximum punishment was several months before the guilty plea, in the arraignment, the record affirmatively shows the intelligence of the guilty plea. The court should give the admonitions, and confirm that the defendant understands them, at the time the defendant proposes to plead guilty.

¶ 33 III. CONCLUSION

¶ 34 For the foregoing reasons, we reverse the trial court's judgment, and we remand this case for further proceedings consistent with this order, including compliance with Rule 402.

¶ 35 Reversed and remanded with directions.