2019 IL App (3d) 170170-U

Order filed July 30, 2019

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2019

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 21st Judicial Circuit,
	)	Kankakee County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-17-0170
v.	)	Circuit No. 16-CM-984
	)	
KYLE OWENS,	)	Honorable
	)	Clark E. Erickson,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Justice Holdridge concurred in the judgment.
Justice Wright concurred in part and dissented in part.

ORDER

¶ 1 *Held*: The circuit court erred in failing to admonish defendant before he proceeded *pro se*.

¶ 2 Defendant, Kyle Owens, appeals his conviction of the unlawful violation of a stalking no contact order, arguing that the Kankakee County circuit court erred in failing to admonish him

pursuant to Illinois Supreme Court Rule 401(a) (eff. July 1, 1984). We vacate defendant's conviction.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged with a Class A misdemeanor for violating a stalking no contact order (740 ILCS 21/125 (West 2016)). Before trial, defendant stated that he wished to discharge his public defender and represent himself. The court asked defendant if he understood that his public defender was educated and experienced in the law. It further asked defendant whether he had been to law school and how many trials defendant had completed. Defendant did not directly answer. The court then advised defendant that he would be expected to follow the rules of procedure and would not be able to argue his own legal incompetence if he was found guilty. The court did not ask defendant if he understood the nature of the charge, the minimum and maximum sentences, or that he had the right to counsel. The court allowed defendant to proceed *pro se*, stating, "Show the defendant is admonished as to the risks and dangers of representing himself."

¶ 5 The case proceeded to a jury trial that same day. Officer Lonnie Sturkey of the Kankakee Police Department testified that he served defendant with a notice of an order of protection on December 4, 2016. Sturkey informed defendant that he was not allowed to contact Elia Kernell in any way.

¶ 6 Kernell testified that she met defendant while she was staying at the Salvation Army. She initially socialized with him, but became "[c]reeped out" when he began to make sexual advances toward her. She, therefore, obtained an order of protection against him, which was issued on November 28, 2016. On December 6 and 9, 2016, she received several Facebook messages that were sent under the names "Ralph Wellgood" and "Elia Kernell's Twin." She

believed that they were authored by defendant because the messages described their interactions. Some messages stated that the author wanted to be Kernell's boyfriend and thought they were "a perfect match." Two messages asked her to "drop the order" so they could talk or he could make it up to her. Another message stated that the author was not Kernell's stalker, used profanity, and called her a "paranoid skitzo freak." She did not respond to the messages and said they made her "scared for [her] own safety." Defendant began cross-examining Kernell, but stopped, stating that she was not being truthful.

¶ 7 Defendant testified that he did send those Facebook messages to Kernell, but she had been stalking him. The jury found defendant guilty. Defendant was sentenced to 364 days in jail, which the court said was "about the maximum."

¶ 8 II. ANALYSIS

¶ 9 On appeal, defendant contends that the court failed to substantially comply with the admonishments required under Illinois Supreme Court Rule 401(a) (eff. July 1, 1984) when it allowed defendant to proceed *pro se*. The State confesses error. After reviewing the record, we accept the State's confession.

¶ 10 Rule 401(a) states,

> "The court shall not permit a waiver of counsel by a person accused of an offense punishable by imprisonment without first, by addressing the defendant personally in open court, informing him of and determining that he 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; and

(3) that he has a right to counsel and, if he is indigent, to have counsel appointed for him by the court." *Id.*

"[S]ubstantial compliance with Rule 401(a) is required for an effective waiver of counsel." *People v. Campbell*, 224 Ill. 2d 80, 84 (2006).

¶ 11 Here, the court did not substantially comply with Rule 401(a), and defendant did not effectively waive his right to counsel. Therefore, defendant's conviction was improper.

¶ 12 We note that defendant requests that we reverse his conviction outright without remanding the case for a new trial, since defendant has fully served his sentence. In support of this contention, he cites *Campbell*, 224 Ill. 2d at 87-88. In *Campbell*, the defendant proceeded *pro se* in his bench trial for driving with a suspended license, a Class A misdemeanor. *Id.* at 82-83. Since the circuit court failed to admonish defendant pursuant to Rule 401(a), our supreme court reversed his conviction. *Id.* at 87. The court stated, "Ordinarily, that error would compel the reversal of defendant's conviction and a remand for a new trial. In this case, however, defendant has already discharged his sentence, and a new trial therefore would be neither equitable nor productive." *Id.* The court, therefore, vacated the defendant's conviction. *Id.* at 87-88. Thus, *Campbell* allows a reviewing court to vacate the conviction outright in circumstances, such as here, where justice requires.

¶ 13 In this case, defendant was tried, convicted, sentenced, served that sentence, and was released, all pursuant to the State's Attorney's charging decision. Because of the trial court's reversible procedural error, the *defendant* became entitled to a new trial. As was the situation in

Campbell, defendant has already completed his sentence, and "a new trial therefore would be neither equitable nor productive." Accordingly, we vacate defendant's conviction.

¶ 14 In reaching this result, we reject the State's contention that violating a stalking no contact order, as defendant did here, is a more serious offense than driving on a suspended license, as the defendant did in *Campbell*. See *id.* at 82-83. The State believes *Campbell* is distinguishable on this fact alone. As both offenses constitute Class A misdemeanors and are subject to the same penalty, the Illinois legislature has expressly determined that one is not more serious than the other.

¶ 15 III. CONCLUSION

¶ 16 The judgment of the circuit court of Kankakee County is vacated.

¶ 17 Vacated.

¶ 18 JUSTICE WRIGHT, concurring in part and dissenting in part:

¶ 19 I agree the trial court failed to properly admonish defendant. Respectfully, I dissent, in part, because I disagree that the remedy should be a vacatur of defendant's conviction without remanding the case to the circuit court for a new trial. The authority relied upon by the majority in reaching this conclusion, *People v. Campbell*, 224 Ill. 2d 80 (2006), is distinguishable from the case now before our court. I would follow the lead of our friends from the Second District, who have found that the holding in *Campbell* is limited to the facts of that case, and that the logic in *Campbell* cannot be applied where the conviction is of a "very different character" from a misdemeanor driving on a suspended license offense. *People v. Vazquez*, 2011 IL App (2d) 091155, ¶ 19.[1]

[1]Notably, the Second District, in the yet to be published opinion in *People v. Nemec*, 2019 IL App (2d) 170382, followed the precedent it established in *Vazquez*. In *Nemec*, the defendant pleaded guilty to driving under the influence, a Class A misdemeanor. *Id.* ¶¶ 3, 24. However, the defendant was deprived of

¶ 20 Initially, our supreme court in *Campbell* used the phrase "In this case" when stating its application and conclusion. *Campbell*, 224 Ill. 2d at 87. I agree, as did the Second District in *Vazquez*, that when read in context this phrase limits *Campbell* to the facts of that case. *Vazquez*, 2011 IL App (2d) 091155, ¶ 18. Indeed, this represents a logical reading of *Campbell*, where our supreme court acknowledged errors under Rule 401(a) *ordinarily* compel a reversal of a defendant's conviction *and* a remand for a new trial. *Campbell*, 224 Ill. 2d at 87; See also *Vazquez*, 2011 IL App (2d) 091155, ¶ 18 ("We note that, *generally*, vacatur of a conviction is followed by remand for retrial, and *** [a vacatur of] a defendant's conviction without remand for retrial must be limited to the facts of *Campbell*." (Emphasis added.))

¶ 21 Further, *Campbell* was based upon a finding that a retrial would be neither "equitable nor productive." *Campbell*, 224 Ill. 2d at 87; *Vazquez*, 2011 IL App (2d) 091155, ¶ 18. However, *Campbell* did not expand upon the considerations for or "enunciate factors to guide future courts" in reaching such a conclusion. *Campbell*, 224 Ill. 2d at 87; *Vazquez*, 2011 IL App (2d) 091155, ¶ 18. Again, in my view, this indicates *Campbell's* holding is limited to the facts of that case, namely, a defendant who committed a misdemeanor traffic offense—such as the status offense of driving on a suspended license—and who served the entire sentence for that offense.

¶ 22 Here, there is no disputing defendant served his entire sentence for violating a stalking no contact order, but, pursuant to *Vazquez*, I conclude a conviction for that offense is of a "very different character" than a misdemeanor traffic offense such as driving on a suspended license. See *Vazquez*, 2011 IL App (2d) 091155, ¶ 19. Most obviously, violating a stalking no contact order involves potentially dangerous activity that could quickly escalate into risk of harm or

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the right to counsel at his revocation hearing when the trial court failed to admonish the defendant under Rule 401(a). *Id.* ¶ 21. In light of *Vazquez*, the Second District held that driving under the influence was of a "very different nature" than the driving on a suspended license offense at issue in *Campbell*. *Id*. ¶ 24. Thus, despite the deprivation of the right to counsel that resulted in a vacatur, the Second District held that a remand for a new revocation hearing would be equitable and productive. *Id*. ¶¶ 22-25.

actual harm to the subject of the stalking no contact order, or even other members of the public. See *id*. ¶ 20. An individual who is driving safely, but with a suspended license, does not similarly pose a risk to the public. *Id*. Reasoning that these offenses are of an equal character simply because our legislature has classified both as Class A misdemeanors puts this case at odds with *Vazquez*, where the Class A misdemeanors of harboring a runaway and contributing to the delinquency of a minor were held to be of a "very different character" than driving on a suspended license. *Id*. ¶¶ 1, 19-21. Such reasoning ignores the inherent and heightened dangers that arise out of a decision to violate a stalking no contact order, and the benefits of obtaining a conviction for that offense. *Id*. ¶¶ 19-21.

¶ 23 In particular, even though the trial court will be unable to impose additional penalties upon defendant, a prior conviction for violating a stalking no contact order would be present in defendant's criminal history and provide "value to the State in its role as prosecutor." *Id*. ¶ 21. As stated in *Vazquez*, a prior conviction could be a factor in future charging decisions, impact whether a plea agreement is offered and the nature of that plea agreement, and be an aggravating factor at a future sentencing hearing. *Id*. In my view, a prior conviction for violating a trial court's order would also be considered to deny the following requests: (1) reduction of bail, (2) probation rather than incarceration, (3) and work release. In addition, violating a trial court's order may be considered when accepting or rejecting a negotiated plea agreement that requires compliance with certain conditions approved by the trial court. Given these implications, "the more severe the offense at issue, the greater the importance of the conviction." *Id*.

¶ 24 As a result, I disagree that *Campbell* controls the outcome of this case, and that a retrial of defendant for violating a stalking no contact order would be neither "equitable nor

productive." See *Campbell*, 224 Ill. 2d at 87. For the foregoing reasons, I respectfully dissent. I would remand the case for a retrial of defendant.