2019 IL App (3d) 170466-U

Order filed June 26, 2019

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2019

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
	)	Tazewell County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-17-0466
v.	)	Circuit No. 12-DT-660
	)	
MICHAEL E. ROBINSON JR.,	)	Honorable
	)	Frank W. Ierulli,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Justices Holdridge and McDade concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court failed to substantially comply with Illinois Supreme Court Rule 402A (eff. Nov. 1, 2003) prior to accepting defendant's admission to the State's petition to revoke his court supervision.

¶ 2 Defendant, Michael E. Robinson Jr., appeals the Tazewell County circuit court's order revoking his court supervision and entering a judgment of conviction on the underlying offense of driving under the influence of alcohol (DUI). Defendant argues that the court failed to admonish him in substantial compliance with Illinois Supreme Court Rule 402A (eff. Nov. 1,

2003) prior to accepting his admission to the State's petition to revoke his court supervision. We vacate the judgment of the circuit court and remand the matter with directions.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged with DUI (625 ILCS 5/11-501(a)(2) (West 2012)). On April 3, 2014, defendant pled guilty. Before accepting defendant's plea, the court admonished defendant, *inter alia*, that the offense was punishable by up to 364 days in jail, a $2500 fine, or both. The court advised defendant that he could also receive up to two years' probation.

¶ 5 Defendant was sentenced to 12 months' court supervision. As conditions of his court supervision, defendant was required to pay certain monetary assessments, refrain from violating any laws, complete required treatment, refrain from ingesting alcoholic beverages before or during the operation of a motor vehicle, submit to random drug testing, and complete a victim impact panel.

¶ 6 On March 18, 2015, the State filed a petition to revoke court supervision. On August 5, 2015, the State filed an amended petition to revoke, which contained additional allegations. On June 16, 2016, the State filed a second amended petition to revoke court supervision. The second amended petition alleged that defendant failed to be evaluated for or undergo treatment as directed; failed to pay all monetary assessments as directed; committed the offense of DUI on August 5, 2015; had a blood alcohol level above 0.08 at the time he was arrested on August 5, 2015; and was arrested for aggravated domestic battery, aggravated assault, possession of stolen property, possession of controlled substances, and possession of drug equipment on May 24, 2016.

¶ 7 On February 22, 2017, defendant appeared in court with counsel. Defense counsel stated that defendant was "making a limited admission to some of the allegations" in the second

amended petition to revoke court supervision. Specifically, defense counsel indicated that defendant was admitting that he had been convicted of the offense of aggravated battery and that he tested positive for alcohol on August 5, 2015. Defense counsel indicated that this admission was set forth on a written admission form that defendant had signed. Defense counsel asked that the court accept defendant's admission and set the matter over for sentencing on a future date. The following exchange occurred:

"THE COURT: Okay, [defendant], is that your understanding, sir?

THE DEFENDANT: Yes, sir.

THE COURT: I have to go through certain admonitions with you. Do you understand that you have a right to have a hearing on this petition to revoke?

THE DEFENDANT: Yes, sir.

THE COURT: And are you waiving your right to a hearing?

THE DEFENDANT: Yes, sir.

THE COURT: And are you waiving your right to a hearing of your own free will?

THE DEFENDANT: Yes, sir.

THE COURT: And other than what [defense counsel] has told me, has anybody made any other promises to you?

THE DEFENDANT: No, sir.

THE COURT: Are you entering this admission of your own free will?

THE DEFENDANT: Yes, sir.

THE COURT: The record will reflect the defendant understands the nature of the petition to revoke and the possible penalties, and the defendant is entering this admission both freely and voluntarily."

¶ 8 A document titled "Admission to Petition to Revoke" appears in the record. The document is signed by defendant and dated February 22, 2017. The document states:

"I understand the nature of the alleged violations and the underlying charge(s) against me and the minimum and maximum range of possible sentences. I understand that I have the right to a hearing by a judge, where the prosecutor must prove by a preponderance of the evidence that I have violated probation or conditional discharge or court supervision. I understand that I have other rights, including without limitation, my rights to be present, to be heard, to present evidence material to the proceedings, to request the issuance of subpoenas, and to cross examine the witnesses against me. I understand that if a sentence of incarceration is possible, I have the right to be represented by an attorney, including an appointed attorney if I am indigent. I waive all those rights, provided that if I have an attorney I am not waiving my right to counsel. I waive those rights freely and voluntarily, and in that regard I represent that there has been no force or threat of force, there have been no promises other than contained in the record as a part of my agreement, I am not under the influence of alcohol or drugs, I do not suffer from any condition preventing me from thinking clearly, and I am thinking clearly."

On the bottom of the written admission, the following sentence was handwritten: "Defendant admits he was convicted of Aggravated Battery in Tazewell County Case # 16 CF 288 and that he tested positive for alcohol on 8-5-15, only."

¶ 9 Following two sentencing hearings, the court ultimately revoked defendant's court supervision and entered a judgment of conviction.

¶ 10 II. ANALYSIS

¶ 11 Defendant argues that his conviction should be reversed and the matter should be remanded for further revocation proceedings because the circuit court failed to comply with Illinois Supreme Court Rule 402A (eff. Nov. 1, 2003) prior to accepting to defendant's admission to the second amended petition to revoke court supervision. Rule 402A(a) provides:

> "The court shall not accept an admission to a violation, or a stipulation that the evidence is sufficient to revoke, without first addressing the defendant personally in open court, and informing the defendant of and determining that the defendant understands the following:
>
> (1) the specific allegations in the petition to revoke *** supervision;
>
> (2) that the defendant has the right to a hearing with defense counsel present, and the right to appointed counsel if the defendant is indigent and the underlying offense is punishable by imprisonment;
>
> (3) that at the hearing, the defendant has the right to confront and cross-examine adverse witnesses and to present witnesses and evidence in his or her behalf;

(4) that at the hearing, the State must prove the alleged violation by a preponderance of the evidence;

(5) that by admitting to a violation, or by stipulating that the evidence is sufficient to revoke, there will not be a hearing on the petition to revoke *** supervision, so that by admitting to a violation, or by stipulating that the evidence is sufficient to revoke, the defendant waives the right to a hearing and the right to confront and cross-examine adverse witnesses, and the right to present witnesses and evidence in his or her behalf; and

(6) the sentencing range for the underlying offense for which the defendant is on *** supervision." Ill. S. Ct. R. 402A(a) (eff. Nov. 1, 2003).

¶ 12 The circuit court must substantially comply with the requirements of Rule 402A in order to satisfy due process. *People v. Ellis*, 375 Ill. App. 3d 1041, 1046 (2007). Substantial compliance entails "a specific and affirmative showing in the record that the defendant understood each of the required admonitions." *Id.* Substantial compliance may be "achieved in ways other than reciting all of Rule 402A to a respondent when the respondent admits to violating probation." *In re Westley A.F., Jr.*, 399 Ill. App. 3d 791, 796 (2010). In determining whether the circuit court substantially complied with Rule 402A, we consider the entire record, including what occurred at earlier proceedings. *Id.* Each case must be considered on its own facts, "with the primary focus on the length of time between the admonishments and the admission of the violation." *People v. Saleh*, 2013 IL App (1st) 121195, ¶ 14. A claim that the circuit court failed to substantially comply with Rule 402A is subject to *de novo* review. *Id.*

¶ 13 Here, we find that the circuit court failed to admonish defendant in substantial compliance with Rule 402A before accepting his admission to the second amended petition to revoke court supervision. The only oral admonishments required by Rule 402A(a) that the court gave defendant were that he had the right to a hearing and he was waiving that right. Several of the other admonishments required by the rule were included in the written admission form defendant signed. Defendant contends that signing the written form did not constitute substantial compliance with Rule 402A because the rule required that defendant be personally admonished in open court. See Ill. S. Ct. R. 402A(a) (eff. Nov. 1, 2003). We note that this court has considered a written waiver in conjunction with oral admonishments in the context of determining substantial compliance with Illinois Supreme Court Rule 402 (eff. July 1, 2012), which also requires that the defendant be addressed personally in open court. *People v. Dougherty*, 394 Ill. App. 3d 134, 139 (2009). However, even considering the written form along with the court's oral admonishments, the record in this case does not contain a specific and affirmative showing that defendant understood each of the required admonishments at the time he entered his admission.

¶ 14 First, while the transcript of the admission hearing arguably shows that defendant understood the two allegations in the second amended petition to revoke court supervision to which he admitted, the record does not contain a specific and affirmative showing that defendant understood all of the specific allegations in the petition. The court did not discuss the specific allegations in the petition with defendant. Although the written form stated defendant understood "the nature of the alleged violations," it did not set forth what the "alleged violations" were. Under these circumstances, the record does not contain a specific and affirmative showing that defendant understood the specific allegations in the petition to revoke court supervision.

¶ 15 Also, the record does not contain a specific and affirmative showing that defendant understood the possible sentencing range for DUI at the time he entered his admission. Defendant was not admonished of the sentencing range for DUI at the admission hearing. While the written form stated that defendant understood "the underlying charge(s) against [him] and the minimum and maximum range of possible sentences," the written form did not set forth what the underlying charge was or what the possible penalties were. We acknowledge that the record shows that defendant was admonished of the sentencing range for DUI at the time he pled guilty. However, the plea hearing occurred nearly three years before the admission hearing. Given the passage of time between the admonishment and the admission, we do not find substantial compliance with Rule 402A based on the admonishment regarding the sentencing range at the guilty plea hearing. See *Saleh*, 2013 IL App (1st) 121195, ¶ 15 (holding that the record did not show substantial compliance with Rule 402A where nearly two years had passed between the time the defendant was admonished regarding the sentencing range for the underlying offense and the time that the defendant stipulated to the violation). Compare *Westley A.F.*, 399 Ill. App. 3d at 796 (holding that there was substantial compliance with Rule 402A where the respondent was admonished regarding the sentencing range for the underlying offense less than one month before he admitted to violating his probation); *People v. Dennis*, 354 Ill. App. 3d 491, 496 (2004) (holding that there was substantial compliance when the court admonished the defendant regarding his revocation rights a month before the defendant's admission).

¶ 16 We reject the State's argument that the issue of whether defendant was admonished in substantial compliance with Rule 402A was forfeited because defendant failed to raise the issue in the circuit court. We find that the admonishment issue is not subject to forfeiture. To hold otherwise would be to " 'place the onus on [defendant] to ensure his own admonishment in

accord with due process.' " *Westley A.F.*, 399 Ill. App. 3d at 795 (quoting *People v. Whitfield*, 217 Ill. 2d 177, 188 (2005)). See also *People v. Curry*, 2019 IL App (3d) 160783, ¶ 22.

¶ 17 III. CONCLUSION

¶ 18 We vacate the judgment of the circuit court of Tazewell County. We remand the matter with directions to allow defendant to withdraw his admission to violating court supervision and for further proceedings consistent with this disposition, as necessary.

¶ 19 Vacated and remanded with directions.