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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. 10 CR 17207
)	
JAMES SIMON,)	Honorable
)	Rickey Jones,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE HYMAN delivered the judgment of the court.
Justices Neville and Mason concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's conviction for delivery of a controlled substance is reversed and this cause is remanded for a new trial where the trial court failed to comply with Supreme Court Rule 401(a) (eff. July 1, 1984) by misadvising defendant about both the minimum and maximum terms of imprisonment, not advising him that he was subject to mandatory Class X sentencing, and then sentencing him to a prison term in excess of the maximum of which he was advised, thereby rendering defendant's waiver of his right to counsel invalid.

¶ 2 Defendant James Simon waived his right to counsel and represented himself at his jury trial, pursuant to Supreme Court Rule 401 (eff. July 1, 1984). The jury convicted Simon of delivery of a controlled substance for having sold cocaine to an undercover police officer. On appeal, Simon contends his waiver of counsel was invalid because the trial court violated Rule 401(a) when it misrepresented both the minimum and maximum sentences prescribed by law,

1-12-1878

then imposed a sentence in excess of the maximum term of which he was advised. Simon also contends his sentence is excessive. We reverse Simon's conviction and remand for a new trial.

¶ 3 Background

¶ 4 Three months after arraignment, Simon's appointed counsel notified the trial court that Simon wanted to represent himself. The following colloquy then occurred:

"THE COURT: All right. I'll talk to him about that. Mr. Simon.

THE DEFENDANT: Yes, sir.

THE COURT: You're charged with delivery of a controlled substance.

You understand the charge?

THE DEFENDANT: Yes, sir.

THE COURT: This is a Class 2 felony. If found guilty, you can be sentenced to the Illinois Department of Corrections for between three and seven years, plus two years mandatory supervised release.

However, depending on your history of felony convictions, the sentence could be enhanced, which means you could be possibly sentenced up to 14 years in the Illinois Department of Corrections with two years mandatory supervised release or possible placement on probation.

You understand that?

THE DEFENDANT: Yes.

THE COURT: You have the right to have an attorney represent you. Do you understand that?

THE DEFENDANT: Yes, sir.

1-12-1878

THE COURT: If you're not able to afford a lawyer, a lawyer will be appointed to represent you at no cost to you.

You understand that?

THE DEFENDANT: Yes.

THE COURT: All right. I appointed the Public Defender's Office to represent you, and their assigned attorney has indicated that he's already worked with you on this case and you don't have to pay for services.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Do you intend to hire a lawyer?

THE DEFENDANT: No, sir.

THE COURT: You don't have the money to do that?

THE DEFENDANT: No, sir.

THE COURT: All right. Do you want the Public Defender's Office to continue to represent you, an attorney from the Public Defender's Office to continue to represent you?

THE DEFENDANT: No, sir.

THE COURT: You want to represent yourself?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Knowing all the things that I've explained to you about these charges and what your possible sentence could be, you still want to do that?

THE DEFENDANT: Yes, sir."

1-12-1878

The trial court then allowed appointed counsel to withdraw.

¶ 4 Several months later, the trial court found it had a *bona fide* doubt of Simon's fitness to stand trial and represent himself and ordered a fitness examination. Simon requested counsel, and the trial court reappointed the public defender to represent Simon. Following a hearing, Simon was found fit. A month later, Simon again decided that he wanted to represent himself, and defense counsel withdrew. The trial court did not restate the Rule 401(a) admonishments. Simon represented himself for the remainder of the pretrial proceedings and trial.

¶ 5 Simon is not challenging the sufficiency of the evidence, hence, a full recitation of the evidence presented at trial is unnecessary. The evidence established that about 10:20 a.m. on September 10, 2010, Chicago police officer Andre Reyes, working as an undercover purchasing officer as part of a narcotics investigation team, saw Simon and an unknown man engaged in a suspected narcotics transaction. After the unknown man walked away, Officer Reyes approached Simon and said "four," indicating he wished to purchase four \$10 bags of crack cocaine. Simon spat some objects from his mouth into his hand and handed the officer four clear Ziploc bags with black spade logos. Each bag contained a white rock-like substance of suspected crack cocaine. Officer Reyes handed Simon \$40 in prerecorded money, left the area, notified his team that he made a purchase and described Simon. Some 40 minutes later, narcotics officers detained Simon, and Officer Reyes identified Simon as the man who sold him the cocaine. Forensic chemist Paula Bosco-Szum tested one of the four items Officer Reyes purchased from Simon and found it positive for 0.1 gram of cocaine. Following deliberations, the jury found Simon guilty of delivery of a controlled substance.

¶ 6 At Simon's request, the trial court reappointed the public defender to represent Simon for post-trial motions and sentencing. At sentencing, the State informed the trial court that,

1-12-1878

although Simon was convicted of a Class 2 felony, based on his criminal history, he was subject to mandatory Class X sentencing. Simon's eligibility for the Class X sentence was based on his two prior Class 1 felony convictions for delivery of a controlled substance in 1997 and 2000.

The State requested a sentence of 10 years' imprisonment. The trial court called Simon manipulative and a danger to the community and sentenced him to 15 years' imprisonment. The court subsequently denied Simon's motion to reduce that sentence.

¶ 7 Analysis

¶ 8 On appeal, Simon first contends his waiver of counsel was invalid because the trial court violated Rule 401(a) when it misrepresented both the minimum and maximum sentences prescribed by law, then imposed a sentence in excess of the maximum term of which he was advised. Simon correctly states that the trial court never advised him that he faced a mandatory Class X sentence with a sentencing range of 6 to 30 years' imprisonment. Simon further states that the court incorrectly admonished him that he would be subject to a two-year term of mandatory supervised release, and that he could possibly be sentenced to probation. Simon asserts that his conviction must be reversed and his case remanded for a new trial. Simon acknowledges that he did not object to the erroneous admonishments or raise the issue in his post-trial motion, but argues that his issue is reviewable as plain error because the right to counsel is a fundamental right.

¶ 9 The State argues that the trial court's substantial compliance with Rule 401(a) sufficed, and in any event, Simon was not prejudiced by the court's error because he unequivocally expressed his desire to proceed *pro se*, was aware that he faced an enhanced sentence based upon his criminal history, and had extensive experience with the court system having six prior drug convictions and a 1998 conviction for unlawful use of a weapon by a felon.

1-12-1878

¶ 10 We have repeatedly held that the trial court's failure to comply with Rule 401(a) denies a defendant his or her fundamental right to be represented by counsel, and therefore, is reviewable as plain error. *People v. LeFlore*, 2013 IL App (2d) 100659, ¶ 51, *appeal allowed*, No. 116799 (Jan. 29, 2014); *People v. Black*, 2011 IL App (5th) 080089, ¶ 24 (and cases cited ; *People v. Jiles*, 364 Ill. App. 3d 320, 328 (2006). Although Simon did not properly 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)).

¶ 11 "The purpose of [Rule 401(a)] is 'to ensure that a waiver of counsel is knowingly and intelligently made.' " *People v. Campbell*, 224 Ill. 2d 80, 84 (2006), quoting *People v. Haynes*, 174 Ill. 2d 204, 241 (1996). The trial court must substantially comply with Rule 401(a) for defendant's waiver of counsel to be valid. *Campbell*, 224 Ill. 2d at 84. Whether the trial court's admonishments complied with Rule 401(a) is a question of law we review *de novo*. *People v. Bahrs*, 2013 IL App (4th) 110903, ¶ 13.

¶ 12 This court has previously stated "when (as here) a defendant is given a sentence in excess of the maximum he was informed of at the time he waived counsel, we hold that the defendant's waiver of counsel can *never* be valid." (Emphasis in original.) *People v. Koch*, 232 Ill. App. 3d 923, 928 (1992). Understating the maximum penalty does not comply with Rule 401(a) except in the extraordinary case where the defendant has such a high level of legal expertise that it can be confidently assumed that he or she already knows the maximum penalty. *Bahrs*, 2013 IL App (4th) 110903, ¶ 15. Correctly admonishing a defendant of the possible penalties is especially important where he or she is facing mandatory Class X sentencing based on criminal history. *LeFlore*, 2013 IL App (2d) 100659, ¶ 53.

¶ 13 We find that the trial court failed to correctly admonish Simon of the minimum and

1-12-1878

maximum penalties he faced as required by Rule 401(a), and therefore, his waiver of counsel was not valid. The record shows the trial court informed Simon that he could be sentenced to three to seven years' imprisonment for the Class 2 felony, and that his sentence could possibly be enhanced up to 14 years, depending on his criminal history. The court never informed Simon that he could be sentenced as a Class X offender when, in fact, Simon was subject to mandatory Class X sentencing. Simon faced a minimum term of six years' imprisonment, twice the amount he was told. More importantly, Simon faced a maximum term of 30 years' imprisonment, more than double the term he was told. The significance of this error was realized when the court sentenced Simon to a term of 15 years' imprisonment, which exceeded the maximum term of which he had been advised. We find no indication in the record that Simon had knowledge whatsoever that he faced a mandatory term of 6 to 30 years' imprisonment. Accordingly, Simon's waiver of counsel was not knowingly and intelligently made, thereby rendering the waiver invalid.

¶ 14 Accordingly, the State's argument that Simon was not prejudiced by the error is without merit. We acknowledge the State's claim regarding Simon's experience with the court system due to numerous convictions, but that experience does not lead to a confident assumption that Simon knew the maximum penalty he faced in this case. The record shows that Simon has never been convicted of a Class X offense. The record further shows that over the last 11 years, since July 2003, Simon's criminal history consists of four Class 4 felony convictions for possession of a controlled substance, for which his sentences ranged from 30 months to 3 years' imprisonment, and one finding of indirect criminal contempt of court for which he received 60 days in jail. To repeat, there is no indication that Simon was aware that he would be sentenced as a Class X offender facing a maximum term of 30 years' imprisonment.

1-12-1878

¶ 15 Accordingly, we reverse Simon's conviction and remand this case to the circuit court for a new trial. On remand, Simon must be given the opportunity to either be represented by an attorney, or to make a knowing and intelligent waiver of that right, which will occur only after he is given proper admonishments as required by Rule 401(a). See *LeFlore*, 2013 IL App (2d) 100659, ¶ 60. Based on our disposition of this issue, we need not consider his argument that the 15-year sentence is excessive.

¶ 16 Finally, our review of the record reveals that the State's trial evidence was sufficient to prove defendant guilty of delivery of a controlled substance beyond a reasonable doubt. Therefore, our order remanding this case for a new trial does not violate defendant's constitutional right against double jeopardy. See *People v. Taylor*, 76 Ill. 2d 289, 309-10 (1979). We emphasize, however, that this determination is not binding on retrial and does not express an opinion regarding defendant's guilt or innocence.

¶ 17 Reversed and remanded with directions.