

2013 IL App (1st) 102689-U

THIRD DIVISION
February 13, 2013

No. 1-10-2689

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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 3227
)	
JOSEPH COSTA,)	Honorable
)	John Joseph Hynes,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HYMAN delivered the judgment of the court.
Presiding Justice Neville and Justice Pierce concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's waiver of counsel was rendered invalid by the trial court's error in its waiver admonishments – that he was not subject to consecutive sentencing when he in fact was – as he was prejudiced by receiving consecutive sentences effectively twice the admonished maximum.

¶ 2 Following a jury trial, defendant Joseph Costa was convicted of two counts of threatening a public official and sentenced to consecutive prison terms of 10 years. Before trial, defendant waived his right to counsel, and he represented himself at trial. On appeal, defendant contends that his waiver of counsel was invalid because the court failed to properly admonish him, as

required by Supreme Court Rule 401 (eff. July 1, 1984), regarding his potential sentence by failing to inform him that he was subject to consecutive sentencing.

¶ 3 Defendant was charged with two counts of threatening a public official for conveying threats to Assistant State's Attorney (ASA) Nina Ricci that would place her in reasonable apprehension of bodily harm. Both counts alleged that he made threats against ASA Ricci, during a telephone conversation that was recorded as he was a jail inmate, because ASA Ricci was prosecuting him in another criminal case. Count 1 alleged that, on or about October 8, 2008, defendant threatened ASA Ricci during the telephone conversation by threatening to strangle and stab her. Count 2 alleged that, on or about March 6, 2009, defendant threatened ASA Ricci by looking at her and nodding as the recording was played in court.

¶ 4 At his first court appearance on March 31, 2010, the court asked defendant if he wanted counsel appointed or would be employing counsel. Defendant replied that he would represent himself, explaining his belief that he could not receive a fair trial in earlier cases due to "the corruption in this county" because counsel were "beaten into submission by former prosecutors that [*sic*] are now judges." The court questioned defendant at length regarding his legal knowledge, during which defendant told the court that he graduated from university.¹ When the State told the court that defendant's charges were extendable, he denied that they were, arguing that he had no convictions because his "cases are on direct appeal." The court admonished defendant that his sentences were extendable if convicted, that "the minimum is two, maximum is ten," and that he would be subject to the same rules of procedure and decorum as an attorney. When the court opined that "[y]ou need a lawyer," defendant requested "a change of venue" and the court sent the case for reassignment to a different judge.

¹Defendant misinformed the court on this point: according to the presentence investigation report (PSI), his highest degree was his GED or high-school equivalency.

¶ 5 When the case was reassigned to another judge that same day, defendant immediately told the court that he was representing himself and was demanding trial, and the court questioned and admonished defendant at length regarding self-representation. Defendant told the court that he had not previously represented himself as he had counsel in his earlier cases, that he could read and write, and that he had a master's degree in business administration. The court asked the State whether defendant would be subject to consecutive sentencing; the ASA did not know but was certain that he was subject to extended-term sentencing. The court thus admonished defendant that "at this point I don't believe you are subject to consecutive sentencing" but each charge was a Class 3 felony subject to 2 to 5 years' imprisonment, or 2 to 10 years' imprisonment due to his prior convictions, with one year of mandatory supervised release.

¶ 6 The court read the two charges to defendant. The State informed the court of defendant's seven prior felony convictions, including in 1990 for criminal sexual assault, for violation of an order of protection and aggravated battery of a peace officer committed in 2006, in 2007 for witness harassment, and in 2009 for aggravated stalking committed in 2006. As of the March 2010 hearing, he was serving prison sentences for another felony witness harassment conviction and two felony convictions for violating bail bonds. The court ascertained from defendant that he was aware of his right to counsel and to the appointment of counsel if indigent. He denied being indigent and declined an opportunity to hire counsel. The court admonished him that, especially in light of his demand for trial, "there is no turning back" from his decision to represent himself so that he should be certain of his choice to proceed *pro se*, that he would not be "given any special privileges" but would be subject to the same rules of procedure as an attorney, and that standby counsel would not be appointed. Defendant expressed understanding of these admonishments and told the court that he had standby counsel assisting him who did not

wish to be named on the record. The court accepted defendant's not-guilty plea and set his bond at \$1 million over the State's request that bond be denied.

¶ 7 In all subsequent proceedings, defendant represented himself. During pre-trial proceedings, he expressed his intent to call as trial witnesses "all my attorneys I have ever had" and sought to subpoena various judges and attorneys. Defendant referred during one hearing to his constitutional "right to defend yourself *** to preserve the integrity of the law," and on the eve of trial to his "constitutional right to be my attorney."

¶ 8 At trial, the parties stipulated to the telephone recordings; additionally, a jail officer testified that all telephone calls out of the jail are recorded and that there are signs stating so in the telephone room. ASA Ricci testified to hearing defendant's jail-recorded telephone conversations before the 2009 hearing, that she took the threats therein seriously and was fearful as a result, and that when the recordings were played during the 2009 hearing, defendant was staring at her and nodded when each of the threats was replayed; defendant stopped doing so only when her partner ASA Andrew Varga noted for the record that defendant was doing so. ASA Varga, the court reporter for the 2009 hearing, and another ASA at the hearing corroborated that defendant stared and nodded at ASA Ricci as the recording was played.

¶ 9 Following closing arguments, instructions, and deliberations, the jury found defendant guilty on both counts. During arguments on his unsuccessful post-trial motion, defendant raised various issues regarding his counsel on earlier cases.

¶ 10 At sentencing, defendant accepted the PSI without amendment. The State sought consecutive extended-term sentences and, following arguments in aggravation and mitigation, the court sentenced defendant to two 10-year prison terms to be served consecutively to each other and to his pending sentences. Defendant's motion to reconsider was denied, and this appeal timely followed.

¶ 11 On appeal, defendant contends that his waiver of counsel was invalid because the court failed to properly admonish him, as required by Supreme Court Rule 401, regarding his potential sentence by not mentioning that he was subject to consecutive sentencing.

¶ 12 Supreme Court Rule 401 governs waivers of counsel in criminal cases and provides that:

"Any waiver of counsel shall be in open court. 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." Ill. S. Ct. R. 401(a) (eff. July 1, 1984).

¶ 13 The purpose of Rule 401 is to protect both the right to counsel and the right to self-representation while ensuring that a defendant's decision to waive the appointment of counsel would pass constitutional scrutiny. Substantial compliance with Rule 401(a) is sufficient to validly waive counsel if the record indicates that waiver was otherwise made knowingly and intelligently and that the admonishments given did not prejudice defendant's rights. *People v. Campbell*, 224 Ill. 2d 80, 84 (2006); *People v. Kidd*, 178 Ill. 2d 92, 113 (1997); *People v. Toy*, 407 Ill. App. 3d 272, 283 (2011). "The requirement of knowing and intelligent choice calls for

nothing less than a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Kidd*, at 104-05.

¶ 14 In *People v. Koch*, 232 Ill. App. 3d 923, 928 (1992), this court stated that "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." The case must be remanded to the trial court, which "must give the correct sentence admonitions anew and then permit defendant to decide whether he still wishes to waive counsel." *Id.* Hence, absent an accurate understanding of the full extent of the sentence he faced, defendant could hardly be said to have knowingly and voluntarily decided to waive counsel.

¶ 15 Here, during defendant's admonishments surrounding his waiver of counsel, the trial court misstated his sentencing range when it, albeit tentatively or uncertainly, ruled out consecutive sentencing.

¶ 16 Despite defendant's repeated request to represent himself, and the court's considerable efforts to admonish him regarding his right to counsel before he waived that right – all of which can tend to indicate that a waiver was otherwise knowing and voluntary – we find that the trial court failed to substantially comply with Supreme Court Rule 401(a) and defendant was prejudiced by the misstatement. Defendant was unaware of and had no opportunity to consider the more severe potential sentence. Had the reverse occurred, and the flawed admonishment been a maximum in excess of what he actually could receive, then a showing of prejudice would be highly unlikely. Defendant was subject to a maximum sentence that was, due to consecutive sentencing, twice the length of which he was admonished, and he received the maximum sentence.

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¶ 17 Accordingly, the judgment of the circuit court is reversed and this cause is remanded for further proceedings consistent with this order.

¶ 18 Reversed and remanded.