2014 IL App (1st) 130638-U

FIFTH DIVISION
DECEMBER 12, 2014

No. 1-13-0638

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. 12 CR 11002
	)	
ALEXANDER KENNEDY,	)	Honorable
	)	Nicholas R. Ford,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE GORDON delivered the judgment of the court.
Presiding Justice Palmer and Justice Reyes concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant's stipulated bench trial was not tantamount to a guilty plea when, although trial counsel stipulated to certain evidence, counsel presented a defense and never stipulated to the legal conclusion that the evidence was sufficient to convict defendant. Affirmed; mittimus corrected.

¶ 2 Following a stipulated bench trial, defendant Alexander Kennedy was found guilty of the offense of armed habitual criminal and sentenced to six years in prison. On appeal, defendant contends that his conviction must be vacated and this cause remanded for a new trial because his

stipulated bench trial was tantamount to a guilty plea and the trial court failed to admonish him pursuant to Illinois Supreme Court Rule 402 (eff. Jul. 1, 2012). He further contends that his mittimus must be corrected to reflect an additional 7 days of presentence custody credit for a total of 205. We affirm and correct defendant's mittimus.

¶ 3 In 2012, defendant was arrested and charged with, *inter alia*, the offenses of armed habitual criminal, armed violence, and possession of a controlled substance with intent to deliver. Defendant then filed a motion to quash arrest and suppress evidence.

¶ 4 At the hearing on the motion, Charmaine Campbell testified that she owned a 1996 Infiniti and that defendant was her boyfriend. On May 15, 2012, she and defendant ran errands, *i.e.*, went to the grocery store, had the vehicle washed and picked up food. They then parked to eat. Campbell was seated in the passenger seat and defendant was in the driver's seat. They had been parked for about 10 minutes when two officers with "drawn" weapons told them to exit the vehicle. Campbell was taken to the front passenger side of the vehicle, and defendant was placed in a squad car. Officers then searched the vehicle. A gun was recovered from under the driver's seat. Campbell did not observe defendant place the gun on the floor. After she was taken to a police station, she gave consent for her home to be searched.

¶ 5 During cross-examination, Campbell testified that she and defendant were at a grocery store near the intersection of 71st and Jeffery an hour prior. Defendant stayed in the vehicle while she went into the store. She did not observe the police officers recover a gun from her vehicle and did not know that drugs and a gun were in the vehicle.

¶ 6 Officer Williams, a 14-year veteran of the Chicago police department, testified regarding information that he received from a registered confidential informant. Specifically, the informant stated that an individual by the name of "Streets" was armed with a gun and selling narcotics

from a vehicle. Williams knew that defendant was known as "Streets." The informant described the vehicle as a silver four-door Infiniti with license plate "L703410." The informant further indicated that narcotics would be located in a black magnetic case under the driver's seat. Williams then went to the area of 71st Street and Jeffrey to locate the vehicle. Once Williams located a vehicle matching the description given by the informant he followed the vehicle for "a while."

¶ 7 During this surveillance, Williams observed that defendant was driving and a woman was in the passenger seat. He also observed three people approach the driver's side of the vehicle while it was parked. The first time, Williams watched as the vehicle was parked at a corner where an unknown person was standing, and the unknown person then approached the driver's side of the vehicle, engaged in a brief conversation and made a quick exchange. Based on his experience, Williams believed that a narcotics transaction occurred. In other words, he observed the person give money to defendant in exchange for certain small objects. As the vehicle pulled away and continued to circle a "small radius" in the neighborhood, two other individuals approached the vehicle and similar interactions took place. In each instance, a person approached the vehicle, gave defendant money and received a small object in return. After observing three suspect narcotics transactions, Williams radioed other units for help.

¶ 8 Williams then watched as fellow officers approached the vehicle and detain defendant. He later learned that a blue steel Glock 9-millimeter gun with 17 live rounds and 4 bags of suspect crack cocaine were recovered after they were found in the vehicle. A black magnetic case containing 12 bags of suspect crack cocaine and 10 bags of suspect heroin was recovered from under the driver's seat during a subsequent search. Police officers also recovered $140 and a police scanner.

¶ 9 Officer Mark Reno testified that when he and his partner approached the silver vehicle he observed defendant making movements towards the floorboard on the driver's side of the vehicle. Reno screamed that defendant should put his hands in the air. As he became closer to the passenger side of the vehicle, he observed a gun between defendant's feet. Reno then told his partner to remove defendant from the vehicle. After defendant was placed in handcuffs, Reno recovered a Glock 9-millimeter gun from the floor. It contained 17 live rounds. As he was removing the gun from the floor, Reno observed four plastic bags on the center console which he believed contained suspect crack cocaine.

¶ 10 In denying defendant's motion to quash arrest and suppress evidence, the trial court found Williams and Reno to be more credible than Campbell and concluded that there was probable cause to arrest defendant and seize the contraband. Defense counsel then stated that the defense wanted a date for trial, requested that trial court set a bench trial, and offered to stipulate to "the testimony that in fact occurred" at the suppression hearing. The trial court responded that a bench trial could be held "now." The court then admonished defendant regarding the differences between a jury trial and a bench trial. When the trial court asked defendant whether he wanted the court to decide his guilt or innocence, defendant answered that he wanted the court to decide. The trial court concluded that defendant knowingly and intelligently waived his right to a trial by jury.

¶ 11 When the State indicated that additional contraband was recovered during a search of the house, the trial court stated that that State was "not going to win on this stuff in the house." The matter then proceeded to a bench trial.

¶ 12 In its opening statement the defense argued, *inter alia*, that the mere fact that there was a gun by defendant's feet did not mean, beyond a reasonable doubt, that defendant possessed the

drugs recovered from the vehicle. The defense stipulated to the evidence presented during the hearing on the motion to quash arrest and suppress evidence. The State then stipulated that Officers Reno and Williams, if called to testify, would testify regarding certain firearms and narcotics recovered from the residence. The parties stipulated that after being read the *Miranda* warnings, defendant explained that the gun was on the floor of the vehicle because defendant was afraid and did not want a gun in his hands, and that he sold drugs because he could not find a job. The parties also stipulated that forensic scientist Christine Dillow-Bank, if called to testify, would testify that she tested the items recovered from the center console and that they tested positive for cocaine. The parties also stipulated as to the chemical nature and weight of certain drugs recovered from the residence. Finally, the parties stipulated that defendant had previously been convicted of unlawful use of a weapon by a felon and armed robbery, and did not possess a valid firearm owner's identification card at the time of his arrest in the instant case.

¶ 13 In closing argument, the defense argued that there was no proof that defendant resided in Campbell's home and that defendant "made no move" when officers approached the vehicle. Rather, the gun was in plain view. The defense further argued that there were two people in the vehicle and although defendant made a "generic statement about selling drugs," no drugs were found on his person, and consequently, there was no basis for the armed violence charge.

¶ 14 The trial court found defendant guilty of the offense of armed habitual criminal "for the gun between his legs." However, the trial court found defendant not guilty with regard to the drugs found in the vehicle and at Campbell's residence. The court then told defendant that prior to his acquittal for armed violence, defendant was facing a minimum of 15 years in prison, so defendant "won that." Ultimately, the trial court sentenced defendant to six years in prison.

¶ 15 On appeal defendant contends that this cause must be remanded for a new trial because although his stipulated bench trial was tantamount to a guilty plea, he was not admonished pursuant to Illinois Supreme Court Rule 402 (eff. Jul. 1, 2012). Defendant acknowledges that he failed to raise this objection before the trial court, but argues that this error may be reviewed pursuant to the plain error doctrine. See *People v. Porter*, 352 Ill. App. 3d 962, 966 (2004).

¶ 16 To preserve a claim of error for review, a defendant must both object at trial and include the alleged error in a posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Pursuant to the plain error doctrine, this court may address unpreserved errors "when either (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence." *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005). A defendant bears the burden of persuasion under both prongs of the plain error doctrine, and if he fails to meet this burden, his procedural default will be honored. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010).

¶ 17 The first step in determining whether the plain error doctrine applies is to determine whether any error occurred (*People v. Patterson*, 217 Ill. 2d 407, 444 (2005)), as without error there can be no plain error (*People v. Williams*, 193 Ill. 2d 306, 349 (2000)).

¶ 18 The question of whether a defendant's stipulated bench trial is tantamount to a guilty plea is a question of law subject to *de novo* review. *People v. Thompson*, 404 Ill. App. 3d 265, 270 (2010). *De novo* consideration means we perform the same analysis that a trial judge would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011). A guilty plea forfeits all nonjurisdictional defenses or defects. *People v. Horton*, 143 Ill. 2d 11, 22 (1991). On the other hand, a stipulated bench trial permits a defendant to avoid the forfeiture rule as to an issue the defendant seeks to raise on appeal, while still allowing him to enjoy the advantages of a guilty plea. *Thompson*, 404 Ill. App. 3d at 270. Stipulated bench trials occur either when the defendant

stipulates to the evidence but does not stipulate to his guilt or when the defendant stipulates to the sufficiency of the State's evidence to convict. See *Horton*, 143 Ill. 2d at 21-22 (noting that the second type is essentially a private agreement between the parties and the court that defendant is guilty). A stipulated bench trial is tantamount to a guilty plea when (1) the State presents its entire case by way of stipulation *and* the defendant fails to preserve a defense, or (2) the defendant concedes, by way of stipulation, that the evidence is sufficient to support a guilty verdict. *People v. Clendenin*, 238 Ill. 2d 302, 322 (2010); see also *Horton*, 143 Ill. 2d at 21 (where counsel stipulates that the facts as presented by the State are sufficient for a finding of guilt beyond a reasonable doubt, a stipulated bench trial is tantamount to a guilty plea). If a stipulated bench trial is tantamount to a guilty plea, then the defendant must be admonished pursuant to Supreme Court Rule 402. See *Horton*, 143 Ill. 2d at 21.

¶ 19 On appeal, defendant contends that his stipulated bench trial was tantamount to a guilty plea because the State presented its entire case through stipulation and no defense was preserved. In the alternative, he contends that the stipulated bench trial was tantamount to a guilty plea because his trial counsel stipulated to evidence that implicated defendant in the offense, *i.e.*, Reno's testimony that he observed defendant with a gun, defendant's statement admitting that he possessed a gun, and defendant's prior convictions. Based upon his conclusion that his stipulated bench trial was essentially a guilty plea, he argues that the trial court's failure to admonish him pursuant to Rule 402 requires that this cause be remanded for a new trial.

¶ 20 The State responds trial counsel did not stipulate that the evidence was sufficient to convict defendant of any crime; rather, counsel stipulated as to what the testimony of the State's witnesses would be if the matter proceeded to trial and defendant presented a defense. The State further argues that trial counsel presented a defense when he explicitly argued against the armed

violence and narcotics charges and highlights the fact that defendant was only convicted of one charge, rather than all of them.

¶ 21 Initially, we note that although the State presented its case via stipulation, trial counsel did not stipulate that the facts as presented by the State were sufficient to find defendant guilty of any charge and counsel did present a defense. Here, counsel litigated the motion to quash arrest and suppress evidence. See *Horton*, 143 Ill. 2d at 22 (presenting and preserving a defense includes a defense theory of suppressing the relevant evidence). With regard to the stipulations, counsel merely stipulated that if the case proceeded to trial, the State would in fact present the testimony that it had just presented at the suppression hearing on defendant's motion to quash arrest and suppress evidence, as well as evidence of defendant's post-*Miranda* statement and prior convictions. Although defendant is correct that this stipulation "implicitly" stipulated to evidence that implicated defendant in an offense, *i.e.*¸ Reno's testimony that he observed a gun between defendant's legs and defendant's statement, trial counsel did not stipulate either that the evidence was sufficient to convict defendant of any offense or to the legal conclusion that defendant was guilty of any offense. See *Horton*, 143 Ill. 2d at 21-22 (the defendant's first stipulated bench trial was not tantamount to a guilty plea because defense counsel merely stipulated to the State's evidence and not to the legal conclusion to be drawn from that evidence and because defense counsel preserved a defense relating to the suppression of evidence; the defendant's second stipulated bench trial, however, was tantamount to a guilty plea because defense counsel stipulated to the sufficiency of the evidence to convict).

¶ 22 To the contrary, trial counsel argued that there was no evidence linking defendant to the drugs recovered from the vehicle and Campbell's house, that defendant made a "generic" statement about selling drugs, that there were two people in the vehicle, and that while the gun

was in plain view defendant made no move toward it. In other words, trial counsel presented a defense and in no way stipulated to the legal conclusion that defendant was guilty. See *Clendenin*, 238 Ill. 2d at 322 (a stipulated bench trial is tantamount to a guilty plea when either the State presents its case by way of stipulation and defendant fails to preserve a defense or defendant concedes that the evidence is sufficient to support a guilty finding).

¶ 23 The record also reveals that the trial court was called upon to determine if the State presented sufficient evidence to prove defendant guilty beyond a reasonable doubt and shows that defendant understood such a determination would be made. "[W]hen a defendant stipulates that evidence is sufficient to convict, this is tantamount to a guilty plea because the court is not called upon to determine if the State has proved defendant guilty beyond a reasonable doubt." *People v. Pollard*, 216 Ill. App. 3d 591, 596 (1991). Here, the trial court admonished defendant regarding the differences between a jury trial and a bench trial and asked defendant whether defendant wanted the court to decide whether the question of his guilt or innocence. Defendant then answered that he wanted the court to decide. Accordingly, because defendant stated that he wanted the trial court to determine the issue of guilt or innocence, the stipulated bench trial was not tantamount to a guilty plea. See *People v. Foote*, 389 Ill. App. 3d 888, 894 (2009) (stipulated bench trial was not tantamount to a guilty plea when, *inter alia*, the defendant agreed that a judge would decide whether the defendant would be found guilty).

¶ 24 Ultimately, here, because defendant did not stipulate that the evidence was sufficient to convict him and he presented and preserved a defense, his stipulated bench trial was not tantamount to a guilty plea, and the trial court was not required to admonish him under Rule 402. See *Horton*, 143 Ill. 2d at 21 (if a stipulated bench trial is not tantamount to a guilty plea, the trial court need not admonish a defendant pursuant to Rule 402). Therefore, the trial court did not err

by failing to admonish defendant pursuant to Rule 402. Absent error, there can be no plain error (*Williams*, 193 Ill. 2d at 349), and this court must honor defendant's procedural default.

¶ 25 Defendant next contends, and the State concedes, that his mittimus must be corrected to reflect an additional 7 days of presentence custody credit for a total of 205 days. Because we have the authority to correct the mittimus at any time without remanding the matter to the trial court (*People v. Pryor*, 372 Ill. App. 3d 422, 438 (2007)), we order the correction of the mittimus to reflect seven additional days of presentence custody credit.

¶ 26 Accordingly, pursuant to Illinois Supreme Court Rule 615(b)(2) (eff. Aug. 27, 1999), we order the clerk of the circuit court to correct defendant's mittimus to reflect 205 days of presentence custody credit. We affirm the judgment of the circuit court of Cook County in all other aspects.

¶ 27 Affirmed; mittimus corrected.