2017 IL App (1st) 150090-U

No. 1-15-0090

May 30, 2017

Second Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 13 CR 19704
	)	
ANTONIO BAUGHNS,	)	Honorable
	)	Kevin M. Sheehan,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Hyman and Justice Mason concurred in the judgment.

ORDER

¶ 1 ***Held***: The trial court adequately conducted an inquiry into defendant's posttrial claim that his trial counsel had been ineffective. However, because the court failed to admonish defendant about his potential sentence before allowing him to represent himself at his sentencing hearing, we must vacate his sentence and remand the matter for a new sentencing hearing.

¶ 2 Following a bench trial, Antonio Baughns, the defendant, was convicted of armed violence (720 ILCS 5/33A-2(a) (West 2012)) and sentenced to 18 years' imprisonment. On appeal, defendant contends that the trial court failed to: (1) adequately perform an inquiry into

his posttrial claim that his trial counsel had been ineffective; and (2) substantially comply with Illinois Supreme Court Rule 401(a) (eff. July 1, 1984) by not informing him of his potential sentence before allowing him to represent himself at his sentencing hearing. We vacate defendant's sentence and remand for a new sentencing hearing.

¶ 3 The State charged defendant with one count of being an armed habitual criminal, one count of armed violence, three counts of unlawful use of a weapon by a felon, two counts of aggravated unlawful use of a weapon and one count of possession of a controlled substance.

¶ 4 The evidence at trial revealed that, early in the morning of September 11, 2013, Chicago police officer Oscar Lopez and his partner responded to a 911 call of a person with a gun at an apartment building on the 2800 block of West 22nd Place. When they arrived, Lopez observed a woman on a porch yelling for help because someone had a gun. She pointed the officers toward a gangway next to the building. As the officers approached the gangway, Lopez observed defendant holding a black object in his right hand. Defendant bent down and placed the object on the ground. The officers jumped over the locked gate in front of the gangway, and defendant began walking toward them. They subsequently detained defendant. Lopez walked to where defendant had bent down and recovered a loaded 9-millimeter handgun. The officers requested a "transport unit," and other officers, including Chicago police officer Russell Pitzer, arrived. Pitzer performed a custodial search of defendant and recovered two plastic bags containing a white powdery substance from one of his pockets, which later tested positive for heroin in the amount of 2.1 grams.

¶ 5 At the conclusion of the State's case, it entered into evidence documentation from the Illinois State Police that defendant had not been issued a valid Firearm Owner's Identification

Card. The State also introduced certified copies of conviction showing defendant had previously been convicted of possession of a controlled substance with intent to deliver in case number 07 CR 4322 and armed robbery in case number 08 CR 17144.

¶ 6 Defendant moved for a directed finding, and the trial court granted the motion on one count of aggravated unlawful use of a weapon.

¶ 7 Defendant testified that he had been in a "heated argument" that morning with Jasmine Warren, and during the argument, he broke her phone. He denied putting a gun on the ground in the gangway or having any knowledge of the gun found by the police. While defendant acknowledged that, prior to being arrested, he had used ecstasy, he denied having any drugs on him that morning.

¶ 8 The trial court found defendant guilty of the remaining seven counts. Defense counsel subsequently filed a motion for a new trial. Counsel, however, informed the court that defendant wanted a different attorney for sentencing. The court gave defendant two weeks to obtain a different attorney, but told him that, if he did not obtain one, the case would proceed with his current attorney representing him.

¶ 9 Two weeks later, defendant appeared in court without a new attorney and requested that the trial court appoint him a new one. The court denied defendant's request, finding he was not entitled to the "appointment of private counsel at sentencing." Defendant replied that his attorney had been "ineffective at trial." The court continued defendant's case for another week so that he could find an attorney.

¶ 10 The following week, defendant informed the trial court that his family had obtained a new attorney for him. That attorney, however, was not present. The court instructed defendant to

have his attorney appear at the next court date, otherwise, the public defender would continue to represent him. Defendant stated that he and his current attorney "have a conflict so we can't proceed." The court responded that "[t]here's no conflict" because no motion had been filed concerning a conflict. The court continued the case so defendant could determine who would be representing him moving forward.

¶ 11 On October 30, 2014, defendant informed the trial court that he did not have a new attorney, but "want[ed] to fire" his current attorney and proceed *pro se*. The court informed him that it would have to admonish him "about going *pro se* for motion for new trial." The following colloquy occurred:

> "THE COURT: Well, you will have to file your own motion for new trial. [Your current attorney] has one that preserved jurisdiction. Sir, you understand normally the *pro se* admonitions go to when trial is yet to be held and you are representing yourself. How far did you go in school, sir?
>
> THE DEFENDANT: Graduated. GED.
>
> THE COURT: Okay. And have you ever represented yourself before?
>
> THE DEFENDANT: No.
>
> THE COURT: You are not a lawyer, are you?
>
> THE DEFENDANT: No.
>
> THE COURT: Do you understand that a lawyer has substantial experience in trial procedure, sentencing, motion—
>
> THE DEFENDANT: Yes.
>
> THE COURT: Let me finish, sir. Do you understand that?

THE DEFENDANT: Mm-hmm. Yes.

THE COURT: Do you understand that if you go *pro se* for motion for new trial and sentencing you will not be allowed to complain on appeal about the competency in your own representation?

THE DEFENDANT: Yes.

THE COURT: Do you understand the effectiveness of your *pro se* representation in the sentencing phase may well be diminished by taking on the role as being your own attorney and defendant in this case, who ultimately may be sentenced in this case?

THE DEFENDANT: Yes.

THE COURT: You understand you will have no extra time for preparation or greater library time? Do you understand that, sir?

THE DEFENDANT: Yes.

THE COURT: Do you understand that your attorney can render an important assistance by determining, having read the transcripts and having come up with issues for motion for new trial? Sir, do you understand that?

THE DEFENDANT: Yes.

THE COURT: Have you ever been treated for any mental illness, sir?

THE DEFENDANT: Back in 2009.

THE COURT: All right. Defendant to go *pro se* for sentencing."

The court told defendant that it would continue his case for two weeks to see "how far along" he was in writing his motion.

¶ 12 On November 19, 2014, the trial court noted that defendant had previously stated there was a "conflict" between him and his attorney and told him that it could "open this discussion up" pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984). Defendant told the court the conflict was "[i]neffective assistance of counsel." The court responded that ineffective assistance of counsel was "a conclusion," and he needed to provide "facts" in support of such a claim. The following colloquy occurred:

"THE DEFENDANT: Problem was I wanted to get records of dispatch, dispatch records showing—

THE COURT: Sir, slow down. I can't understand. If I can't [the court reporter] can't take it down. Go as slow as you can.

THE DEFENDANT: First thing I wanted dispatch records.

THE COURT: You wanted dispatch records?

THE DEFENDANT: Yes, for the case.

THE COURT: What else?

THE DEFENDANT: And fingerprints on the gun.

THE COURT: Okay.

THE DEFENDANT: Tests.

THE COURT: Do you even know if fingerprints exists on the gun?

THE DEFENDANT: No. I know I ain't had the gun.

THE COURT: I'm not asking what you—just 'cause you want prints on the gun doesn't mean there's prints on the gun. What else? How else was she ineffective?"

¶ 13 Defendant and the trial court continued their discussion. Defendant told the court that there was perjured testimony and that he was not allowed to "face [his] accuser" as a police officer who testified before the grand jury did not testify at trial. The court responded that defendant did not understand perjury, the right to confront his accusers did not mean "every witness has to be called by either side" and his attorney would not have been effective if she called witnesses on his behalf that would hurt him. The court again asked defendant what made his attorney ineffective. The following colloquy occurred:

> "THE DEFENDANT: Are we having a hearing on this?
>
> THE COURT: Yes, sir. It's called a *Krankel* hearing. When a *pro se* defendant claims that his representation was ineffective I can inquire about that to determine whether I would appoint an attorney for you and that's what I'm doing right now under *People v. Krankel*.
>
> THE DEFENDANT: Okay. I didn't know we was going to a *Krankel* hearing.
>
> THE COURT: I get to inquire of you, sir, when you ask to have somebody appointed and then you say I have a conflict or she's ineffective, I informally inquire of you about the nature of her ineffectiveness so I can make a proper ruling of whether to appoint counsel. That's what this is about."

¶ 14 Defendant and the trial court continued their discussion with the court further asking defendant why else his attorney had been ineffective. The following colloquy occurred:

> "THE DEFENDANT: At trial we have inconsistent—well, I got—I didn't know we were having this.

THE COURT: Sir, inconsistencies, that's a conclusion.

THE DEFENDANT: Right. What you said based on the testimony that you find them credible and the testimony collaborates [*sic*].

THE COURT: Here's the problem. What I find credible is based on my assessment of the witness.

THE DEFENDANT: Right. You said the testimony collaborates [*sic*].

THE COURT: Corroborates. That's a judicial finding. That has nothing to do with [your attorney].

THE DEFENDANT: But at trial, you know what I'm saying, that issue, she didn't bring out inconsistencies. You know what I'm saying?

THE COURT: I don't know what she raised 'cause I have her motion for new trial that was timely filed. You're saying the testimony was inconsistent and therefore didn't prove you guilty beyond a reasonable doubt. Is that what you're saying?

THE DEFENDANT: Yes, because certain things that, you know what I'm saying, Officer Lopez testified and Officer Christie testified, you know what I'm saying, didn't go to that. I didn't prepare for this, you know what I'm saying, hearing right now."

Defendant further stated that he was waiting to file his motion for a new trial because he had not received the police reports. The court informed defendant that he was not entitled to the reports and denied his request for them. Defendant asked the court to see the ruling "in writing." The court responded: "No, sir. I don't write things for you. Let me explain what's happening. Right

now I find for *People v. Krankel* that appointment of counsel is not proper; that what the defendant brings up lacks merit and pertains to trial strategy by [his attorney.]"

¶ 15 The trial court continued to discuss posttrial procedures and defendant's desire to obtain discovery. Defendant asked the court if he could talk with his prior attorney before deciding whether he wanted to supplement her already filed motion for a new trial. The court allowed them to discuss his case off the record. After discussing the matter, the court asked defendant if he wanted to continue on his own. Defendant responded that his attorney "won't put all my issues in [the motion for a new trial]." The court responded: "No, no, sir. You wanted to go *pro se*. You said she is ineffective. This makes sense. Now you discussed all the issues you want." The court continued defendant's case so that he could complete his *pro se* motion for a new trial.

¶ 16 On December 10, 2014, defendant filed his *pro se* motion for a new trial. The trial court incorporated counsel's previously-filed motion for a new trial into defendant's *pro se* motion. The court read defendant's *pro se* motion into the record and denied it.

¶ 17 The parties proceeded to sentencing. The court merged all of defendant's convictions into his conviction for armed violence and sentenced him to 18 years' imprisonment. The court subsequently denied defendant's *pro se* motion to reconsider the sentence. This timely appealed followed.

¶ 18 Defendant first contends that the trial court failed to conduct an adequate inquiry into his allegations underlying his posttrial claim of ineffective assistance of counsel. Consequently, he requests that we remand the matter for a proper inquiry.

¶ 19 Under *People v. Krankel*, 102 Ill. 2d 181 (1984), and its progeny, when a defendant makes a posttrial *pro se* claim of ineffective assistance of counsel, the trial court must examine

the factual basis underlying the claim. *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003). However, the trial court need not appoint new counsel for the defendant merely because he raises a claim of ineffective assistance of counsel. *People v. Ayres*, 2017 IL 120071, ¶ 11. Instead, " '[t]he law requires the trial court to conduct some type of inquiry into the underlying factual basis, if any,' " into the defendant's claim. *Id.* (quoting *Moore*, 207 Ill. 2d at 79). The court's inquiry will be adequate if it is " 'sufficient to determine the factual basis of the claim.' " *Id.* (quoting *People v. Banks*, 237 Ill. 2d 154, 213 (2010)).

¶ 20 In making this preliminary inquiry, the trial court may ask the defendant's counsel about the allegations, discuss the allegations directly with the defendant, or rely on its own knowledge of counsel's performance at trial and the insufficiency of the defendant's allegations on their face. *Id.* ¶ 12. If, after this inquiry, the court determines that the allegations are meritless or pertain to matters of trial strategy, it does not have to appoint the defendant new counsel. *Id.* ¶ 11. But, if the court determines that the allegations demonstrate " 'possible neglect of the case' " by counsel, it should appoint the defendant new counsel. *People v. Jolly*, 2014 IL 117142, ¶ 29 (quoting *Moore*, 207 Ill. 2d at 78). We review whether the trial court adequately conducted its inquiry into the defendant's claim *de novo*. *Id.* ¶ 28.

¶ 21 Defendant argues the trial court failed to make an adequate inquiry into the factual basis of two of his allegations: (1) that his counsel should have obtained "the dispatch records" and (2) that counsel did not bring out the "inconsistencies" of the State's witnesses. Concerning his dispatch records claim, he asserts that the court failed to ascertain what the records would have shown, how the records would have helped his case and whether counsel had actually obtained them. Concerning his inconsistencies claim, defendant posits that the court misstated his allegation and failed to ascertain what inconsistencies his claim concerned.

¶ 22 The trial court had a lengthy and detailed discussion with defendant concerning the allegations underlying his claim of ineffective assistance of counsel. Based on this discussion, we find the court attempted to ascertain the factual basis underlying his claim. Several times after defendant made an allegation, the court informed him how his allegation was incorrect, a conclusion without supporting facts or how his allegation was a question properly resolved only by the court itself.

¶ 23 Although defendant argues the trial court did not do enough to understand his dispatch records claim, the court gave him an opportunity to explain his claim. Defendant initially stated that he "wanted to get records of dispatch, dispatch records showing—," but the court interjected and told defendant to "slow down." Defendant then told the court that he wanted the records "for the case." This singular conclusory statement about the dispatch records did not necessitate further inquiry by the court. See *People v. Towns*, 174 Ill. 2d 453, 466-67 (1996). Nevertheless, in response, the court followed up and asked "[w]hat else?" Defendant, however, did not continue discussing the dispatch records and shifted the conversation to an issue concerning fingerprints. Despite being afforded the opportunity to expound on his claim, defendant simply rested on his conclusory statement that the dispatch records were needed "for the case." Given these circumstances, the court fulfilled its duty under *Krankel*.

¶ 24 Similarly, the trial court fulfilled its duty under *Krankel* concerning defendant's allegation that his counsel failed to bring out the inconsistencies of the State's witnesses. After defendant brought up that "[a]t trial we have inconsistent—," the court told him that resolving inconsistencies in the evidence was a matter reserved for the trial court. Defendant responded that his counsel "didn't bring out inconsistencies." The court clarified with defendant whether he

was "saying the testimony was inconsistent and therefore didn't prove [him] guilty beyond a reasonable doubt." Defendant responded "[y]es" and specifically mentioned the testimony from the police officers. In light of this discussion, the court's inquiry into this allegation plainly revealed that defendant was complaining that his counsel had failed to bring out the inconsistencies in the police officers' testimony. The court ultimately found all of defendant's allegations were either meritless or pertaining to trial strategy, and we note that determining how to conduct a cross-examination and whether to impeach a witness are both matters of trial strategy. See *People v. Pecoraro*, 175 Ill. 2d 294, 326-27 (1997). The court therefore fulfilled its duty under *Krankel* regarding this allegation.

¶ 25 In sum, the trial court's inquiry into the underlying factual basis, through its discussion with defendant, was a sufficient preliminary inquiry to comply with *Krankel* and its progeny. See *Ayres*, 2017 IL 120071, ¶ 11.

¶ 26 Defendant next contends that, before the trial court allowed him to represent himself at his sentencing hearing, it did not inform him of his potential sentence and thus failed to substantially comply with the admonishments required by Illinois Supreme Court Rule 401(a) (eff. July 1, 1984). Defendant argues that his waiver of his right to counsel was therefore not knowingly and intelligently made, and consequently, we must vacate his sentence and remand for further posttrial proceedings.

¶ 27 Initially, defendant concedes that he failed to raise the issue in the trial court, thereby forfeiting his claim of error on appeal. See *People v. Leach*, 2012 IL 111534, ¶ 60. However, he argues we may review the claim of error under the second prong of the plain-error doctrine, which allows us to bypass a defendant's forfeiture if the error is clear or obvious and "the error

was so egregious as to deny the defendant a fair sentencing hearing." *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). The first step in a plain-error analysis is to determine whether an error occurred. *People v. Eppinger*, 2013 IL 114121, ¶ 19. Accordingly, we turn to the issue of the trial court's compliance with Rule 401(a).

¶ 28 A defendant has the constitutional right to the assistance of counsel. U.S. Const., amend. VI; Ill. Const. 1970, art. I, § 8; *People v. Haynes*, 174 Ill. 2d 204, 235 (1996). The sixth amendment right to counsel applies at all critical stages of the criminal proceedings, including prior to trial, during trial and at sentencing. *People v. Vernon*, 396 Ill. App. 3d 145, 153 (2009). The defendant, however, also has the constitutional right to represent himself. *People v. Baez*, 241 Ill. 2d 44, 115 (2011). To represent himself, the defendant must "knowingly and intelligently" waive his right to counsel. *Id.* at 115-16. To ensure such a waiver, the trial court must admonish the defendant pursuant to Illinois Supreme Court Rule 401(a) (eff. July 1, 1984). *People v. Campbell*, 224 Ill. 2d 80, 84 (2006).

¶ 29 Under Rule 401(a), the trial court "shall not permit a waiver of counsel by a person accused of an offense punishable by imprisonment without first *** 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 ***; 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).

¶ 30 At the outset, the State argues that Rule 401(a) does not apply to defendant because he waived his right to counsel prior to sentencing. Supporting this argument, the State highlights the

rule's language that it only applies to "a person accused of an offense punishable by imprisonment" (*id.*) and cites to *People v. Young*, 341 Ill. App. 3d 379 (2003). In *Young*, we found that "Rule 401(a) manifests only the intent to deal with defendants who are considering a waiver of counsel at the initial-appointment stage of the proceedings" as the rule expressly states the admonishments are only "to be given to a defendant 'accused' of an offense 'punishable' by imprisonment." *Id.* at 387 (quoting Ill. S. Ct. R. 401(a) (eff. July 1, 1984)). However, we note this decision is at odds with several other decisions that have found Rule 401(a) admonishments apply to defendants waiving their right to counsel after being convicted but prior to being sentenced. See *e.g.*, *People v. Washington*, 2016 IL App (1st) 131198, ¶¶ 58-68; *People v. Bahrs*, 2013 IL App (4th) 110903, ¶¶ 3-8, 14, 57-59; *People v. Meeks*, 249 Ill. App. 3d 152, 171-72 (1993); *People v. Langley*, 226 Ill. App. 3d 742, 748, 752 (1992). We therefore find, after reviewing the aforementioned cases, that, contrary to *Young* and the State's position, the Rule 401(a) admonishments apply to defendant, who waived his right to counsel prior to sentencing.

¶ 31 Although compliance with Rule 401(a) is mandatory, strict compliance is not. *Haynes*, 174 Ill. 2d at 236. "Rather, substantial compliance will be sufficient to effectuate a valid waiver if the record indicates that the waiver was made knowingly and voluntarily, and the admonishment the defendant received did not prejudice his rights." *Id.*

¶ 32 In the present case, after the trial court merged all of defendant's convictions into his conviction for armed violence under the one-act, one-crime doctrine (see *People v. King*, 66 Ill. 2d 551 (1977)), he faced sentencing on a single Class X felony, which had a minimum sentence of 15 years' imprisonment. 720 ILCS 5/33A-3(a) (West 2012). Furthermore, due to defendant's criminal background, he was eligible for an extended-term sentence, subjecting him to a

maximum sentence of 60 years' imprisonment. See 730 ILCS 5/5-4.5-25(a), 5-5-3.2(b)(1), 5-8-2(a) (West 2012). However, before allowing defendant to represent himself at sentencing, the trial court failed to comply with Rule 401(a) by advising him that he was facing a sentence of between 15 years' and 60 years' imprisonment. Consequently, the court did not strictly comply with Rule 401(a).

¶ 33 While the trial court attempted to warn defendant about the risks of representing himself at sentencing and the benefits of having an attorney, and attempted to discern whether his education and mental health made the *pro se* request proper, the court's failure to inform defendant about his potential sentence prevented him from making a knowing and intelligent waiver of his right to counsel prior to his sentencing hearing. The Rule 401(a) admonishments are necessary " 'so that defendant can consider the ramifications' " of his decision to represent himself. *Washington*, 2016 IL App (1st) 131198, ¶ 66 (quoting *Langley*, 226 Ill. App. 3d at 750). The lack of the admonishment regarding his sentencing range prevented defendant from understanding the consequences of his decision and therefore directly impacted his ability to knowingly and intelligently waive his right to counsel. Under these circumstances, we therefore find that the trial court did not substantial comply with Rule 401(a), and an error occurred. See *id.* ¶¶ 57-68 (finding the trial court did not substantially comply with Rule 401(a) when it failed to inform the defendant of the minimum and maximum penalties before allowing him to represent himself at sentencing even though he represented himself at trial and requested, and received, counsel for posttrial motions).

¶ 34 Having found an error occurred, we further find that the error constituted plain error. The right to the representation of counsel is fundamental at a sentencing hearing, and during the

hearing, the defendant's substantial rights are affected. *Id.* ¶ 45. The error therefore denied defendant a fair sentencing hearing. See *Hillier*, 237 Ill. 2d at 545. Accordingly, the proper remedy is to vacate defendant's 18-year sentence for armed violence and remand the matter to the trial court for a new sentencing hearing in which defendant will be represented by counsel or, alternatively, represented by himself if he waives counsel after proper admonishments pursuant to Rule 401(a). See *Bahrs*, 2013 IL App (4th) 110903, ¶ 59.

¶ 35 Vacated and remanded with directions.