No. 2—09—1009
Order filed March 31, 2011
Modified upon denial of rehearing April 28, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Lake County.
Plaintiff-Appellee,	)	
v.	)	Nos. 06—CF—1304 06—CF—1321 06—CF—1333 06—CF—1384 06—CF—1481 06—CF—1711
DAVID A. WESTON,	)	Honorable Fred L. Foreman,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Bowman concurred in the judgment.

ORDER

Held: Defendant's waiver of counsel was valid, although the trial court did not provide Rule 401(a) admonishments at the hearing at which he waived counsel, it did so only two days before, at the same stage of the proceedings.

Defendant, David A. Weston, was charged with six counts of burglary (720 ILCS 5/19—1(a) (West 2006)). The trial court appointed an attorney for him. Later, defendant discharged his

attorney, entered negotiated pleas of guilty to the six charges of burglary, and was sentenced to 36 months' probation. Defendant filed a *pro se* motion to withdraw his guilty plea. At a hearing, he requested counsel to represent him on the motion. At the next hearing, however, defendant told the court that he would proceed *pro se* on the motion. After allowing defendant to proceed *pro se*, the trial court denied the motion. Defendant appealed.

On appeal, defendant contends that the trial court erred in accepting his postjudgment waiver of counsel without first admonishing him in accordance with Illinois Supreme Court Rule 401(a) (Ill. S. Ct. R. 401(a) (eff. July 1, 1984)). We affirm.

In 2006, defendant was charged separately with six counts of burglary (and other offenses not pertinent here). The trial court appointed the public defender for defendant, and the cases were consolidated. On October 3, 2008, defendant filed a *pro se* motion to suppress evidence. On October 9, 2008, at a hearing, defendant's attorney, Jennifer Snyder, told the court, Judge Fred L. Foreman presiding, that defendant wanted to proceed *pro se*. Judge Foreman admonished defendant in accordance with Rule 401(a), found that he had properly waived his right to counsel, and allowed the public defender and Snyder to withdraw. On November 24, 2008, the court, Judge Daniel P. Shanes presiding, heard the motion to suppress and denied it.

On January 7, 2009, the parties presented the court with an agreement under which defendant would plead guilty to six counts of burglary and the State would recommend 36 months' probation, with 24 months' periodic imprisonment, and restitution of $7,125.41. Judge Foreman accepted defendant's plea and entered written judgments embodying the agreement.

On January 23, 2009, defendant moved to withdraw the plea, arguing that the total restitution ordered differed from that in the plea agreement. He also moved for permission to use his laptop computer and cell phone while at work. Also on January 23, 2009, the State filed a petition to revoke

defendant's probation (PTR), alleging that he had violated certain conditions. Several continuances followed.

At a hearing on February 23, 2009, the following exchange occurred:

"THE COURT: Okay. Mr. Weston, the State filed a petition to revoke your probation. You know, you were on probation for burglary which is a Class II felony carrying with it a possible sentence of 3 to 7 years in the Department of Corrections with a two[-]year mandatory supervised release term. It is probationable, up to four years probation, conditional discharge, between 18 and 30 months of periodic imprisonment and a $25,000 fine.

You are entitled to a hearing ***. You are entitled to be represented by Counsel [*sic*]. If you so request I will appoint Counsel [*sic*] to represent you on this matter. Do you wish for me to appoint counsel?

THE DEFENDANT: Yes."

The judge reappointed Snyder to represent defendant. After a short discussion of other matters, the following exchange occurred:

"THE DEFENDANT: Your Honor, about the motion that I filed or the two motions that I filed, that's what we were supposed to be hearing today for [*sic*].

THE COURT: Well, that's what we're supposed to be here on Friday for and then you were disciplined in periodic so do you wish me also to appoint counsel to represent you on those motions?

THE DEFENDANT: Yes.

THE COURT: That will be—that's what we'll do then and those matters will be taken up on Wednesday [February 25] as well."

On February 25, 2009, at the start of the hearing, the following colloquy occurred:

"MR. KLEINHUBERT [assistant State's Attorney]: *** Judge, this was up on Monday and you reappointed the Public Defender and we put it up for status today. I just tendered Miss Snyder a copy of the paperwork from the work release.

MS. SNYDER: I know there is a pro se motion still pending, Judge. I don't have those or know anything about them. I don't know if he wants to proceed on those. I believe it is a motion to withdraw his plea and we didn't represent him at the plea. We are guessing he wants to proceed on that one by himself since we don't represent him. I don't have the motion.

THE COURT: How do you want to do that, Mr. Weston?

THE DEFENDANT: I will proceed on that motion by myself. No problem."

The judge then set February 27, 2009, for the hearing on defendant's *pro se* motion to withdraw his guilty plea and for status on the PTR. On February 27, 2009, the court set March 2, 2009, for both purposes. On March 2, 2009, with Snyder representing him on the PTR only, defendant first argued his motion to withdraw his guilty plea. That day, the court corrected the restitution amounts in the sentencing orders but denied the motion.

On March 23, 2009, after a hearing, the trial court granted the PTR and continued the cause for resentencing. On April 27, 2009, the court allowed defendant to file two *pro se* motions relating to the hearing on the PTR, discharged the public defender, and continued the cause. On May 8, 2009, the court denied defendant's motions and resentenced him to six concurrent five-year prison terms.

We allowed defendant to file a late notice of appeal from the order of March 2, 2009, denying his *pro se* motion to withdraw his guilty plea.[1]

On appeal, defendant contends that the trial court erred when, at the February 25, 2009, hearing, it accepted his counsel waiver without admonishing him in substantial compliance with Rule 401(a). Defendant notes that, only two days earlier, he had told the trial court that he wanted counsel appointed to assist him with his motion to withdraw his plea and vacate the judgment. Relying principally on the First District's opinion in *People v. Cleveland*, 393 Ill. App. 3d 700 (2009), defendant asserts that the court should not have allowed him to "proceed on that motion by [him]self" without first admonishing him to ensure that his waiver of counsel was voluntary and intelligent.

The State responds in two ways. First, relying primarily on the Fourth District's opinion in *People v. Young*, 341 Ill. App. 3d 379 (2003), the State contends that *Cleveland* was decided wrongly, because Rule 401(a) does not apply to postjudgment proceedings at all. Second, the State contends that *Cleveland* is distinguishable, because here, unlike the defendant in *Cleveland*, defendant had already been sentenced *and* had received sufficient Rule 401(a) admonishments a mere two days before waiving counsel.

We need not decide whether *Young* or *Cleveland* is the better-reasoned opinion. Even under *Cleveland*, the trial court substantially complied with Rule 401(a). Because the record as a whole shows that defendant knowingly and voluntarily waived his right to counsel, we affirm the judgment.

Rule 401(a) states:

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[1]Defendant also appealed separately from the judgment resentencing him based on the PTR. On November 19, 2009, on defendant's motion, we dismissed that appeal.

"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).

Substantial compliance with Rule 401(a) will support a waiver of counsel as long as the entire record shows that the defendant's choice was knowing and voluntary. *People v. Johnson*, 119 Ill. 2d 119, 132 (1987). When a defendant validly waives counsel, the waiver remains in place throughout the case unless the defendant later requests counsel or other circumstances suggest that the waiver is limited to a particular stage of the case. *People v. Palmer*, 382 Ill. App. 3d 1151, 1162 (2008).

Here, there is no dispute that defendant's original waiver of counsel was valid. The question is how to treat his waiver of counsel at the February 25, 2009, hearing, only two days after he stated that he wanted the Public Defender reappointed. Defendant received no Rule 401(a) admonishments at the February 25, 2009, hearing. He contends that this deficiency, in itself, invalidates his decision to proceed *pro se* at the hearing.

Preliminarily, we note that, in the proceedings on his postjudgment motion, defendant had both a constitutional and a statutory right to counsel. See *People v. Young*, 355 Ill. App. 3d 317, 324 (2005) (motion to withdraw guilty plea is critical stage that triggers constitutional right to counsel);

725 ILCS 5/113—3(b) (West 2008); *People v. Campbell*, 224 Ill. 2d 80, 85 (2006) (indigent has statutory right to appointment of public defender).

As the State contends, under *Young*, defendant's claim would be unsound as a matter of law. In *Young*, the appellate court held that Rule 401(a) applies only to "defendants who are considering a waiver of counsel at the initial-appointment stage of the proceedings." *Young*, 341 Ill. App. 3d at 387. The court reasoned that the rule's limitation to a defendant who has been "accused" of an offense "punishable" by imprisonment (Ill. S. Ct. R. 401(a) (eff. July 1, 1984)) plainly means that a defendant who has already been convicted and sentenced need not be admonished; moreover, the court explained, it would make no sense to require the trial court to explain the nature of the charge and the possible sentence to a defendant who has already been convicted and sentenced. *Young*, 341 Ill. App. 3d at 387. The dissenting justice countered that the majority disregarded *People v. Langley*, 226 Ill. App. 3d 742, 751 (1992), which held that Rule 401(a) applies to a counsel waiver at sentencing. Also, the dissenter reasoned, the purpose of the rule, to ensure that the defendant understands the consequences of waiving counsel whenever he might do so, requires applying the rule beyond the initial-appointment stage. *Young*, 341 Ill. App. 3d at 388-89 (Appleton, J., dissenting).

In *Cleveland*, before trial, the defendant received proper Rule 401(a) admonishments and validly waived his right to counsel. After a bench trial, he was found guilty of two charges. On June 20, 2007, the trial court appointed counsel to assist the defendant thereafter. On July 27, 2007, before proceeding on the defendant's posttrial motion, the trial court, after providing severely limited admonishments, allowed him to proceed *pro* se. On August 9, 2007, the court granted the posttrial motion in part, denied it in part, and conducted a sentencing hearing, The defendant proceeded *pro se*, without any Rule 401(a) admonishments, was sentenced, and appealed.

On appeal, the appellate court held that the defendant's second waiver of counsel was not valid without a second set of admonishments that substantially complied with Rule 401(a). *Cleveland*, 393 Ill. App. 3d at 710. The court explained that the limited admonishments did not pass this test and that the valid admonishments that the defendant had received before his trial could not take the place of proper new admonishments. *Id.*, 393 Ill. App. 3d at 710.

Cleveland did, however, hold that the new admonishments need not be given at the very hearing at which the defendant waives counsel. Thus, the court approvingly cited (and distinguished) *People v. Phillips*, 392 Ill. App. 3d 243 (2009), which held that the trial court had substantially complied with Rule 401(a) by providing full admonishments nine months before the defendant waived counsel and one month later, before the trial began. *Cleveland*, 393 Ill. App. 3d at 709-10; see *Phillips*, 392 Ill. App. 3d at 263. Moreover, the First District has limited *Cleveland*'s readmonishment rule to when the second waiver occurs at a separate stage of the proceedings from the initial waiver. *People v. Ware*, No. 1—09—0338, slip op. at 25 (Ill. App. Feb. 10, 2011).

Here, even under *Cleveland*'s generous rule, the trial court substantially complied with Rule 401(a), and the record demonstrates that defendant knowingly and voluntarily retracted his previous request for counsel and decided to proceed *pro se* on his motion to withdraw his guilty plea. Not only did the trial court provide full Rule 401(a) admonishments during the same stage of the proceedings during which defendant waived counsel, but it did so a mere two days before defendant stated that he did not want the public defender to represent him on the motion. Moreover, defendant had been admonished properly before trial, and he accepted and retained the public defender to represent him in the proceedings on the PTR. There is no reason to conclude that defendant's waiver of counsel was unknowing or involuntary. The trial court's failure to readmonish him at the February 25, 2009, hearing was not reversible error.

The soundest practice for trial courts would be to administer Rule 401(a) admonishments and question the defendant each time that he waives counsel. However, the trial court's failure to do so will not necessarily invalidate a waiver of counsel.

Since defendant elected to represent himself at the hearing on his *pro se* motion to withdraw his guilty plea, the Rule 604(d) (Ill. S. Ct. R. 604(d) (eff. Aug. 1, 1992)) certification of counsel requirement was rendered moot. See *People v. Barnes*, 263 Ill. App. 3d 736, 739 (1994) (Rule 604(d) requirement applied where there was no evidence in the record that defendant waived his right to counsel).

The judgment of the circuit court of Lake County is affirmed.

Affirmed.