2018 IL App (1st) 160573-U

Sixth Division
October 26, 2018

No. 1-16-0573

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. TH 302 083
	)	
MICHAEL ZAPLATICH,	)	Honorable
	)	Robin D. Shoffner,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Delort and Justice Cunningham concurred in the judgment.

ORDER

¶ 1 *Held*: The record sufficiently established that defendant knowingly and understandingly waived his right to a jury trial.

¶ 2 Following a bench trial, defendant Michael Zaplatich was found guilty of driving under the influence of alcohol (625 ILCS 5/11-501(a)(2) (West 2014)) and sentenced to 18 months' conditional discharge, "significant C treatment," one victim impact panel, and 40 hours of community service. On appeal, defendant contends that the trial court violated his constitutional right to a jury trial because, when the court accepted defendant's written jury waiver, it did not

discuss his right to a jury trial in his presence in open court or ensure that his jury waiver was authentic or he understood the ramifications of it. We affirm.

¶ 3 On August 19, 2014, the State charged defendant with driving under the influence and littering from a motor vehicle and gave him notice of his summary suspension. On October 21, 2014, defendant, who was represented by private counsel, filed a petition to rescind statutory summary suspension. During a pretrial court date on November 19, 2014, defendant was present in court and the trial court, the State, and defense counsel engaged in the following discussion about the trial date:

> "[ASSISTANT STATE'S ATTORNEY]: Judge, I think we're going to be setting the matter down then for trial. The next key date is 2/13.
>
> [DEFENSE COUNSEL]: We can go by agreement, Judge.
>
> ***
>
> THE COURT: By agreement 2/13/15, with for bench on the case in chief, and order of court 2/13/15 on the petition.
>
> [DEFENSE COUNSEL]: Very good. Continue demand on that, Judge."

On February 13, 2015, defendant was present in court and another attorney appeared on behalf of defense counsel. The covering attorney informed the court that defense counsel could not appear in court that day and requested: "If we can have that April 30, 2015 date for trial by agreement." The State agreed and the court continued the case to April 30, 2015. The half-sheet contained in the common law record on appeal indicated that the court continued the case to April 30, 3015, for a bench trial by agreement. On April 30, 2015, when defense counsel and defendant were present in court, the trial court set the case for June 8, 2015, for hearings on defendant's pretrial

motions, including his motion in *limine* to bar video evidence, and for trial, noting "It's indicated."

¶ 4 On the date of trial, June 8, 2015, defendant was present and, after the hearing on defendant's motion in *limine*, the following exchange occurred between the court and defense counsel regarding defendant's jury waiver:

"[DEFENSE COUNSEL]: Judge, before we begin —

THE COURT: Yes.

[DEFENSE COUNSEL]: — will I check the court file? I don't recall filing, on the last date in November, if a Jury Waiver was entered or not.

THE COURT: I went through the court file just now and I can tell you I didn't see one.

[DEFENSE COUNSEL]: Okay. Tendering to the Court at this time a Jury Waiver.

THE COURT: All right. Thank you, sir."

The record contains a preprinted form entitled "Jury Waiver," which was signed by defendant on June 8, 2015, and states "I, the undersigned, do hereby waive jury trial and submit the above entitled cause to the Court for hearing."

¶ 5 Chicago police officer David Macapagal testified that on August 19, 2014, at about 4 a.m. when he was around the 1200 block of Milwaukee Avenue, he observed a man, who he identified in court as defendant, sitting behind the steering wheel inside a parked vehicle. Macapagal and his partner parked their vehicle and approached defendant on foot. There was vomit next to the driver's side door and defendant was slumped over and sleeping in the vehicle.

Macapagal knocked on the window to wake defendant up and asked him if he was okay. Defendant's response was unintelligible. The key was in the ignition and the car was running. Macapagal took the key out of the ignition and asked defendant to get out of the car and to perform field sobriety tests, which were recorded on Macapagal's squad car's recording device. Defendant failed the field sobriety tests. The video, which did not have audio, was published to the court. Defendant denied to Macapagal that he had been drinking.

¶ 6 Later at the police station, after Macapagal read defendant the "Warning to Motorist," defendant refused to take a Breathalyzer test. Macapagal had observed people under the influence of alcohol hundreds of times. Based on Macapagal's professional and personal experience and observations of defendant, he concluded that defendant was under the influence of alcohol. His conclusion was based on his observations that defendant had glassy and bloodshot eyes, slurred speech, a strong odor of alcoholic beverage from his breath, the field sobriety tests, and the vomit next to defendant's vehicle, which had a strong odor of alcohol.

¶ 7 On cross-examination, Macapagal testified that he did not receive any type of dispatch or complaint that defendant was violating any laws and he never saw defendant commit any traffic violations. When Macapagal saw defendant sleeping in his car, he did not know how many hours defendant had been sleeping. Defendant was not combative, belligerent, mumbling, or thick tongued.

¶ 8 The trial court found defendant not guilty of littering with respect to the vomit but guilty of driving under the influence of alcohol. It subsequently denied defendant's motions for reconsideration and a new trial and sentenced him to 18 months' conditional discharge,

"significant C treatment," one victim impact panel, 40 hours of community service, and mandatory fees and costs.

¶ 9 Defendant contends on appeal that the trial court violated his constitutional right to a jury trial because it accepted his jury waiver without ensuring that the waiver was authentic and that he understood the ramifications of it. Defendant argues that the written jury waiver alone was insufficient to show that he understandingly waived his right to a jury trial because the trial court failed to ensure that his right to a jury trial was discussed in his presence in open court. Defendant requests we reverse his conviction and remand for a new trial.

¶ 10 As an initial matter, defendant acknowledges that he did not properly preserve his claim by objecting at trial and raising the issue in a posttrial motion. See *People v. Thompson*, 238 Ill. 2d 598, 611 (2010) (To preserve a claim for review, a defendant must object at trial and also include the issue in a written posttrial motion). Defendant however argues, and the State concedes, that we may nevertheless review his claim under the plain error doctrine. We agree that we may review defendant's challenge to his jury waiver under the plain error doctrine despite his failure to properly preserve the issue. See *People v. Gatlin*, 2017 IL App (1st) 143644, ¶ 32 ("It is well settled that, when a defendant's right to a jury trial has been violated, such an error may be deemed a plain error under the second prong of the plain-error doctrine."). Under the plain error doctrine, we must first determine whether any error occurred at all. See *People v. Bannister*, 232 Ill. 2d 52, 65 (2008).

¶ 11 The right to a jury trial is a fundamental constitutional right. *People v. Bracey*, 213 Ill. 2d 265, 269 (2004). A defendant may waive this right, but the waiver must be made knowingly and understandingly in open court. *People v. Reed*, 2016 IL App (1st) 140498, ¶ 7 (citing 725 ILCS

5/103-6 (West 2014)). The trial court is not required to give any specific admonition or advice to a defendant for a jury waiver to be valid. *Bannister*, 232 Ill. 2d at 66. Further, the determination of whether a defendant knowingly waived the right to a jury trial does not rest on any precise formula but depends on the facts and circumstances of each case. *People v. Clay*, 363 Ill. App. 3d 780, 791 (2006). "Generally, a jury waiver is valid if it is made by defense counsel in defendant's presence in open court, without objection by defendant." *Bracey*, 213 Ill. 2d at 270.

¶ 12 It is a defendant's burden to establish that his or her jury waiver was invalid. *Reed*, 2016 IL App (1st) 140498, ¶ 7. Because the facts are not in dispute here, our review of the issue of whether defendant knowingly and understandingly waived his right to a jury trial is *de novo*. See *Bracey*, 213 Ill. 2d at 270.

¶ 13 We conclude that the facts and circumstances support the conclusion that defendant knowingly and understandingly waived his right to a jury trial. Defendant signed the written jury on June 8, 2015, the same day it was tendered to the court, and the waiver states, "I, the undersigned, do hereby waive jury trial and submit the above entitled cause to the Court for hearing." Thus, the written jury waiver supports the finding that defendant knowingly waived his right to a jury trial. See *Reed*, 2016 IL App (1st) 140498, ¶ 7 ("Although a signed jury waiver alone does not prove a defendant's understanding, it is evidence that a waiver was knowingly made.").

¶ 14 Further, at a pretrial court date on November 19, 2014, the trial court indicated that the case was set for February 3, 2015, "with for bench on the case in chief." Defendant was present in court and did not object to the case being set for a bench trial. On February 3, 2015, defendant was present in court when another attorney appearing on behalf of defense counsel requested the

court to set the case for April 30, 2015, "for trial by agreement." The court set the case for April 30, 2015, and the half-sheet indicates it was set for a bench trial by agreement. Then, on the date of trial and before opening statements, defense counsel informed the court that he did not "recall filing, on the last date in November, if a Jury Waiver was entered or not," and the court responded, "I went through the court file just now and I can tell you I didn't see one." Defense counsel then responded, "Tendering to the Court at this time a Jury Waiver." Thus, defendant was present in court and did not object when the trial court and defense counsel in open court discussed whether there was a jury waiver in the record and when defense counsel expressly stated that it was tendering to the court his jury waiver. See *People v. Asselborn*, 278 Ill. App. 3d 960, 962-63 (1996) (finding the defendant's jury waiver was valid despite no written waiver where, on the day of trial, defense counsel informed the court that the case would be a bench trial and the defendant did not object, noting "[a] defendant, who permits his counsel in his presence and without objection to waive his right to a jury trial, is deemed to have acquiesced in, and is bound by his counsel's actions").

¶ 15 In addition, there is nothing in the record that suggests, and defendant has not argued otherwise, that his background or education level prevented him from understanding that he had a right to a jury trial and that, if he waived that right, a judge would decide the case. See *id.* (it is a defendant's burden to establish that his jury waiver was invalid).

¶ 16 Defendant asserts that the trial court never ensured that he understood the ramifications of the jury waiver. However, we note, as previously stated, the trial court was not required to give any specific admonishment or advice to defendant to ensure that his jury waiver was

effective. See *Bannister*, 232 Ill. 2d at 66 ("a trial court need not give any specific admonition or advice for a defendant to make an effective jury waiver").

¶ 17 Accordingly, under the facts and circumstances, we conclude that defendant knowingly and understandingly waived his right to a jury trial in open court. Defendant has not met his burden of establishing that his jury waiver was invalid. See *Reed*, 2016 IL App (1st) 140498, ¶ 7. We therefore conclude that no error occurred. There being no error, the plain error doctrine does not apply and defendant's claim remains forfeited.

¶ 18 For the reasons explained above, we affirm defendant's conviction.

¶ 19 Affirmed.