

2018 IL App (2d) 160414-U

No. 2-16-0414

Order filed September 24, 2018

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Kendall County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 14-CF-93
)	
JAMES C. SIMPSON,)	Honorable
)	Timothy J. McCann,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Presiding Justice Hudson and Justice Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held:* (1) Defendant's jury waiver as to his initial charges was valid as to the amended charges, as the trial court reminded him that he had a right to a jury, he told the court that he understood, and he did not thereafter object to a bench trial; (2) the trial court did not abuse its discretion in imposing consecutive sentences, as the record supported its finding that they were necessary to protect the public.

¶ 2 Defendant, James C. Simpson, appeals from his conviction of two counts of Class 2 felony unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a), (e) (West 2014)). He contends that (1) he did not validly waive his right to a jury when the charges were amended and the court did not obtain a new jury waiver and (2) the court abused its discretion in sentencing him to consecutive sentences. We affirm.

¶ 3

I. BACKGROUND

¶ 4 Defendant was initially indicted on two counts of Class 3 felony unlawful possession of a weapon by a felon (*id.*) and several drug charges. The drug charges were severed and tried separately in a jury trial. Defendant was found guilty on the drug charges and sentenced to concurrent terms of 10 and 16 years.

¶ 5 On March 9, 2016, defendant waived his right to a jury trial on the weapons charges. He does not contend that the waiver on the initial charges was invalid, and the record shows that he was fully admonished about his right to a jury, had discussed the matter with his counsel, and understood the difference between a bench and jury trial. The State noted that it was going to seek to amend the charges and that the most efficient way to do so would be before the judge who would be handling the trial. Trial was set for March 16, 2016.

¶ 6 On March 16, 2016, the parties appeared before a different judge for the bench trial. In addressing a motion to exclude evidence of defendant's prior convictions, the State and the court noted that the weapons charges had been severed so that the prior convictions would not be presented to a jury. The State then amended the charges to Class 2 felonies based on defendant's previous conviction of unlawful use of a weapon by a felon. Defendant did not object, and his counsel stated that she was aware of the prior conviction. Defendant was arraigned on the new charges. During discussion of the sentencing range, the court asked: "Counsel, are these consecutive or concurrent to any other sentences, as far as you know?" The State responded that the sentences would be consecutive to sentences in another case, but concurrent to the sentences previously imposed on the drug charges. The court then informed defendant that the sentences would be concurrent to the sentences imposed in the drug case.

¶ 7 The court next admonished defendant about various rights, including: “you have the right to plead not guilty and have a trial. You may have that trial before a jury or you may waive that right and have a trial by a judge.” Defendant said that he understood. The case then proceeded to a bench trial.

¶ 8 Evidence at trial showed that defendant sold drugs to Jurgita Jankauskaite, an undercover officer. Jankauskaite also asked defendant to get her a firearm for her protection and exchanged text messages with him in which he said that he had arranged to get her a .32 or .38 caliber handgun for \$400. After defendant told Jankauskaite that he had obtained a gun for her, Jankauskaite indicated that she and another woman would have sex with defendant and arranged to meet him at a hotel. When defendant arrived at the hotel, he was arrested. He did not bring a gun with him to the hotel. Two 9-millimeter handguns were found in a search of his home. The court found him guilty.

¶ 9 At sentencing, the State noted that the court could order consecutive sentences if it found that doing so was necessary to protect the public from further criminal conduct. The State argued that defendant had committed six prior felonies and was on bond for one of them when he committed the present crimes. The State further noted a probation report that defendant was a high risk to commit another crime. Defendant argued that he had been a model prisoner and that the nature of the crimes did not warrant consecutive sentences. The court sentenced him to six-year terms of incarceration, concurrent with each other but consecutive to the sentences imposed for the drug offenses, finding that consecutive sentences were necessary to protect the public. The court noted that defendant sold drugs to a complete stranger while also intending to deliver a firearm to that person. Defendant did not move to reconsider the sentence. He appeals.

¶ 10

II. ANALYSIS

¶ 11 Defendant first contends that he did not validly waive his right to a jury when the court arraigned him on the amended charges without obtaining a new jury waiver. He argues that his first waiver did not apply to the new charges and that he did not acquiesce to a bench trial through his silence in light of the court's misinformation as to consecutive sentences.

¶ 12 Defendant concedes that he forfeited the issue for review because he failed to object at sentencing and raise the matter in a motion to reconsider. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). However, defendant contends that plain error applies. The right to a jury trial is fundamental, and the deprivation of the right in the absence of a proper waiver is reversible plain error. *People v. Bracey*, 213 Ill. 2d 265, 270 (2004). However, the first step in plain-error review is to determine whether error occurred. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

¶ 13 “Although the trial court is not required to provide a defendant with any particular admonishment or information regarding the constitutional right to a jury trial, it has a duty to ensure that any waiver of that right is made expressly and understandingly.” *People v. Hernandez*, 409 Ill. App. 3d 294, 297 (2011). “Regardless of whether the defendant executed a written jury waiver, the record must show that the defendant understandingly relinquished the right to a jury trial.” *Id.* The determination of whether a jury waiver is valid turns on the particular facts and circumstances of each case. *Bracey*, 213 Ill. 2d at 269. When charges are amended, three factors are helpful in determining whether a defendant's jury waiver is valid: (1) whether the defendant was present during discussions of a jury waiver; (2) the defendant's level of sophistication; and (3) whether the amended charges call for the same strategy as the original charges. See *Bracey*, 213 Ill. 2d at 267-70; *People v. Frey*, 103 Ill. 2d 327, 332-33 (1984); *Hernandez*, 409 Ill. App. 3d at 297-301.

¶ 14 In *Hernandez*, several months after the defendant waived his right to a jury trial, the State amended the complaint to add charges. The jury waiver was not discussed, and the defendant was found guilty. *Hernandez*, 409 Ill. App. 3d at 295-96. On appeal, the defendant argued that the amended charges were outside the scope of his jury waiver. *Id.* at 296. We held that the waiver did not apply to the amended charges when there was no suggestion that, at the time of the waiver, the defendant was aware of, or intended his waiver to cover, any later-filed charges. *Id.* at 297.

¶ 15 In reaching our determination, we discussed *Bracey*, in which our supreme court held that the defendant's jury waiver in one trial did not cover a retrial on remand following a successful appeal. There, the defendant made a written waiver of his right to a jury on an aggravated battery charge, and the trial court found him guilty, but the appellate court vacated the judgment and remanded for a new trial. *Bracey*, 213 Ill. 2d at 267-68. On remand, the trial court assumed that the retrial would also be a bench trial, and the topic of renewing the defendant's jury waiver was not discussed. *Id.* at 272. The new bench trial resulted in a conviction that was reversed by the supreme court on the ground that the jury waiver for the first trial did not apply to the second trial. *Id.* at 271-72. The supreme court held that "given the fact that, prior to defendant's second trial, defense counsel made no statements in defendant's presence indicating that defendant was electing, once again, to give up his right to a trial by jury, defendant's silent acquiescence to a second bench trial is insufficient to support a finding that he knowingly and voluntarily relinquished his fundamental right to trial by jury." *Id.* at 273.

¶ 16 We also noted that, in contrast, in *Frey*, our supreme court found a valid waiver based on the defendant's silent acquiescence to the trial court's statement in his presence on the day of trial that all counts were set for a bench trial. *Hernandez*, 409 Ill. App. 3d at 299-300; see *Frey*,

103 Ill. 2d at 333. There, the defendant was initially indicted on two counts of reckless homicide and waived his right to a jury. About three months later, the State charged the defendant with driving under the influence (DUI). The parties then agreed that the reckless-homicide counts would be tried before the DUI count. After the agreement was made, the defendant was present on occasions when the matter of a bench trial was discussed. On the day of the first trial, the court announced that all three counts were set for a bench trial. The defendant was acquitted on the reckless-homicide charges and convicted on the DUI charge. *Frey*, 103 Ill. 2d at 331.

¶ 17 The defendant appealed, asserting that he had not waived a jury for the DUI charge. The supreme court disagreed, because the record showed that the defendant, an educated and sophisticated man, had acquiesced to a bench trial on that charge by remaining silent when the bench trial was discussed. The court noted that the defendant executed a jury waiver in his counsel's presence and gave no indication of any objection to a bench trial. Further, the choice of a bench trial in the case, which involved emotional factors favoring the prosecution, was a logical strategy. *Id.* at 333.

¶ 18 Relying on *Bracey*, we held in *Hernandez* that, while a defendant can waive the right to a jury trial by acquiescing to a bench trial, there had been no statements made in the defendant's presence to indicate that he was forgoing a jury trial on the new charges. *Hernandez*, 409 Ill. App. 3d at 300. We distinguished *Frey* because, in *Hernandez*, there was no indication that a jury waiver on the new charges was ever discussed in the defendant's presence. Thus, his waiver was invalid as to the new charges. *Id.*

¶ 19 Here, as in *Frey*, and unlike in *Hernandez*, the record shows that defendant was present during discussion of a jury waiver, signed the waiver after being admonished by the court, and acknowledged that waiver in the presence of counsel in open court. Trial was then set with

defendant knowing that there was going to be a motion to amend the charges. When the parties returned a week later, the charges were amended without objection. The court then repeated that defendant had a right to a jury trial or could waive it, and defendant stated that he understood. Defendant did not voice any desire to change his mind about having a bench trial. Defendant, while not sophisticated to the level of the defendant in *Frey*, was also no stranger to the criminal justice system, and the record does not suggest that he lacked understanding of his right to a jury trial. Indeed, he had specifically elected to proceed to a jury trial on the drug charges while pursuing a bench trial on the weapons charges. That choice was logical. The record shows that the weapons charges had been severed so that the prior felony convictions would not be presented to a jury. Defendant does not suggest a reason why that strategy would have changed based on the amended charges. In light of these factors, defendant acquiesced to a bench trial on the amended charges.

¶ 20 Defendant contends that the trial court's initial statement that his sentences would be concurrent rendered his previous waiver invalid. We agree that the misinformation as to sentencing is troubling. However, our supreme court has rejected such an argument. In *People v. Bannister*, 232 Ill. 2d 52, 64 (2008), the defendant was convicted and contended on appeal that his jury waiver was invalid because the trial court had misinformed him of the minimum and maximum sentences for several charges. In rejecting that argument, the court observed that, in contrast to the decision whether to plead guilty, for which the trial court must admonish the defendant about the possible sentences, the decision to waive a jury trial is unlikely to be affected by misinformation about the possible sentences. *Id.* at 68-69. This is because “[a] defendant who pleads not guilty receives a full and fair trial” at either a jury trial or a bench trial, and, either way, “the defendant’s possible sentences would be the same.” *Id.* at 69. The court

observed that nothing suggested that, absent the incorrect admonishments, the defendant would have decided not to forgo his right to a jury trial. *Id.* at 68. The defendant “knew the difference between a bench trial and a jury trial and voluntarily chose the former.” *Id.* at 71.

¶ 21 Here, while we are significantly troubled by and do not condone the trial court’s misinformation to defendant concerning consecutive sentences, we nevertheless are constrained by the holding in *Bannister*. Nothing in the record suggests that defendant would have chosen a jury trial had he been admonished that the court in its discretion could sentence him to consecutive sentences. Indeed, as previously discussed, choosing a bench trial was a logical strategy. The record does not suggest that the potential for consecutive sentences had a bearing on that strategy, and defendant’s sentence would have been the same whether he was convicted by a jury or by the court. Accordingly, applying *Bannister*, we find no error in the trial court’s failure to specifically obtain a second jury waiver.

¶ 22 Defendant next argues that the trial court abused its discretion when it sentenced him to consecutive sentences. Defendant concedes that he did not raise the matter in the trial court, but contends that plain error applies.

¶ 23 “In cases where consecutive sentences are not mandatory, such sentences should be imposed sparingly.” *People v. Buckner*, 2013 IL App (2d) 130083, ¶ 35. Section 5-8-4(c)(1) of the Unified Code of Corrections (730 ILCS 5/5-8-4(c)(1) (West 2014)) provides that, other than where consecutive sentences are mandated, a concurrent sentence must be imposed, unless, considering the nature and circumstances of the offense and the history and character of the defendant, consecutive sentences are necessary to protect the public from further criminal conduct by the defendant. “If the trial court imposes consecutive sentences to protect the public,

it ‘shall set forth in the record’ the basis for such sentences.” *Id.* (quoting 730 ILCS 5/5-8-4(b) (West 2008)).

¶ 24 “Because the trial court is in the best position to consider a defendant’s credibility, demeanor, general moral character, mentality, social environment, and habits, the trial court’s imposition of consecutive sentences will not be reversed on appeal absent an abuse of discretion.” *Buckner*, 2013 IL App (2d) 130083, ¶ 36. “The record must show that the trial court concluded that consecutive terms were necessary to protect the public.” *Id.* “If the record does not reflect that the trial court took mitigating factors into account, including a defendant’s potential for rehabilitation, and the record does not support the trial court’s determination that consecutive sentences were necessary to protect the public, an abuse of discretion has occurred.” *Id.*

¶ 25 Here, no error occurred. The trial court specifically considered whether consecutive sentences were necessary in order to protect the public. In determining that they were, the court noted that defendant was a repeat offender with a high risk of recidivism. The court further noted that defendant was not only selling drugs to a stranger, but was willing to obtain a gun for her. Defendant argues that the court misconstrued the evidence, because Jankauskaite pressured him to obtain a gun and there was no evidence that he actually did so, but the record reflects that he had taken steps to obtain a gun for her. Defendant also relies on several cases that overturned consecutive sentences involving what he asserts to be more serious crimes. However, a comparative sentencing argument is not permissible. *Id.* ¶ 43. Given that the court was in the best position to consider defendant’s character and the resulting need to protect the public, we cannot say that the decision to impose consecutive sentences was error. Thus, there was also no plain error.

¶ 26

III. CONCLUSION

¶ 27 Defendant's jury waiver was valid as to the amended charges, and the trial court did not abuse its discretion in imposing consecutive sentences. Accordingly, the judgment of the circuit court of Kendall County is affirmed. As part of our judgment, we grant the State's request that defendant be assessed \$50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 28 Affirmed.