

2019 IL App (1st) 170784-U

No. 1-17-0784

Order filed June 11, 2019

Second Division

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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. 14 CR 12095
)	
ERIC TATE,)	Honorable
)	Luciano Panici,
Defendant-Appellant.)	Judge, presiding.

JUSTICE MASON delivered the judgment of the court.
Justices Pucinski and Hyman concurred in the judgment.

ORDER

¶ 1 *Held:* We affirm defendant's conviction for aggravated domestic battery where defendant's jury waiver was knowing and voluntary. We remand so that defendant may raise alleged errors in the imposition or calculation of fines, fees, costs, and *per diem* credit in the trial court.

¶ 2 Following a bench trial, defendant Eric Tate was found guilty of aggravated domestic battery (720 ILCS 5/12-3.3(a-5) (West 2014)) and sentenced to three years' incarceration. On appeal, Tate argues that (1) the trial court's failure to provide adequate admonitions to him when

it accepted his jury waiver amounts to plain error; and (2) certain monetary assessments imposed should be offset or vacated. We affirm the trial court's judgment and remand to the trial court to allow Tate to raise alleged errors in the trial court's imposition of fines, fees, costs, and *per diem* credit.

¶ 3 Tate was charged with multiple counts of attempted murder and aggravated domestic battery based upon allegations that he strangled his girlfriend Patrinia Dorbin and attempted to strike her with a metal mallet. At a pretrial hearing on August 12, 2016, defense counsel informed the court in Tate's presence that Tate was electing a bench trial rather than a jury trial. Tate did not object.

¶ 4 On February 15, 2017, immediately before trial commenced, defense counsel tendered a copy of Tate's signed jury waiver form to the trial court. The court and Tate then engaged in the following exchange:

“[TRIAL COURT]: Mr. Tate, I have been tendered, by your attorney, a document entitled jury waiver. Is that your signature on the document?

[DEFENDANT]: Yes, sir.

[TRIAL COURT]: And do you understand that you are giving up your right to trial by jury, when you sign this?

[DEFENDANT]: Yes, sir.

[TRIAL COURT]: All right. Now Mr. Tate, that's what you want to do as you are standing before me. Right?

[DEFENDANT]: Yes, sir.

[TRIAL COURT]: You want me to try the case as opposed to 12 people. Is that right?

[DEFENDANT]: Yes.

[TRIAL COURT]: All right. Now let the record reflect that the Defendant has made a knowing[] and intelligent[] waiver of his right to trial by jury. And the waiver has been so duly executed and made part of the court record.”

¶ 5 At trial, Dorbin testified that on June 8, 2014, she and Tate were dating and lived together. Early that morning, Tate woke Dorbin up by screaming at her about someone who had called her mobile phone. Tate began punching and hitting her, placed both of his hands around her throat and began to choke her, and, at one point, attempted to hit her head with a metal mallet. Dorbin was treated at a hospital for her injuries, photographs of which were admitted into evidence. Dorbin acknowledged giving a contradictory statement to Tate’s investigator years after the attack, but stated she gave it in Tate’s presence and its contents were, for the most part, false. A nurse and police officers testified to Dorbin’s injuries.

¶ 6 The court found Tate not guilty of attempted murder, and guilty of three counts of aggravated domestic battery. At the sentencing hearing, the trial court denied Tate’s motion for a new trial, merged the counts, and sentenced Tate to three years’ imprisonment. The court awarded Tate 40 days of presentence custody credit, and imposed \$714 in fines, fees, and costs.¹ Tate timely appealed.

¶ 7 Tate first argues that the trial court denied him his constitutional right to a jury trial and to due process of law, because it failed to provide adequate admonitions to him regarding waiver of his right to a jury trial. Tate acknowledges he did not raise the issue in the trial court and thus failed to preserve it for appeal (see *People v. Hillier*, 237 Ill. 2d 539, 544-45 (2010) (holding that

¹ On the record, the trial court indicated the \$714 total included credit for the 40 days Tate was in custody before sentencing. The fines, fees, and costs written order reflects the \$714 total due (assessments totaling \$754 minus \$40 credit).

to preserve claims for appeal and avoid forfeiture, a defendant must make both a contemporaneous objection and file a written postsentencing motion raising the issue)), but argues we may review the issue as plain error.

¶ 8 Illinois Supreme Court Rule 615(a) (eff. Jan. 1, 1967) provides that plain errors which affect substantial rights may be raised on appeal, even though they were not brought to the attention of the trial court. The Illinois Supreme Court has held that a reviewing court may address a forfeited claim if a clear and obvious error occurred and (1) the evidence is so closely balanced that the error threatened to tip the scales of justice against the defendant or (2) the error is so serious that it deprived the defendant of a fair trial and challenged the integrity of the judicial process. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). Reviewing courts examine the issue of whether a defendant was unfairly deprived of his right to a jury trial under the second prong of the plain error doctrine. See, e.g., *People v. Bannister*, 232 Ill. 2d 52, 65 (2008); *People v. Bracey*, 213 Ill. 2d 265, 270 (2004); *People v. Smith*, 106 Ill. 2d 327, 333 (1985). Under either prong, the burden of persuasion rests with the defendant. *People v. Walker*, 232 Ill. 2d 113, 124 (2009). The initial consideration in this analysis is whether an error occurred at all. *Piatkowski*, 225 Ill. 2d at 565. Here, unless the court erred in accepting Tate’s jury waiver, there can be no plain error. *Bannister*, 232 Ill. 2d at 71.

¶ 9 “The right to a trial by jury is a fundamental right guaranteed by our federal and state constitutions.” *Bracey*, 213 Ill. 2d at 269. Under the relevant portion of Section 103-6 of the Code of Criminal Procedure, “[e]very person accused of an offense shall have the right to a trial by jury unless (i) understandingly waived by defendant in open court.” 725 ILCS 5/103-6 (West 2016). The trial court must ensure a defendant waives the right to a jury trial expressly and understandingly. *Bannister*, 232 Ill. 2d at 66. However, the court is not required to give specific

admonitions or advice before an effective jury waiver is made, and the validity of a jury waiver necessarily depends upon the specific facts and circumstances of each case. *Id.* Where, as here, the facts are not in dispute, our review is *de novo*. *Id.*

¶ 10 The circumstances of this case reflect that Tate’s jury waiver was knowingly and understandingly made. Tate not only signed a written jury waiver but then also engaged in a colloquy with the trial court in which he confirmed his understanding of the content of the waiver and the right he was relinquishing. While the existence of a written waiver is not dispositive of whether a defendant’s waiver is knowing and voluntary, a signed waiver viewed with other factors can “lessen[] the probability that the waiver was not made knowingly.” *People v. Clay*, 363 Ill. App. 3d 780 (1st Dist. 2006) (internal citations omitted). The content of Tate’s colloquy with the court supports finding his jury waiver valid. Under questioning by the court, Tate acknowledged he signed the waiver form and understood that he was giving up his right to a jury trial. The court ensured that Tate understood what this meant, and thus that he understandingly waived the right, when it asked him “[y]ou want me to try the case as opposed to 12 people” and Tate answered “yes.”

¶ 11 Tate argues that the waiver form was misleading because it indicates that Tate will be subject to a “hearing” rather than a “trial” and does not clarify the distinction between a jury and bench trial. However, the trial court explained the difference between a jury and bench trial to Tate after counsel tendered the waiver form to the court, asking Tate to confirm that he wanted the court rather than “12 people” to decide his case.

¶ 12 Tate further argues that the court’s admonitions were not adequate, and the court should have questioned him regarding a number of other issues including whether “[defendant] understood how a jury is selected, or if he knew that during a jury trial, he could cross-examine

the State's witnesses and present witnesses and evidence in his own defense." Apart from the fact that specific admonishments are not required (*Bannister*, 232 Ill. 2d at 66), Tate does not articulate how an explanation of the jury selection process would have impacted his decision to waive a jury. And because a defendant always has the right to cross-examine witnesses and present evidence in his defense whether he elects a bench or jury trial, Tate did not give up these rights when he elected a bench trial and so the court's failure to mention them is irrelevant.

¶ 13 Tate was represented by counsel throughout the proceedings and was present in open court when counsel first informed the court Tate wanted a bench trial. If he disagreed with his counsel or did not understand the issue, he had the opportunity to object or speak out in open court regarding his preference for a jury trial. See *People v. Reed*, 2016 IL App (1st) 140498, ¶ 7 ("a present defendant's silence while his or her attorney requests a bench trial provides evidence that the waiver is valid"). Additionally, the record shows that, at the time he waived his right to a jury, Tate was familiar with criminal court proceedings, having previously been convicted of three felonies, and thus was presumably aware of the ramifications of waiving that right. *People v. Tooles*, 177 Ill. 2d 462, 471 (1997) ("defendant's criminal record consisted of four prior convictions, through which he was presumably familiar with his constitutional right to a trial by jury and the ramifications attendant to waiving this right").

¶ 14 In sum, we find Tate knowingly, understandingly, and voluntarily waived his right to a jury trial where he was familiar with criminal court proceedings, did not object to his counsel's seeking a bench trial, signed a written jury waiver, and affirmed to the trial court his understanding of his right to a jury trial and that he wanted to give up that right. He has not met his burden to show the trial court erred in accepting his jury waiver and, therefore, plain error cannot override forfeiture of this issue.

¶ 15 Tate next contends certain fines, fees, and costs the trial court assessed against him should be offset or vacated. More specifically, he argues that a pre-sentence incarceration credit should be applied against certain fines subject to the offset, and the appellate court should vacate the \$5 Electronic Citation Fee. Tate did not raise these claims before the trial court.

¶ 16 On February 26, 2019, while this appeal was pending, our Supreme Court adopted new Illinois Supreme Court Rule 472, which sets forth the procedure in criminal cases for correcting sentencing errors in, as relevant here, the “imposition or calculation of fines, fees, assessments, or costs” and “application of *per diem* credit against fines.” Ill. S. Ct. R. 472(a)(1), (2) (eff. Mar. 1, 2019). On May 17, 2019, Rule 472 was amended to provide that “[i]n all criminal cases pending on appeal as of March 1, 2019, or appeals filed thereafter in which a party has attempted to raise sentencing errors covered by this rule for the first time on appeal, the reviewing court shall remand to the circuit court to allow the party to file a motion pursuant to this rule.” Ill. S. Ct. R. 472(e) (eff. May 17, 2019). “No appeal may be taken” on the ground of any of the sentencing errors enumerated in the rule unless that alleged error “has first been raised in the circuit court.” Ill. S. Ct. R. 472(c) (eff. May 17, 2019). Therefore, pursuant to Rule 472, we “remand to the circuit court to allow [defendant] to file a motion pursuant to this rule,” raising the alleged errors regarding fines, fees, costs, and *per diem* credit. Ill. S. Ct. R. 472(e) (eff. May 17, 2019).

¶ 17 Accordingly, the fines and fees issues are remanded pursuant to Rule 472(e). The trial court is affirmed in all other respects.

¶ 18 Affirmed; fines and fees issues remanded.