2019 IL App (3d) 170345-U

Order filed May 30, 2019

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2019

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-17-0345 Circuit No. 15-CF-710
STEPHEN L. KING,	)	Honorable Lisa Y. Wilson,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE CARTER delivered the judgment of the court.
Justices Lytton and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's jury waiver was not knowing, intelligent, and voluntary.

¶ 2 Defendant, Stephen L. King, appeals his conviction for aggravated driving while under the influence of alcohol (DUI), arguing, in pertinent part, that his constitutional rights were violated where the court accepted his jury waiver without providing adequate admonishments and ensuring that his wavier was knowing, intelligent, and voluntary. We vacate and remand.

¶ 3 I. BACKGROUND

¶ 4 In October 2015, defendant was charged by indictment with aggravated DUI (625 ILCS 5/11-501(d)(2)(B) (West 2014)). The indictment alleged that defendant had two prior DUI convictions. Defendant also received tickets for driving while license suspended (*id.* § 6-303), driving between 26 and 34 miles per hour over the speed limit (*id.* § 11-601.5(a)), and failing to stop at a stop sign (*id.* § 11-1204(b)).

¶ 5 On January 7, 2016, defendant was in court with his counsel, and the following interaction occurred:

> "THE COURT: All right. The matter will be set on March 22—well, actually we'll need to do March 21, it's a Monday.
>
> [DEFENSE COUNSEL]: It's a bench trial, Judge.
>
> THE COURT: Pardon?
>
> [DEFENSE COUNSEL]: It's going to be a bench trial.
>
> THE COURT: Okay. All right. So March 22 at 2:30 p.m."

Later on that same day, the court stated, "Bench trial will be March 22 at 2:3[0]." The record does not contain any written jury waiver or any oral mention of a jury waiver.

¶ 6 The case proceeded to a bench trial on March 22, 2016. Before trial began, the court stated, "I believe that the matter was set for a bench trial." The court asked both parties if they were ready to proceed to the trial, and both agreed that they were. Joshua Blankenship testified, in part, that he was trooper for the Illinois State Police and had received DUI training. On September 17, 2015, around 1 a.m., he was on patrol in Peoria County. He observed a motorcycle cross the overpass over Interstate 74 at "a high rate of speed." He activated his radar unit, which showed the motorcycle was traveling 74 miles per hour in a 40-mile-per-hour speed zone. While Blankenship had his emergency lights activated, the motorcycle continued driving

for a couple of blocks, drove through a stop sign without stopping, drove another half a block, and then pulled into a driveway.

¶ 7 Blankenship pulled in behind the motorcycle and identified defendant as the driver. As Blankenship was "calling out [the] traffic stop to [his] telecommunicators," the driver of the motorcycle put the kickstand down and started walking toward Blankenship's car. Blankenship identified the driver as defendant. Blankenship ordered defendant several times to get back on the motorcycle for Blankenship's safety. Defendant failed to comply and started walking toward the residence before Blankenship eventually got him to sit on the motorcycle. As defendant was walking, Blankenship observed that "he seemed to be a little unsteady on his feet, stumbling." Blankenship stated, "As I reached him and started talking with him, I observed a strong smell of an odor of an alcoholic beverage coming from [defendant's] breath. And he had a hard time following directions." When asked, defendant denied that he had been drinking.

¶ 8 Blankenship asked defendant for his license and proof of insurance. Defendant said they were in his saddlebags and began opening them. "He had a hard time getting the straps undone on the first saddlebag." There was nothing in the first saddlebag. Defendant again had trouble opening the second saddlebag, and Blankenship helped him. While doing so, Blankenship saw that there was a six-ring pack of beer cans: four cans were gone and two unopened cans remained. Blankenship stated, "The beer cans were still cold and had condensation on them." It did not appear that any beer had spilled. Defendant then remembered that his license and insurance were in his wallet, handed his entire wallet to Blankenship, and gave Blankenship permission to retrieve them. Blankenship stated that he ran defendant's license on his in-car computer and found out that it was suspended.

¶ 9 Blankenship asked defendant to perform field sobriety tests. Defendant was uncooperative so Blankenship determined that he was not going to comply with the field sobriety tests and placed defendant in the back of his squad car. While in the back of the car, defendant threatened to hurt Blankenship, spat on the inside of the car window, and called Blankenship a derogatory name. Blankenship read defendant the warning to motorist and asked defendant to provide a breath sample. Defendant refused. The stop was videotaped and the video was played in court. Defendant did not tell Blankenship that he was having any problems with his motorcycle. Based on his observations, Blankenship believed that defendant was under the influence of alcohol.

¶ 10 Matt Mocilan, a Peoria police officer, testified that he responded to the traffic stop as backup for Blankenship. He confirmed that defendant was not cooperative and had to be placed in the vehicle. He heard defendant refuse to do field sobriety tests.

¶ 11 Defendant testified that he had not consumed alcohol on the night in question. He was driving fast because he was having issues with the throttle on the motorcycle. He had not seen the officer behind him. It may have smelled like an alcoholic beverage because one of the beers had broken in his bag. The court found defendant guilty of aggravated DUI, driving while license suspended, failing to stop at a stop sign, and speeding 26 to 34 miles per hour over the speed limit. Defendant was sentenced to 10 days in jail, with credit for 5 days served, 36 months probation, and $1000 in costs.

¶ 12 II. ANALYSIS

¶ 13 On appeal, defendant contends, *inter alia*, that his constitutional rights were violated where the court accepted his jury waiver without providing adequate admonishments regarding the nature of the right he was waiving and without ensuring that his waiver was knowing,

intelligent, and voluntary. Because the record does not show that the jury waiver was ever discussed in court, we find that defendant's waiver was not knowingly, intelligently, and voluntarily made.

¶ 14 The right to a trial by jury is a fundamental constitutional right under both the United States and Illinois Constitutions. *People v. Bracey*, 213 Ill. 2d 265, 269 (2004).

> "A defendant may, of course, waive the right to a jury trial, but any such waiver, to be valid, must be knowingly and understandingly made. 725 ILCS 5/103-6 (West 2002) ('Every person accused of an offense shall have the right to a trial by jury unless *** understandingly waived by defendant in open court'); *In re R.A.B.*, 197 Ill. 2d 358, 364 (2001); *People v. Frey*, 103 Ill. 2d 327, 332 (1984). Whether a jury waiver is valid cannot be determined by application of a precise formula, but rather turns on the particular facts and circumstances of each case. *In re R.A.B.*, 197 Ill. 2d at 364; *Frey*, 103 Ill. 2d at 332. A written wavier, as required by section 115-1 of the Code of Criminal Procedure of 1963 ('All prosecutions *** shall be tried by the court and a jury unless the defendant waives a jury trial *in writing*' (emphasis added) (725 ILCS 5/115-1 (West 2002))), is one means by which a defendant's intent may be established. However, adherence to this provision, while recommended, is not always dispositive of a valid wavier. See *People v. Scott*, 186 Ill. 2d 283 (1999). Nor is the lack of a written waiver fatal, if it can be ascertained that the defendant understandingly waived his right to a jury trial. See *People v. Tooles*, 177 Ill. 2d 462 (1997). For a waiver to be effective, the court need not impart to defendant any set admonition or advice. *People v. Smith*, 106 Ill. 2d 327, 334 (1985). Generally, a jury waiver is valid if it is made by

> defense counsel in defendant's presence in open court, without an objection by defendant. See *People v. Murrell*, 60 Ill. 2d 287 (1975); *People v. Sailor*, 43 Ill. 2d 256 (1969). However, as noted by this court in *People v. Scott*, 186 Ill. 2d 283, 285 (1999), 'We have never found a valid jury waiver where the defendant was not present in open court when a jury waiver, written or otherwise, was at least discussed.' " *Id.* at 269-70.

We review *de novo* the question of whether a defendant's jury waiver was knowingly, voluntarily, and intelligently made. *Id.* at 270. Moreover, where a defendant, as here, did not raise the issue in the circuit court, we consider the issue under the second prong of the plain error doctrine. *Id.*; *People v. Watson*, 246 Ill. App. 3d 548, 549 (1993).

¶ 15 Here, no written jury waiver was included in the record and the transcripts include no discussion of defendant's right to a jury trial or his waiver of such right. The only indication in the record that defendant would not be having a jury trial was this colloquy on January 7, 2016,

> "THE COURT: All right. The matter will be set on March 22—well, actually we'll need to do March 21, it's a Monday.
>
> [DEFENSE COUNSEL]: It's a bench trial, Judge.
>
> THE COURT: Pardon?
>
> [DEFENSE COUNSEL]: It's going to be a bench trial.
>
> THE COURT: Okay. All right. So March 22 at 2:30 p.m."

After that, the bench trial was referenced twice: on that same date when the court stated, "Bench trial will be March 22 at 2:3[0]," and before trial began on March 22, 2016, when the court again stated, "I believe that the matter was set for a bench trial." We find that these instances do not support a finding that defendant's jury waiver was discussed in open court. There is no indication

that defendant knew he had the right to a jury trial, let alone that he had waived that right. Moreover, the court did not admonish defendant to determine that he knowingly, voluntarily, and intelligently waived his right to a jury trial. "Although no set admonition or advice is required before an effective waiver of the right to trial by jury may be made, the decisions of our supreme court 'have imposed on the circuit courts the duty of ensuring that a defendant's waiver of his right to a jury trial be made expressly and understandingly.' " *People v. Williamson*, 311 Ill. App. 3d 54, 61 (1999) (quoting *People v. Smith*, 106 Ill. 2d 327, 334 (1985)). As our supreme court has stated,

> " ' "It takes but a few moments of a trial judge's time to directly elicit from a defendant a response indicating that he understands that he is entitled to a jury trial, that he understands what a jury trial is, and whether or not he wishes to be tried by a jury or by the court without a jury. This simple procedure incorporated in the record will reduce the countless contentions raised in the reviewing courts about jury waivers." ' " *Scott*, 186 Ill. 2d at 288 (Bilandic, J., specially concurring) (quoting *People v. Chitwood*, 67 Ill. 2d 443, 448-49 (1977), quoting *People v. Bell*, 104 Ill. App. 2d 479, 482 (1969)).

¶ 16 In coming to this conclusion, we find distinguishable the cases of *People v. Asselborn*, 278 Ill. App. 3d 960, 962-63 (1996), and *People v. Tucker*, 183 Ill. App. 3d 333, 334 (1989), that the State cites. In both of these cases, the court actually mentioned the option of a jury trial. In *Asselborn*, the court said, "Jury waiver. Bench or jury?" *Asselborn*, 278 Ill. App. 3d at 962. In *Tucker*, the court said, "Jury trial?" and defense counsel stated, "No. Bench." *Tucker*, 183 Ill. App. 3d at 334. The appellate courts in each of these cases held that this was enough to apprise the defendant of the right to a jury trial. *Asselborn*, 278 Ill. App. 3d at 962-63; *Tucker*, 183 Ill.

App. 3d at 334. However, here, as stated above, there was no mention of a jury trial so as to inform defendant that he had the right. We find the scenario in this case more similar to that in *People v. Ruiz*, 367 Ill. App. 3d 236, 239 (2006). In *Ruiz*, the defendant signed a written jury waiver and a bench trial was referenced twice before trial. *Id.* The appellate court held that this did not amount to a discussion in open court of the defendant's jury waiver. *Id.*

¶ 17 We further reject the State's contention that "defendant's criminal background demonstrates that defendant was aware of his right to a jury trial and knowingly and understandingly waived that right." In support of this contention, the State cites *People v. Bannister*, 232 Ill. 2d 52, 71 (2008), and *People v. Tooles*, 177 Ill. 2d 462, 469-72 (1997). We find these cases distinguishable. In *Bannister*, the record on appeal included transcripts from a prior case showing that the defendant had been admonished that he had the right to a jury trial and what a jury trial was, and had affirmatively waived that right and decided to proceed with a bench trial. *Bannister*, 232 Ill. 2d at 71. Thus, the defendant was aware of his right to a jury trial and could knowingly and voluntarily waive it. *Id.* In *Tooles*, the court had admonished the defendant and ascertained that he understood that he had a right to a jury trial and was waiving that right. *Tooles*, 177 Ill. 2d at 469-72. The court held that such admonishments, in conjunction with the defendant's familiarity with the judicial system, was enough to show that he understood and waived his right. *Id.* Moreover, the court in *People v. Thornton*, 363 Ill. App. 3d 481, 490 (2006), rejected this same argument, stating that the defendant's history with the criminal justice system "did not impute knowledge of his right to a jury trial." The record, here, does not show that defendant was apprised of his right to a jury trial and ability to waive that right in any of his other cases.

¶ 18 In sum, we find that defendant's jury waiver was not knowingly, understandingly, and voluntarily made. We thus vacate his conviction and remand for further proceedings. Because we do so, we need not reach defendant's other contentions of error: that the court erred in admitting his driving abstract into evidence and that his fines and fees order should be corrected to apply *per diem* credit. However, we would be remiss if we did not note that under Illinois Supreme Court Rule 472 (eff. May 17, 2019), defendant would first have to raise any issue with fines, fees, monetary assessments, *per diem* credit, presentence custody credit, or clerical errors, in the circuit court before raising them on appeal. The rule states that "In 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).

¶ 19 III. CONCLUSION

¶ 20 The judgment of the circuit court of Peoria County is vacated and remanded.

¶ 21 Vacated and remanded.