

2011 IL App (1st) 093216-U
No. 1-09-3216

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Petitioner-Appellee,)	Cook County
)	
v.)	No. 09 CR 11018
)	
CHARLES WHITE,)	Honorable
)	James B. Linn,
Respondent-Appellant.)	Judge Presiding.

JUSTICE ROBERT E. GORDON delivered the judgment of the court.
Presiding Justice Garcia and Justice McBride concurred in the judgment.

ORDER

¶1 **Held:** A defendant who has gone through the criminal justice system on seven previous occasions and who signs a jury waiver after the trial court's admonishments cannot later say that his waiver was not voluntarily, knowingly, and understandingly made because he claimed the trial court and his attorney confused him when the record does not support his claims.

¶2 Following a bench trial, defendant Charles White was convicted of delivering 1.1 grams of heroin in violation of 720 ILCS 570/401(c)(1) (West 2010). After a hearing in aggravation and mitigation, defendant was sentenced to four years in the Illinois Department of Corrections.

Defendant appeals, arguing that the trial court accepted a jury waiver that was not voluntarily, knowingly and understandingly made because it was motivated by misinformation provided by the trial court and defense counsel. We affirm.

¶3 I. BACKGROUND

¶4 On June 17, 2009, defendant was arrested with his wife, Wanda Byrd, and charged with delivering a controlled substance to an undercover narcotics officer.

¶5 On July 13, 2009, defendant entered a plea of not guilty on his arraignment, filed a motion for discovery, and his attorney requested an August 6, 2009 date by agreement, which defendant contested by stating to the court: “No, Your Honor, not by agreement. Can we get a court date sooner than that please?” After some discussion, the trial court entered an August 6, 2009 status date by agreement of the parties, and defendant made no further statements or objections to the court.

¶6 On August 6, 2009, Byrd, defendant’s wife and co-defendant, pled guilty and was sentenced to two years probation with level three Treatment Alternatives for Safe Communities (TASC) as a condition of probation. Defendant’s trial was then set for September 1, 2009 by agreement.

¶7 On August 31, 2009, defendant filed a *pro se* motion for a speedy trial and on September 1, 2009 in the presence of defendant, his attorney stated, “We’re requesting the matter be set down for a bench trial.” A trial date was set for September 29, 2009. Defendant then inquired whether he was eligible for a TASC evaluation, but made no objection to the bench trial or the change in the trial date. The trial court informed defendant that a TASC evaluation could be pursued if defendant was found guilty and was found eligible for TASC.

¶8 On September 29, 2009, the parties answered ready to proceed with a bench trial and the

trial court admonished defendant as follows:

“THE COURT: You have a right to a jury trial where twelve people would be selected from the community to hear the evidence. All twelve would have to unanimously agree you were proven guilty beyond a reasonable doubt before you could be found guilty. If you didn’t have a jury trial, you could have a bench trial where I would hear the evidence myself and I decide myself whether you have been proven guilty beyond a reasonable doubt. What kind of trial do you want to have a bench or jury trial?

DEFENDANT: Well, I guess, your Honor, I would like to go with the jury trial please.

THE COURT: Jury?

DEFENDANT: Yes.

DEFENSE COUNSEL: I’m not prepared to do a jury trial, Judge.

THE COURT: Well, your client is right demanding trial.

DEFENSE COUNSEL: But that’s not his—

THE COURT: So we’ll get a jury and we’ll pick a jury and let the twelve people decide.

DEFENSE COUNSEL: That’s not one of the things he gets to decide, whether or not to demand trial, unless he wishes to represent himself. The decision to demand trial is within the—

THE COURT: What are you doing, Mr. White what are you doing here?

DEFENDANT: What am I doing here, sir? Your Honor, right now I would like to have another counsel represent me because I feel—

THE COURT: Denied. Unless you want to represent yourself. You’re entitled to a

lawyer. If you're indigent, you're locked up, you don't have the money for your own lawyer, you get the Public Defender. I'm not picking and choosing which Public Defender you get. She happens to be really good. I know [your counsel]. She's here frequently.

DEFENDANT: I don't want her to—

THE COURT: It's her or it's you.

DEFENDANT: I don't know what to tell you. I don't know what it. It just seems like my counsel don't have any interest in—

THE COURT: She is going to be your lawyer or you're going to be your own lawyer. That's the reality. There's not going to be any other way to resolve this either she's going to speak for you or you're going to speak for yourself.

DEFENDANT: Your Honor, I don't know want to waste any more of the taxpayers' money. I'm here today and I want to take this to trial.

THE COURT: Bench trial with me or a jury trial.

DEFENDANT: Yes, with you, your Honor.

THE COURT: With me.

DEFENDANT: Yes, sir.

THE COURT: And you understand that by signing that piece of paper your lawyer is preparing means you're telling me in writing you don't want a jury trial?

DEFENDANT: (Indicating)

THE COURT: Is that right?"

Defendant then signed the jury waiver without asking any further questions and without any objection, and the trial court commenced the bench trial.

¶9 After opening statements, the State called undercover Chicago police officer William Pierson as a witness on its behalf. Officer Pierson testified that he was part of an undercover narcotics ongoing operation on February 14, 2009 when his surveillance officers directed him to arrive at the vicinity of Jackson and Whipple in civilian clothes with a covert vehicle to make a controlled narcotics purchase. Officer Pierson testified that he observed defendant walking and handing out items to a group of individuals from a clear plastic bag that he was holding. He then observed defendant walk through an iron fence to a gangway between two buildings, one of which was a house next door to where defendant resided. He further observed Byrd receive what appeared to be U.S. currency from people coming up to the fence, and observed defendant take small items from the clear plastic bag and hand them to the individuals through the fence. Officer Pierson testified that based on his nineteen years experience as a police officer with six years assigned to the narcotics division, he opined that he was observing narcotic transactions. Officer Pierson testified that he approached the fence and asked Byrd for four “blows,” to which Byrd asked if he had \$20 bills. Officer Pierson replied that he only had \$10’s and \$5’s, to which Byrd responded, “Good, because now I can get change for that lady over there.” Officer Pierson testified that he handed Byrd \$40 of 1505 funds,¹ and then defendant handed him four bags of suspect narcotics through the fence. Officer Pierson testified he could observe the defendant’s face and then returned to his vehicle, showing the four bags in his hand to the surveillance officers. Officer Pierson drove away while contacting his team members that he made a positive purchase of narcotics.

¶10 After the surveillance team detained both defendant and Byrd, Officer Pierson returned to

¹ U.S. currency with prerecorded serial numbers, which the Chicago Police Department utilizes to purchase illegal narcotics.

the same location to positively identify the two individuals who sold him the narcotics. Pierson testified that he then returned back to his unit at Homan and Filmore where he observed photo arrays and was able to identify Byrd and defendant from the photos.

¶11 Both parties stipulated that forensic chemistry testing revealed that the contents of the four bags purchased from the defendant tested positive for the presence of heroin at a total estimated weight of 1.1 grams. The State also introduced into evidence without objection a DVD of the undercover operation conducted on February 14, 2009, which corroborated the testimony of Pierson.

¶12 The State rested and defendant did not testify on his own behalf or present any evidence. The trial court found defendant guilty of delivery of a controlled substance a Class 1 felony.

¶13 As noted, on November 4, 2009 at the sentencing hearing, the trial court sentenced defendant to serve four years in the Illinois Department of Corrections after hearing aggravation and mitigation and considered defendant's seven prior felonies. After the sentencing hearing, defendant filed a motion to reconsider his sentence, which was denied. This timely appeal follows.

¶14 II. ANALYSIS

¶15 On appeal, defendant claims that his waiver of a jury was not voluntarily, knowingly, and understandingly made because his attorney claimed to be unprepared for a jury trial and failed to explain that she could have asked for a continuance to prepare for the jury trial, and that the trial court indicated to defendant that he could only have a jury trial if he chose to represent himself. Defendant claims that he thought he was required to sign the jury waiver and was required to proceed to trial without a jury. Alternatively, defendant argues that since the trial court caused him to believe that he could only have a jury trial if he chose to represent himself, he should be

given a new trial with a jury. Defendant asks us to find that he received ineffective assistance of counsel and requests that we address the issue of the jury waiver under the plain error doctrine since there was no objection to the jury waiver and it was not included in defendant's posttrial motion. We affirm.

¶16 The right to trial by jury is guaranteed to every Illinois citizen under both the Federal and Illinois Constitutions. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, §§ 8, 13. However, a defendant may waive his right to a jury trial if it is knowingly, understandingly, and voluntarily waived in open court. 725 ILCS 5/103-6 (West 1990); *People v. Bannister*, 232 Ill. 2d 52, 66 (2004); *In re R.A.B.*, 197 Ill. 2d 358, 363 (2001); *People v. Frey*, 103 Ill. 2d 327, 332 (1984). A determination on the validity of such a waiver does not rely upon a precise formula, but rather depends upon the facts and circumstances of each particular case. *In re R.A.B.*, 197 Ill. 2d at 363; *People v. Tooles*, 177 Ill. 2d 462, 469 (1997); *Frey*, 103 Ill. 2d at 332. Additionally, the court is not required to make any specific admonition or advice prior to an effective waiver. *In re R.A.B.*, 197 Ill. 2d at 364; *Tooles*, 177 Ill. 2d at 469; *Frey*, 103 Ill. 2d at 332 (“We have not required that the record affirmatively establish that the court advised defendant of his right to a jury trial and elicited his waiver of that right, nor that the court or counsel advised defendant of the consequences of the waiver.”). Further, if defendant is present when the court and defense counsel discuss a jury trial waiver and defendant does not object to the waiver, the defendant is deemed to have acquiesced to the waiver. *People v. Sailor*, 43 Ill. 2d 256, 260 (1969). The standard of review regarding the validity of the waiver is *de novo*. *Bracey*, 213 Ill. 2d 265, 270 (2004); *In re R.A.B.*, 197 Ill. 2d at 362. *De novo* consideration means we perform the same analysis that a trial judge would perform and give no deference to the judge's conclusions or specific rationale. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564 (2011).

¶17

A. Plain Error

¶18 Defendant requests this court to find plain error under the plain error doctrine. The Illinois Supreme Court has held that a “defendant must both specifically object at trial and raise the specific issue again in a posttrial motion to preserve any alleged error for review” or the issue is forfeited. *People v. Woods*, 214 Ill. 2d 455, 470 (2005); *People v. Piatkowski*, 225 Ill. 2d 551, 564 (2007). When a defendant has failed to preserve an error for review, we may still review for plain error. *Piatkowski*, 225 Ill. 2d at 562-63; 134 Ill. 2d R. 615(a) (“Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court.”).

¶19 “[T]he plain-error doctrine allows a reviewing court to consider unpreserved error when (1) a clear or obvious error occurs and the evidence is so closely balanced that the error alone threaten[s] to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurs and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence.” *Piatkowski*, 225 Ill. 2d at 565; *Woods*, 214 Ill. 2d at 471.

Defendant requests that we find plain error under the second prong, however before we reach the issue of plain error, we must first determine whether any error occurred at all. *People v. Walker*, 392 Ill. App. 3d 277, 294 (2009) (“[i]n a plain error analysis, ‘the first step’ for a reviewing court is to determine whether any error at all occurred”). Defendant carries the burden of persuasion under both prongs of the plain error rule. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009).

¶20

B. Court’s Misrepresentation

¶21 Defendant claims that the trial court erred by suggesting that the defendant could not have a jury trial unless he was willing to represent himself. The record does not reflect that this

happened in the manner in which defendant claims. After denying defendant's request for a new assistant public defender, the trial court responded: "She is going to be your lawyer or you're going to be your own lawyer" if defendant wanted a bench trial scheduled for that day. The defendant signed the jury waiver after he was told by the trial court: "that by signing that piece of paper your lawyer is preparing, you're telling me in writing that you don't want a jury trial." Further, it is not the role of the trial court, but rather that of defendant's lawyer, to explain to defendant the legality of the legal issues. Ill. Sup. Ct. Rules of Prof. Conduct, Rule 1.4(b) Defendant's counsel was present at the time of the trial court's inquiry, and defendant did not ask his lawyer for clarification or otherwise indicate he was confused.

¶22 Moreover, we are not convinced that we are dealing with an unsophisticated defendant who is unfamiliar with the procedures of the criminal justice system. The defendant has experience in the criminal justice system from his seven prior felony convictions, four of which are possession of a controlled substance. It was defendant himself who inquired into the option of a TASC evaluation and also filed a *pro se* motion for a speedy trial, further indicating his familiarity with the criminal justice process.

¶23 C. Ineffective Assistance

¶24 Defendant also claims that his Sixth Amendment right to effective assistance of counsel was violated. The Sixth Amendment to our federal Constitution states:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for

obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.” U.S. Const., amend. VI.

¶25 The Illinois Supreme Court has held that, to determine whether a defendant was denied his or her right to effective assistance of counsel, a reviewing court must apply the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Colon*, 225 Ill. 2d 125, 135 (2007), citing *People v. Albanese*, 104 Ill. 2d 504 (1984). Under *Strickland* a defendant must prove both that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. *Colon*, 225 Ill. 2d at 135; *People v. Evans*, 209 Ill. 2d 194, 219-20 (2004); *Strickland*, 466 U.S. at 687.

¶26 Under the first prong of the *Strickland* test, the defendant must prove that his counsel's performance fell below an objective standard of reasonableness “under prevailing professional norms.” *Colon*, 225 Ill. 2d at 135; *Evans*, 209 Ill. 2d at 220. Under the second prong, the defendant must show that, “but for” counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. *Colon*, 225 Ill. 2d at 135; *Evans*, 209 Ill. 2d at 220. “[A] reasonable probability that the result would have been different is a probability sufficient to undermine confidence in the outcome-or put another way, that counsel's deficient performance rendered the result of the trial unreliable or fundamentally unfair.” *Evans*, 209 Ill. 2d at 220; *Colon*, 225 Ill. 2d at 135. To prevail, the defendant must satisfy both prongs of the *Strickland* test. *Colon*, 225 Ill. 2d at 135; *Evans*, 209 Ill. 2d at 220. “That is, if an ineffective-assistance claim can be disposed of because the defendant suffered no prejudice, we need not determine whether counsel's performance was deficient.” *People v. Graham*, 206 Ill. 2d 465, 476 (2003).

¶27 Defendant argues that error occurred when defense counsel did not explain to defendant

the steps she could take to prepare for a jury trial by first asking for a continuance. Defendant claims the omission of such information was by itself misinformation, and, if defendant had known the steps, he reasonably would not have waived his right to a jury trial.

¶28 Additionally, the three cases cited by defendant to support his contention are distinguishable. The first case defendant cites is *People v. Maxwell*, 148 Ill. 2d 116 (1992). In *Maxwell*, defendant was convicted by a jury of murder and attempted armed robbery. DThe evidence showed that the defendant and two other men approached the victim when one of the men pointed a gun at the victim and announced a stickup. *Maxwell*, 148 Ill. 2d at 121. The victim threw a beer bottle at defendant who responded by firing two shots from his gun, killing the victim. *Maxwell*, 148 Ill. 2d at 121. A police officer later found the victim's wallet with an ID, but found no money. *Maxwell*, 148 Ill. 2d at 121.

¶29 At the jury trial, the State introduced three additional pending offenses, for which defendant had been arrested and charged, but neither tried nor convicted at the time. These offenses, which occurred all on the same day, occurred eight days after the murder and attempted robbery. In the first offense, three men entered a victim's garage, one man drew a gun and demanded keys to the victim's automobile, removed \$90 from the victim's pocket, then drove off in the victim's vehicle. In the second offense, three men cut off a victim in his automobile, then later approached the victim with a gun, and threatened to shoot him. In the third offense, a man entered a victim's garage, placed a gun to the victim's head, and took \$20 from the victim's shirt pocket as two other men stood nearby. *Maxwell*, 148 Ill. 2d at 121-22. For all three offenses, the victims identified the gunman as the defendant. *Maxwell*, 148 Ill. 2d at 121-22. Later that same day, police arrested defendant for the string of offenses after an ensuing auto chase and retrieved a handgun abandoned by defendant during the chase. *Maxwell*, 148 Ill. 2d at 122. In a lineup,

each victim positively identified defendant as the gunman in each offense. *Maxwell*, 148 Ill. 2d at 122. Nine days later, a friend of the victim positively identified defendant as the shooter, and bullet fragments removed from the dead victim matched test firings from the gun abandoned by defendant in the auto chase. Defendant then admitted to the police he had shot the victim.

Maxwell, 148 Ill. 2d at 123. In *Maxwell*, the jury found defendant guilty of murder and attempted robbery. *Maxwell*, 148 Ill. 2d at 120. The defendant waived his right to a jury for the purposes of a capital sentencing hearing. *Maxwell*, 148 Ill. 2d at 120. At the sentencing hearing, the trial court sentenced defendant to death for the murder of the victim and also added a 15-year prison term for attempted armed robbery. *Maxwell*, 148 Ill. 2d at 124.

¶30 Prior to the introduction of the other crimes evidence, defense counsel incorrectly believed that the evidence of defendant's involvement in the other crimes was inadmissible. *Maxwell*, 148 Ill. 2d at 140. On appeal, defendant argued that based upon this belief, defense counsel advised defendant to waive his right to a jury at the sentencing stage. *Maxwell*, 148 Ill. 2d at 140. The appellate court in its decision, noted defense counsel cited three reasons to defendant to convince him to waive a jury: (1) a judge would be more lenient than a jury; (2) a prospective juror who did not believe in the death penalty would be removed for cause; and (3) to avoid prejudice by those jurors who would be "inflamed" by defendant's other offenses. *Maxwell*, 148 Ill. 2d at 143. The Illinois Supreme Court acknowledged defense counsel's error, however it found the jury waiver necessary in that instance to effectuate defense counsel's strategy to avoid the sentencing determination by jurors who would be made aware of defendant's extensive criminal history. *Maxwell*, 148 Ill. 2d. at 146. The supreme court found defense counsel did not act professionally unreasonable and that defendant suffered no prejudice as a result of defense counsel's advice. *Maxwell*, 148 Ill. 2d. at 145.

¶31 By contrast, in the case at bar, the record shows that defense counsel neither misinterpreted the law or legal procedure, nor suggested to defendant to forfeit his right to a jury trial based upon false or misleading information. On the contrary, the record shows that on September 1, 2009, defense counsel stated in the presence of the defendant, “We’re requesting the matter be set down for a bench trial.” Defendant neither objected to the request for a bench trial nor voiced his desire for a jury trial at that time. Additionally, on September 29, 2009, when defendant made a request for a jury trial during the trial court’s admonishments, his lawyer referred to defendant’s personal desire for an immediate trial: “[t]hat’s not one of the things he gets to decide, whether or not to demand trial, unless he wishes to represent himself.” This statement did not constitute a legal misinterpretation of any fact on the part of defense counsel. Defense counsel was talking about who decides when the case goes to trial, not the issue of whether the trial would be by bench or jury.

¶32 The defendant stated on July 13, 2009, that he preferred a court date to be scheduled earlier than what defense counsel had requested. Then on August 31, 2009, defendant filed a *pro se* “Motion for a Right to a Speedy Trial.” On September 29, 2009, defendant stated, “I don’t want to waste any more of the taxpayers’ money. I’m here today and I want to take this to trial,” and then further clarified that he had meant a bench trial. These prior statements and actions of the defendant reflected his desire to continue with the proceedings on that date. Furthermore, as previously discussed, defendant was not an unsophisticated criminal without knowledge of the criminal justice system, not unfamiliar with its procedures. Now the defendant argues that “if defendant had known the steps, he reasonably would not have waived his right to a jury trial,” however that is not supported by the record. Unlike the defendant in *Maxwell*, defendant in the case at bar previously stood before the trial courts for seven prior felony convictions. Four of

those felony convictions were for possession of a controlled substance. Defendant's in-court statements, request for a TASC evaluation, and *pro se* filing of a motion for a speedy trial further indicate his familiarity with the criminal system and its procedures.

¶33 The second case defendant cites is *People v. Smith*, 326 Ill. App. 3d 831 (2001). In that case, defendant was tried and convicted at a bench trial of first-degree murder. Defendant and two other men approached the victim and his two companions. *Smith*, 326 Ill. App. 3d at 836. Defendant recognized an individual from the victim's party and began shooting in his direction while continuing to walk toward him. *Smith*, 326 Ill. App. 3d at 836. Defendant approached within two feet of the victim, who already had been shot eight times by the defendant, and then shot the victim one last time in the right temple. *Smith*, 326 Ill. App. 3d at 836. Defendant waived his right to a jury trial, and after a bench trial was sentenced to 20 years in the Illinois Department of Corrections. *Smith*, 326 Ill. App. 3d at 836. After an unsuccessful direct appeal, Defendant filed an initial and amended petition for postconviction relief, which was dismissed by trial court as frivolous and patently without merit. *Smith*, 326 Ill. App. 3d at 836.

¶34 On appeal, defendant argued that his lawyer advised him to waive his right to a jury trial because a bench trial would be the better option since the trial judge owed defense counsel a favor and would have information not otherwise available to a jury. *Smith*, 326 Ill. App. 3d at 847. We found at the first stage of a postconviction petition that by alleging such a statement on the part of his defense counsel, sufficient facts were alleged to establish conduct that was professionally unreasonable, resulting in a sufficiently deficient performance by trial counsel under the first prong of the *Strickland* test. *Smith*, 326 Ill. App. 3d at 848. We further found, under the second prong, that there was a reasonable likelihood that the defendant would not have waived his right to a jury trial in the absence of the alleged deficient performance. *Smith*, 326 Ill.

App. 3d at 848. Additionally, the statement by defense counsel that the judge would have information not available to the jury was also legally inaccurate since a judge is presumed to not consider inadmissible matters. *Smith*, 326 Ill. App. 3d at 849. We found the defendant's allegations were neither frivolous nor patently without merit and the defendant's petition should advance to the second stage of the postconviction process. *Smith*, 326 Ill. App. 3d at 849.

¶35 In the case at bar, defense counsel did not advise or persuade defendant to forfeit his right to a jury trial based on a factually inaccurate assessment or erroneous advice. The record is silent on accusations by defendant suggesting that defense counsel promised defendant anything in exchange for giving up his right to a jury trial or that the judge would be privy to information not otherwise available to a jury as in *Smith*. Defendant did not object when defense counsel requested a bench trial from the trial court. The Illinois Supreme Court has concluded that if a defendant is present when the trial court and defense counsel discuss a jury trial waiver and the defendant does not object to the waiver, the defendant is deemed to have acquiesced in the waiver. *People v. Sailor*, 43 Ill. 2d 256, 260 (1969). Defendant stated himself that he did not want to waste anymore taxpayer's money and was there that day to move ahead with a bench trial. Defendant's choice to move ahead with a bench trial was of his own accord.

¶36 The third case defendant cites is *People v. Dameron*, 196 Ill. 2d 156 (2001). In that case, defendant was tried and convicted of first-degree murder and sentenced to death after waiving his right to a jury trial. At 1:30 a.m., defendant picked up his three-year-old daughter at the house of a neighbor who was babysitting for her. *Dameron*, 196 Ill. 2d at 159. Though defendant was to attend a sobriety party at 9 p.m. that night, he had been drinking at several bars from 5 p.m. to 1 a.m. *Dameron*, 196 Ill. 2d at 159. Defendant claimed after he picked up his daughter at the neighbors house and arrived at home, he had dropped his daughter down the stairs. *Dameron*,

196 Ill. 2d at 161. Defendant then told an elaborate story to his neighbor that his daughter was kidnapped and then called the police. *Dameron*, 196 Ill. 2d at 160. The police arrived at the location and searched the house after obtaining the defendant's permission. The police found the three-year-old's dead body wrapped in a towel inside two plastic bags that were stuffed inside a canvas duffle bag and placed in a playroom closet. *Dameron*, 196 Ill. 2d at 161. The autopsy revealed the three-year-old's vagina was dilated, stretched, and torn, and anal area was torn. In addition, the body received 37 types of injuries from what the forensic pathologist surmised resulted from the baby being swung against a smooth, hard surface more than 10 times. The brain had been reduced to a liquid state, and blood and brain matter seeped from the right ear. *Dameron*, 196 Ill. 2d at 161. After the jury convicted the defendant of first-degree murder, the defendant waived his right for a jury sentencing. *Dameron*, 196 Ill. 2d at 158-59. The trial court found him eligible for the death penalty on two grounds: (1) the defendant murdered a person during an attempted aggravated criminal sexual assault; and (2) the defendant murdered a person under 12 years of age, and the death resulted from "exceptionally brutal or heinous behavior indicative of wanton cruelty." *Dameron*, 196 Ill. 2d at 161-62.

¶37 On appeal, defendant argued that his jury waiver for sentencing was invalid.

Approximately a year before the trial, defendant filed a *pro se* "Motion for instruction that the jury is to presume that if sentenced to life, the defendant will spend the remainder of his natural life in prison" otherwise known as a *Gacho* instruction. *Dameron*, 196 Ill.2d at 166; see Illinois Pattern Jury Instructions, Criminal, No. 7C.05 (3d ed.1992); see *People v. Gacho*, 122 Ill.2d 221, 262 (1988). However, at the hearing on the defendant's *pro se* motion, defense counsel incorrectly informed the court that the Illinois Supreme Court had held the Public Act 89-203,

specifically 5-8-1(a)(1)(c)(ii)² which applied to the defendant, was unconstitutional. *Dameron*, 196 Ill.2d at 167; see 730 ILCS 5/5-8-1(a)(1)(c)(ii) (West 1996). Defense counsel stated: “I would have asked for such an instruction, but it’s not a mandatory situation now, and so certainly can’t tell the jury if he doesn’t get the death penalty he’s going to get life, because that may not be the case.” *Dameron*, 196 Ill. 2d at 167. Defendant complied with defense counsel to withdraw the motion, but argued that such compliance would not have happened had he received proper advice from the trial court and the *Gacho* instruction he requested. *Dameron*, 196 Ill. 2d at 168.

¶38 The *Dameron* court found that a waiver may be invalid when a defendant receives erroneous legal advice from the trial court, and that both defense counsel and the trial court were erroneous in their advisements. *Dameron*, 196 Ill.2d at 170-71; see *People v. Brown*, 169 Ill. 2d 132, 156 (1996). The court then stated that the erroneous *Gacho*-instruction ruling “irreparably tainted the defendant’s waiver decision” and, although it affirmed the defendant’s first-degree murder conviction, it vacated his death sentence, and remanded for a new sentencing hearing. *Dameron*, 196 Ill. 2d at 170, 180.

¶39 As discussed previously at length in comparing the instant case with *Maxwell* and *Smith*, in the case at bar, defense counsel did not advise defendant to forfeit his right to a jury trial based on erroneous legal advice as in *Dameron*. Not informing defendant of every statement made or

² The section states: “(a) * * * [A] sentence of imprisonment for a felony shall be a determinate sentence set by the court under this Section, according to the following limitations: (1) for first degree murder, * * * (c) the court shall sentence the defendant to a term of natural life imprisonment when the death penalty is not imposed if the defendant, * * * (ii) is a person who, at the time of the commission of the murder, had attained the age of 17 or more and is found guilty of murdering an individual under 12 years of age * * * .”

strategic decision conducted by defense counsel does not constitute erroneous legal advice. In *Dameron*, the erroneous legal advice limited defendant's options to just two: (1) a sentence handed down by a judge, or (2) a sentence handed down by a jury that did not receive a *Gacho* instruction. *Dameron*, 196 Ill. 2d at 170. Such a prejudicial limitation does not exist in the instant case where the defendant acquiesced to the bench trial by not objecting to the waiver when discussed by the defense counsel and the trial court in defendant's presence.

¶40 Defendant also cites *Dameron* to support his contention that he would not have waived his right to a jury trial had he been properly advised by defense counsel that he had the possibility of a continuance. As discussed prior, defendant was convicted of seven previous felonies and was not new to the criminal justice system. The defendant personally requested an earlier court date than what defense counsel had requested and filed a *pro se* "Motion for a Right to a Speedy Trial." On the day of trial, defendant stated, "I don't want to waste any more of the taxpayers' money. I'm here today and I want to take this to trial," and then further clarified that he had meant a bench trial. Again, defendant's awareness of the criminal process and desire for a quicker bench trial is reflected both in his statements and requests reflected in the record and his *pro se* motion for a speedy trial. The trial court's admonitions, together with defendant's signature on the jury waiver, rebut the defendant's claim of ineffective assistance of counsel.

¶41 III. CONCLUSION

¶42 As to defendant's claim of misrepresentation by the trial court we found no error, therefore we cannot find any plain error. *People v. Hanson*, 238 Ill. 2d 74, 115 (2010) ("Finding no error, our plain-error analysis ends here.").

¶43 In addition, we fail to find ineffective assistance of counsel.

¶44 Affirmed.