

FIRST DIVISION
May 7, 2012

No. 1-10-0799

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 JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 08 C4 41139
)	
TERRENCE DAVIS,)	Honorable
)	Thomas M. Tucker,
Defendant-Appellant.)	Judge Presiding.

JUSTICE KARNEZIS delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

ORDER

¶ 1 *HELD:* Where the record does not reflect that defendant understandingly waived his right to a jury trial in open court, the cause is reversed and remanded for a new trial.

¶ 2 Following a bench trial, defendant Terrence Davis was convicted of aggravated driving under the influence of alcohol and was sentenced to 18 months' probation. On appeal, defendant contends that he was denied his fundamental right to a trial by jury where a bench trial was conducted despite the absence of a jury waiver in open court. He further contends that he is entitled to \$15 presentence custody credit toward his assessed fines. For the reasons that follow,

we reverse the judgment of the circuit court and remand for a new trial.

¶ 3 Because defendant is contending that he did not waive his right to a jury trial in open court, our recitation of the facts of the case begins with four pretrial proceedings wherein the words "bench" or "bench trial" were uttered.

¶ 4 First, in open court on August 18, 2009, defense counsel stated, "Judge, today I am tendering a two-page document related to the car that [defendant] was allegedly driving on the night of the incident, and we're asking to set it for a bench trial." After setting a date, the trial court said, "So it's just with for bench trial. We'll get it done on that date for you, September 30th."

¶ 5 Second, on September 30, 2009, after introducing himself, defense counsel stated, "It was set for bench today." After counsel explained that a defense witness was not available and asked for another date, the trial court said, "With for bench. I'll see you then, sir."

¶ 6 Third, on November 4, 2009, defense counsel stated, "Judge, this was set for bench trial and I do have one witness in addition." The case was passed, and when it was recalled, defense counsel reported, "The State informs me that their trooper is still not in court, so we are going to ask to go by agreement to December 7th for a bench." Following discussion between the judge and the attorneys, defense counsel stated, "All right. No problem, Judge. By agreement 12-7 for bench."

¶ 7 Finally, on December 7, 2009, defense counsel stated his name for the record and said, "It was set for bench trial today." Counsel then informed the court that the defense was missing a witness, and the parties suggested another date. The trial court agreed to the date, stating, "You got it. With for bench trial. See you then."

¶ 8 When trial commenced on January 26, 2010, nothing was said by the trial court or any of the attorneys about defendant's right to a jury trial. Instead, the parties waived opening

statements and proceeded to present witnesses. A written jury waiver, signed by defendant and dated January 26, 2010, is included in the record. The written waiver, which appears to be a pre-printed form, provides as follows: "I, the undersigned, do hereby waive jury trial and submit the above entitled cause to the Court for hearing." The half-sheet entry for the date of trial includes a handwritten notation which is practically illegible, but which the State asserts is "JW," an abbreviation for "jury waiver."

¶ 9 At trial, Illinois State Police trooper J. Malave testified that about 10:50 p.m. on August 16, 2008, he was dispatched to respond to a report of a person sleeping in a parked vehicle on the shoulder of I-290. When Trooper Malave arrived on the scene, he found defendant sleeping in the driver's seat of the vehicle, which was running. Trooper Malave knocked on the window, and when defendant did not respond, he opened the driver's door. Defendant woke up, answered Malave's questions, and produced a State identification card in lieu of a driver's license. Trooper Malave noted two beer bottles in the center console, one of which was open. Defendant's eyes were glassy and bloodshot, his speech was slurred and mumbled, and his breath carried a strong odor of alcohol. Malave ran a check on defendant's identification and learned that his driver's license was suspended.

¶ 10 Trooper Malave testified that defendant agreed to perform standardized field sobriety tests including the horizontal gaze nystagmus, walk and turn test, and one-legged stand. In Malave's opinion, defendant failed all three tests. Thereafter, Trooper Malave transported defendant to a police station. After reading defendant the "Warning to Motorists" and observing him for 20 minutes, Malave conducted a breath test on defendant to determine his blood alcohol content, which was .190. Malave advised defendant of his *Miranda* rights and then asked defendant if he had been drinking that evening. Defendant initially said no, but then stated he had drunk six beers.

¶ 11 The State entered into evidence a breath test ticket from the test conducted on defendant, as well as defendant's driving abstract, which revealed that on the date in question, defendant's driving privileges were suspended for a statutory summary suspension.

¶ 12 Kelvin Lewis testified on defendant's behalf. He stated that on the day in question, he went to a barbecue with defendant. Defendant had been drinking, so when they left the barbecue, Lewis drove defendant's truck. Defendant fell asleep during the drive. As Lewis drove on I-290, the truck started having engine problems. Lewis pulled over on the shoulder and looked under the hood. He could not find anything wrong and restarted the truck. The truck would not go into gear, so Lewis called his girlfriend to come get him and defendant. However, when his girlfriend arrived, she was driving a two-seat car, so she was only able to pick up Lewis. When Lewis left defendant, the keys were in defendant's ignition, but the truck was not running. Lewis came back within the hour, intending to pick up defendant, but defendant and his truck were gone.

¶ 13 Defendant testified that on the day in question, he went to a party with Kelvin Lewis. At the party, defendant drank beer and vodka. When they left the party about 10 p.m., Lewis drove defendant's truck while defendant rode in the passenger seat. Defendant acknowledged that there were "some bottles" of beer in the center console.

¶ 14 Defendant testified that as Lewis drove along I-290, he vaguely remembered Lewis asking him something about how the truck was performing. Lewis pulled off onto the shoulder. At some point, defendant got out of the truck to relieve himself. When he got back into the truck, Lewis was not there. Defendant sat in the driver's seat, and he testified that the air conditioning was on because it was hot. Eventually, a State trooper approached the car and placed him under arrest. According to defendant's testimony, his truck was towed from the scene and subsequently taken to a repair shop. A new transmission was installed a few days later.

¶ 15 Following closing arguments, the trial court found defendant guilty of aggravated driving

under the influence of alcohol. The court subsequently sentenced defendant to 18 months of probation.

¶ 16 On appeal, defendant contends that he was denied his fundamental right to a trial by jury where the trial court conducted a bench trial despite the absence of a jury waiver in open court. Defendant acknowledges that the common law record includes a written jury waiver, but argues that the record does not reflect that he signed the waiver in open court. He asserts that where the report of proceedings reflects no in-court jury waiver, it cannot be shown that he voluntarily and knowingly waived his right to a jury trial.

¶ 17 As an initial matter, the State argues that due to defendant's failure to raise this issue during trial or in a posttrial motion, it is waived. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). However, plain errors affecting substantial rights may be reviewed even if they were not identified during trial or in a posttrial motion. *In re R.A.B.*, 197 Ill. 2d 358, 362-63 (2001). The right to a trial by jury is a fundamental right; therefore, we will consider the issue of whether that right was violated under the plain error doctrine. *People v. Bracey*, 213 Ill. 2d 265, 270 (2004); *R.A.B.*, 197 Ill. 2d at 363. Because the facts of the instant case are not in dispute, our review is *de novo*. *Bracey*, 213 Ill. 2d at 270.

¶ 18 Under section 103-6 of the Code of Criminal Procedure of 1963, an accused has the right to a trial by jury unless that right is "understandingly waived by the defendant in open court." 725 ILCS 5/103-6 (West 2008). The determination whether a jury waiver is effective does not rest on any precise formula, but instead, turns on the particular facts and circumstances of each case. *Bracey*, 213 Ill. 2d at 269. The existence of a written jury waiver, alone, does not validly waive a defendant's right to a jury trial. *People v. Scott*, 186 Ill. 2d 283, 284 (1999); see also *People v. Dominguez*, 2012 IL 111336, ¶¶ 27, 30 (written admonishments serve as supplements to oral admonishments, not substitutes). In general, a jury waiver is effective if it is made by

defense counsel in the defendant's presence in open court, without objection by the defendant. *Bracey*, 213 Ill. 2d at 270. However, our supreme court has noted that it has "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." *Scott*, 186 Ill. 2d at 285. Regarding the contents of such a conversation, "Something in the discussion must indicate to the defendant that his or her right to a jury trial is being waived." *People v. Rincon*, 387 Ill. App. 3d 708, 718 (2008).

¶ 19 Here, it is undisputed that defendant executed a written jury waiver. In addition, on four different pretrial dates, defense counsel or the trial court made reference to a bench trial without objection from defendant. Specifically, over the course of four pretrial court dates, defense counsel uttered the terms "bench trial" and "bench" three times each, while the trial court said "bench trial" twice and "bench" once.

¶ 20 The question in the instant case is whether the existence of the written waiver, along with counsel's and the trial court's pretrial utterances of "bench" or "bench trial," provide a sufficient basis to show that defendant knowingly and understandingly waived his right to a jury trial. See *Bracey*, 213 Ill. 2d at 271, 272. We find that the evidence does not support a finding that such a waiver occurred. While counsel and the trial court made references to a bench trial, those references were insufficient to constitute a "discussion" of jury waiver in open court. See *R.A.B.*, 197 Ill. 2d at 367; *People v. Williamson*, 311 Ill. App. 3d 54, 59 (1999). The references to a "bench" or a "bench trial" arose during exchanges regarding scheduling matters, not substantive discourses of what a jury trial or bench trial entails. Neither the attorneys nor the court mentioned defendant's right to a jury trial or the option to waive such a right. In fact, the only time the word "jury" was ever used during the pretrial proceedings at issue was when the trial court rejected a possible trial date for defendant because it was conducting a separate jury trial the same week. In short, nothing was said at the pretrial dates that would have indicated to

defendant that he had a right to a jury trial or that his right to a jury trial was being waived. In these circumstances, we cannot find that a valid jury waiver exists.

¶ 21 The State maintains that defendant's silence at the pretrial proceedings when defense counsel or the trial court mentioned a bench trial, coupled with the written jury waiver, constitutes an effective jury waiver. However, the cases relied upon by the State in making its arguments are distinguishable. Unlike the instant case, in the cases cited by the State, either counsel or the court mentioned the right to a jury trial or discussed the jury waiver in the defendant's presence in open court. See, e.g., *People v. Frey*, 103 Ill. 2d 327, 330, 333 (1984) (the defendant was advised of his right to a jury trial, and "was present at some point prior to trial when the jury waiver was discussed"); *People v. Reynolds*, 359 Ill. App. 3d 207, 217 (2005) (the written waiver indicated the defendant had understandingly waived his right to a jury trial in open court); *People v. Asselborn*, 278 Ill. App. 3d 960, 962 (1996) (prior to the onset of opening statements, the trial court noted the defendant's jury waiver and asked whether he was opting for bench or jury); *People v. Tucker*, 183 Ill. App. 3d 333, 334 (1989) (the trial court asked counsel in the defendant's presence whether he wanted a jury trial, and counsel declined, stating his request for a bench trial).

¶ 22 We reverse the judgment of the circuit court and remand for a new trial. Given our disposition, we need not address defendant's contention that he is entitled to \$15 presentence custody credit toward his assessed fines. Since the cause is remanded, we have reviewed the record and find that the evidence presented was sufficient to convict defendant of aggravated driving under the influence of alcohol. Accordingly, there will be no double jeopardy violation. *R.A.B.*, 197 Ill. 2d at 369.

¶ 23 For the reasons explained above, we reverse the judgment of the circuit court of Cook

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County and remand for a new trial.

¶ 24 Reversed and remanded.