2015 IL App (1st) 121642-U

SIXTH DIVISION
February 27, 2015

No. 1-12-1642

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. 09 CR 22129
	)	
LARRY MINNIEFIELD,	)	Honorable
	)	Michael Brown,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Hoffman and Justice Hall concurred in the judgment.

O R D E R

¶ 1 ***Held:*** The trial court erred when it denied defendant's request to waive a jury trial, because it lacked the discretion to do so at a point where the jury had been selected, but not yet impaneled and sworn in.

¶ 2 Following a jury trial, defendant Larry Minniefield was found guilty of failure to register as a sex offender pursuant to sections 3(a)(1),(c)(4) of the Sex Offender Registration Act (the Act), (730 ILCS 150/3(a)(1),(c)(4) (2010)) and sentenced to 10 years in prison. On appeal,

defendant contends that the court violated his state constitutional right to a bench trial by denying his waiver of a jury trial. He also contends that the trial court erred in failing to substantially comply with Supreme Court Rule 401(a) (eff. July 1, 1984) prior to allowing defendant to waive counsel and represent himself *pro se* during various "critical stages" of the proceedings. We reverse and remand.

¶ 3 In September 2009, defendant was indicted for violation of the Act. The State alleged that defendant, having been previously convicted of rape under case number 80 C 3054, knowingly failed to register as a sex offender. At a hearing on October 1, 2009, defendant asserted his right to proceed *pro se*. The trial court granted defendant's request, and further informed him that standby counsel would not be appointed. Defendant presented a *pro se* motion to quash his arrest, examined the arresting officer, and began to argue the motion. During argument, defendant requested the appointment of counsel to "assist" him. The trial court again informed defendant that standby counsel would not be appointed, and, after discussion with defendant, appointed the public defender to represent him.

¶ 4 In May 2010, defendant attempted to file a *pro se* motion "in the nature of a *habeas corpus* and *mandamus*." The public defender requested leave to withdraw, if defendant intended to file *pro se* motions. After discussion with defendant, the trial court granted the public defender leave to withdraw and allowed defendant to proceed *pro se*.

¶ 5 On October 17, 2011, the State answered ready for trial. Although he had previously requested to proceed *pro se*, defendant stated that he needed an attorney to represent him, and the public defender was reappointed. Despite the appointment, defendant attempted to file a *pro se*

motion asserting that the trial court lacked jurisdiction over defendant because he was a "Moorish American Muslim Asiac." At the next hearing, the public defender representing defendant agreed with the State to a January 9, 2012 trial date. Defendant attempted unsuccessfully to address the court as he was being escorted from the courtroom.

¶ 6 On January 9, 2012, the trial court asked defendant what kind of trial he wished to have. Defendant did not respond, instead, he asked leave to file some motions and to represent himself *pro se* because he was "being harassed" by counsel. The court found that defendant was "a disruptive person," found that his request was for the purpose of delay of trial, denied his request, and proceeded to jury selection. Defendant elected to return to "the bullpen" during jury selection. After the jury selection process was completed, the trial court directed the jurors to come back the next morning at 9:30 a.m. The same day, defendant filed a *pro se* motion for substitution of judge, which was denied.

¶ 7 On January 10, 2012, defendant asked to waive his right to a jury trial. The court denied defendant's request, ruling that the right to waive a jury trial had become discretionary because the jury had already been selected. Defendant objected stating:

> "I would like to waive my right to a jury and I have the right to do so. But—And also, the jury has not been impounded, [*sic*] has not been sworn in and there has not been any evidence taken, so therefore jeopardy has not attached in this case. And I still reserve the right to exert what I am telling you now, that I waive my right to a jury."

After further discussion, the trial court acted in accordance with its earlier ruling and swore in the jury.

¶ 8 At trial, the State presented the testimony of the two police officers that arrested defendant. They testified consistently that defendant told them that he had been living in a park. When asked about his obligation to register defendant replied that the police didn't need to know what he was doing. An Illinois Department of Corrections field service representative testified that the day before defendant was discharged to parole he met with defendant and explained his duty to register as a sex offender. The State also presented the testimony of a police officer who searched a police department database and "hard files" and discovered that defendant had not registered as a sex offender. Finally, the State presented a certified copy of defendant's conviction for rape under case number 80 C 003054-01.

¶ 9 The State rested, defendant elected not to testify, and the defense rested. The trial court instructed the jury, and they retired to deliberate.

¶ 10 The jury found defendant guilty of failure to register as a sex offender. At sentencing, defendant attempted to file a *pro se* motion, and when told that he could not do so while represented by counsel, elected to proceed *pro se*. During the sentencing hearing, the trial court found that defendant's 1999 conviction for aggravated battery rendered defendant subject to an extended sentence, because defendant committed a same or greater offense within 10 years. The court sentenced defendant to 10 years in prison.

¶ 11 On appeal, defendant contends that the court violated his state constitutional right to a bench trial by denying his request to waive a jury trial. The State responds that defendant has forfeited this contention by failing to raise it at the trial level.

¶ 12 To preserve an issue for appeal, both a contemporaneous objection and a written posttrial motion are required. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). In this case, defendant did not preserve this issue in his *pro se* motion for a new trial. As such, we find that this issue has been forfeited. See *People v. Jones*, 235 Ill. App. 3d 342, 350 (1992). Defendant acknowledges his failure to raise this issue in the trial court, but argues that the trial court's action amounted to plain error. See Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967). The plain-error doctrine allows a reviewing court to consider an unpreserved error in two instances: (1) where a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error; or (2) where a clear or obvious error occurred 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. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007); see also *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). Our supreme court has held that a violation of a defendant's right to elect whether to proceed to a bench or jury trial constitutes a plain error of the second type. *People v. Bracey*, 213 Ill. 2d 265, 270 (2004), citing *In re R.A.B.*, 197 Ill. 2d 358, 363 (2001).

¶ 13 The first step in determining whether plain error exists is determining whether an error actually occurred. *People v. Thomas*, 2014 IL App (2d) 121203, ¶17; *People v. Downs*, 2014 IL App (2d) 121156, ¶ 21. Accordingly, we turn to whether the trial court's denial of defendant's request constitutes error.

¶ 14 The accused in a criminal proceeding has a constitutional right to a jury trial (U.S. Const., amends. VI, XIV; Ill. Const.1970, art. I, §§ 8, 13) unless he understandingly waives the right in

open court. 725 ILCS 5/103-6 (West 2008); *People v. Stokes*, 281 Ill. App. 3d 972, 977 (1996). Prior to the start of trial, a defendant has an unfettered right to select either trial by jury or by the court. See *People v. Zemblidge*, 104 Ill. App. 3d 654, 656 (1982). Once an election for a jury trial is made and testimony begins, defendant has no absolute right to waive the jury. *Id*. "[A] motion to waive the jury after commencement of trial [should] be addressed to the sound discretion of the trial court." *Id.* at 657. Whether a defendant validly waived his right to a jury trial is a question of law subject to *de novo* review. *People v. Victors*, 353, Ill. App. 3d 801, 805 (2004).

¶ 15 Defendant and the State both agree that prior to commencement of trial a defendant has the right to waive a jury trial. However, they disagree on what event marks the "start of trial" for purposes of a valid jury waiver. Defendant contends that the start of trial occurs once the jury is impaneled and sworn citing *People v. Frazier*, 127 Ill. App. 3d 151, 152 (1984). The State relies on *People v. Vest*, 397 Ill. App. 3d 289, 294-95 (2009) to argue that *voir dire* marks the beginning of trial. However, the *Vest* court was concerned with an issue distinct from the right to waive a jury trial; it was considering, instead, the timing of a motion challenging a defective indictment. See *Id*. at 296. We agree with defendant that precedent supports the rule that for the purposes of jury waiver a trial is deemed to have commenced only after the jury is impaneled and sworn. See *People v. Rand*, 291 Ill. App. 3d 431, 436 (1997), citing *People v. Shick*, 101 Ill. App. 2d 377, 379 (1968).

¶ 16 In this case, defendant attempted to waive his right to a jury trial after the jury had been selected, but before it was impaneled and sworn. The court denied defendant's attempted jury

waiver, holding that the right to waive a jury trial had become discretionary because the jury had already been selected. This represented a mistake of law. This court has long held that prior to the start of trial a defendant has an absolute right to elect trial by jury or by the court. See *People ex rel. Daley v. Joyce*, 126 Ill. 2d 209, 222 (1988); see also *Zemblidge*, 104 Ill. App. 3d at 656. At the point where defendant requested to waive a jury trial, the jury had not been sworn in nor had they heard any testimony against defendant. Because trial had not started when defendant asked to waive a jury trial, the court was obligated to honor defendant's request. See *Zemblidge*, 104 Ill. App. 3d at 656. By prematurely exercising its discretion and denying defendant his right to waive a jury trial, the court committed an error so serious that it affected the fairness of defendant's trial. See *Piatkowski*, 225 Ill. 2d at 565.

¶ 17 We are not unsympathetic to the plight of the trial court. Defendant was clearly disruptive, and his vacillation between representation through counsel and *pro se* representation delayed the trial significantly. It is understandable that, when defendant attempted to exercise his right to a bench trial that it was treated as a delay tactic. Nevertheless, defendant was absolutely correct when he asserted that he still possessed an unfettered right to elect a bench trial at that point in the proceedings. Therefore, defendant's conviction should be reversed and the cause remanded for a new trial.

¶ 18 Having found that retrial is required because defendant was denied his right to waive a jury trial, we need not consider his alternative argument regarding violation of Supreme Court Rule 401.

¶ 19 We further note that, the State presented sufficient evidence to prove defendant guilty of failure to register under the Act, such that remand for a new trial does not implicate double jeopardy concerns. See *Frazier*, 127 Ill. App. 3d at 153. We make no finding of guilt, however, that would be binding on remand. *Id.* at 153-54.

¶ 20 We reverse the judgment of the Circuit court of Cook County and remand the cause for further proceedings.

¶ 21 Reversed and remanded.