2015 IL App (1st) 131289-U

SIXTH DIVISION
January 23, 2015

No. 1-13-1289

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Petitioner-Appellee,	)	Cook County.
	)	
v.	)	12 JD 03075
	)	
JOVANTE L., a minor,	)	Honorable
	)	Andrew Berman,
Respondent-Appellant.	)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Hoffman and Justice Lampkin concurred in the judgment.

ORDER

HELD: The respondent did not knowingly and voluntarily waive his right to a jury trial.

¶ 1 On August 3, 2012, the State filed a petition for adjudication of wardship alleging that the respondent, Jovante L., was delinquent in that he committed the offenses of robbery, theft from a person, and aggravated battery. According to the State's evidence, on June 28, 2012, respondent

(who was 16 years old at the time) and a co-offender, robbed the victim by snatching a cell phone from her hand as she stood on a school playground talking on the phone. Prior to the adjudicatory hearing, the State dismissed the charges of theft from a person and aggravated battery, and proceeded solely on the robbery charge. Following an adjudicatory hearing before the bench and without a jury, respondent was adjudicated delinquent of robbery. He was subsequently committed to the Department of Juvenile Justice as an habitual juvenile offender until his twenty-first birthday pursuant to section 5-815(f) of the Juvenile Court Act of 1987(Act) (705 ILCS 405/5-815(f) (West 2012)).

¶ 2 On appeal, respondent contends: (1) he did not knowingly and voluntarily waive his right to a jury trial; and (2) the trial court created a *per se* conflict of interest when it appointed defense counsel to act both as his attorney and guardian *ad litem*. Respondent further argues on appeal that the habitual juvenile offender provision of the Act is unconstitutional under: the eighth amendment of the United States Constitution, the proportionate penalties clause of the Illinois Constitution, and the Supreme Court's decision in *Miller v. Alabama*, 567 U.S. ---- , 132 S. Ct. 2455 (2012). Respondent also claims the habitual juvenile offender provision of the Act violates federal and state due process and the equal protection clauses of the United States and Illinois Constitutions.

¶ 3 We believe the dispositive issue is whether respondent knowingly and voluntarily waived his right to a jury trial. We answer in the negative and therefore reverse and remand for a new adjudicatory hearing.

¶ 4 ANALYSIS

¶ 5 As an initial matter, the State contends that respondent forfeited review of the jury-waiver issue because he failed to object to his counsel's alleged request for a bench trial and he failed to

raise the issue in a posttrial motion. A defendant's failure to object to an error at trial and raise the issue in a posttrial motion ordinarily results in forfeiture of the issue. *People v. Enoch,* 122 Ill. 2d 176, 186 (1988). In delinquency proceedings, juveniles are not required to file posttrial motions in order to preserve issues for appellate review (*In re Samantha V.*, 234 Ill. 2d 359, 368 (2009)), but they are still generally required to make objections at trial in order to preserve a claimed error for review. *Id*. As a result, the respondent's failure to object to an alleged error in the trial court below would ordinarily result in forfeiture of the issue on appeal. However, since this case deals with the knowing waiver of the fundamental right to a jury trial, we will consider the issue under the second prong of the plain error doctrine which allows a reviewing court to consider a forfeited error when the error is so serious it affected the fairness of the trial and challenged the integrity of the judicial process. See *In re R.A.B.*, 197 Ill. 2d 358, 362-63 (2001).

¶ 6 The right to a jury trial in a criminal case is guaranteed by both the federal and the state constitutions. U.S. Const., amend. VI; Ill. Const. 1970, art. I, §§ 8, 13. Our supreme court has noted that " ' virtually all of the constitutional requirements of a criminal trial have been introduced into juvenile delinquency proceedings *** includ[ing] the right to adequate notice of charges, the right to counsel, the right to remain silent, and the right to confront and cross-examine witnesses.' " *In re R.A.B.*, 197 Ill. 2d at 363 (quoting *In re A.G.*, 195 Ill. 2d 313, 318 (2001)). Although jury trials are not typically required in juvenile proceedings (*McKeiver v. Pennsylvania*, 403 U.S. 528, 547 (1971)), juveniles adjudicated as habitual offenders under the habitual juvenile offender provision of the Act have a statutory right to a jury trial. *In re G.O.*, 191 Ill. 2d 37, 42 (2000).

¶ 7 Section 5-815 of the Act governs habitual juvenile offenders: those who have been adjudicated delinquent twice before for what would be a felony if they had been prosecuted as

adults and who are thereafter adjudicated delinquent minors for a third time. 705 ILCS 405/5-815(a) (West 2012). In regard to an habitual juvenile offender's right to a jury trial under the Act, section 5-815(d) of the habitual juvenile offender provision of the Act (705 ILCS 405/5-815(d) (West 2012)), provides that "Trial on such petition shall be by jury unless the minor demands, in open court and with advise of counsel, a trial by the court without jury."

¶ 8 A jury waiver is not valid unless it is made knowingly and understandingly in open court. *People v. Bracey*, 213 Ill. 2d 265, 269 (2004); 725 ILCS 5/103-6 (West 1998). The determination of whether a jury waiver is valid does not rest on a precise formula but instead depends on the particular facts and circumstances of each case. *In re R.A.B.*, 197 Ill. 2d at 364. Where, as here, the relevant facts are not in dispute, the issue of whether a defendant validly waived his right to a jury trial is reviewed *de novo* as a question of law. *People v. Ruiz*, 367 Ill. App. 3d 236, 238 (2006).

¶ 9 Applying these principles to the present case, we find that respondent did not knowingly and voluntarily waive his right to a jury trial. The State relies on the following colloquy in support of it's assertion that the respondent knowingly and voluntarily waived his right to a jury trial:

> "THE COURT: Yeah. I mean, if it's just a question of -- I mean, you can also talk to the State and come up with a -- in theory and come up with a trial -- I mean, you can do all of that without involving me, and then just --
>
> [Defense Counsel]: Okay.
>
> THE COURT: -- somebody can just stand up here and say, 'Okay, we've agreed on this date for the jury and da da da da da.'
>
> [Defense Counsel]: Okay.

[Assistant State's Attorney]: That's fine, Judge.

THE COURT: So, I mean, that's -- all of this doesn't have to be done in front of a bench.

[Defense Counsel]: Okay.

THE COURT: You --

[Defense Counsel]: We could do that.

***

[Defense Counsel]: Right, and the minor has to decide if he wants a bench or jury."

¶ 10 Here, the only reference to a jury trial is from defense counsel who stated, "Right, and the minor has to decide if he wants a bench or jury." The remainder of the dialogue in the transcript merely pertains to scheduling the upcoming trial which depended on whether the trial was going to be a bench or jury trial. There is no evidence in the record that the trial court advised respondent of his right to a jury trial or that he personally waived the right in open court. There is no indication that respondent was aware of his right to a jury trial or that he knowingly and intelligently waived that right.

¶ 11 Although the record contains a signed jury waiver, the record also shows there was only one mention of the waiver, which occurred after respondent had already been convicted of robbery. The State commented, for purposes of the record, that a written jury waiver was previously entered. The written jury waiver respondent signed was filed on an earlier date, December 3, 2012. There was no courtroom discussion of respondent's waiver of his right to a jury trial. Respondent never acknowledged the written jury waiver in open court either affirmatively or through his silence.

¶ 12 Under the facts and circumstances of this case, respondent's written jury waiver, standing alone, is insufficient to prove a valid waiver of his right to a jury trial. "[O]ur supreme court has stated, there can never be a valid jury waiver where the defendant was not present in open court 'when a jury waiver, written or otherwise, was at least discussed.' " *People v. Victors*, 353 Ill. App. 3d 801, 806 (2004) (quoting *People v. Scott*, 186 Ill. 2d 283, 285 (1999)). Because there is no evidence in the record that the respondent waived his right to a jury trial in open court, his written jury waiver must be deemed invalid. A "written jury waiver, standing alone, is insufficient to prove a valid waiver of the right to a jury trial." *People v. Thornton*, 363 Ill. App. 3d 481, 485 (2006).

¶ 13 In light of the fact that we are remanding for a new adjudicatory hearing, we need not address respondent's contention that the trial court created a *per se* conflict of interest when it appointed defense counsel to act both as his attorney and guardian *ad litem*. Finally, before concluding, we note that our court has recently determined that the habitual juvenile offender provision of the Act does not violate the eighth amendment of the United States Constitution, the proportionate penalties clause of the Illinois Constitution, or the federal and state due process and the equal protection clauses of the United States and Illinois Constitutions. See *In re A.P.*, 2014 IL App (1st) 140327, ¶¶ 13, 33. After reviewing the facts of this case, we see no reason to depart from this court's holding in *In re A.P.*, 2014 IL App (1st) 140327.

¶ 14 For the foregoing reasons, we reverse the adjudication of delinquency and remand for a new adjudicatory hearing.

¶ 15 Reversed and remanded.