2015 IL App (1st) 133816-U

FIFTH DIVISION
DECEMBER 4, 2015

No. 1-13-3816

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. 13 CR 8683
	)	
VICTOR WATKINS,	)	Honorable
	)	Joseph M. Claps,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE GORDON delivered the judgment of the court.
Justices Lampkin and Palmer concurred in the judgment.

O R D E R

¶ 1 *Held*: The trial court sufficiently admonished defendant to ensure he knowingly and voluntarily waived his right to a jury trial. Defendant's sentence is not excessive.

¶ 2 Following a bench trial, defendant Victor Watkins was convicted of burglary and, based on his criminal history, sentenced to a Class X term of 12 years in prison. On appeal, defendant contends that the trial court plainly erred in failing to ensure that he understandingly waived his right to a jury trial where the trial court did not admonish him concerning the nature of the right to a jury trial and where he had a history of schizoaffective disorder and distrust of his appointed

counsel. In the alternative, defendant contends that his sentence is excessive where his previous burglary conviction was punished with only one year in prison and he was successfully fighting his addiction to cocaine.

¶ 3 For the reasons that follow, we affirm.

¶ 4 Defendant's conviction arose from the events of August 4, 2011, when Donita Nurse's automobile was burglarized. Based on DNA evidence, defendant was arrested almost two years later, on April 8, 2013. He was charged with one count of burglary.

¶ 5 At defendant's arraignment, the trial court asked defendant, "And do you understand what a trial by a jury is?" Defendant answered, "Yes, I do." The trial court then informed defendant of his various rights and indicated that it had appointed him an attorney. At the next court appearance, defendant told the trial court that his attorney had refused to file a motion to quash arrest. He also claimed that although he had been talking with his attorney, "it doesn't seem like anybody is concerned about my rights." Defense counsel denied having refused to file a motion, told the court that she would need discovery before she could file a motion, and reported that when she tried to explain this to defendant, he said he was going to contact the ARDC and hung up on her. The trial court advised defendant to let counsel obtain discovery and then explain the case to him.

¶ 6 During the next court appearance, the State asked the court to order defendant to comply with a buccal swab for confirmatory DNA testing. Trial counsel objected for the record because defendant believed "this" was unconstitutional. Defendant then addressed the court, asserting that his arrest violated the fourth amendment. The trial court granted the State's motion for a buccal swab.

¶ 7 At the next appearance, defendant was represented by a new assistant public defender. Defendant addressed the court, stating that he felt like he had a conflict of interest with the public defender's office "because there's been no judicial review of my arrest at this point, and I feel like it was a violation of my fourth amendment." Defendant stated that he had conversed with his new attorney, but that he wished to proceed *pro se* so that he could challenge his arrest for lack of probable cause. The trial court asked defense counsel to decide by the next court appearance whether she was going to file a motion to quash arrest and suppress evidence, after which the court would "ask you the question about whether or not there's going to be a BCX [(behavioral clinical examination)]."

¶ 8 When the case was next called, defendant requested that he be allowed to represent himself so that he could make a fourth amendment challenge to his arrest. Defendant stated, "Your honor, everyone is -- well, not everyone, but certain people are telling me there was no violation of the 4th Amendment." The trial court admonished defendant concerning his right to counsel and then permitted him to proceed *pro se*. That day, defendant filed a written *pro se* motion "to challenge the illegal or improper arrest," alleging that the arresting officers lacked probable cause and violated the fourth amendment.

¶ 9 At the hearing on the motion to quash arrest, defendant presented two witnesses. Chicago police detective Freeman testified that while he was investigating the burglary of the victim's automobile, he learned that blood recovered from the automobile had been tested for DNA and had produced a sample that matched defendant. Detective Freeman spoke with the victim to determine if there was a reason for defendant's DNA to be at the crime scene.

¶ 10 Chicago police officer Anthony Martin testified that on April 8, 2013, Officer Freeman gave him a report indicating that defendant's DNA was recovered from the victim's automobile.

Officer Martin testified that he called defendant and convinced him to agree to look at some pictures to help him investigate an unrelated robbery in which defendant was the victim. Defendant gave his location, which was an Alcoholics Anonymous meeting. Officer Martin and another officer went to the meeting's location and arrested defendant. Officer Martin testified that defendant was arrested based on the DNA evidence and a "CODIS [(Combined DNA Index System)] hit."

¶ 11 In closing argument, the State asserted that the DNA match to the blood at the scene and Detective Freeman's interview with the victim provided probable cause for the police to arrest defendant. Defendant argued that the report Detective Freeman received regarding defendant's DNA did not establish probable cause and that a "CODIS hit holds no weight in a court of law" because it is "a policy to circumvent the fourth amendment or the arrest warrant requirement of the Constitution." Following arguments, the trial court denied defendant's motion to quash arrest.

¶ 12 Five days after the hearing on the motion to quash arrest, defendant appeared in court, stated that he wanted "to get this case over with," and asked the trial court to reappoint counsel. The trial court did so, and defense counsel agreed to a trial on October 1, 2013. Immediately thereafter, the assistant State's Attorney asked, "Bench?" and defense counsel responded, "Yes."

¶ 13 When defendant's case was called on October 1, 2013, the trial court indicated it had received a written jury waiver form. The court then engaged in the following conversation with defendant:

> "THE COURT: Did you sign this document entitled jury waiver?
>
> DEFENDANT: Yes, I did, your Honor.
>
> THE COURT: Anybody make any promises or threats to get you to waive your right to trial by jury?

DEFENDANT: No, they did not.

THE COURT: You make that decision of your own free will?

DEFENDANT: Yes, your Honor.

THE COURT: Okay. Jury waiver accepted."

¶ 14 At trial, Donita Nurse testified that on the evening of August 3, 2011, she parked her vehicle on the street. When she returned to the vehicle the next morning, the front passenger side window was broken and the passenger door and trunk were open. The victim testified that her mother's Vicodin pills were missing from the automobile's front cup holder and some hair products that she used for her job were missing from the trunk. The victim drove to a repair shop to have the broken window fixed and noticed blood on the interior handle of the front passenger side door. After the repairs were done, she drove to a police station, made a report, and watched while an evidence technician swabbed the inside of the vehicle. The victim testified that she did not know or recognize defendant and had not given him permission to enter her automobile.

¶ 15 Chicago police officer Kamil Judeh, an evidence technician, testified that he took photographs of the victim's automobile and collected samples from two spots of blood on the interior of one of the automobile's doors. The parties stipulated that if called, a Cook County State's Attorney investigator would have testified that she took a buccal swab from defendant, and that an Illinois State Police forensic scientist would have testified that he prepared the buccal swabs and blood samples for analysis. The parties further stipulated that another Illinois State Police forensic scientist would have testified that she analyzed the DNA content of the swabs and samples and concluded that defendant could not be excluded as a contributor to the blood found in the victim's vehicle, with only one in 2.1 quintillion black men sharing the relevant DNA profile.

¶ 16 Defendant did not present any evidence or testify on his own behalf. The trial court found defendant guilty of burglary.

¶ 17 Defense counsel subsequently filed a motion to reconsider or, in the alternative, motion for a new trial, as well as an amended motion to reconsider. After the court heard argument on the motion, defendant addressed the court, stating, among other things, "Now, I'm not a lawyer but I do know my rights and I can read." The trial court denied the motion.

¶ 18 At sentencing, the trial court indicated that it had received a copy of the presentence investigation (PSI) report. The PSI report listed the following prior felony convictions and sentences: five years in prison for robbery in 1992; three years in prison for burglary in 2001; 24 months of probation for burglary in 2003; 30 months of probation for burglary in 2006; concurrent terms of one year in prison for two convictions of possession of burglary tools in 2006; and 13 months in prison for possession of a controlled substance in 2007. According to the PSI report, defendant was an only child whose father committed suicide when he was four years old. Defendant was raised by his mother and stepfather. He reported that his mother took his father's Veterans Administration (VA) benefits and took money that his grandfather gave him, that both his mother and stepfather would beat him, and that his mother "kicked him out" of her home when he was 17 years old because his father's VA benefits ran out. Defendant reported that he dropped out of high school because he needed to work.

¶ 19 Defendant reported that he started drinking regularly when he was 15 years old. At one point, he would drink about a case of beer and a fifth of liquor every day, but he stopped drinking about two years prior to the report. According to the PSI report, defendant stopped smoking marijuana as a teen because it made him violently paranoid. The then smoked PCP daily for three years, but stopped because it made him "really sick." Defendant also used cocaine

and crack cocaine daily but stopped about two years prior to the report. He reported that he had been to treatment about four times in his life, and that two years ago, he "got sick of the life he was leading and used the information he learned from his prior treatment episodes to get clean from drugs and alcohol." He had not used any illegal drugs in two years.

¶ 20 Defendant reported that he joined the Black P Stone street gang when he was 14 years old. He remained a member until he was 30 and had held the rank of general. More recently, defendant spent his days attending meetings, going to college, and working. All of his friends were "recovering friends." Defendant reported that he had been hospitalized numerous times for mental health issues and had been diagnosed with schizoid-affective disorder. He was taking two prescriptions of psychotropic medications. He had been court ordered to complete three behavioral clinical examinations, the last one in 2006.

¶ 21 The PSI report indicated that defendant stated he had last been employed by Income Tax Solutions and that the company's owner was also defendant's substance abuse sponsor. However, the presentence investigator was unable to contact the business because its number was disconnected. Defendant also reported that he had been working as an Avon representative for the last six months and received $900 per month in disability payments for his mental health issues.

¶ 22 Neither the State nor defense counsel argued in aggravation or mitigation. The trial court sentenced defendant to 12 years in prison. Defendant's motion to reduce his sentence was denied, and a notice of appeal was filed.

¶ 23 On appeal, defendant contends that the trial court plainly erred in failing to ensure that he understandingly waived his right to a jury trial where the trial court did not admonish him concerning the nature of the right to a jury trial and where he had a history of schizoaffective

disorder and distrust of his appointed counsel. Defendant argues that although the trial court inquired into the voluntariness of the plea, it did not make any inquiries to ensure that he understood his right to a jury trial or the nature of a jury trial. Relying on *People v. Murff*, 69 Ill. App. 3d 560 (1979), defendant argues that due to his history of mental disorders and his interactions with defense counsel, "greater concern or consideration" was necessary to ensure that his constitutional waivers were made knowingly. He asserts that the record shows his mental disorder was interfering with defense counsel's ability to advise him about the law, as he had rejected information given to him by counsel, thought counsel was not concerned about his rights, and believed counsel was lying to him about the law.

¶ 24 As an initial matter, we note that defendant did not raise the validity of his jury waiver at trial or in a posttrial motion. Therefore, the issue is procedurally defaulted. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Nevertheless, because the right to a jury trial is a fundamental right, whether that right has been violated is a matter that may be considered under the plain error rule. *People v. Bracey*, 213 Ill. 2d 265, 270 (2004); *In re R.A.B.*, 197 Ill. 2d 358, 363 (2001). The first step of plain error review is to determine whether error occurred. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009); *People v. Bannister*, 232 Ill. 2d 52, 65 (2008). Here, for the reasons that follow, we find no error.

¶ 25 The right to a trial by jury is a fundamental right that a criminal defendant may waive so long as he does so knowingly and voluntarily. *Bannister*, 232 Ill. 2d at 65; see also 725 ILCS 5/103-6 (West 2012) ("Every person accused of an offense shall have the right to a trial by jury unless *** understandingly waived by defendant in open court"). Whether a jury waiver is valid is not determined by an exact formula, but rather, depends on the particular facts and circumstances of each case. *Bracey*, 213 Ill. 2d at 269. Such circumstances include whether the

defendant has prior experience with the criminal justice system and therefore is familiar with his right to a jury trial and knows that he would receive a bench trial if he waives that right. *Bannister*, 232 Ill. 2d at 71. A trial court is required to ensure that a defendant has waived the right to a jury trial expressly and understandingly, but there is no requirement that a trial court give any specific admonition to a defendant for an effective jury waiver. *Bannister*, 232 Ill. 2d at 66. A written jury waiver, although not dispositive, helps demonstrate a defendant's intent to waive his right to a jury trial. *Bracey*, 213 Ill. 2d at 269-70. Where, as here, the facts of a case are not in dispute and the appeal presents solely a question of law, we review the validity of a defendant's jury waiver *de novo*. *Bannister*, 232 Ill. 2d at 66.

¶ 26 Several factors in the instant case demonstrate the knowing, understanding, and voluntary nature of defendant's waiver of his right to a jury trial. First, defendant had a significant criminal history, which suggests that he was familiar with the right to a jury trial and the consequences of waiving that right. Even if his previous convictions were by guilty pleas, presumably defendant was admonished upon and waived his right to jury trial on those prior occasions. Second, defendant executed a written jury waiver and acknowledged his signature on it. Third, at defendant's arraignment, the trial court specifically asked defendant whether he understood "what a trial by a jury is," and defendant answered, "Yes, I do." Finally, just before trial commenced, defendant, who was represented by counsel, assured the court that no one made any promises or threats to convince him to waive his right to a jury trial and that he had made that decision of his own free will. In our view, this record shows that the trial court fulfilled its duty to determine that defendant's jury waiver was made understandingly. While it may have been preferable for the court to explain to defendant the details of what a jury trial entails or to have defendant describe a jury trial in his own words, we cannot find that under the circumstances of

this case, the trial court committed error. There being no error, plain error review is not applicable and the issue remains forfeited.

¶ 27 We are not persuaded otherwise by the decision in *Murff*, 69 Ill. App. 3d 560. In *Murff*, two months before trial, the Psychiatric Institute of the Circuit Court of Cook County issued a report to the trial court following a psychiatric examination listing a diagnosis of "schizophrenia, paranoid type." *Murff*, 69 Ill. App. 3d at 562. On the day of trial, the following exchange took place between the trial court and the defendant:

> "COURT: You want to be tried by me today?
>
> DEFENDANT: Since I wouldn't be allowed to have a continuance, I guess I would have to.
>
> COURT: We are going to resolve it today. When you do, Mr. Murph [*sic*], you waive your right to a jury trial that means you give up your opportunity to have on trial your case before twelve people from throughout the community, and those people would determine your guilt or innocence. Do you understand that?
>
> DEFENDANT: Your Honor, I also have a witness, but the witness isn't here today.
>
> COURT: Well, I am denying your continuance, Mr. Murph [*sic*], because the case had been up sometime already, and we have to go to trial today." *Murff*, 69 Ill. App. 3d at 564.

¶ 28 On appeal, this court found that the defendant did not knowingly and understandingly waive his right to a trial by jury. *Murff*, 69 Ill. App. 3d at 564. We held that the record failed "to reveal that defendant understood the concept of a jury trial, or that he understood that he was entitled to demand a jury trial, or that he knowingly waived that right in favor of a trial by the

court." *Murff*, 69 Ill. App. 3d at 564. The defendant was never affirmative and unequivocal in any of his responses to the court's questions; instead, he stated that he "guess[ed]" he would have to be tried by the judge and then did not respond to the question whether he understood the meaning of a jury trial. *Murff*, 69 Ill. App. 3d at 564. This court also "noted that in view of the colloquy at the time of sentencing, the court was mindful that defendant was then receiving treatment from the Illinois Psychiatric Institute and a greater concern or consideration may have been necessary." *Murff*, 69 Ill. App. 3d at 564.

¶ 29 In the instant case, unlike *Murff*, no diagnosis was presented to the trial court prior to trial that would support the conclusion that defendant suffered from a mental condition that impaired his ability to understand and waive his right to a trial by jury. We are mindful that the trial court did mention to defense counsel at a pretrial appearance that it was planning to "ask you the question about whether or not there's going to be a BCX." However, in our view, this reference to a behavioral clinical examination does not rise to the level of pretrial notice of mental illness that was present in *Murff*. Additionally, while the PSI report in the instant case reflects that defendant reported he had been hospitalized numerous times for mental health issues, had been diagnosed with schizoid-affective disorder, was taking two prescription psychotropic medications, and had been court-ordered to complete three behavioral clinical examinations in the past, nothing in the record indicates that this information was available to the trial court at the time defendant waived his right to a jury trial. We disagree with defendant's assertion in his reply brief that the trial court had reason to be aware of his mental problems prior to sentencing because "his distrust of his defense counsel and idiosyncratic beliefs about the law were on display continuously before trial." Distrusting an attorney and having idiosyncratic beliefs about the fourth amendment does not equate to a psychological diagnosis. Finally, we find it significant

that in *Murff*, there was no evidence of a written jury waiver and no evidence that the defendant had any prior convictions. *Murff*, 69 Ill. App. 3d at 560-64. Here, in contrast, defendant executed a written jury waiver, acknowledged his signature on it, and had an extensive criminal history, which suggests familiarity with criminal proceedings. We find *Murff* inapposite.

¶ 30 Defendant's second contention on appeal is that his sentence is excessive. He argues that the trial court abused its discretion in sentencing him to 12 years in prison where his previous burglary conviction was punished with only one year in prison and where he was successfully fighting his addiction to cocaine. He asserts that remand for resentencing is necessary so that his potential for rehabilitation, as evidenced by his recent efforts to break his cocaine addiction, will be properly taken into account. He also argues that his history of burglaries and drug possession is significantly mitigated because those crimes were the result of his cocaine addiction, and that the instant crime, a late night automobile burglary, posed no risk of harm to any person.

¶ 31 Sentencing decisions are entitled to great deference on appeal because the trial court is in a superior position to fashion an appropriate sentence based on firsthand consideration of relevant sentencing factors, including the defendant's credibility, demeanor, moral character, mentality, social environment, habits, and age. *People v. Fern*, 189 Ill. 2d 48, 53 (1999). We will not disturb a sentencing determination absent an abuse of discretion. *People v. Hauschild*, 226 Ill. 2d 63, 90 (2007). Sentences within the permissible statutory range may be deemed the result of an abuse of discretion only where they are "greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense." *People v. Stacey*, 193 Ill. 2d 203, 210 (2000).

¶ 32 Here, the record indicates that the trial court was well aware of the nonviolent nature of the burglary at issue from having presided over defendant's trial. The court also reviewed the PSI

report, which included detailed information regarding defendant's criminal record,[1] history of drug use, and efforts to break his addictions. Where mitigating evidence has been presented, it is presumed that the trial court considered it. *People v. Sven*, 365 Ill. App. 3d 226, 242 (2006).

¶ 33 The trial court sentenced defendant to 12 years' imprisonment, a term well within the permissible Class X sentencing range of 6 to 30 years. 730 ILCS 5/5-4.5-25(a) (West 2012). Given the facts of the case, the interests of society, and the trial court's consideration of relevant aggravating and mitigating factors included in the PSI report, we cannot find that defendant's sentence is "greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense." *Stacey*, 193 Ill. 2d at 210. Accordingly, we find no abuse of discretion in the length of defendant's sentence.

¶ 34 For the reasons explained above, we affirm the judgment of the circuit court.

¶ 35 Affirmed.

[1] We note that contrary to defendant's assertion in his brief, he was not punished with one year in prison for a prior burglary conviction. Rather, he received three years in prison for burglary in 2001, 24 months of probation for burglary in 2003, 30 months of probation for burglary in 2006, and concurrent terms of one year in prison for two convictions of possession of burglary tools in 2006.