

NOTICE
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2015 IL App (5th) 130449-U

NO. 5-13-0449

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Montgomery County.
)	
v.)	No. 12-CF-132
)	
DARRYL D. TANDY,)	Honorable
)	Kelly D. Long,
Defendant-Appellant.)	Judge, presiding.

JUSTICE MOORE delivered the judgment of the court.
Justices Chapman and Cates concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's conviction and sentence affirmed as modified because: (1) the trial judge did not abuse his discretion when he denied the defendant's motion to rescind his waiver of jury trial, and (2) State concedes error with regard to the amount of the Violent Crime Victims Assessment charged to the defendant.

¶ 2 The defendant, Darryl D. Tandy, appeals his conviction and sentence following a bench trial in the circuit court of Montgomery County. For the following reasons, we affirm as modified.

¶ 3

FACTS

¶ 4 The facts necessary to our disposition of this appeal follow. On July 31, 2012, the defendant was charged, by information, with one count of aggravated criminal sexual abuse, in violation of section 11-1.60(d) of the Criminal Code of 2012 (720 ILCS 5/11-1.60(d) (West 2012)). On September 12, 2012, an amended information was filed, again charging one count of aggravated criminal sexual abuse. On November 19, 2012, the defendant moved to continue his jury trial, which at the time was set for late January 2013. At the hearing on the defendant's motion, counsel for the defendant, David Grigsby, asked the defendant if he was "agreeable" to moving the trial date. The defendant answered, "Yes, sir." The trial judge asked the defendant if anyone had forced him to agree to move the trial date. The defendant answered, "No." The defendant's motion was granted and the case was set for a trial by jury on February 11, 2013. On January 14, 2013, the defendant again moved to continue his jury trial. At the hearing on the defendant's motion, Grigsby indicated the defendant, who had posted bond and was no longer in custody, agreed to the motion to continue. The State objected, on behalf of the victim, to the motion to continue. After ensuring that the defendant understood and agreed that the continuance would be charged against the defendant for purposes of the defendant's right to a "speedy trial," the trial judge reset the jury trial for April 8, 2013, with a pretrial conference set for March 8, 2013.

¶ 5 On March 8, 2013, the defendant appeared in court with counsel, still David Grigsby. Grigsby informed the trial judge that the defendant planned to waive his right to a jury trial, and asked that the case "be set for a bench trial." The defendant proposed the

date of May 24, 2013, for a "half a day" bench trial. The State agreed to the defendant's suggestion of May 24, 2013, for "a half day trial," with the caveat that if the victim's high school was still in session at that time, the State might "ask for a short continuance" until June. Grigsby then presented the judge with a written waiver of jury trial, in which the defendant stated that of his "own free will" and "after being fully advised of [his] rights and the consequences of this waiver," he did hereby waive his right to a trial by jury and consented to further proceedings without a jury and by the court, "and that this matter be tried by a [j]udge, without a [j]ury." Acknowledging the document, the judge asked the defendant if he understood the difference between a jury trial and a trial by court, to which the defendant responded that he did, and that counsel "explained it" to him. The following colloquy then occurred:

THE COURT: How old are you?

THE DEFENDANT: 38.

THE COURT: Read and write?

THE DEFENDANT: Yes, sir.

THE COURT: How far did you go in school?

THE DEFENDANT: I graduated.

THE COURT: High school?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand once you give up your constitutional right to a jury trial, then a judge will decide both the law and the facts of the case?

THE DEFENDANT: Yes, sir.

THE COURT: The jury is composed of 12 citizens selected from the residents of Montgomery County. In a jury trial, they decide the facts and the judge decides the law.

Anybody force you to give up your right to a jury trial?

THE DEFENDANT: No, sir.

THE COURT: Anybody promise you anything?

THE DEFENDANT: No, sir.

THE COURT: Is there anything that you don't understand about what you're doing?

THE DEFENDANT: No, sir.

THE COURT: You signed this written waiver of jury trial. Do you have any questions whatsoever about what you're doing?

THE DEFENDANT: No, sir.

THE COURT: Did you have enough time to discuss this with Attorney Grigsby?

THE DEFENDANT: Yes, sir.

THE COURT: You're making this decision on your own?

THE DEFENDANT: Yes."

¶ 6 The trial judge then accepted the written and verbal waivers and set the matter for a bench trial on May 24, 2013. At a hearing on May 16, 2013, new counsel, Edmond Rees, appeared on behalf of the defendant, who was at the time hospitalized, but was expected to be released soon, possibly later that day. Rees asked to continue the May 24,

2013, bench trial, and noted that he had also filed "a motion to reinstate his right to a jury trial." The trial judge stated that he would not rule on any "felony motion" in the absence of the defendant. Accordingly, the hearing on the defendant's motions was reset for May 20, 2013, when the defendant was expected to be present. On May 20, 2013, with both the defendant and Rees present,¹ the hearing was held on both the defendant's motion to continue his bench trial, and on his motion to reinstate jury trial. Attorney Rees stated that he had filed his motion to reinstate jury trial "more than two weeks, approximately three weeks" before the scheduled bench trial of May 24, 2013.² Rees acknowledged that there exists no absolute "right to reinstatement as a matter of right," and that the decision was "discretionary with the court." The trial judge then asked if anything "was done wrong" when the defendant made his waiver of jury trial. Rees responded that he did not "know that anything was wrong." The judge then stated, "You don't get to switch back and forth if nothing was done wrong." Rees reiterated that he believed the judge had discretion to allow a reinstatement, and noted that he believed the factual issues in the case were "best decided by a jury." He conceded that he had not reviewed the transcript

¹Although neither the parties nor the judge made a formal record at the outset of the hearing of the defendant's presence at the hearing, the defendant was asked, and he answered, a question at the hearing—proof that he was present.

²The record on appeal reflects that the motion to reinstate was filed in the circuit court on May 10, 2013, exactly two weeks prior to the scheduled bench trial, and was accompanied by a letter from Rees dated May 8, 2013.

of the waiver, and added that he wasn't disputing the propriety of the trial judge's acceptance of the waiver.

¶ 7 The State, when asked, voiced its objection to a reinstatement, pointing out that the waiver had come "on the eve of jury trial," at a time when the State "had witnesses prepared for trial." The trial judge ruled, "This was a proper waiver of jury trial. It was before me and all the questions were asked and answered that are required of the defendant. The motion to reinstate the jury trial is denied." The judge then granted the defendant's motion to continue, setting the bench trial for June 14, 2013.

¶ 8 On that date, the bench trial was held, during which evidence was adduced that is not relevant to either of the issues raised by the defendant on appeal. In closing argument, Rees again argued that the case should have been tried before a jury. Following argument, the trial judge stated that during one of the recesses, he had reviewed the transcript of the defendant's waiver of jury trial. He stated that "it's still the Court's opinion that Mr. Tandy waived his right to a jury trial freely and voluntarily," and noted that he had not been presented with "any authority that says that well into the case a person can un-waive a valid jury waiver." The trial judge found the defendant guilty of aggravated criminal sexual abuse, for having sexual intercourse with the victim, who was 14 at the time of the offense. The judge ruled that the defendant was not credible when he testified, and that the defendant's affirmative defense had been overcome "beyond a reasonable doubt." The judge noted that he had observed the victim "live today a year almost after the" sexual abuse, and that with regard to the defendant's affirmative defense, no reasonable person could "assume that she was 17 years of age or older."

¶ 9 A sentencing hearing was held on September 3, 2013. Following the presentation of evidence, allocution, and argument, the trial judge sentenced the defendant to six years of imprisonment in the Illinois Department of Corrections, followed by a term of mandatory supervised release. The judge also imposed fines and costs, including a \$100 Violent Crime Victims Assessment. This timely appeal followed.

¶ 10 ANALYSIS

¶ 11 On appeal, the defendant first contends the trial judge abused his discretion when he denied the defendant's motion to rescind his waiver of jury trial. As this court has previously recognized, "[a]lthough a defendant has a right to a trial by jury, once [the defendant] has voluntarily waived that right [the defendant] cannot withdraw [the defendant's] waiver as a matter of right." *People v. Peacock*, 324 Ill. App. 3d 749, 753 (2001) (citing *People v. Catalano*, 29 Ill. 2d 197, 202 (1963)). Unless the particular circumstances of a case demonstrate that a defendant failed to understand the consequences or his or her waiver of the right to a jury trial, the decision of whether to allow a defendant to withdraw his or her waiver is left to the sound discretion of the trial court. *Id.* Where, as in the case at bar, the validity of the waiver is undisputed, the question for a reviewing court "is whether the trial court abused its discretion in denying [the] defendant's motion to withdraw [the] validly entered jury waiver." *Id.* The abuse of discretion standard of review is " 'the most deferential standard of review available with the exception of no review at all,' " and is traditionally reserved "for those decisions of the lower court which deserve great deference on review, *i.e.*, decisions made by the trial judge in overseeing his or her courtroom or in maintaining the progress of a trial."

People v. Coleman, 183 Ill. 2d 366, 387 (1998) (quoting M. Davis, *A Basic Guide to Standards of Judicial Review*, 33 S.D. L. Rev 469, 480 (1988)). Recognizing the deference to which the trial court is entitled, this court will find an abuse of discretion only if we conclude that the trial court's ruling "is arbitrary, fanciful, or unreasonable or where no reasonable person would take" the view adopted by the trial court. *People v. Ursery*, 364 Ill. App. 3d 680, 686 (2006).

¶ 12 As we recognized in *People v. Peacock*, 324 Ill. App. 3d 749, 754-55 (2001) (citing *People v. Catalano*, 29 Ill. 2d 197, 202-03 (1963)), the Supreme Court of Illinois has provided guidance for trial courts to use when determining whether to allow a defendant to withdraw a validly entered waiver of the right to a trial by jury, noting that factors to be considered may include the timeliness of the motion to withdraw the waiver, which in turn may involve the question of whether a pretrial motion to withdraw the waiver would, if granted, impede justice, prejudice the State, or cause inconvenience to the witnesses. We reiterated, however, that the trial court maintains "discretion in ruling on [a] defendant's motion to withdraw [a] validly executed jury waiver and the court [is] not required to apply a specific 'timeliness test' or to enunciate findings regarding timeliness" in its ruling. *Id.* at 756.

¶ 13 In the case at bar, the defendant contends the trial judge abused his discretion because, *inter alia*, the judge "was predisposed to deny" the defendant's motion. In support of this contention, the defendant points to the repeated inquiries of the trial judge into whether there was any impropriety in the manner in which the defendant waived his right to a trial by jury. The defendant contends these inquiries demonstrate that the judge

was unduly focused on the circumstances surrounding the original waiver, rather than the circumstances at the time the defendant sought to rescind his waiver. The defendant also notes that no case holds that a validly entered waiver of the right to a trial by jury is "unassailable." However, as the State aptly notes, the question of the voluntariness of the waiver *was* an essential consideration for the judge as he contemplated the defendant's motion to rescind the waiver, particularly because this court has held, on prior occasions, that if a defendant has not knowingly and understandingly waived his or her right to a jury trial, it is error for a judge to deny a request to withdraw that waiver. See, *e.g.*, *People v. Spracklen*, 335 Ill. App. 3d 768, 772 (2002). Accordingly, we believe the judge's inquiries demonstrate not a predisposition to deny the defendant's motion, but instead, an attempt to fully understand the nature of the motion and the circumstances attendant thereto. This is exactly what one would expect a conscientious trial judge to do. There was no error.

¶ 14 The defendant also emphasizes the factors laid out by our supreme court, discussed in detail above, and essentially asks this court to reweigh the factors and conclude that the trial judge abused his discretion. In particular, the defendant stresses the timeliness of his motion, the fact that the defendant "had a contentious relationship" with former counsel Grigsby, and the fact that the State did not "affirmatively declare" that it would be prejudiced if the motion was granted. He contends that once Rees replaced Grigsby, Rees moved very quickly to change strategies and to attempt to reinstate a jury trial.

¶ 15 However, the defendant does not contend that the jury waiver was in any way improper or involuntary, and the record, quoted extensively above, would belie such a claim even if the defendant did so contend. Moreover, although the defendant contends Rees planned a change in strategy, the State is correct in noting that the very defense employed by Rees—the affirmative defense of a reasonable belief on the part of the defendant that the victim was old enough to consent to sexual contact—was originally put forward by Grigsby on January 14, 2013, almost two months prior to the defendant's waiver of his right to a trial by jury. As noted above, it is the inherent province of the trial court to make decisions regarding the management of its docket and the progress of trials. After a careful review of the arguments put forward by the defendant, against the backdrop of our very deferential standard of review, we do not conclude that the trial judge's ruling was arbitrary, fanciful, or unreasonable, nor do we conclude that no reasonable person would take the view adopted by the trial judge and deny the defendant's motion. See, e.g., *People v. Ursery*, 364 Ill. App. 3d 680, 686 (2006). Accordingly, we affirm the trial judge's decision.

¶ 16 The second issue raised on appeal by the defendant is that the amount of the Violent Crime Victims Assessment charged to the defendant must be reduced from the \$100 assessed by the trial court to \$25, which was the statutory amount in effect at the time of the defendant's offense. The State concedes that the defendant is correct on this issue, and we agree. Accordingly, we modify the defendant's Violent Crime Victims Assessment to \$25.

¶ 17

CONCLUSION

¶ 18 For the foregoing reasons, we affirm, as modified, the defendant's conviction and sentence.

¶ 19 Affirmed as modified.