

2014 IL App (2d) 121032-U  
No. 2-12-1032  
Order filed April 23, 2014

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of Ogle County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 11-CM-478
	)	
THOMAS DANIEL ESKEW,	)	Honorable
	)	Robert T. Hanson,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE SCHOSTOK delivered the judgment of the court.  
Justices Hutchinson and Spence concurred in the judgment.

**ORDER**

¶ 1 *Held:* (1) Defendant's jury waiver was invalid: despite defendant's written waiver, the trial court's open-court statement that the matter would be "heard by a judge only" was insufficient to establish that defendant's agreement was knowing and understanding; (2) defendant's \$200 clerk's fee was unauthorized, as the enabling statute capped the fee at \$75.

¶ 2 Following a bench trial, defendant, Thomas Daniel Eskew, was convicted of violating an order of protection (720 ILCS 5/12-3.4(a)(1)(i) (West 2010)) and sentenced to 12 months' probation. He appeals, contending that the trial court (1) failed to ensure that his waiver of a jury

trial was valid and (2) improperly assessed a \$200 clerk's fee where the proper range is \$25 to \$75. We reverse and remand.

¶ 3 On February 17, 2012, defendant was arraigned on a charge of violating an order of protection. The court explained to defendant the charge and the possible punishments and told him that he had the right to an attorney. When asked what he wanted to do about a lawyer, defendant answered that he was "just going to show up." The court asked, "Show up for what?" The prosecutor told that court her understanding that defendant wanted to waive both an attorney and the right to a jury trial. When the court asked if that were true, defendant replied, "Yeah." The following colloquy then occurred:

“THE COURT: All right. Mr. Eskew, I've been advised you want to waive or give up your right to a jury trial and have this matter heard by a judge only. Is that true?”

THE DEFENDANT: Yes.

THE COURT: Have you signed this form?

THE DEFENDANT: Yes.

THE COURT: I'll accept the defendant's waiver of jury trial, plea of not guilty, and you're going to represent yourself.

THE DEFENDANT: Yes.”

¶ 4 Defendant tendered a written jury waiver. Following a bench trial, the court found him guilty of violating an order of protection. The court sentenced him to 12 months' probation and, among other things, imposed a \$200 clerk's fee. Defendant timely appeals.

¶ 5 Defendant first contends that the trial court failed to ensure that he knowingly and understandingly waived his right to a jury trial. Defendant acknowledges that he did not object in the trial court. This would normally forfeit the issue for review but, given that the right to a

jury trial is fundamental, it invokes the second prong of plain error. *In re R.A.B.*, 197 Ill. 2d 358, 362-63 (2001).

¶ 6 Although a defendant may waive the right to a jury trial, such a waiver is not valid unless it is made knowingly and understandingly in open court. *People v. Bracey*, 213 Ill. 2d 265, 269 (2004). Accordingly, before a court may accept a defendant's jury waiver, it must ensure that the defendant understands the nature of the right to a jury trial and the difference between a jury trial and a bench trial. In other words, the defendant must understand that the facts will be determined by a judge rather than a jury. *People v. Bannister*, 232 Ill. 2d 52, 69 (2008). A written jury waiver does not by itself establish a valid waiver. *Id.* at 66. However, a court is not required to issue specific admonishments as a prerequisite to a valid jury waiver. *Id.* Where, as here, the facts are not in dispute, the question is one of law that we review *de novo*. *Bracey*, 213 Ill. 2d at 270.

¶ 7 In arguing that his waiver was invalid, defendant relies primarily on *People v. Sebag*, 110 Ill. App. 3d 821 (1982). There, the court informed the defendant that he was “ ‘entitled to have [his] case tried before a jury or judge.’ ” *Id.* at 829. This court reversed the defendant's conviction, holding that the record did not establish a valid waiver of the defendant's right to a jury trial, as the court did not explain even minimally what a jury trial was or the difference between a jury trial and a bench trial. *Id.* at 829; see also *People v. Phuong*, 287 Ill. App. 3d 988, 996 (1997) (jury waiver invalid where defendant was not informed that members of the jury would serve as factfinders in the case).

¶ 8 The State attempts to distinguish *Sebag* and *Phuong*, but does not cite any case where a valid jury waiver was found in circumstances similar to those here. We acknowledge that additional issues were present in those cases. In *Sebag*, it was not even clear that the waiver

applied to the particular charge at issue, on which the defendant had not yet been arraigned. In *Phuong*, the appellate court's primary concern was the trial judge's comments that showed a possible bias against the defendant, a recent immigrant who spoke little English. *Phuong*, 287 Ill. App. 3d at 994. The reviewing court reversed on that basis, and the discussion of the jury waiver was essentially *dicta*. Moreover, as to the waiver, the court was particularly concerned about the defendant's lack of English skills. *Id.* at 996.

¶ 9 Although those additional concerns are not present here, we nevertheless conclude that the limited discussion of defendant's purported jury waiver did not show that the waiver was knowing and understanding. Cases on which *Sebag* relied are even more closely on point and found purported jury waivers invalid under similar circumstances. *Sebag* cited *People v. Miller*, 55 Ill. App. 3d 1047 (1977). There, the court asked the 20-year-old defendant, " 'Do you waive your right to a jury trial and you want to be tried by this court?' " *Id.* at 1051. The court reversed the defendant's conviction, finding that the record did not show that the defendant understood the right he was giving up. *Id.* at 1052. In *People v. Murff*, 69 Ill. App. 3d 560, 564 (1979), the trial court's explanation that the defendant's waiving his right to a jury trial meant that " '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,' " did not ensure that the defendant's waiver was knowing.

¶ 10 The colloquy here is almost indistinguishable from those in *Sebag*, *Murff*, and *Miller*. The trial court's statement that defendant would have "this matter heard by a judge only" did not explain the nature of a jury trial or the difference between a jury trial and a bench trial. The fact that this case involves a misdemeanor rather than a felony is not relevant here; trial courts must provide adequate explanations of a jury waiver in either situation. We therefore cannot conclude

that the record shows that defendant here knowingly gave up his right to a jury trial. Accordingly, we reverse defendant's conviction and remand for a new trial.

¶ 11 Defendant next contends that the trial court erred by imposing a \$200 clerk's fee. We address this issue because it might occur again on remand. The State confesses error, noting that the enabling statute permits a court to impose a maximum fee of \$75 where, as here, a defendant is convicted of a misdemeanor. 705 ILCS 105/27.1a(w)(1)(B) (West 2010). Thus, if defendant is again convicted following a new trial, the court may not impose a clerk's fee greater than \$75.

¶ 12 The judgment of the circuit court of Ogle County is reversed and the cause is remanded.

¶ 13 Reversed and remanded.