

No. 2--05--0984

This Order Is Not Precedential
And Is Not To Be Cited

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

| | | |
|-------------------------|---|-------------------------------|
| THE ILLINOIS DEPARTMENT |) | Appeal from the Circuit Court |
| OF NATURAL RESOURCES, |) | of Lake County. |
| |) | |
| Plaintiff-Appellee, |) | |
| |) | |
| v. |) | No. 05--CV--1395 |
| |) | |
| ANTONIO M. VERNON, |) | Honorable |
| |) | Christopher R. Stride, |
| Defendant-Appellant. |) | Judge, Presiding. |

RULE 23 ORDER

Defendant, Antonio M. Vernon, was convicted of the misdemeanor offense of unlawful display of martial arts devices on Department of Natural Resources land. See 17 Ill. Adm. Code §110.170, as amended by 24 Ill. Reg. 12556 (August 7, 2000) ("It shall be unlawful for any person, other than authorized peace officers, to display or use on Department-controlled lands *** martial arts devices"); 17 Ill. Adm. Code §110.180, as amended by 27 Ill. Reg. 8866 (May 19, 2003) (a violation of this provision is a Class B misdemeanor); 20 ILCS 835/6(7) (West 2004) (same). Defendant timely appeals pro se, arguing, inter alia, that he did not understandingly waive his right to a jury trial. We reverse and remand for a new trial.

BACKGROUND

Defendant was charged by citation and complaint with unlawfully displaying martial arts devices, i.e., nunchucks, a sais, rubber knives, and bo staffs, at Illinois Beach State Park. Defendant

completed the back of the citation and mailed it to the trial court, indicating that he intended to plead not guilty to the offense and requesting a jury trial.

Defendant represented himself at trial. According to the certified bystander's report, the court advised defendant of the charge against him and defendant indicated that he was ready for trial. The court then swore in the witnesses and proceeded with a bench trial. Defendant was found guilty and sentenced to 60 days' court supervision and ordered to pay \$79 in fines and court costs.

ANALYSIS

On appeal, defendant seeks remand for a new trial on the basis that he was deprived of a jury trial, where the trial court failed to obtain a valid jury waiver before proceeding with the bench trial. Although defendant failed to preserve this issue in the trial court, this does not result in a forfeiture of the issue on appeal. People v. Bracey, 213 Ill. 2d 265, 270 (2004). A defendant has a fundamental right to a trial by jury, and the issue of whether that right has been violated may be considered under the plain error rule. In re R.A.B., 197 Ill. 2d 358, 363 (2001).

Initially we note that the Department did not file a brief. However, as the claimed error can be decided without an appellee's brief, we may decide the merits of the appeal. First Capitol Mortgage Corp. v. Talandis Construction Corp., 63 Ill. 2d 128, 133 (1976).

Every person accused of an offense has the statutory right to a trial by jury unless it is understandingly waived by the defendant in open court. 725 ILCS 5/103--6 (West 2004); 725 ILCS 5/102--15 (West 2004); People v. Woerly, 50 Ill. 2d 327, 328 (1972) ("offense" is defined as a violation of any penal statute of this State). The validity of a jury waiver depends on the facts and circumstances of each particular case. In re R.A.B., 197 Ill. 2d at 364. The failure to obtain a written jury waiver does not require reversal if the waiver was understandingly made in open court. People

v. Scott, 186 Ill. 2d 283, 284-85 (1999). An understanding waiver, however, will not be presumed from a silent record. People v. Taylor, 291 Ill. App. 3d 18, 20 (1997).

Where, as in the instant case, the facts are not in dispute, the question of whether a defendant validly waived his right to a jury trial is one of law subject to de novo review. In re R.A.B., 197 Ill. 2d at 362.

Review of the validity of a defendant's jury waiver depends, of course, on the existence of an adequate memorial of the event, if it occurred at all. People v. Smith, 106 Ill. 2d 327, 334 (1985). Given the statutory requirement that a jury waiver be made in open court, a defendant must substantiate the claim by presenting a sufficient record of the relevant proceedings. Smith, 106 Ill. 2d at 334. Where there is no verbatim transcript of the court proceedings, the defendant is obligated to take advantage of the other available alternatives to reconstruct an absent record. In re W.L.W., 299 Ill. App. 3d 881, 884 (1998). Under Supreme Court Rule 323(c) (166 Ill. 2d R. 323(c)), a proposed report of proceedings, in the form of a bystander's report, may be prepared by the defendant from the best available sources, including recollection, and submitted to the trial court for approval. In re W.L.W., 299 Ill. App. 3d at 884.

Here, in lieu of a verbatim transcript, defendant submitted a bystander's report for court certification. The Department participated, via telephone, at the hearing on the motion to certify the report, and it waived the right to supplement the record. The bystander's report was certified by the trial court.

According to the bystander's report, after defendant indicated that he was ready for trial, the court simply swore in the witnesses and commenced a bench trial. There is no affirmative showing in the record that defendant understandingly waived his right to a jury trial in open court.

The case of People v. Losacano, 29 Ill. App. 3d 103 (1975), is directly on point. In Losacano, the defendant was charged with driving while his license was revoked. There was no verbatim transcript and the defendant filed a certified bystander's report. Losacano, 29 Ill. App. 3d at 105. Although the appellate court found an executed jury waiver form in the file, the bystander's report was silent regarding when the waiver form was signed. Losacano, 29 Ill. App. 3d at 109. Moreover, the bystander's report did not reveal any admonishments by the trial court or the defendant's express waiver of his right to a jury trial. Losacano, 29 Ill. App. 3d at 108. Based on the record, the appellate court determined that the defendant's waiver of a jury trial was ineffective. Losacano, 29 Ill. App. 3d at 110. The court would not presume an understanding waiver from a silent record on this point. Losacano, 29 Ill. App. 3d at 109; see also People v. Harris, 363 Ill. App. 3d 586, 589 (2006) (even though defendant requested a bench trial on the back of his citation, this did not serve as a substitute for defendant's understanding waiver of a jury trial in open court); People v. Rosen, 128 Ill. App. 2d 82, 85 (1970) (reversed and remanded where there was no affirmative showing in the record that defendant expressly and understandingly waived his right to a jury trial).

Of course, it is possible that defendant did validly waive his right to a jury trial in open court but that the bystander's report simply fails to demonstrate it. However, we must presume otherwise. Although generally any doubts arising from an incomplete record will be resolved against the appellant, this principle cannot be applied so broadly as to render a bystander's report worthless; we must assume that a bystander's report is materially complete on the points it addresses. People v. Majka, No. 2--04--0434, slip op. at 7-8 (May 17, 2006). In this case, defendant's bystander's report addresses the proceedings leading up to his bench trial. Thus, we must presume that it is accurate on this point. If there were any misleading omissions, it was incumbent upon the State or the court

to clarify or correct the record. See Majka, slip op. at 9. The State participated at the hearing on the motion to certify and did not propose any amendments. Furthermore, the court took the case under advisement and ultimately certified the report. As a result, we must presume that the report accurately conveys that no valid waiver occurred.

Considering the record as a whole, we cannot find that defendant made an understanding waiver of his right to a jury trial in open court. The common law record indicates that defendant demanded a jury trial but was subsequently tried by the court. The record is devoid of any admonishments by the court or defendant's express waiver of his right to a jury trial. Where the record is silent, as it is in this case, as to a defendant's jury waiver, such deficiency requires remand. Losacano, 29 Ill. App. 3d at 110. This conclusion is further bolstered by the fact that defendant was not represented by an attorney at trial, and, thus, it cannot be said that his understanding of his rights was aided by outside advice. Losacano, 29 Ill. App. 3d at 109.

In light of the decision to remand this case for a new trial, we need not address the other issues defendant raises in his brief. In addition, we need not address defendant's motion to correct his brief, which we took with the case; as defendant's motion pertains to the remaining issues, the motion becomes moot, and we deny it as such. However, we note that the evidence was sufficient to support a guilty verdict and, thus, there is no double jeopardy bar to retrial. See People v. Blackman, 359 Ill. App. 3d 1013, 1022 (2005) (retrial of defendant will not offend double jeopardy where the court reverses a conviction due to trial error and not for evidentiary insufficiency). This conclusion does not imply a determination of defendant's guilt or innocence that would be binding on retrial.

For these reasons, the judgment of the circuit court of Lake County is reversed, and the cause is remanded for a new trial.

No. 2--05--0984

Reversed and remanded.

BYRNE, J., with HUTCHINSON and GILLERAN JOHNSON, JJ., concurring.