

2019 IL App (1st) 160927-U

No. 1-16-0927

September 25, 2019

Third Division

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 15 CR 08176
)	
RICKEY CONNERS,)	Honorable
)	Joseph M. Claps,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Justices Fitzgerald Smith and Cobbs concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's conviction for unlawful use or possession of a weapon by a felon is affirmed over his contentions that he did not knowingly and intelligently waive his right to a jury trial and that the trial court's ruling rested on a faulty recollection of the evidence. The case is remanded to the circuit court to allow defendant to file a motion seeking additional days of presentence custody credit.

¶ 2 Following a bench trial, defendant Rickey Connors was convicted of unlawful use or possession of a weapon by a felon (720 ILCS 5/24-1.1(A) (West 2014)) and sentenced to five years in prison. On appeal, defendant contends his case should be remanded for a new trial

because the court did not fully explain his right to a jury trial and thus, he did not knowingly and intelligently waive that right. He also contends a new trial is warranted because the trial court based its ruling on an incorrect recollection of the evidence and on matters outside the record. In addition, defendant asserts he should receive additional days of credit toward his sentence for time spent in custody.

¶ 3 Defendant was charged with seven counts of weapons-related offenses following his May 2015 arrest. Those charges included two counts of unlawful use or possession of a weapon by a felon (U UW) (720 ILCS 5/24-1.1(a) (West 2014)) (Counts 1 and 2) and four counts of aggravated unlawful use of a weapon (aggravated U UW) (720 ILCS 5/24-1.6(a)(1), (a)(2) (West 2014)) (Counts 3 through 6). Defendant also was charged with one count of defacing identification marks of a firearm (720 ILCS 5/24-5 (West 2014)) (Count 7).

¶ 4 On November 9, 2015, the court called defendant's case and addressed defendant:

“THE COURT: Sir, your case is set for trial. Do you want trial by jury or a trial by judge?

DEFENDANT: By you, sir, Judge Claps.

THE COURT: All right. So you are waiving your right to trial by jury.

DEFENDANT: Yes, sir.

THE COURT: Did you sign the document entitled jury waiver?

DEFENDANT: Yes, your Honor.

THE COURT: Is that your signature on this document entitled jury waiver?

DEFENDANT: Yes, your Honor.

THE COURT: Anybody make any promises or threats to get you to waive your right to a trial by jury?

DEFENDANT: No, your Honor.

THE COURT: You're making that decision of your own free will?

DEFENDANT: Yes, your Honor.

THE COURT: Jury waiver is accepted."

¶ 5 At trial, Chicago police officer Andrew Kemps testified that at about 4:44 p.m. on May 4, 2015, he and Chicago police officer Kevin Killen were in an unmarked vehicle in plain clothes near a park at 346 West 42nd Street. Kemps saw defendant in the park. Defendant was looking toward the unmarked vehicle.

¶ 6 Kemps testified that as the vehicle got closer to the park, defendant's "right hand kind of moved toward his right waistband *** toward his belt line and it stayed there." Defendant and one or two other people started to move to the rear of the park. When Kemps stopped the vehicle and opened the door, defendant and two other people ran away from the park.

¶ 7 Kemps pursued defendant on foot and lost sight of defendant briefly. Kemps caught up to defendant and saw defendant throw a gun into the backyard of 329 West 42nd Street and run toward the front of that property. Kemps was about 30 feet away from defendant when he saw defendant discard the weapon. The gun was recovered and determined to be a loaded .32-caliber revolver. After recovering the weapon, Kemps went to the front of 329 West 42nd Street and saw Killen standing with defendant. Kemps testified part of the weapon's serial number had been filed off.

¶ 8 On cross-examination, Kemps stated he was a passenger in the unmarked police car and there were about 10 people in the park at the time. One person was standing right next to defendant in the park. Kemps said the foot chase lasted about two minutes. Cannabis was recovered from defendant during his arrest.

¶ 9 The State entered into evidence a certified copy of defendant's 2008 conviction for UUW by a felon in case No. 08 CR 9087. The parties stipulated defendant had never been issued a firearm owner's identification (FOID) card or a concealed carry license. The State rested its case in chief.

¶ 10 Defendant testified that at on May 4, 2015, he was visiting his girlfriend in Chicago and that he lived in Ohio. Defendant went to the park to buy marijuana. About four other people were at the park. He had previously purchased narcotics from the same seller and had just made the purchase when the police drove by.

¶ 11 Defendant gave the seller a \$100 bill for \$50 of marijuana and was waiting to receive his change when the seller ran away. He said he thought the seller "was trying to run with my money, so I took off behind him." Defendant did not see the police until the seller fled. He stopped running at 42nd Street because "the police [were] behind me" and he had "no reason to run." He denied carrying a weapon or throwing a weapon into a yard on 42nd Street. About 10 minutes later, a police officer asked him for identification, handcuffed him and searched him, recovering the marijuana from his pants pocket.

¶ 12 On cross-examination, defendant acknowledged telling the officer who detained him that he ran because he thought there was a warrant for his arrest for missing a court date in Ohio. He said he did not want the officers to know he was buying drugs. The officer told defendant there

was no warrant out for him. Defendant denied telling the officer he ran because the people in the park were crazy and he did not want to get shot by police. On redirect examination, defendant said he grew up in the neighborhood where these events took place and felt unsafe there but denied that he had a weapon.

¶ 13 In rebuttal, the State entered a stipulation that if Kemps was recalled to testify, he would testify that defendant told Killen he “ran because those were some crazy mother f---ers out there. I did not want to get shot by the police.”

¶ 14 In making its ruling, the trial court stated that the case involved a “question of credibility.” The court contrasted defendant’s testimony with that of Kemps and found the officer testified credibly.

¶ 15 The court further stated:

“There’s a finding of guilty as to Counts 1 through 6. There’s a finding of not guilty on Count 7. These counts merge into Count 1 for sentencing.”

¶ 16 Defense counsel filed a motion for a new trial, asserting the court did not accurately recall defendant’s testimony. The court denied the motion. At sentencing, evidence was presented of defendant’s previous criminal offenses, including prior felony and misdemeanor convictions. The trial court sentenced defendant to five years in prison. The court awarded defendant 295 days of credit toward his sentence for time spent in custody.

¶ 17 On appeal, defendant first contends his waiver of his right to a jury trial was invalid. He points out that the trial court did not explain the constitutional nature of that right, how a jury is selected or who sits on a jury, how a jury trial differs from a bench trial, or that a jury must reach

a unanimous verdict. Defendant asserts that because the court failed to confirm his understanding of those concepts, the record does not show his waiver was knowingly and intelligently made.

¶ 18 Defendant acknowledges he did not question the validity of his jury waiver during proceedings in the trial court; however, he seeks review under the plain-error doctrine. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). The right to a jury trial is a fundamental right protected by our federal and state constitutions, and the deprivation of the right in the absence of a proper waiver is plain error. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, " 8, 13; *People v. Bannister*, 232 Ill. 2d 52, 65 (2008). The initial consideration in a plain-error analysis is to determine whether error occurred. *People v. West*, 2017 IL App (1st) 143632, ¶ 11.

¶ 19 While the right to a jury trial is guaranteed, that right may be waived by the defendant. 725 ILCS 5/103-6 (West 2014); *People v. Bracey*, 213 Ill. 2d 265, 269 (2004). For a jury waiver to be valid, the defendant must both knowingly and voluntarily waive the right in open court. 725 ILCS 5/103-6 (West 2014). While it is the trial court's duty to ensure a jury waiver is made knowingly, the court is not required to provide a specific admonition or declaration to ensure a knowing waiver. *Bannister*, 232 Ill. 2d at 66. Each waiver must be considered on a case-by-case basis. *Bracey*, 213 Ill. 2d at 269. "The crucial determination is whether the waiving defendant understood that his case would be decided by a judge and not a jury." *People v. Reed*, 2016 IL App (1st) 140498, ¶ 7. A defendant's prior interactions with the criminal justice system may also reinforce the determination that he was familiar with the constitutional right to a jury trial and the ramifications of waiving that right. *People v. Thomas*, 2019 IL App (2d) 160767, ¶ 16.

¶ 20 The execution of a written jury waiver is evidence that a defendant knowingly waived that right but is not dispositive. *Id.*; *People v. Ruiz*, 367 Ill. App. 3d 236, 239 (2006) (despite

existence of signed waiver, defendant's waiver was not valid where no discussion of waiver took place in open court). Where, as here, the facts surrounding defendant's alleged waiver are undisputed, our review is *de novo*. *In re R.A.B.*, 197 Ill. 2d 358, 362 (2001).

¶ 21 Here, defendant executed a written jury waiver, and our review of the colloquy demonstrates he knowingly and intelligently waived his right to a jury trial. The trial court began by telling defendant his case was set for trial and asking him if he wanted a "trial by jury or a trial by judge?" Defendant responded, "By you, sir, Judge Claps." Thus, even though defendant now contends he did not know "what he was waiving," his response to the court's inquiry establishes his understanding of the choice to have the judge to decide his case, as opposed to a jury, which is the key inquiry. *Id.* When the court confirmed the defendant's choice by asking if he was waiving his right to a jury trial, he responded, "Yes, sir." The court then ascertained he had signed the written jury waiver and had done so without any undue influence.

¶ 22 Again, there is no specific admonishment or advice that the trial court is required to extend to the defendant before accepting a jury waiver. *People v. Reed*, 2016 IL App (1st) 140498, ¶ 7. Although defendant contends the court should have described additional concepts to him, including the constitutional right to a jury trial, the process of jury selection and the need for a unanimous verdict, defendant offers no legal authority that those explanations were required for a valid jury waiver. Defendant did not demonstrate any confusion or uncertainty in his interaction with the court. Moreover, his previous interactions with the justice system, which weigh in favor of a knowing waiver. See *Thomas*, 2019 IL App (2d) 160767, ¶ 19. Under these circumstances, we conclude defendant validly waived his right to a jury trial.

¶ 23 Defendant next asserts he should receive a new trial because the court violated his right to due process by basing its finding of guilt on an incorrect recollection of the evidence. He also contends the court speculated on matters outside the record by offering generalized remarks about cannabis sales.

¶ 24 Defendant included this general argument in his motion for a new trial, which the trial court denied. Defendant now contends, and we agree, his assertions can be considered even though he did not object before the trial court when the court made the statements in question. See *People v. Dameron*, 196 Ill. 2d 156, 171 (2001); *People v. Davis*, 185 Ill. 2d 317, 343 (1998) (the waiver rule is applied less stringently “where the basis for the objection is the circuit judge’s conduct”).

¶ 25 In a bench trial, the trial court is limited to the record developed during the course of the trial before the court. *People v. Wallenberg*, 24 Ill. 2d 350, 354 (1962). A trial judge sitting as the trier of fact must consider all the matters in the record before deciding the case. *People v. Joiner*, 2018 IL App (1st) 150343, ¶ 69. The trial court is presumed to have considered only competent evidence, and that presumption is only rebutted by affirmative evidence in the record. *Id.* Furthermore, the court bears the responsibility of determining the credibility of the witnesses and the weight to be given their testimony and drawing reasonable inferences from the evidence. *People v. Manskey*, 2016 IL App (4th) 140440, ¶ 107. In doing so, the trial court may accept or reject as much or as little of a witness’s testimony as it pleases. *People v. White*, 2015 IL App (1st) 131111, ¶ 19.

¶ 26 The failure of the trial court to recall evidence that is crucial to a criminal defendant’s defense is a denial of the defendant’s right to due process. *People v. Williams*, 2013 IL App (1st)

111116, ¶ 75 (citing *People v. Mitchell*, 152 Ill. 2d 274, 323 (1992)). The defendant does not receive a fair trial where the record affirmatively shows that the court did not remember or did not consider the crux of the defense when entering judgment. *People v. Simon*, 2011 IL App (1st) 091197, ¶ 91. However, minor misstatements by the court that did not affect the basis of the trial court's ruling or "result in a mistake in the decision-making process" do not deny due process to the defendant. *People v. Schuit*, 2016 IL App (1st) 150312, ¶ 35. Whether a criminal defendant's due process rights have been violated presents an issue of law and is subject to *de novo* review. *People v. Stapinski*, 2015 IL 118278, ¶ 35.

¶ 27 In its ruling, the trial court stated as follows:

"I have heard the evidence and arguments, considered the testimony, evaluated that testimony. It really becomes a question of credibility in reaching my decision. The defendant testified [] that he's from Ohio and he was in the area to buy marijuana although he also has a girlfriend in Chicago. Well, clearly one wouldn't have to come to Chicago to buy marijuana. I take judicial notice to the fact [*sic*] that marijuana can be bought almost anywhere in the United States. There was a lot of land before Chicago and Ohio.

He also stated that he had [a] \$100 bill which is what he gave to the seller of the marijuana, but he only bought \$50 worth. That would pretty much have to be your first venture into the buying of marijuana that you decided to walk into a neighborhood like that with [a] \$100 bill expecting the seller to make change like you're in some retail store. I have evaluated his testimony, and I evaluated the police officer's testimony. I believe that the police officers [*sic*] testified credibly."

¶ 28 Defendant first contends the court inaccurately recalled his testimony in stating that he drove from Ohio to Chicago for the sole purpose of purchasing drugs. Defendant argues he did not testify he came to Chicago to buy marijuana but rather he was in Chicago to visit his girlfriend and bought marijuana in his former neighborhood from a known seller. He asserts that the court's mistaken recollection of his testimony led the court to discount his credibility. The trial court's remarks do not indicate the court mistakenly recalled evidence that was critical to the defense case. Kemps testified that he saw defendant toss a gun into a backyard during a foot chase. Whether defendant traveled from Ohio solely to buy marijuana was not germane to whether he unlawfully possessed a weapon.

¶ 29 Next, defendant points to the trial court's statement that, contrary to defendant's testimony, it was unlikely that defendant would have handed the cannabis seller a \$100 bill and expected to receive change "like [] in some retail store." He contends that remark demonstrates the court operated on an incorrect assumption and engaged in speculation about how drugs are bought and sold.

¶ 30 The trial court was free to reject defendant's testimony that he was in the park to buy marijuana and that he bought drugs with a \$100 bill and stood in the park, waiting for change. See *White*, 2015 IL App (1st) 131111, ¶ 19. The court may comment on the implausibility of the theory or theories presented by the defense. *Joiner*, 2018 IL App (1st) 150343, ¶ 70. In conclusion, defendant has not rebutted the overall presumption that the trial court found him guilty based only on competent evidence.

¶ 31 Defendant's remaining contention in this appeal requires remand. After imposing defendant's five-year sentence, the trial court awarded him 295 days of credit toward that term.

A defendant is given credit toward his sentence for each day that he spent in custody as a result of the offense for which the sentence was imposed. 730 ILCS 5/5-4.5-100(b) (West 2014). Defendant now contends in this appeal, for the first time, that he should receive an additional seven days of credit toward his sentence, for a total of 302 days.

¶ 32 On February 26, 2019, while this appeal was pending, our supreme court adopted new Illinois Supreme Court Rule 472, which sets forth the procedure in criminal cases for correcting sentencing errors in, as relevant here, the calculation of presentence custody credit. Ill. S. Ct. R. 472(a)(3) (eff. Mar. 1, 2019). On May 17, 2019, Rule 472 was amended to provide that “[i]n all criminal cases pending on appeal as of March 1, 2019, or appeals filed thereafter in which a party has attempted to raise sentencing errors covered by this rule for the first time on appeal, the reviewing court shall remand to the circuit court to allow the party to file a motion pursuant to this rule.” Ill. S. Ct. R. 472(e) (eff. May 17, 2019). “No appeal may be taken” on the ground of any of the sentencing errors enumerated in the rule unless that alleged error “has first been raised in the circuit court.” Ill. S. Ct. R. 472(c) (eff. May 17, 2019). Therefore, pursuant to Rule 472, we remand to the circuit court to allow defendant to file a motion pursuant to this rule,” raising the alleged error regarding presentence custody credit. Ill. S. Ct. R. 472(e) (eff. May 17, 2019).

¶ 33 The judgment is affirmed in all other respects.

¶ 34 Affirmed and remanded.