

**NOT DESIGNATED FOR PUBLICATION**

<b>STATE OF LOUISIANA</b>	*	<b>NO. 2001-KA-1490</b>
<b>VERSUS</b>	*	<b>COURT OF APPEAL</b>
<b>PERRY L. TAYLOR</b>	*	<b>FOURTH CIRCUIT</b>
	*	<b>STATE OF LOUISIANA</b>
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APPEAL FROM  
CRIMINAL DISTRICT COURT ORLEANS PARISH  
NO. 386-278, SECTION "C"  
Honorable Sharon K. Hunter, Judge  
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**Judge Dennis R. Bagneris, Sr.**  
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(Court composed of Judge James F. McKay, III, Judge Dennis R. Bagneris, Sr., and Judge Max N. Tobias, Jr.)

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**REVERSED AND  
REMANDED FOR NEW TRIAL**

***STATEMENT OF THE CASE***

Defendant Perry Taylor (“the defendant”) was charged by bill of information on November 18, 1996 with aggravated burglary, a violation of La. R.S. 14:60. The defendant pled not guilty at his November 21, 1996 arraignment. The defendant was tried by bench trial on April 16, 1999 and found guilty of the responsive verdict of simple burglary of an inhabited dwelling. The trial court sentenced the defendant to three years at hard labor on April 25, 1997. On June 13, 1997, the trial court adjudicated the defendant a second-felony habitual offender, vacated the original sentence, and sentenced the defendant to ten years at hard labor. On September 30, 1997, this Court granted the defendant’s writ application for the sole purpose of transferring it to the trial court to be considered as motion for an out of

time appeal. On December 16, 1997, this Court granted the defendant's writ application, reversing the trial court's denial of the defendant's motion for an out of time appeal, and ordering it to grant the defendant an appeal. In the defendant's appeal, State v. Taylor, unpub., 99-0762 (La. App. 4 Cir. 5/24/00), this Court remanded the case for an evidentiary hearing on the issue of whether the defendant validly waived his right to trial by jury, premitting discussion of the defendant's assignment of error that the evidence was insufficient to support his conviction. On November 8, 2000, this Court granted the defendant's writ application, ordering the trial court to conduct an evidentiary hearing on the jury waiver issue within thirty days. At the close of a March 22, 2001 evidentiary hearing, the trial court ruled that the defendant had validly waived his right to trial by jury. The defendant orally noted his intent to appeal this decision.

### ***ASSIGNMENT OF ERROR NUMBER ONE***

In this assignment of error, the defendant argues that the trial court erred in finding that the defendant validly waived his right to trial by jury. In the defendant's original appeal, this Court noted that the only mention in the record as to defendant's right to trial by jury was a minute entry from defendant's arraignment noting that he had been advised of his right to trial by judge or jury. Accordingly, this Court remanded for an evidentiary

hearing to determine whether the defendant validly waived this right.

La. C.Cr.P. art. 780(A) provides that a defendant charged with an offense other than one punishable by death may “knowingly and intelligently waive a trial by jury and elect to be tried by a judge,” and that “[a]t the time of arraignment, the defendant shall be informed by the court of his right to waive trial by jury.” The waiver of the right to trial by jury cannot be presumed. State v. Comeaux, 2000-0054, p. 4 (La. App. 4 Cir. 11/27/00), 774 So. 2d 322, 324. The waiver must be established by a contemporaneous record setting forth the articulated appraisal of that right followed by a knowing and intelligent waiver by the accused. State v. Wolfe, 98-0345, p. 6 (La. App. 4 Cir. 4/21/99), 738 So. 2d 1093, 1097. The Louisiana Supreme Court has recognized that the preferred practice, although not required, is for the trial court to inform the accused of his right and require that the accused waive that right in writing or orally in open court on the record. Id.

At the evidentiary hearing in the instant case, JoAnn Lloyd, an attorney with the Orleans Indigent Defender Program, testified that she had represented the defendant in the trial court proceedings. She first testified that she believed the defendant pled guilty and did not go to trial. The State then refreshed Ms. Lloyd’s recollection by showing her a docket master

from the case. Ms. Lloyd stated that she always discusses with her clients their rights to trial by judge or jury. She noted that the defendant was subject to being charged as a habitual offender, and she said she was positive that she went over it. She said there was no way that she would not have discussed the issue with any client. Ms. Lloyd also testified that she knew that the trial court advised the defendant of his rights because she recalled the trial judge sitting in on a number of trials for a two-week period before the judge assumed office. She also recalled the trial judge being unusually concerned about making sure people knew they had a right to a trial by judge or jury. Ms. Lloyd said she always advised defendants of the rights, and so did the trial judge—the same judge who presided over the evidentiary hearing.

Ms. Lloyd admitted on cross-examination by the defendant's attorney that she did not specifically recall any conversation with the defendant; nor did she recall anything special about the defendant's case. Ms. Lloyd testified that she never obtained a written waiver of a right to trial by jury from any defendant. She said normally the judge would advise defendants they had a right to trial by judge or jury, ask them what they wanted to do, and they would tell the judge. Ms. Lloyd said that if this had not been done, she would have had no qualms about calling it to the attention of the judge.

When questioned by the court as to whether she had ever proceeded to trial in a manner other than the one chosen by her client, Ms. Lloyd responded in the negative. She said it is always the defendant's choice as to which manner of trial he desires, indicating that she advises them of factors to consider in making their decisions. When asked if she was absolutely sure that the ultimate choice as to the manner of trial was the defendant's, and that she would fully represent that defendant according to his expressed choices and decisions, Ms. Lloyd responded, "absolutely." She said she had never proceeded to a judge trial when her client wanted a jury trial.

The defendant testified that he recalled the date of trial. He said at the time he was on medication, Celexa and Elavil. He then stated that he thought it was Elavil, but he was unsure of the name of the medication. He said it was for manic depression and violent behavior, and a prison doctor had prescribed it. He later stated that he no longer was on that medication. The defendant remembered that he was charged with aggravated burglary. He admitted that he wanted to proceed to trial. However, he claimed that he was not advised of his right to a judge or jury trial, noting that everyone was in front of the judge's bench after another case was handled, and then the prosecutor and everyone else came back and the judge sequestered the witnesses and began the trial. The defendant said he remembered everything

that happened that day. He admitted later pleading guilty to the habitual offender bill of information, which he said he did because he knew he had the prior conviction.

The defendant said on cross-examination that the only thing he and Ms. Lloyd discussed was that Ms. Harris was lying. He said he asked her to subpoena Ms. Harris' uncle; this fact is reflected by a witness list contained in the record. He stated that on the day of trial, he did not talk to Ms. Lloyd, and that all he knew was that he was going to trial. He admitted that Ms. Lloyd explained the habitual offender matter to him before he pled guilty. The defendant indicated that the medication he was on at the time of trial did not affect his memory, but it rendered him unable to verbalize his thoughts. The defendant admitted that he was aware that he had a right to trial by judge or jury, based on his previous experience with the criminal justice system. However, he maintained that he did not exercise that right on the day of his trial. He also said it was the first time he had ever gone to trial. The defendant also admitted to the court that he was given complete instructions before pleading guilty to the habitual offender information, the instructions he said he had always received when pleading guilty. Several times throughout his testimony, the defendant denied having been advised of his right to a trial by judge or jury at the time of his arraignment in the

instant case, although a minute entry reflects that he was.

On recross-examination, the prosecutor asked the defendant why he sat through a judge trial if he wanted a trial by jury, knowing that he had a right to a jury trial. The defendant said he did not know what he really wanted at that time because of the medication. When asked if the medication clouded his mind, the defendant said it did, because when he thought of something to say, it did not come out right. On re-redirect examination, the defendant was asked if he voluntarily and knowingly waived his right to trial by jury, and he responded in the negative.

The trial court found that the evidence showed that the defendant would have made a choice after discussing it with Ms. Lloyd, and that his choice of a judge trial was knowingly, willingly and freely made.

In State v. Thomas, 98 231 (La. App. 3 Cir. 1/6/99), 735 So.2d 669, the trial court conducted an evidentiary hearing to determine whether the defendant knowingly and intelligently waived his right to trial by jury. As in the instant case, the hearing was conducted on remand from the appellate court. The defendant testified at the evidentiary hearing that he had not waived his right to trial by jury, and would have exercised his right to a jury trial had he been given the opportunity. On appeal after the evidentiary hearing, the appellate court vacated the defendant's conviction on the ground

that he had not waived his right to trial by jury.

In State v. James, 99-1047 (La. App. 5 Cir. 1/25/00), 751 So. 2d 419, the trial court conducted an evidentiary hearing to determine whether the defendant knowingly and intelligently waived his right to a trial by jury. As in the instant case, the hearing was conducted on remand from the appellate court. At the hearing, the State introduced a colloquy showing that the trial court advised the defendant at his arraignment that he had a right to trial by jury or could waive that right and be tried by the court. There was no indication that the defendant waived his right at that time, or at any other time. The State also presented the testimony of the indigent defender, Walter Amstutz, who represented the defendant at his trial. He testified similarly to Ms. Lloyd in the instant case. Mr. Amstutz stated that his general procedure with all clients was to advise them of their rights, including their right to a jury trial and that they could waive that right. Mr. Amstutz testified that he always advised his clients of this right, and that it was his understanding that the defendant, not counsel, was the one who must make the decision whether or not to waive the right. Consequently, he said that if a bench trial took place, then the defendant must have waived his right to trial by jury. The trial court concluded that the defendant knowingly and intelligently waived his right to a jury trial. The appellate court disagreed,

finding that Mr. Amstutz essentially presumed that the defendant waived his right to trial by jury. The court said the evidence established at best that Mr. Amstutz probably advised the defendant of his right to trial by judge or jury, but not that defendant waived that right.

The facts of James are very similar to those in the instant case. A minute entry in the instant case reflects that the defendant was advised at arraignment of his right to trial by judge or jury. As in James, counsel who represented the defendant at trial essentially presumed that both she and the trial court had advised the defendant of his right to trial by jury and that he waived it, based on her standard operating procedure, as well as the trial court's. Although the defendant admitted that he was aware that he had a right to trial by judge or jury, he also said he had never before proceeded to trial. The transcript of the trial does not indicate that the defendant had any trouble expressing himself, despite his assertion at the evidentiary hearing that he sat through the bench trial because the medication he was taking prevented him from adequately expressing himself. The defendant's only defense was his version of his relationship with the victim and the events of the night in question. He had a prior conviction for armed robbery, which the jury would have learned of had he testified. Had he not testified, he would have had no defense. At no point does the defendant argue that he

would have chosen a trial by jury.

Nevertheless, the evidence only suggests that the defendant knowingly and intelligently waived his right to a trial by jury. To find that in fact there was a valid waiver would be to presume there was a waiver, which is prohibited. See Comeaux, supra; James, supra (a waiver of the right to trial by jury cannot be presumed). The trial court erred in finding that the defendant knowingly and intelligently waived his right to trial by jury.

There is merit to this assignment of error.

#### ***ASSIGNMENT OF ERROR NUMBER TWO***

The defendant's second assignment of error is that the evidence is insufficient to support his conviction. Because we are reversing and remanding this case for a trial on the merits, we see no reason to address the merits of whether Mr. Taylor's conviction is proper.

#### ***CONCLUSION***

Because the record does not furnish an adequate basis for concluding that defendant validly waived his right to trial by jury, we find that the defendant's conviction and sentence should be reversed, and we remand this case for a new trial.

The defendant requests that his case be re-allotted due to the trial

court's attitude of hostility toward him, and what he characterizes as the deliberate neglect of its duty in this case, particularly on remand for the evidentiary hearing. However, we find that the defendant has failed to show adequate grounds to justify this court ordering a re-allotment of his case on remand. Therefore, we decline to re-allot this case.

**REVERSED**  
**AND**  
**REMANDED FOR NEW TRIAL**