

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DWAYNE EDWARD JUDE,

Defendant-Appellant.

UNPUBLISHED

October 13, 2009

No. 286664

Genesee Circuit Court

LC No. 07-020780-FH

Before: Murphy, P.J., and Meter and Beckering, JJ.

BECKERING, J. (*dissenting*).

I respectfully dissent.

At issue in this case is whether the trial court obtained a constitutionally valid waiver of defendant's Sixth Amendment right to a jury trial before conducting a bench trial. While I agree with my colleagues that the law does not require strict compliance with MCR 6.402(B), I respectfully disagree with the proposition that post-trial discussions with a defendant can rehabilitate an otherwise constitutionally invalid waiver.

Both the United States and Michigan constitutions guarantee a criminal defendant the right to a jury trial to determine whether he or she is guilty of the crime charged beyond a reasonable doubt. US Const, Am VI; Const 1963, art 1, § 20; *People v Bearss*, 463 Mich 623, 629; 625 NW2d 10 (2001). With the consent of the prosecutor and the approval of the trial court, a defendant may waive his or her right to a jury trial and proceed with a bench trial. MCR 6.401; *People v Leonard*, 224 Mich App 569, 595; 569 NW2d 663 (1997). In order for a waiver to be constitutionally valid, it must be made knowingly and voluntarily. *People v Cook*, ___ Mich App ___; ___ NW2d ___; 2009 WL 2707120, p 1, citing MCR 6.402(B).

As the majority indicated, MCR 6.402(B) sets forth the procedural requirements for acceptance of a criminal defendant's decision to waive a jury trial:¹

¹ Defendant cites the trial court's failure to obtain a written waiver signed by defendant in accordance with MCL § 763.3; however, the procedure for securing a jury waiver is now governed by MCR 6.402(B). *People v Mosly*, 259 Mich App 90, 95; 672 NW2d 897 (2003). See (continued...)

Before accepting a waiver, the court must advise the defendant in open court of the constitutional right to trial by jury. The court *must also ascertain, by addressing the defendant personally*, that the defendant understands the right and that the defendant voluntarily chooses to give up that right and to be tried by the court. A verbatim record must be made of the waiver proceeding. [Emphasis added.]

By complying with the requirements of MCR 6.402(B), a trial court ensures that a defendant's waiver is knowing and voluntary. *People v Mosly*, 259 Mich App 90, 96; 672 NW2d 897 (2003). A trial court's "failure to follow the mandated procedural requirements pursuant to MCR 6.402(B) could be harmless if 'the record establishes that [the] defendant nonetheless understood that he had a right to a trial by jury and voluntarily chose to waive that right.'" *Cook*, *supra* at 2-3, quoting *Mosly*, *supra*.

"A knowing, understanding, and voluntary waiver requires the right to be unequivocally explained." *People v Eagan*, 46 Mich App 377, 378; 208 NW2d 219 (1973). As this Court recently held in *Cook*, *supra* at 2, "an attorney cannot waive the right to a jury trial 'without the fully informed and publicly acknowledged consent of the client'" (citations omitted). Statements made by a defendant's trial counsel indicating that the defendant agrees to waive his jury trial right, along with a written waiver signed only by counsel, "does not rise to the level of a valid waiver." *Id.* "[T]here is no presumption of waiver from a silent record." *Mosly*, *supra* at 97. "Without any evidence on the record that [the] defendant was fully informed about his right to a jury trial and voluntarily waived that right, we must conclude that [the] defendant did not validly waive his right to a jury trial," and the trial court is "without the authority to proceed with a bench trial." *Cook*, *supra* at 2.

In this case, the trial court failed to comply with MCR 6.402(B) in every respect. The court did not advise defendant in open court of his constitutional right to a jury trial. It did not ascertain, by addressing defendant personally, whether defendant understood that right and whether he was voluntarily choosing to give up that right. In fact, the court did not directly address defendant at all regarding waiver of the jury trial. Moreover, defendant did not utter anything on the record before trial that could be interpreted as a knowing and voluntary waiver. Furthermore, defendant did not sign a written waiver that might serve as evidence that he knowingly and voluntarily waived his right to a jury trial before proceeding with a bench trial.

The majority states that if the pretrial record were all we had and there was a complete lack of any personal acknowledgment by defendant that he was waiving his right to a jury trial, this Court's ruling in *Cook* would require reversal due to a structural error. I agree. Where I respectfully part with the majority is on the issue whether post-trial conversations with defendant served to essentially rehabilitate an otherwise constitutionally invalid waiver. The majority bases its decision to affirm on defendant's answers to the trial court's inquiries at sentencing, wherein the court solicited defendant's agreement that he knew before trial he had a right to a jury trial and did not want one. First, I disagree with the majority's statement that defendant "would have been highly motivated" to disagree with the trial judge regarding the jury waiver

(...continued)

also MCR 6.001(E).

issue in the moments before the same judge determined defendant's future by dispensing his sentence.² More importantly, while I do not contend that defendant was coerced to agree to something that was not true, I disagree with the proposition that a trial court can rehabilitate, after-the-fact, an otherwise constitutionally invalid waiver. Valid waivers are to be obtained *before* trial. Trial courts are required to ascertain whether a defendant's waiver of a jury trial is knowing and voluntary *before* accepting it. Without a constitutionally valid waiver, a trial court is "without the authority to proceed with a bench trial." *Cook, supra* at 2. If there were any evidence on the record establishing that defendant personally acknowledged his right to a jury trial and waived that right before trial, it might be reasonable to consider post-trial evidence as further indication that the waiver was knowing and voluntary. However, if this Court embarks on a course of affirming jury waivers based on after-the-fact evidence in the face of a totally silent pre-trial record, we travel down a slippery slope of what constitutes a constitutionally valid waiver. Aside from being "sloppy" as described by the majority, we risk weakening the process designed to ensure, before trial, that a defendant's constitutional rights are protected and preserved. Therefore, I would vacate defendant's convictions and sentences and remand for a jury trial or a bench trial after a valid jury waiver.

/s/ Jane M. Beckering

² Majority opinion, footnote 1.