NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2001-KA-0838**
VERSUS	*	**COURT OF APPEAL**
IRBY CLEMENTS	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 409-779, SECTION "D"
Honorable Frank A. Marullo, Judge
* * * * * *
Judge Terri F. Love
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(Court composed of Judge Charles R. Jones, Judge Patricia Rivet Murray, Judge Terri F. Love)

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CONDITIONALLY AFFIRMED, REMANDED

On September 24, 1999, defendant, Irby Clements, was charged by bill of information with distribution of cocaine in violation of La. R.S. 40:967. The defendant entered a plea of not guilty at his arraignment on September 29, 1999. A preliminary hearing was held on December 8, 1999. The hearing was continued until June 21, 2000 at which time a suppression hearing was also conducted. The trial court found probable cause and denied defendant's motion to suppress evidence. On August 28, 2000, the defendant elected a judge trial and was found guilty of possession of cocaine. The trial court sentenced the defendant to serve five years in the department of corrections on September 6, 2000. On the same date, the State filed a multiple bill of information alleging defendant to be a second offender. The defendant filed a pro se motion for new trial on September10, 2000. On October 20, 2000, the defendant admitted to the multiple bill of information and was adjudicated a second felony offender. The trial court vacated the original sentence imposed and resentenced defendant to thirty months in the department of corrections. Defendant's oral motion for appeal

was granted. On February 21, 2001, the trial court denied defendant's motion for new trial.

On August 25, 1999, New Orleans Police Officer Eugene Landry was an undercover narcotics agent who purchased cocaine from Defendant, Irby Clements. Officer Landry testified that he picked up the defendant in the 7000 block of Chef Menteur Highway. Officer Landry then asked the defendant if he knew where the officer could purchase cocaine. The defendant entered Officer Landry's undercover vehicle and instructed the officer to drive to the 6000 block of Chef Menteur Highway. When they arrived in the area, the defendant called out to a person called Tank, later identified as Clarence Smith. Tank entered the rear passenger seat of the vehicle. The defendant told Tank that they were looking for cocaine. Tank pulled out a twenty-dollar piece of crack cocaine from a cigarette pack and handed it to the defendant. The defendant and Officer Landry each gave Tank a ten-dollar bill. After Tank left the vehicle, the defendant broke the piece of crack cocaine in half and gave one of the pieces to the officer. Officer Landry then drove the defendant to a nearby motel. When Officer Landry left the defendant at the motel, the support team moved in and arrested the defendant. Officer Landry identified the cocaine he obtained from Tank and the defendant.

It was stipulated at trial that if Officer William Giblin would testify, he would state that the cocaine recovered by Officer Landry tested positive for cocaine.

In his sole assignment of error, the defendant contends that the trial court erred in failing to obtain a proper waiver of trial by jury. The trial transcript reflects that a bench conference was held immediately prior to trial. After the bench conference, the trial court stated "All right. This is going to be a Judge trial, is that correct?" At which time, defense counsel stated "Yes, Judge." The record is devoid of any communications between the defendant and the trial judge.

La. C.Cr.P. art. 780 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 the judge. In State v. Wolfe, 98-0345, p. 6 (La. App. 4 Cir. 4/21/99), 738 So.2d 1093, 1097, this court stated:

> The waiver of the right to a jury trial cannot be presumed. State v. McCarroll, 337 So.2d 475 (La.1976). 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. Smith, 447 So.2d 4, 5 (La.App. 3d Cir.1984). The Supreme Court has recognized that the preferred practice would be for the trial judge to personally inform the accused of his right and to require the accused to waive that right in writing or orally in open court on the record. State v. Wilson, 437 So.2d 272 (La.1983).

98-0345 at p. 6, 738 So.2d at 1097.

As noted by this court in State v. Richardson, 575 So.2d 421 (La. App. 4 Cir. 1991), the Supreme Court has upheld cases in which a waiver of jury trial was made by the defendant's attorney, rather than the defendant personally, when the defendant was considered to have understood his right to a jury trial and still consented to the waiver. The Supreme Court has also permitted a waiver to be made by defense counsel in cases where the defendant was present in court and failed to object when defense counsel made the waiver, State v. Phillips, 365 So.2d 1304 (La.1978); State v. Page, 541 So.2d 409 (La.App. 4 Cir.1989). In such cases, there had been some evidence that the defendant had been informed of his right to a jury trial at some point during the prosecution of the case, usually at arraignment.

However, in the present case, the transcript and appellate record does not sufficiently prove whether the defendant "knowingly and intelligently" waived his right to a jury trial. There was no colloquy between the trial judge and the defendant. Nor is there any indication in the transcript that the defendant was a party to the bench conference or that defense counsel conferred with defendant prior to informing the trial court of the decision to proceed with a bench trial.

We conclude that since the record does not sufficiently disclose whether the defendant knowingly waived his right to a jury trial, the

defendant's conviction and sentence are conditionally affirmed and the matter remanded for an evidentiary hearing on the issue of whether a valid jury waiver was obtained.

CONDITIONALLY AFFIRMED,

REMANDED.