

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA * **NO. 2008-KA-0335**
VERSUS *
GEORGE ASHBY * **COURT OF APPEAL**
* **FOURTH CIRCUIT**
* **STATE OF LOUISIANA**

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 470-285, SECTION "G"
Honorable Julian A. Parker, Judge

Judge Terri F. Love

(Court composed of Judge Patricia Rivet Murray, Judge Terri F. Love, Judge Roland L. Belsome)

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AFFIRMED

OCTOBER 15, 2008

This appeal arises from a second degree murder conviction. The defendant, George Ashby, asserts that the trial court did not determine whether he “knowingly and intelligently waived his constitutional right to a jury.” We find that George Ashby was sufficiently apprised of his right to a jury and affirm.

PROCEDURAL HISTORY

A recitation of the facts is inapplicable to the issue in the case *sub judice*. George Ashby (“Mr. Ashby”) was charged by Bill of Information with one count of attempted second degree murder, in violation of La. R.S. 14(27)30.1. Mr. Ashby appeared for arraignment and was appointed counsel. He was informed of, among other things, his right to trial by judge or jury.

A hearing on defense motions was held during which, probable cause was found, and Mr. Ashby’s motions to suppress evidence and identification were denied.

Mr. Ashby’s counsel informed the trial court that he had chosen to have a trial by judge after the trial court called to have the jury enter the courtroom. Mr. Ashby was found guilty as charged.

Mr. Ashby filed a motion for a new trial and a motion for a post-verdict judgment of acquittal. Both were denied by the trial court. Mr. Ashby was

sentenced to serve thirty-five years in the custody of the Louisiana Department of Corrections without benefit of probation, parole, or suspension of sentence. Mr. Ashby filed a motion to reconsider sentence, which was denied and a motion for appeal and designation of record, which was granted.

ERRORS PATENT

No errors patent were found.

TRIAL BY JURY

Mr. Ashby argues that the trial court erred in failing to address him personally to determine whether his waiver of the right to a jury trial was knowingly and intelligently made.

In the case *sub judice*, at the arraignment, after Mr. Ashby's counsel entered a plea of not guilty, the trial court made the following statement:

THE COURT:

Let the not guilty plea be entered in the record. Mr. Ashby, you have a right to trial by judge or jury. You don't have to make that decision today whether you wish to be tried by the court or the jury. You make that decision after you've had a chance to speak with an attorney. You have the right to an attorney and have the attorney present with you at all stages of these proceedings. You have a right to remain silent. Not have your silence held against you. Do you understand your rights?

MR. ASHBY:

Yes, sir.

On the day of trial, August 13, 2007, the following exchange took place:

MR. BAIR:

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MR. DONNELLY:

Donald M. Donnelly, representing Mr. George Ashby, who is present in court.

MR. NAIR:

State is ready to go to trial.

MR. DONNELLY:

Defense is ready.

THE COURT:

Send for a jury of twelve.

MR. DONNELLY:

Your Honor, this will be at the defendant's request, a judge trial.

THE COURT:

Alright.

Pursuant to La. C.Cr.P. art. 780(A), a defendant, except in capital cases, may knowingly and intelligently waive his right to a trial by jury and elect to be tried by the judge, even though the right to a trial by jury is protected by La. Const. Art. I, Sec. 17 (1974). At the time of arraignment, the defendant in such cases shall be informed by the court of his right to waive trial by jury.

Our courts have insisted upon a knowing, intelligent and voluntary waiver by the defendant. *State v. Abbott*, 92-2731 (La. App. 4 Cir. 2/25/94), 634 So. 2d 911. However, Louisiana courts have consistently rejected placing upon the trial court the burden of personally ascertaining whether the defendant is aware of his right to trial by jury. *State v. James*, 576 So. 2d 611 (La. App. 4th Cir. 1991); *State v. Houston*, 94-592 (La. App. 5 Cir. 12/14/94), 648 So. 2d 948. For example, in *State v. Phillips*, 365 So. 2d 1304, 1309 (La. 1978), the Court, while recognizing La. C.Cr.P. art. 780, held that the trial court committed no error in allowing the defendant to proceed with a judge trial despite the fact that the waiver was not made by the defendant personally. The Louisiana Supreme Court stated:

We find no error in the determination of the trial judge here that the present defendant gave his informed consent to the waiver made in his presence by his attorney, especially in light of the facts that the judge had informed defendant not once, but twice, of his right to choose between a judge trial and a jury trial, and that the defendant was shown to have had prior experience as an accused in the trial of a criminal prosecution.

Phillips, 365 So. 2d at 1309.

The arraignment transcript and the trial transcript, demonstrate that Mr. Ashby effectively waived his right to trial by jury. Mr. Ashby's silence after the trial court ordered that a jury panel be sent up, combined with his continued silence as his counsel advised the court that jury trial was waived "at the defendant's request," can only be interpreted as assent. Therefore, we find that the trial court did not err in finding that Mr. Ashby waived his constitutional right to a trial by jury.

DECREE

For the above mentioned reasons, we find that the trial court did not err in finding that Mr. Ashby waived his right to a trial by jury and affirm.

AFFIRMED