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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0762**

State of Minnesota,
Respondent,

vs.

Omari Thomas,
Appellant.

**Filed July 8, 2008
Affirmed
Willis, Judge**

Hennepin County District Court
File No. 05033238

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Mike Freeman, Hennepin County Attorney, Jean Burdorf, Assistant County Attorney, C-2000 Government Center, Minneapolis, MN 55487 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, G. Tony Atwal, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Willis, Judge; and Johnson, Judge.

UNPUBLISHED OPINION

WILLIS, Judge

Appellant challenges his conviction of possession of a firearm by an ineligible person, arguing that he did not (1) knowingly and intelligently waive his right to a jury trial or (2) validly waive his right to testify. We affirm.

FACTS

On May 31, 2005, a 911 caller reported to police that two males in a red Dodge Intrepid with a license plate similar to LBB-319 had pointed guns at unidentified individuals in north Minneapolis. The caller also identified one of the men in the car as “Black,” a known alias for appellant Omari Thomas. Shortly after the report, police officers located a red Dodge Intrepid with the license plate LDB-314 at a gas station. Thomas was pumping gas; his brother Keenan was in the passenger seat. As the officers approached the car, they saw Keenan make “furtive movements,” as if he was putting something under the passenger’s seat. Officers searched the car and located two handguns, one under the driver’s seat and one under the passenger’s seat, as well as ammunition in the center console.

Thomas was charged with one count of possession of a firearm by an ineligible person, in violation of Minn. Stat. §§ 624.713, subs. 1(b), 2(b), 609.11, subd. 5(b) (2004). On the day of trial, Thomas agreed on the record to waive his right to a jury trial and submit the case to the district court on stipulated evidence. The parties agreed to submit “all the facts as they are written in the police report.” When Thomas’s counsel attempted to also offer a tape recording of the custodial interrogations of Thomas and his

brother, the prosecutor objected, noting that the tape was not part of the stipulation.

Thomas's counsel then stated:

It's my assumption that [the] tape would come in which it just shows his defense even though—because he's not going to testify. It wasn't my understanding that [the tape] was not coming in. That's the only thing I would ask to be added to the stipulation. There [are] no admissions in it but it does create his defense.”

After a recess, the parties agreed to introduce a document that (1) summarized the interrogation and (2) described Thomas's version of the events, including his statement that he did not know that the guns were in the car.¹

Because Thomas had a 2003 conviction of a felony controlled-substance offense and the district court found that Thomas constructively possessed a firearm on May 31, 2005, he was found guilty of the charged offense. Thomas brought a motion for a new trial, arguing that he had not knowingly and intelligently waived his right to a jury trial or validly waived his right to testify. The district court denied Thomas's motion for a new trial and sentenced him to 60 months' imprisonment. This appeal follows.

D E C I S I O N

I. Thomas knowingly and intelligently waived his right to a jury trial.

Thomas contends that he did not knowingly and intelligently waive his Sixth Amendment right to a jury trial because his jury-trial waiver was “premised on the exculpatory . . . interview tape being made part of the stipulated facts trial.” It is within

¹ Thomas mischaracterizes the record by repeatedly asserting in his brief that the district court ruled that the tape was “inadmissible.” Although the district court expressed doubts about the tape's admissibility, the parties ultimately agreed that a written summary of the tape's contents was sufficient in lieu of the tape recording itself.

the discretion of the district court to accept or reject the waiver of a defendant's right to a jury trial. *See State v. Pietraszewski*, 283 N.W.2d 887, 890 (Minn. 1979).

The United States Constitution and the Minnesota Constitution provide a criminal defendant with the right to a jury trial. *See* U.S. Const. amend. VI; Minn. Const. art. I, § 6. But Minn. R. Crim. P. 26.01, subd. 1(2)(a), provides that this right can be waived by the defendant personally, either in writing or orally on the record. Rule 26.01 sets out a “relatively painless and simple procedure to protect a basic right” and is strictly construed. *State v. Tlapa*, 642 N.W.2d 72, 74 (Minn. App. 2002) (quotation omitted), *review denied* (Minn. June 18, 2002).

Additionally, a valid waiver of the right to a jury trial must be voluntary, knowing, and intelligent. *See Brady v. United States*, 397 U.S. 742, 748, 90 S. Ct. 1463, 1469 (1970) (holding that waiver of constitutional rights must be voluntary, knowing, and intelligent); *State v. Ross*, 472 N.W.2d 651, 653 (Minn. 1991) (stating that waiver of the right to a jury trial as guaranteed by the Minnesota Constitution must be voluntary, knowing, and intelligent). A defendant waives his right to a jury trial voluntarily, knowingly, and intelligently when he shows an “awareness of the relevant circumstances and likely consequences” of the waiver. *State v. Johnson*, 354 N.W.2d 541, 543 (Minn. App. 1984).

For several reasons, we conclude that Thomas's claim that he did not knowingly and intelligently waive his right to a jury trial is without merit. First, Thomas signed a written waiver of his right to a jury trial, which states: “Having been advised by the Court of my right to trial by jury and having had an opportunity to consult with counsel, I do

hereby, with the approval of this Court, waive my right to trial by jury.” This written waiver complies with rule 26.01, which requires that a defendant waive a jury trial “in writing or orally upon the record in open court.” And the district court informed Thomas that “there will not be a jury . . . it will be a court trial where the court makes the findings.” Thomas’s waiver, therefore, complied with rule 26.01, subd. 1(2)(a), and “[a] waiver made in compliance with Rule 26.01, subdivision 1(2)(a), meets the knowing, voluntary, and intelligent requirement.” *State v. Thompson*, 720 N.W.2d 820, 827 (Minn. 2006).

Additionally, Thomas’s claim is significantly undermined by the fact that (1) he was represented by counsel, (2) his counsel stated that he had explained to Thomas the effect of agreeing to a stipulated-facts trial, and (3) Thomas stated in open court that he understood that he had a right to a jury trial and that it was his idea to waive that right.

Thomas asserts that his jury-trial waiver was “premised on” the introduction of the tape of his interrogation. But there is no evidence in the record to support this assertion. In fact, Thomas’s counsel stipulated to the submission of a document that summarized the contents of Thomas’s police interview, and Thomas did not object to the stipulation. Because the record contains no evidence that Thomas did not understand the consequences of waiving his right to a jury trial, he knowingly and intelligently waived that right. *See Ross*, 472 N.W.2d at 654 (stating that a defendant need only understand the nature of the right to a jury trial and the effect of waiving that right to establish a knowing and intelligent waiver of that right).

II. Thomas validly waived his right to testify.

Thomas also contends that he is entitled to a new trial because “there was no on-the-record colloquy of [his] waiver of his right to testify.”² A defendant shall “acknowledge and waive” the right to testify “in writing or orally on the record.” Minn. R. Crim. P. 26.01, subd. 3; *see also State v. Halseth*, 653 N.W.2d 782, 786 (Minn. App. 2002) (“The right to testify is a fundamental right that must be personally waived by a defendant.”).

Thomas’s argument is without merit because the record contains a signed waiver in which Thomas expressly waived his right to testify at trial. That waiver provides that Thomas “acknowledge[s] and waive[s] [his] right to testify at trial, to have the prosecution witnesses testify at trial, to have the prosecution witnesses testify in open court in [his] presence, to question those prosecution witnesses, and to require any favorable witnesses to testify for [him] in court.” Although Thomas did not orally waive his right to testify, the record contains a valid written waiver of that right. *See* Minn. R. Crim. P. 26.01, subd. 3 (permitting written waivers of the right to testify).

Affirmed.

² Thomas’s brief conflates his waiver of a jury trial with his waiver of the right to testify. We construe them as two separate arguments.