

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

NICHOLAS D. HOWE,

Appellant.

No. 38474-4-II

UNPUBLISHED OPINION

Armstrong, J. — Nicholas D. Howe appeals his conviction for first degree assault, arguing that the trial court accepted his waiver of a jury trial in violation of article I, section 21 of the Washington State Constitution. In the alternative, he contends that his waiver was invalid absent an affirmative showing that he understood the full extent of his jury trial rights. We affirm.

FACTS

The State charged Nicholas Howe with first degree assault after he allegedly stabbed Thomas Krulich with a knife. Before trial, Howe submitted to the court a written waiver of his jury trial right. The signed waiver included an explanation that Howe was entitled to a jury trial under the state and federal constitutions. It also explained that in a jury trial, the State must convince all 12 jurors of guilt beyond a reasonable doubt, whereas in a bench trial, the State must convince only the judge of guilt beyond a reasonable doubt. Howe's attorney signed the waiver, indicating he believed his client's waiver was voluntarily, knowingly, and intelligently made.

In addition, the court engaged in the following colloquy:

[DEFENSE COUNSEL]: I am going to hand forward, if I may, the waiver of trial by jury. I reviewed this with Mr. Howe this morning, and he has signed it. It is his desire to - that I try the case tomorrow before Judge McCauley, without a jury.

THE COURT: Are you Nicholas Howe?

THE DEFENDANT: Yes.

THE COURT: Mr. Howe, did you hear what your attorney just had to say?

THE DEFENDANT: Yes, sir.

THE COURT: Is it true, do you wish to waive your trial by jury tomorrow?

THE DEFENDANT: Yes, sir.

THE COURT: You wish to, instead, have your case tried to a judge, sitting without a jury?

THE DEFENDANT: Yes, sir.

THE COURT: You understand that you have a constitutional right to a trial by jury?

THE DEFENDANT: Yes, sir.

THE COURT: That would be a jury of 12 citizens from Grays Harbor County. They contact those individuals would be selected from a larger pool, people your attorney would have an opportunity to ask them questions to ensure that they were fair and impartial and could objectively hear the evidence and decide your guilt and innocence, do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: You wish to waive that right?

THE DEFENDANT: Yes, sir.

THE COURT: Do you believe that it is in your best interests to waive your trial by a jury trial and proceed to a trial without a jury?

THE DEFENDANT: Yes, sir.

THE COURT: And you have had an opportunity to discuss this with [defense counsel] and to ask him any questions you may have about your right to a jury trial?

THE DEFENDANT: Yes, sir.

THE COURT: Has anyone threatened you or promised you anything to cause you to want to waive this right?

THE DEFENDANT: No, sir.

THE COURT: Any questions for me about your constitutional rights and your decision to waive a jury?

THE DEFENDANT: No.

THE COURT: I will accept the waiver.

Report of Proceedings (Sept. 25, 2008) at 11-13.

After a bench trial, the trial court found Howe guilty as charged.

ANALYSIS

I. State Constitutional Right to Trial by Jury

We review constitutional issues de novo. *Shoop v. Kittitas County*, 149 Wn.2d 29, 33, 65 P.3d 1194 (2003). Howe argues that under article I, section 21 of the Washington State Constitution, parties to a felony prosecution may not waive a jury trial. Article I, section 21 provides:

The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

Wash. Const. art. I, § 21.

The Washington State Supreme Court has held that this provision does not preclude an accused from waiving his jury trial right. *State v. Forza*, 70 Wn.2d 69, 70-71, 422 P.2d 475 (1966) (right to a jury trial is subject to a knowing, intentional, and voluntary waiver). *Forza*, in large part, relied on *State v. Lane*, 40 Wn.2d 734, 246 P.2d 474 (1952), where the Supreme Court held that an accused can waive his privilege to trial by a jury of 12 and submit his case to 11 jurors. The *Lane* court reasoned that the constitutional language prohibiting legislative or judicial interference with the jury trial right does not mean an accused cannot waive it. *Lane*, 40 Wn.2d at 736. The court also rejected the dissent's argument that the provision's language—explicitly vesting the legislature with the ability to provide a rule governing waiver in civil trials—implicitly denies the legislature the power to provide for a waiver in criminal cases. *See Lane*, 40 Wn.2d at 740-41. The *Lane* court upheld RCW 10.01.060, which permits waiver

with assent of the court, as a valid legislative policy on the basis that “[g]ranting a choice of privileges can in no way jeopardize their preservation.” *Lane*, 40 Wn.2d at 737.

We are bound by majority opinions of our Supreme Court. *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984). Howe contends, however, that *State v. Gunwell*, 106 Wn.2d 54, 720 P.2d 808 (1986), establishes that article I, section 21 does not allow for the waiver of a jury trial, implicitly overruling *Forza*.

Howe misapprehends *Gunwall*. A *Gunwall* analysis is appropriate when a party contends that the state constitution offers greater protection than the comparable provisions of the United States Constitution. *Gunwall*, 106 Wn.2d at 61. Here, there is no conflict between state and federal constitutional law. Washington State case law¹, statutes², and court rules³ authorize the waiver of a jury trial, independent of the Fifth Amendment of the United States Constitution. A *Gunwall* analysis is inappropriate where, as here, a court is not required to choose between the state constitutional standard and its federal counterpart.

Moreover, whether the state jury trial right is broader than the federal right is irrelevant where the issue is waiver of that right. *Gunwall* addresses “the extent of a right and not how the right in question may be waived.” *State v. Pierce*, 134 Wn. App. 763, 773, 142 P.3d 610 (2006). In *Pierce*, we explained that although Washington’s constitutional right is more expansive than

¹ *Forza*, 70 Wn.2d at 70-71; *see also Lane*, 40 Wn.2d at 736.

² “[E]xcept in capital cases, where the person informed against or indicted for a crime is represented by counsel, such person may, with the assent of the court, waive trial by jury and submit to trial by the court.” RCW 10.01.060.

³ “Cases required to be tried by jury shall be so tried unless the defendant files a written waiver of a jury trial, and has consent of the court.” CrR 6.1(a).

the federal right, it does not follow that additional safeguards are required to validly waive the more expansive right. *Pierce*, 134 Wn. App. at 773. Thus, the extent of protection offered under the state constitution has no bearing on the legal standard for waiving the right. *Pierce*, 134 Wn. App. at 773; *see also Forza*, 70 Wn.2d at 70 (because an accused cannot be deprived of a right by legislative or judicial action, it does not follow that he cannot waive it (citing *State v. Ellis*, 22 Wash. 129, 60 Pac. 136 (1900))). Accordingly, a *Gunwall* analysis does not apply to the issue of waiver of a state or federal constitutional right.

We reject Howe's *Gunwall* analysis and follow, as we must, *Forza*.

II. Valid Waiver?

Howe contends that to be valid, his jury waiver must affirmatively show he was aware of the full extent of the right. Howe again reasons that because his state right is broader than the corresponding federal right, it requires a more extensive explanation than a federal right waiver. Howe argues that neither the written waiver nor the court's colloquy demonstrate that he fully understood: (1) that he could participate in the selection of jurors; (2) that jurors were required to be fair and impartial; (3) that he would be presumed innocent by the jury; and (4) that the court might impose a deadly weapon enhancement on top of his standard range sentence.

We review de novo a jury trial waiver. *State v. Ramirez-Dominguez*, 140 Wn. App. 233, 239, 165 P.3d 391 (2007). A defendant may waive the right so long as he does so knowingly, intelligently, voluntarily, and free from improper influences. *State v. Stegall*, 124 Wn.2d 719, 725, 881 P.2d 979 (1994). We will not presume that a defendant waived his jury trial right unless the record adequately establishes a valid waiver. *Pierce*, 134 Wn. App. at 771. Although

Washington's right to a jury trial is more expansive than its federal counterpart, there are no additional safeguards required for its waiver. *Pierce*, 134 Wn. App. at 773.

While not determinative, a defendant's written waiver pursuant to CrR6.1(a) is strong evidence that he validly waived a jury trial. *Pierce*, 134 Wn. App. at 771. Also relevant is an attorney's representation that his client knowingly, intelligently, and voluntarily relinquished this right. *Pierce*, 134 Wn. App. at 771. Courts are not required to engage in an extended colloquy; the only requirement is a personal expression of waiver by the defendant. *Stegall*, 124 Wn.2d at 725.

Here, the written waiver, Howe's acknowledgement that he discussed the waiver with his attorney, and the court's explanation of the right support the conclusion that Howe was adequately informed of his right to a jury trial. *See Pierce*, 134 Wn. App. at 772 (defendant had enough information to validly waive his right when the court explained the essence of the right to a jury trial). Howe's arguments to the contrary fail: the presumption of innocence and his right to an impartial fact finder—two aspects of the jury trial right that Howe claims he did not fully understand—were not waived by Howe in waiving his right to a jury trial. *Pierce*, 134 Wn. App. at 772 (defendant never waived the right to be presumed innocent or to an impartial trier of fact when waiving his right to a jury trial because these rights are inherent in a fair trial). Next, Howe's contention he was not aware he could participate in juror selection is contradicted by the record; the court explained that in selecting the jury, his attorney would have an opportunity to question the jurors to ensure that they were fair and impartial. After stating that he understood this, Howe confirmed that he still wanted to waive his right. Finally, Howe cites no authority for

his argument that a defendant must understand sentencing procedures to validly waive a jury. *See* RAP 10.3. The right to have a jury determine guilt or innocence beyond a reasonable doubt does not include the right to know in advance the potential sentence following a conviction.

The record here establishes a valid waiver. Howe signed the waiver and expressed his intent to waive the right as explained to him. Furthermore, Howe's attorney informed the court that he believed the waiver was voluntarily, intelligently, and knowingly made. We are satisfied that Howe validly waive his right to a jury trial.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Van Deren, C.J.

Penoyar, J.