

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KELLY KAY TIMMER,

Defendant-Appellant.

UNPUBLISHED

October 22, 2009

No. 287676

Shiawassee Circuit Court

LC No. 08-006816-FH

Before: Fort Hood, P.J., and Sawyer and Donofrio, JJ.

PER CURIAM.

Defendant was convicted after a bench trial of operating a vehicle while intoxicated, third offense, MCL 257.625(1). On appeal, defendant argues that the trial court deprived her of her right to a jury trial. We agree, reverse defendant's conviction and remand for further proceedings. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant's conviction arose from her arrest on February 21, 2008, after an individual phoned police after noticing a truck driving erratically near Laingsburg. According to the responding officer, he discovered a parked truck matching the description given to him. Defendant was in the driver's seat, and the truck's engine was running. Defendant admitted that she had been drinking. After she failed a field sobriety test, a DataMaster test confirmed that defendant was intoxicated.

While the record is somewhat sparse, apparently the instant case was set for a jury trial on June 12, 2008, following a pretrial hearing on March 24, 2008. However, following a hearing on June 9, 2008, on defendant's unrelated motion to quash the information based on the unconstitutionality of applying the recent amendments of MCL 257.625 to defendant's case, the trial court indicated in its docket sheet that the "parties agree to adjourn trial and have a non-jury trial." This proceeding was not transcribed. Nor did defendant sign a written waiver form. See MCL 763.3. The trial court's final pretrial note for this proceeding states that, "prosecutor and [defense counsel] agree to adjourn trial [and] to have a non-jury trial when reset." Defendant did not challenge the absence of a jury during her subsequent bench trial.

Defendant argues that, while she did not raise this issue below, she is entitled to a reversal of her conviction because the trial court failed to follow the procedure outlined in MCR 6.402(B) governing the waiver of the right to a jury trial, and that this structural error requires reversal. We agree.

“A criminal defendant has a constitutionally guaranteed right to a jury determination that he is guilty beyond a reasonable doubt.” *People v Cook*, ___ Mich App ___; ___ NW2d ___ (Docket No. 280600, issued August 27, 2009), slip op at 2. However, a defendant may waive this right to a jury trial with the consent of the prosecutor and the trial court’s approval. MCL 763.3; MCR 6.401; *People v Leonard*, 224 Mich App 569, 595; 569 NW2d 663 (2007). In order for a jury trial waiver to be valid, however, it must be both knowingly and voluntarily made. MCR 6.402(B); *People v Godbold*, 230 Mich App 508, 512; 585 NW2d 13 (1998). MCR 6.402(B) provides the pertinent requirements for ensuring that a jury trial waiver is knowing and voluntary. See *People v Mosly*, 259 Mich App 90, 96; 672 NW2d 897 (2003). MCR 6.402(B) states:

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.

In the instant case, plaintiff acknowledges that the trial court did not comply with the requirements of MCR 6.402(B). In addition, plaintiff specifically concedes that defendant did not waive her right to a jury trial on the record, and that there was no signed written jury trial waiver form in the file. However, plaintiff argues that the failure to follow the procedure set out in this rule does not merit automatic reversal so long as defendant’s waiver was made knowingly, voluntarily and intelligently.

We find that plaintiff’s argument is without merit given the nature of the error here. “[A]n attorney cannot waive the right to a jury trial ‘without the fully informed and publicly acknowledged consent of the client.’” *Cook, supra*, slip op at 2, quoting *Taylor v Illinois*, 484 US 400, 417-418, 418 n 24; 108 S Ct 646; 98 L Ed 2d 798 (1987). Thus, the evidence on the record that defendant’s attorney agreed to change the proceedings to a bench trial is insufficient to show waiver here. *Cook* provided a discussion of whether such an error can be viewed as harmless, or is structural and requires automatic reversal. It held that, while the failure to fully comply with MCR 6.402(B) could be considered harmless in itself, the lack of an otherwise valid waiver is structural error requiring reversal. *Id.*, slip op at 3-4. In the instant case, as in *Cook*, no record evidence establishes that defendant understood her right to a jury trial and voluntarily chose to waive it. Nothing shows that defendant, rather than her attorney, made the decision to waive a jury trial, or whether any decision by defendant was made after adequate counsel.

We reverse defendant’s conviction and remand this case for a new jury trial or a bench trial after a valid jury waiver. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ David H. Sawyer
/s/ Pat M. Donofrio