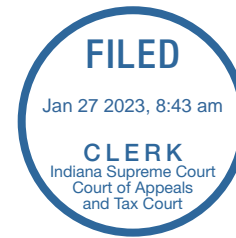


MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as binding precedent, but it may be cited for persuasive value or to establish res judicata, collateral estoppel, or law of the case.



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IN THE COURT OF APPEALS OF INDIANA

Delicia R. Collier,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

January 27, 2023

Court of Appeals Case No.
22A-CR-1372

Appeal from the Marion Superior
Court

The Honorable William Nelson,
Judge
The Honorable Mark Renner,
Magistrate

Trial Court Cause No.
49D18-2003-F6-12039

Bailey, Judge.

Case Summary

- [1] Delicia Collier appeals her convictions for auto theft, as a Level 6 felony,¹ and driving with a suspended license, as a Class A misdemeanor,² following a bench trial. Collier raises four issues for our review, but we find one dispositive, namely, whether Collier personally waived her right to a jury trial. We reverse and remand.

Facts and Procedural History

- [2] In early 2020, Collier was friends with Jamion Carver. At that time, Collier, who worked and was raising children, did not have “reliable transportation.” Tr. Vol. 2 at 82. In order to help Collier, Carver rented a Hyundai Elantra on February 24 and loaned it to Collier. The plan was for Collier to return the vehicle to Carver on March 2. However, when it was “time to meet back up,” Collier “blocked” Carver. *Id.* at 83. Carver attempted to call Collier, but Carver received a notice that “the number was changed.” *Id.* Carver also messaged Collier via Facebook and CashApp, but the messages to Facebook “couldn’t be sent,” and Collier “kept denying” Carver’s requests via CashApp. *Id.*

¹ Ind. Code § 35-43-4-2(a)(1)(B).

² I.C. § 9-24-19-2.

[3] On March 6, Carver attended a funeral. When she arrived at the funeral home, she saw the Hyundai Elantra that she had rented. Carver then called 9-1-1. Carver approached Collier, and she told Collier that she “was on the phone with 9-1-1 and that if [Collier] didn’t give [her] the car, [she] was reporting it stolen.” *Id.* at 88. Collier “started yelling” and said that officers were “going to have to find her.” *Id.* Collier then “got in the car” and drove away. *Id.* Carver was able to observe some damage to the vehicle that had not been present when she first loaned the car to Collier.

[4] On March 21, Indianapolis Metropolitan Police Officer Daniel Hiser saw a car matching the description of the stolen Hyundai. Officer Hiser confirmed that the car was “still actively stolen” and conducted a traffic stop of the vehicle. *Id.* at 106. Officer Hiser observed that Collier was driving the vehicle. Officer Hiser ran Collier’s information through his system “to check her driving status and for warrants” and discovered that Collier “had a driver status of suspended prior.” *Id.* at 107.

[5] The State charged Collier with auto theft, as a Level 6 felony, and driving while suspended, as a Class A misdemeanor. The trial court scheduled a jury trial for March 3, 2022. At an attorneys-only conference on March 2, Collier’s attorney, Jack Simon, informed the court that Collier intended to waive her right to a jury trial. Simon then submitted a waiver of trial by jury form. The form was signed “/s/ Delicia Collier (by JS).” Appellant’s App. Vol. 2 at 93. Simon acknowledged that Collier “gave [him] permission to sign the jury waiver on her behalf” and that he had “read through everything with her[.]” Tr. Vol. 2 at

57. The court responded that it would proceed with a bench trial the following afternoon and “go over the waiver in kind of a pro forma way” with Collier in order to “verify” the waiver “for the record.” *Id.*

[6] At the start of the bench trial the next day, another attorney for Collier informed the court that Collier would not be able to attend the trial. According to Collier’s attorney, Collier’s employer would not release her from her shift and that she would “likely” lose her job if she left. *Id.* at 63. As such, Collier’s counsel asked for a continuance. The court found that Collier “had notice” of the trial, that “her failure to appear is voluntary and knowing,” and that the circumstances surrounding her absence did not “excuse her in any way from being here for her court trial.” *Id.* at 64. Accordingly, the court denied the motion for a continuance and conducted the bench trial in absentia. Collier’s counsel then objected to the court proceeding with a bench trial because it had “not reviewed the waiver [of the right to a jury trial] with” Collier. *Id.* at 65. The court overruled that objection.

[7] During the trial, the State moved to introduce “the certified driving record” of Collier as State’s Exhibit 8. *Id.* at 110. The listed name on the record was Jessica Michelle Smith, and the license status was “SUSPENDED – PRIOR.” Ex. Vol. 3 at 35. Collier’s attorney affirmatively stated that he had “[n]o objection” to the admission of that document. Tr. Vol. 2 at 110.

[8] During the closing arguments, Collier’s attorney asserted that Collier was not guilty of the auto theft charge but “concede[d] that Ms. Collier did drive a car

with a suspended license. I think the evidence is clear on that[.]” *Id.* at 121. The court responded that it was “surprised” by the attorney’s comments regarding the driving while suspended charge because it “thought [counsel] would have argued vehemently that State’s Exhibit 8 doesn’t identify [his] client as the person whose records they introduced. The records they introduced [name] Jessica Michelle Smith.” *Id.* Collier’s attorney responded: “That’s an alias, Judge.” *Id.*

- [9] The court found Collier guilty of both counts. At a sentencing hearing, the court sentenced Collier to 730 days, with 710 days suspended to probation, and ordered Collier to pay restitution to Carver in the amount of \$2,706.61. The court then ordered that Collier’s probation would “terminate upon the payment of the restitution[.]” *Id.* at 149. This appeal ensued.

Discussion and Decision

- [10] Collier contends that the court committed fundamental error when it proceeded with a bench trial because she did not personally waive her right to a jury trial. The State argues that “[t]he waiver form filed with the trial court fulfills” all of the requirements to show that Collier personally waived her right to a jury trial” because her counsel explained to the trial court that Collier “‘gave [counsel] permission to sign the jury form on her behalf.’” Appellee’s Br. at 14-15 (quoting Tr. Vol. 2 at 57). According to the State, the “trial court was presented with sufficient facts to conclude that Collier had personally chosen to waive a jury trial.” *Id.* at 16. We cannot agree with the State’s argument.

[11] “The jury trial right is a bedrock of our criminal justice system, guaranteed by both Article I, Section 13 of the Indiana Constitution and the Sixth Amendment to the United States Constitution.” *Horton v. State*, 51 N.E.3d 1154, 1158 (Ind. 2016). Under Indiana constitutional jurisprudence, “in a felony prosecution, waiver [of the jury trial right] is valid only if communicated *personally* by the defendant[.]” *Id.* (emphasis original). Personal waiver of the right to a jury trial may be either in writing or in open court. *Id.* at 1159. Indiana has rejected the purported waiver of a right to a jury trial where such waiver is communicated solely by a defendant’s counsel. *Id.* at 1158-59 (citing, *inter alia*, *Kellems v. State*, 849 N.E.2d 1110, 1113-14 (Ind. 2006); *Good v. State*, 267 Ind. 29, 366 N.E.2d 1169 (1977)). In other words,

[a] defendant is presumed not to waive [her] jury trial right unless [s]he affirmatively acts to do so. It is fundamental error to deny a defendant a jury trial unless there is evidence of a knowing, voluntary, and intelligent waiver of the right. The defendant must express [her] personal desire to waive a jury trial and such a personal desire must be apparent from the court’s record, whether in the form of a written waiver or a colloquy in open court

Pryor v. State, 949 N.E.2d 366, 371 (Ind. Ct. App. 2011) (internal citations and quotations omitted). And the failure to confirm a defendant’s personal waiver before proceeding to bench trial constitutes fundamental error. *Horton*, 51 N.E.3d at 1160.

[12] In *Horton*, the State charged the defendant with Class A misdemeanor domestic battery, which it sought to elevate to a Class D felony based on Horton’s prior

domestic-battery conviction. The trial was bifurcated. After Horton was found guilty of Class A misdemeanor domestic battery, and while the jurors were still seated in the box, the trial court asked defense counsel how counsel intended to proceed on the Class D felony enhancement. Counsel responded, “as a bench trial.” *Id.* at 1156. Our Supreme Court held that, without Horton’s personal waiver of the jury trial right, “failure to confirm Horton’s personal waiver before proceeding to bench trial was fundamental error[,]” and this was so even where the circumstances appeared to “imply waiver was the defendant’s choice.” *Id.* at 1159-60. Similarly, in *Kellems*, our Supreme Court held that even where Kellems had been advised of his right to a jury trial and his option to waive that right—and had subsequently responded that he did not have any questions regarding his rights—counsel’s communication of waiver was not enough. 849 N.E.2d at 1113-14. Simply put, absent questioning of the defendant or a signed writing indicating intent to waive a jury trial, no waiver may be deemed to have occurred. *See id.*

[13] Here, there is no evidence that Collier personally waived her right to a jury trial. Instead, the record shows that Collier’s counsel “spoke” with Collier outside of court and then counsel told the court that Collier wished to proceed with a bench trial. Tr. Vol. 2 at 57. Collier did not personally express a desire to waive her right to a jury trial. And, while Collier’s counsel submitted a waiver-of-rights form, that form was not signed by Collier but, rather, was signed by Collier’s counsel “on her behalf.” *Id.* Again, waiver of the jury trial right is valid only if communicated personally by a defendant. *Horton*, 51 N.E.3d at

1158. And that personal waiver may be either in writing or in open court. *Id.* at 1159. However, here, Collier neither made any statement in open court to waive her right, nor did she personally sign the waiver of rights form. Thus, the trial court's failure to confirm Collier's personal waiver before proceeding with a bench trial was fundamental error, even though the circumstances appear to imply that waiver was her choice. *Id.* at 1159-60.

[14] We acknowledge that Collier failed to appear for her scheduled trial at which time the court could have confirmed her personal waiver. But this Court has held that “a defendant in Indiana does not waive [her] right to a jury trial by failing to appear at trial.” *Carr v. State*, 591 N.E.2d 640, 641 (Ind. Ct. App. 1992) (holding that the trial court erred when it determined that Carr's absence at trial constituted a waiver of his right to a jury trial and conducted a bench trial in his absence). Thus, the simple fact that Collier failed to appear does not constitute a waiver of her right to a jury trial, and the trial court was still required to obtain her personal waiver—whether in person or through a waiver of rights form that she signed on her own behalf.

[15] The waiver by Collier's counsel was invalid, and the court's failure to confirm Collier's personal waiver before proceeding to a bench trial constituted fundamental error. See *Anderson v. State*, 833 N.E.2d 119, 122 (Ind. Ct. App. 2005) (holding waiver invalid where defendant neither signed written waiver nor personally expressed a personal desire to waive right to jury trial in open court); see also *Horton*, 51 N.E.3d at 1160.

Conclusion

[16] Collier did not personally waive her right to a jury trial, and the trial court committed fundamental error when it conducted a bench trial. We therefore reverse Collier's convictions and remand with instructions to proceed to a new trial.³

[17] Reversed and remanded with instructions.

Riley, J., and Vaidik, J., concur.

³ Because we agree with Collier that the court committed fundamental error when it conducted a bench trial absent a personal waiver for right to a jury trial, we need not address her arguments that the court abused its discretion when it denied her motion for a continuance and conducted the trial in absentia, that her counsel was ineffective for conceding that she had driven with a suspended license, or that the court's sentencing order failed to fix the matter of performance.