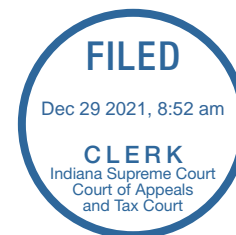


MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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IN THE COURT OF APPEALS OF INDIANA

Jeremy Brenman,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

December 29, 2021

Court of Appeals Case No.
21A-CR-1219

Appeal from the LaPorte Superior
Court

The Honorable Richard R.
Stalbrink, Jr., Judge

Trial Court Cause Nos.
46D02-2001-F6-34
46D02-2001-CM-72

Crone, Judge.

- [1] Jeremy Brenman appeals his conviction for level 6 felony impersonation of a public servant. He argues, the State concedes, and we agree that the record does

not show his personal waiver of the right to trial by jury, either orally or in writing, before the bench trial. The absence of his personal jury trial waiver requires reversal of his conviction and remand for a new trial.

[2] In January 2020, the State charged Brenman with level 6 felony impersonation of a public servant, and a special prosecutor was appointed to try him. This cause was combined with two pending class A misdemeanor invasion of privacy charges under cause numbers 46D02-2001-CM-72 (CM-72) and 46D02-2001-CM-2 (CM-2). In April 2021, at pretrial conference, Brenman’s defense counsel told the trial court, “We’d confirm trial today. However, [Brenman has] notified me this morning that he would like to waive jury and try it to the bench.” Tr. Vol. 2 at 8. Neither the special prosecutor in the current case nor the prosecutor on the misdemeanor charges objected to the jury trial waiver.

[3] At the start of trial, the trial court stated, “We were set for a jury trial. At that time, all parties agreed and waived their right to a jury trial and have asked to proceed with a bench trial.” *Id.* at 12. The trial court proceeded on the level 6 felony impersonation of a public servant charge. At the close of evidence, the trial court took that matter under advisement. Then, pursuant to an agreement with the State, Brenman pled guilty to the class A misdemeanor invasion of privacy charge under cause CM-72, and the State dismissed the charge in cause CM-2. During the guilty plea colloquy, the trial court asked Brenman, “We’re, in fact, here for trial today, and you waived your right to a jury trial and proceeded with a bench trial, correct?” *Id.* at 87. Brenman replied, “Yes.” *Id.* at 88.

[4] At the judgment/sentencing hearing, the trial court found Brenman guilty of level 6 felony impersonation of a public servant. The trial court sentenced him to a suspended sentence of one and a half years for that conviction and to a consecutive suspended sentence of one year for his conviction in cause CM-72. This appeal ensued.

[5] Indiana Code Section 35-37-1-2 provides, “The defendant and prosecuting attorney, with the assent of the court, may submit the trial to the court. Unless a defendant waives the right to a jury trial under the Indiana Rules of Criminal Procedure, all other trials must be by jury.” Our supreme court has made clear that

A fundamental linchpin of our system of criminal justice is the right to a trial by jury. *See* U.S. Const. amend. VI; Ind. Const. art. 1, § 13. Although this right may be waived, we have concluded that the statutory requirement [under Indiana Code Section 35-37-1-2] that a defendant assent to a waiver of his right to jury trial “means that an assent by the defendant be personally reflected in the record *before the trial begins* either in writing or in open court. This is to assure that the waiver is made in a knowing, intelligent, and voluntary manner, with sufficient awareness of the surrounding circumstances and the consequences. Thus, it is the duty of the trial court to assume in a criminal case that the defendant will want a trial by jury, *unless the defendant personally indicates a contrary desire in writing or verbally in open court. This waiver must be made part of the record* so that the question of an effective waiver can be reviewed even though no objection was made at trial.

Kellems v. State, 849 N.E.2d 1110, 1112 (Ind. 2006) (emphases added) (footnote, citations, quotation marks, and brackets omitted).

[6] In *Kellems*, the defendant had been advised of his right to a jury trial at a pretrial hearing and personally indicated to the judge that he understood that right, and at a subsequent status conference, he was silent when his defense counsel informed the trial court that he had decided to waive trial by jury. Although the *Kellems* court observed that it would be possible under these facts to conclude that Kellems’s waiver was knowing, voluntary, and intelligent, it declined to do so. The court emphasized:

Indiana Code Section 35-37-1-2 [], dictates that a knowing, voluntary, and intelligent waiver of the right to a jury trial requires assent to a bench trial by defendant personally, reflected in the record before the trial begins either in writing or in open court. The record reflection must be direct and not merely implied. It must show the personal communication of the defendant to the court that he chooses to relinquish the right.

Id. at 1113. (citation and quotation marks omitted). Therefore, the court concluded that because “the trial court did not secure a waiver from Kellems personally, [i]ts failure to do so—and to ensure that the waiver was reflected in the record—necessitate[d] granting Kellems a new trial.” *Id.* at 1114.

[7] Here, Brenman was present at the pretrial hearing when his counsel communicated to the trial court that Brenman waived his right to a jury trial. The trial court did not question Brenman or elicit a statement from him for the record. Although Brenman verified his desire to waive trial by jury when he pled guilty to the charge in CM-72, the record does not show that Brenman either personally or in writing agreed to waive his right to a jury trial before trial

on the current charge was held. Accordingly, we reverse his conviction for level 6 felony impersonation of a public servant and remand for a new trial.

[8] Reversed and remanded.

Bradford, C.J., and Tavitas, J., concur.