

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Robert S. Frost

Appellant-Defendant,

v.

State of Indiana,

Appellee-Plaintiff

August 7, 2023

Court of Appeals Case No.
22A-CR-2946

Appeal from the Elkhart Superior
Court

The Honorable Christopher J.
Spataro, Judge

Trial Court Cause Nos.
20D05-2204-F6-502
20D05-2207-F6-914

Memorandum Decision by Judge Crone
Judge Brown and Senior Judge Robb concur.

Crone, Judge.

Case Summary

- [1] Robert S. Frost appeals his convictions, following a bench trial, for two counts of level 6 felony invasion of privacy. He contends that the trial court committed fundamental error in conducting a bench trial as opposed to a jury trial because he never personally waived his right to a jury trial. We agree and therefore reverse and remand.

Facts and Procedural History

- [2] In April 2022, the State charged Frost with level 6 felony invasion of privacy under cause number 20D05-2204-F6-502 (F6-502). Thereafter, in July 2022, the State charged Frost with level 6 felony invasion of privacy under cause number 20D05-2207-F6-914 (F6-914). A status hearing was held on August 22, 2022, regarding F6-502 and a separate misdemeanor invasion of privacy charge under cause number 20D05-2205-CM-775 (CM-775). Frost appeared in person and with appointed counsel. During that hearing, Frost's appointed counsel requested that the cases be "set for Bench Trial[,]” noted that there was “another” pending charge involving the same victim, and asked if the court could “set 'em all for the same day.” Supp. Tr. Vol. 2 at 4. The State agreed to trying the cases on the same day. Later during that same hearing, Frost spoke in open court and requested that he be permitted to proceed pro se “because this attorney is not doing what I ask.” *Id.* at 8. At the conclusion of the hearing, the trial court set all three matters for a bench trial on October 20, 2022, but advised Frost that his request to proceed pro se would need to be submitted in writing.

Frost's counsel filed a motion to withdraw as the attorney of record on August 25, 2022. The trial court granted the motion the same day.

- [3] Frost wrote a letter to the trial court, dated August 22 but filed on August 29, referring to "S.C. #5" and requesting that he be permitted to proceed pro se. Appellant's App. Vol. 2 at 31. Frost indicated to the court that he had experience with proceeding pro se because he had recently represented himself in a jury trial. In the letter, he further requested, among several other things, "Have a request to you; is for a bench trial." *Id.*¹ The trial court set Frost's pro se request for hearing on September 19, 2022, "to ensure that this decision is being made knowingly, intelligently and voluntarily." *Id.* at 35. At the outset of the hearing, the trial court noted that all three of Frost's pending cases were "set for bench trial on October 20th[.]" Supp. Tr. Vol. 2 at 14. The trial court did not engage in any colloquy with Frost regarding his right to a jury trial or any alleged waiver of that right. The trial court advised Frost of the perils of proceeding pro se, granted his request to proceed pro se, and appointed standby counsel. Toward the end of the hearing, the trial court again noted that all three cases were set for bench trial on the same date and asked Frost if he had any questions. Frost responded that he did not.

¹ Although the letter did not indicate a specific cause number, the State suggests that "in context" the reference to "S.C. #5" likely meant "Elkhart Superior Court 5" because the felony charges were pending in that court. State's Br. at 8.

[4] A final pretrial hearing was held on October 12, 2022. Frost appeared pro se and with standby counsel. At the outset, the trial court noted that the State had filed a motion to consolidate the cases, which the trial court granted, and the court noted that there would be a “one-day bench trial.” *Id.* at 32. The trial court then spent a considerable amount of time explaining to Frost how to handle the admission of evidence and making objections in the context of a bench trial. Again, the trial court did not engage in any colloquy with Frost regarding his right to a jury trial or any alleged waiver of that right.

[5] A bench trial was held on November 14, 2022. The trial court found Frost guilty of two counts of level 6 felony invasion of privacy as charged in F6-502 and F6-914 and not guilty of class A misdemeanor invasion of privacy as charged in CM-775. The trial court sentenced Frost to 600 days in F6-502, with 158 days of credit time, and to 900 days in F6-914. The court ordered that the sentences be served consecutively. This appeal ensued.

Discussion and Decision

[6] Frost contends that the trial court committed fundamental error when it proceeded with a bench trial because he did not personally waive his right to a jury trial. The State argues that the letter Frost wrote to the trial court requesting a bench trial was sufficient to constitute a personal waiver of the right to a jury trial. We cannot agree with the State’s argument.

[7] “The jury trial right is a bedrock of our criminal justice system, guaranteed by both Article [1], 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). Broadly stated, “federal and Indiana constitutional jury trial rights guarantee the same general protection—a criminal defendant must receive a jury trial, unless he waives it.” *Id.* Pursuant to Indiana constitutional jurisprudence, “in a felony prosecution,” that “waiver is valid only if communicated *personally* by the defendant[.]” *Id.* Personal waiver of the right to a jury trial may be either in writing or in open court. *Id.* at 1159. Indiana has repeatedly 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. In sum,

[a] defendant is presumed not to waive his jury trial right unless 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 his 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) (citations and quotations omitted). Indeed, “[t]he 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 [to a jury trial].” *Kellems v. State*, 849 N.E.2d 1110, 1113 (Ind. 2006) (citation omitted). A trial court’s failure to confirm a personal waiver before proceeding to bench trial is fundamental error. *Horton*, 51 N.E.3d at 1160.

[8] There is no evidence in the record that Frost personally waived his right to a jury trial. Frost neither made any statement in open court to waive his right to a jury trial, nor did he sign any waiver of rights form. We disagree with the State's bald assertion that Frost's personal "request" for a bench trial, even assuming Frost's letter to the court clearly communicated such request and to which charge or charges it applied, is the same as a personal waiver of the right to a jury trial. State's Br. at 7. As stated above, the defendant must express his personal desire to waive a jury trial, and such a personal desire must be apparent from the court's record. The record here is essentially silent. We may not presume the waiver of a fundamental right from a silent record. *Cheesman v. State*, 100 N.E.3d 263, 269 (Ind. Ct. App. 2018), *trans. denied*. Under the circumstances, there is no evidence in the record of a knowing, voluntary, and intelligent personal waiver of Frost's right to a jury trial, and therefore the trial court committed fundamental error in conducting a bench trial. We reverse Frost's felony convictions and remand for a new trial on those charges.

[9] Reversed and remanded.

Brown, J., and Robb, Sr.J., concur.